PATTERN JURY INSTRUCTIONS
(Criminal Cases)

Prepared by the Committee on Pattern Jury Instructions
District Judges Association Fifth Circuit
2024 Edition

INTRODUCTION

The 2024 edition of the Pattern Jury Instructions (Criminal) continues a project first initiated in 1978 by the Fifth Circuit District Judges Association. The PJI–Criminal represents a collaborative effort by federal judges and others to provide federal trial courts in the Fifth Circuit with pattern instructions that accurately reflect the law and assist in the trial of criminal cases.

The Committee revised Instructions in response to statutory and caselaw developments since July 1, 2019. In addition, the Committee has added 24 new Instructions to reflect statutory and caselaw developments, as well as recurring issues that trial courts face in this circuit. The Note section for each Instruction provides explanatory comments and legal authority, and identifies some issues that judges may wish to consider when preparing Instructions for juries. The Committee understands, however, that each case presents unique factual and legal circumstances that may warrant modifications to the pattern Instructions.

The Committee researched Fifth Circuit caselaw and statutory changes through December 31, 2023, and the decisions from the Supreme Court through June 2024. For future revisions, the Committee recommends that any review begin as of January 1, 2024.

The federal judges on the Committee received the able support from ex-officio Committee members representing the Federal Public Defender's office (Michael Herman) and the United States Attorney's office (Kevin Boitmann). In addition, Professor Susan Klein of the University of Texas School of Law served as Recorder and provided her invaluable comments for the Committee's consideration. The Committee also thanks Faculty Assistant Nicholas Charlesworth from the University of Texas School of Law, as well as the many law clerks who assisted Committee members. The work of the Committee's predecessors also deserve our gratitude.

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1.01

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 those facts to the law as the court will give it to you. You must follow that law whether you agree with it or not. Perform these duties fairly. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way. In particular, do not let racial, ethnic, national origin, or other bias influence your decision in any way.

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 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, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second: the burden of proof is on the government until the very end of the case. The defendant has no burden to prove his 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 _____ (*insert charge*(*s*)). 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*:**

Now, a few words about your conduct as jurors.

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 linger 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.

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 this 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, or 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.

I know that many of you use cell phones, 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 through any means, including your cell phone, through e-mail, iPhone, text messaging, or on Snapchat or Twitter, or through any blog or website, including Facebook, Google, WhatsApp, Instagram, 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. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

***Course of the trial*:**

I will now give you a roadmap to help you follow what will happen over the entire course of this trial. 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 [she] 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.

The trial will now begin.

Note

This instruction is largely based on the Federal Judicial Center's Benchbook for U.S. District Court Judges (6th ed. 2013). The "Duty of the Jury" paragraph has been modified to emphasize that jurors should perform their duty fairly to reflect the Supreme Court's opinion in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). *See also United States v. Lee*, 966 F.3d 310, 321 (5th Cir. 2020) (citing instruction favorably).

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 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 proceedings 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

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 the 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. 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, and without consulting any outside or online source or materials. 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); *see also United States v. Hill*, 63 F.4th 335, 359–60 n.8 (5th Cir. 2023) (finding no abuse of discretion in curative instruction after improper contact with juror: "No events outside the courtroom should affect your ability to be a fair and impartial juror. Your verdict must be based upon the testimony of the witnesses and the evidence presented to you during trial.").

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 error, 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 a 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. 1998) (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, 969 (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. 328, 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

This instruction is appropriate as a final instruction on evidence, and it may in many instances cure prejudicial comments, questions, or arguments during trial. *See, e.g.*, *United States v. Hill*, 63 F.4th 335, 350–52 (5th Cir. 2023) (holding limiting instruction cured any prejudice resulting from co-defendant's outburst during trial); *United States v. Johnson*, 880 F.3d 226, 232 (5th Cir. 2018) (limiting instruction cured prosecutor's remarks); *United States v. Murra*, 879 F.3d 669, 685 (5th Cir. 2018) (same; evidence of guilt strong); *United States v. Turner*, 674 F.3d 420, 440 (5th Cir. 2012) (presuming instruction followed); *United States v. McCann*, 613 F.3d 486, 496–98 (5th Cir. 2010) (generic instruction counterbalanced by defendant's improper remark). However, it may be insufficient in some cases, depending on several factors, and stronger cautionary instructions should be given to the jury during trial to ameliorate prejudice to the defendant in those cases. *See United States v. Rodriguez-Lopez*, 756 F.3d 422, 433–34 (5th Cir. 2014); *United States v. Aguilar*, 645 F.3d 319, 326–27 (5th Cir. 2011) (considering three factors: (1) the magnitude of the prejudice, (2) the effect of cautionary instructions, and (3) the strength of the inculpatory evidence); *United States v. Garcia*, 522 F.3d 597, 604 (5th Cir. 2008) (instruction did not cure prejudicial taint of improper statement).

Finally, the court may choose not to give a stronger instruction "because it would merely call further attention to, and thus be more harmful than the original comment." *United States v. Thomas*, 548 F. App'x 987, 990 (5th Cir. 2013) (citing *United States v. Paul*, 142 F.3d 836, 844 (5th Cir. 1998)).

1.07

SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES—DEFINED 18 U.S.C. § 7

The defendant is charged with _____ (*insert offense*). That statute provides in part that the defendant must have committed the crime in the special maritime or territorial jurisdiction of the United States.

The government must prove beyond a reasonable doubt that the defendant committed the crime in the special maritime or territorial jurisdiction of the United States. To satisfy its burden of proof, the government must prove beyond a reasonable doubt that the alleged crime occurred at _____ (*describe location where crime is alleged to have occurred upon which jurisdiction is based*). You are instructed as a matter of law that the alleged crime occurred within the special maritime or territorial jurisdiction of the United States if you find beyond a reasonable doubt that such offense occurred in the location described in the indictment.

1.08

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 weights 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 [her] 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 eyewitness. "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 weights 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 [her] 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. Freeman*, 56 F.4th 1024, 1025 (5th Cir. 2023) ("The sufficiency [of evidence] standard remains the same whether the evidence is direct or circumstantial . . ."); *United States v. Mesquias*, 29 F.4th 276, 282 (5th Cir. 2022) ("Categorical evidentiary requirements are at odds with a jury's ability to consider a broad array of direct and circumstantial evidence."); *United States v. Harris*, 960 F.3d 689, 693 (5th Cir. 2020) ("[D]irect and circumstantial evidence are given equal weight."); *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)); *see also United States v. Gaspar-Felipe*, 4 F.4th 330, 341–42 (5th Cir. 2021); *United States v. Portillo*, 969 F.3d 144, 177 (5th Cir. 2020) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.") (quoting *Michalic v. Cleveland Tankers*, *Inc*., 81 S. Ct. 6, 11 (1960)); *United States v. Okpara*, 967 F.3d 503, 511 (5th Cir. 2020) ("While we recognize that circumstantial evidence is no less probative than direct evidence, the circumstantial proof must be susceptible of inferences from which the jury might reasonably have found guilt beyond a reasonable doubt.").

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).

1.09

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 or she 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. Guanespen-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).

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).

1.10

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. Greenlaw*, 84 F.4th 325, 359 (5th Cir. 2023) (approving instruction as mitigating effect of prosecutor's improper comment); *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" to the defendant's theory of the case. *United States v. Jones*, 833 F. App'x 528, 548 (5th Cir. 2020); *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 (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.

1.11

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.

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). However, "[a] refusal to give a requested instruction is reversible error only if the proposed instruction was (1) substantively correct, (2) not substantively covered in the jury charge, and (3) concerned an important issue in the trial, such that failure to give the requested instruction seriously impaired the presentation of a defense." *United States v. Jones*, 132 F.3d 232, 242 (5th Cir. 1998); *see also United States v. Robinson*, 87 F.4th 658, 674 (5th Cir. 2023) (citing *Jones* and holding that the court's refusal did not constitute reversable error when the defendant did not specify what trial statements—i.e., evidence admitted solely for impeachment by prior inconsistency—would be subject to the requested instruction).

In the absence of a request, failure to give a limiting instruction can sometimes be plain error. *See United States v. Okpara*, 967 F.3d 503, 512 (5th Cir. 2020) (failure of trial court to sua sponte give an impeachment-only limiting instruction constituted plain error); *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.").

1.12

IMPEACHMENT BY PRIOR CONVICTION (DEFENDANT'S TESTIMONY)

You have been told that the defendant, _____ (*name defendant*), was found guilty in _____ (*name jurisdiction and date*) of _____ (*name offense*, *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. 1.32, 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. 2.43D and 2.98A, Possession of a Firearm by a Convicted Felon and Continuing Criminal Enterprise, respectively.

See also United States v. Johnson, 880 F.3d 226, 232 (5th Cir. 2018) (pattern instruction cured possible prejudice); *United States v. Maes*, 961 F.3d 366, 374–75 (5th Cir. 2020) (a similar limiting instruction was appropriate); *United States v. Turner*, 674 F.3d 420, 430 (5th Cir. 2012) (same).

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

1.13

IMPEACHMENT BY PRIOR CONVICTION (WITNESS OTHER THAN DEFENDANT)

You have been told that the witness, _____ (*name witness*), was convicted in _____ (*name jurisdiction and date*) of _____ (*name offense*, *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 witnesses' 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. Portillo*, 969 F.3d 144, 179–80 (5th Cir. 2020) (trial court's limiting instruction reduced possibility of unfair prejudice where court repeatedly "reminded jurors that evidence about non-defendants' criminal activity could not be used to prove the defendants' guilt.").

This instruction has been cited with approval. *See United States v. Mazkouri*, 945 F.3d 293, 301–02 (5th Cir. 2019); *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).

1.14

IMPEACHMENT BY EVIDENCE OF UNTRUTHFUL CHARACTER

You have heard the testimony of _____ (*name witness*). 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 _____ (*name witness*) 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 other instructions you have been given.

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); *cf. United States v. Hoffman*, 901 F.3d 523, 546–47 (5th Cir. 2018) (when defense counsel impeached witness by cross-examination, jury was entitled to make its own credibility determination).

It should be emphasized that this instruction relates to testimony about the character of a witness, rather than testimony about a non-witness defendant. *See United States v. De Leon*, 728 F.3d 500, 504–05 (5th Cir. 2013) (finding error in limiting testimony to the reputation for truthfulness when that testimony was about the defendant, who did not testify at trial).

1.15

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. Hoffman*, 901 F.3d 523, 547 (5th Cir. 2018); *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).

"[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 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).

1.16

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. Hamilton*, 37 F.4th 246, 261–62 (5th Cir. 2022), and *United States v. Quiroz*, 137 F. App'x 667, 671–72 (5th Cir. 2005). *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. Jordan*, 945 F.3d 245, 258–59 (5th Cir. 2019); *United States v. Tacker*, 434 F. App'x 399, 400 (5th Cir. 2011); *United States v. 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, No. 94-50732, 1995 WL 449861, at *1 (5th Cir. Jun. 29, 1995) (unpublished); *United States v. Pierce*, 959 F.2d 1297, 1304 (5th Cir. 1992).

A limiting instruction may be required in cases where a conviction is based solely on the testimony of an accomplice. *United States v. McClaren*, 13 F.4th 386, 400 (5th Cir. 2021) (citing *Tillery v. United States*, 411 F.2d 644, 644 (5th Cir. 1969) (finding reversible error where there was no limiting instruction in a case where the accomplice "indicated less concern with the truth than with his own skin")).

1.17

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).

1.18

EXPERT OPINION TESTIMONY

During the trial you heard the testimony of _____ (*name of expert*) who expressed opinions concerning _____ (*subject matter*). 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. Lara*, 23 F.4th 459, 475–78 (5th Cir. 2022) (finding error in admission of law enforcement agent testimony but finding no effect on substantial rights when, *inter alia*, instruction similar to pattern instruction given); *United States v. Medeles-Cab*, 754 F.3d 316, 321 (5th Cir. 2014); *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 Fifth Circuit interprets Federal Rule of Evidence 704(b) "narrowly" and has explained that "expert testimony about the typical mental state shared by individuals in a specific criminal role does not violate the Rule 704(b) bar." *United States v. Portillo*, 969 F.3d 144, 171 (5th Cir. 2020) (citing *Morin*, 627 F.3d at 985). A witness, however, may not offer "a direct opinion as to the defendant's mental state or [give] the functional equivalent of such a statement." *Lara*, 23 F.4th at 475. In *Diaz v. United States*, 144 S. Ct. 1727, 1735 (2024), the Supreme Court reasoned that "[a]n expert's conclusion that 'most people' in a group have a particular mental state is not an opinion about 'the defendant' and thus does not violate Rule 704(b)." Based on a comparison of the testimony at issue in these cases, some tension may exist between *Diaz* and the Fifth Circuit's application of the functional equivalent doctrine.

When permitting a law enforcement agent to testify in accordance with *Diaz*, the district court may wish to include an additional instruction to the jury:

> You have heard testimony of a law enforcement officer that, based on the officer's experience, he [she] believes that [some] [many] [most] people involved in activities similar to those that the defendant is alleged to have committed know about [the controlled substances hidden in the [vehicle/ other container]] [other contraband]. I caution you that the officer did not and cannot tell you whether the defendant in this case knew about the [controlled substances] [contraband] as alleged in this case. Whether the defendant had such knowledge in this case is for

you alone to decide, based on your review of all the evidence admitted at trial. The law enforcement officer's opinion is just one part of the evidence, and, as with all evidence, you may accept it, reject it, or give it such weight as you think it deserves, taking into account all evidence presented to you in this trial.

For issues that arise when a witness testifies both as an expert and a fact witness, *see United States v. Portillo*, 969 F.3d 144, 170 (5th Cir. 2020); *United States v. Haines*, 803 F.3d 713, 735–36 (5th Cir. 2015).

Certain evidence can be introduced without the need for expert testimony. *See, e.g.*, *United States v. Williams*, 83 F.4th 994, 995 (5th Cir. 2023) ("When law enforcement uses [extraction technology] to pull information from a [cell]phone and a lay juror would require no additional interpretation to understand that information, the party does not need to introduce the evidence through an expert."); *United States v. Arthur*, 51 F.4th 560, 571 (5th Cir. 2022) ("[e]xpert testimony is not necessary to enable the jury to judge the obscenity of material which . . . has been placed into evidence," though "[t]he defense should be free to introduce appropriate expert testimony").

The text of this instruction does not describe the witness as an "expert witness" to avoid influencing the jury by use of that description. *See* Fed. R. Evid. 702 Advisory Committee's Notes to 2000 Amendment ("The use of the term 'expert' in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an 'expert.' Indeed, there is much to be said for a practice that prohibits the use of the term 'expert' by both the parties and the court at trial. Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness's opinion, and protects against the jury's being overwhelmed by the so-called 'experts'.").

"[E]xpert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in [Federal Rule of Evidence 702]." Fed. R. Evid. 702 Advisory Committee Notes to 2023 Amendment (citing Fed. R. Evid. 104(a)). "This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules." *Id.* (citations omitted).

1.19

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) and was cited with approval in *United States v. Naidoo*, 995 F.3d 367, 379–80 (5th Cir. 2021). *See also United States v. Hernandez*, No. 19-51135, 2022 WL 3031301, at *2 (5th Cir. Aug. 1, 2022).

"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)); *see also United States v. Girod*, 646 F.3d 304, 316–17 (5th Cir. 2011).

If the defendant has raised an alibi defense dependent upon a particular day, this instruction should be coordinated with Instruction No. 1.37, Alibi. *See United States v. King*, 703 F.2d 119, 122–25 (5th Cir. 1983) (approved instructions substantially similar to Instruction Nos. 1.19 and 1.37 and held that the trial court did not err in giving both the "On or About" instruction and the "Alibi" instruction).

1.20

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 affect the object of a conspiracy, although it remains separate and distinct from the conspiracy itself. Though the overt act need not be of 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. Lee*, 966 F.3d 310, 319 (5th Cir. 2020); *United States v. Brown*, 898 F.3d 636, 640–41 (5th Cir. 2018); *United States v. Lanier*, 879 F.3d 141, 147–48 (5th Cir. 2018); *United States v. Kiekow*, 872 F.3d 236, 243 (5th Cir. 2017); *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 Smith v. United States*, 143 S. Ct. 1594, 1603 (2023); *United States v. Lee*, 966 F.3d at 319–20; *United States v. Owens*, 724 F. App'x 289, 295–96 (5th Cir. 2018) (per curiam); *United States v. Romans*, 823 F.3d 299, 309−10 (5th Cir. 2016); *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 and even if all overt acts in that district occurred before the defendant joined the conspiracy. *See United States v. Rodriguez-Lopes*, 756 F.3d 422, 429–30 (5th Cir. 2014); *Pomranz*, 43 F.3d at 159, n.2; *United States v. Caldwell*, 16 F.3d 623, 624 (5th Cir. 1994).

Further, "[a]n overt act is an act performed to effect the object of a conspiracy. It does not need to be a criminal act, but it must be done in furtherance of the object of the conspiracy." *Lee*, 966 F.3d at 319–20.

"[T]he purposes of the venue requirement" are "convenience of the defendant and witnesses and ensuring that the jury has a connection to the case." *Brown*, 898 F.3d at 641 (citing *United States v. Romans*, 823 F.3d 299, 326 (5th Cir. 2016) (Costa, J., concurring); *see also Lee*, 966 F.3d at 320 (describing the "the original vicinage right concern that a defendant might be 'dragged to a trial . . . away from his friends, witnesses, and neighbourhood' and 'subjected to the verdict of mere strangers'" (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1775 (1833)).

"[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; *Lee*, 966 F.3d at 320.

'"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.

1.20A

VENUE—GENERALLY

In order for you to return a guilty verdict, the government must prove by a preponderance of the evidence that the offense charged was begun, continued, or completed [was committed] in the _____ District of _____. Unlike the other elements of the offense, this is a fact that the government must prove only by a preponderance of the evidence. This means the government must convince you only that it is more likely than not that the offense charged was begun, continued, or completed [was committed] 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 offense charged occurred*) is located in the _____ District of _____.

Note

Generally, venue is proper in any district in which the offense charged was committed. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."); *see also United States v. Cabrales*, 118 S. Ct. 1772, 1775–76 (1998); *United States v. Britain*, 34 F.4th 482, 483 (5th Cir. 2022); *United States v. Lee*, 966 F.3d 310, 319 (5th Cir. 2020); *United States v. Lanier*, 879 F.3d 141, 147 (5th Cir. 2018) (quoting *United States v. Anderson*, 66 S. Ct. 1213, 1217 (1946)); *United States v. Rounds*, 749 F.3d 326, 335 (5th Cir. 2014); *United States v. Strain*, 396 F.3d 689, 693 (5th Cir. 2005). But, "[w]here the Government alleges a single continuing offense committed in multiple districts, it must show that the trial is taking place 'in any district in which [the] offense was begun, continued, or completed.'" *Strain*, 396 F.3d at 693 (quoting 18 U.S.C. § 3237(a)); *accord Lee*, 966 F.3d at 319–20 (with regard to conspiracy, "[v]enue is proper in any district where the agreement was formed or an overt act occurred"); *Lanier*, 879 F.3d at 148; *United States v. Romans*, 823 F.3d 299, 309 (5th Cir. 2016); *Rounds*, 749 F.3d at 335 ("[V]enue can be based on 'evidence showing the commission of any single act that was part of the beginning, continuation, or completion of the crime.'" (quoting *United States v. Fells*, 78 F.3d 168, 171 (5th Cir. 1996))).

The Government must establish venue by a preponderance of the evidence. *See Lee*, 966 F.3d at 320; *Lanier*, 879 F.3d at 147; *Romans*, 823 F.3d at 309; *Rounds*, 749 F.3d at 335. When testimony at trial puts venue at issue (e.g., sufficiency of the evidence), the district court errs by failing to instruct on venue at the defendant's request. *See United States v. Carreon-Palacio*, 267 F.3d 381, 392 (5th Cir. 2001).

Venue is offense-specific and, accordingly, must be established for each charged offense. *See Lanier*, 879 F.3d at 148; *see also United States v. Stewart*, 843 F. App'x 600, 603–04 (5th Cir. 2021) (discussing venue with respect to SORNA violation); *United States v. Davis*, 666 F.2d 195, 198 (5th Cir. 1982) ("Venue may properly be laid in one district with respect to one count of an indictment, but still be improper with respect to the other counts.").

Retrial is the appropriate remedy when a prosecution occurs in the wrong venue in violation of the Venue Clause. *See Smith v. United States*, 143 S. Ct. 1594, 1608 (2023).

1.21

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. Gates, 624 F. App'x 893, 897 (5th Cir. 2015) ("[T]he district court employed many of the curative measures recognized by our court to protect against a constructive amendment to the indictment, such as: instructing the jury to only consider the crime charged in the indictment; instructing the jury that the Defendants-Appellants were not on trial for any offense not alleged in the indictment . . . "). *See also United States v. Valenzuela*, 57 F.4th 518, 523 (5th Cir. 2023) (finding use of second sentence in this instruction mitigated harm by misuse of evidence of prior conviction); *United States v. Maes*, 961 F.3d 366, 375 (5th Cir. 2020) (approving specific curative instruction limiting impeachment evidence of other crimes); *United States v. Poydras*, 569 F. App'x 318 (5th Cir. 2014) (second sentence of pattern instruction guarded against unfair prejudice); *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).

1.22

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 Shannon v. United States, 114 S. Ct. 2419, 2424 (1994) ("It is well established that when a jury has no sentencing function [as it would, for example, in a capital trial], it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'''') (quoting *Rogers v. United States*, 95 S. Ct. 2091, 2095 (1975)); *United States v. Buchner*, 7 F.3d 1149, 1153–54 (5th Cir. 1993). *See also United States v. Crittenden*, 46 F.4th 292, 298 n.8 (5th Cir. 2022) (approving instructing and stating that court cannot consider punishment in deciding whether to grant a new trial). *But see United States v. Jordan*, 958 F.3d 331, 338 (5th Cir. 2020) (finding district court did not abuse discretion in granting new trial when court security officer ("CSO") told juror to vote "without regard to the punishment that may be imposed" because "the CSO arguably conveyed a preference for a guilty verdict" and because his "official character as an officer of the court gave his comments a veneer of authority that could have carried great weight with a jury" (cleaned up)).

1.23

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. Robert*, No. 20-61084, 2021 WL 4484983, at *2 (5th Cir. Sept. 30, 2021) (unpublished) (per curiam); *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.

1.24

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). In *United States v. Sanders*, 966 F.3d 397, 403–05 (5th Cir. 2020), the Fifth Circuit rejected various arguments of misjoinder, citing in part the curative effect of jury instructions the jury "must give separate consideration to the evidence as to each defendant" and specifically instructed the jury to consider testimony concerning one defendant only against that defendant. *See also Iglesias-Villegas v. United States*, 144 S. Ct. 268 (2023) ("[C]ompelling prejudice [from joint trial] is not shown if it appears that, through use of cautionary instructions, the jury could reasonably separate the evidence and render impartial verdicts as to each defendant."); *United States v. Shows Urquidi*, 71 F.4th 357, 378 (5th Cir. 2023); *United States v. Hill*, 63 F.4th 335, 353 (5th Cir. 2023) ("Even in cases involving a high risk of prejudice [from joint trial], limiting instructions will often suffice to cure this risk.").

1.25

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. Mendoza*, 685 F. App'x 345, 351 & n.4 (5th Cir. 2017); *see also United States v. Hankton*, 51 F.4th 578, 608 (5th Cir. 2022); *United States v. Sanders*, 966 F.3d 397, 403–05 (5th Cir. 2020); *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 in 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.

1.26

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.

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. Recall, you must base your verdict solely on the evidence, testimony, and stipulations at trial and not on any outside or online material or source. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way. In particular, do not let racial, ethnic, national origin, or other bias influence your decision in any way. 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 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 conclusion 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) (quoting *United*

States v. Holley, 942 F.2d 916, 925–26 (5th Cir. 1991)). "But an exception to the general rule arises when the 'differences between means [of commission of the crime] become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses.'" *United States v. Sila*, 978 F.3d 264, 267 (5th Cir. 2020) (quoting *Schad v. Arizona*, 111 S. Ct. 2491 (1991)). Regarding the use of a specific unanimity instruction, *see* Note to Instruction No. 1.27, 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).

For discussions about how a trial judge may handle allegations of juror misconduct during deliberations, including a juror's refusal to follow his duty to deliberate, *see Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (finding a Sixth Amendment racial, ethnicity, and national origin bias exception to the no-impeachment rule); *In re Robinson*, 917 F.3d 856, 868–70 (5th Cir. 2019) (summarizing *Pena-Rodriguez*'s standard); *United States v. Ramos*, 801 F. App'x 216, 220–23 (5th Cir. 2020) (holding that district court abused discretion by dismissing juror without investigation); *United States v. Ebron*, 683 F.3d 105, 126–28 (5th Cir. 2012) (district court did not abuse discretion in interviewing jurors to investigate alleged misconduct); *United States v. Patel*, 485 F. App'x 702, 712–14 (5th Cir. 2012). For a discussion of how a trial judge may handle improper outside influences on the jury, including *ex parte* contact, *see United States v. Hill*, 35 F.4th 366, 390–92 (5th Cir. 2022) (finding specific jury instruction to address improper *ex parte* contact was sufficient in circumstances of the case).

1.27

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 _____ (*name crime*) 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 element 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.

For examples of discussions of unanimity in the context of other offenses, *see, e.g.*, *United States v. Talbert*, 501 F.3d 449, 451–52 (5th Cir. 2007) (unanimity not required as to particular firearm under 18 U.S.C. § 922(g)(1)); *United States v. Patino-Prado*, 533 F.3d 304, 310–12 (5th Cir. 2008) (unanimity requirement discussed with regard to drug and other conspiracies); *United States v. Suarez*, 879 F.3d 626, 633–34 (5th Cir. 2018) (unanimity not required for particular firearm underlying conviction under 18 U.S.C. § 924(c)(1)(A) because the particular firearm

"pertains to the means by which the crime was committed"; however, unanimity required as to type of firearm for purposes of imposition of statutory mandatory minimum sentence based on category of firearm pursuant to 18 U.S.C. § 924(c)(1)(B)(i)); *United States v. Coffman*, 969 F.3d 186, 190–92 (5th Cir. 2020) (unanimity not required for the alternative verbs in paragraph one of 18 U.S.C. § 641 because they "are means of committing the offense, not elements").

"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) (quoting *United States v. Holley*, 942 F.2d 916, 925–26 (5th Cir. 1991)); *see United States v. Meshack*, 225 F.3d 556, 579–80 (5th Cir. 2000), *amended on other grounds* 244 F.3d 367 (5th Cir. 2001). "But an exception to the general rule arises when the 'differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses.'" *United States v. Sila*, 978 F.3d 264, 267 (5th Cir. 2020) (quoting *Schad*, 111 S. Ct. at 2498 (plurality opinion), *abrogated on other grounds recognized by Edwards v. Vannoy*, 141 S. Ct. 1547, 1556 n.4 (2021)). "Where the exception applies, a general unanimity 'instruction will be inadequate to protect the defendant's constitutional right to a unanimous verdict' because '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.'" *Sila*, 978 F.3d at 267–68 (quoting *inter alia Holley*, 942 F.2d at 926); *see also United States v. Villegas*, 494 F.3d 513, 515–16 (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).

Take particular care when submitting special interrogatories to the jury on the theory of liability. *See United States v. Gonzales*, 841 F.3d 339, 346–48 (5th Cir. 2016) (reversing conviction where evidence did not support theory of liability found by jury pursuant to special interrogatories). Also take special care when submitting a general verdict form to the jury when multiple theories of culpability have been charged. *See United States v. Jones*, 935 F.3d 266, 269, 271–74 (5th Cir. 2019) (reversing conviction under 18 U.S.C. § 924(c) on plain-error review when indictment alleged two predicate offenses as possible bases of culpability, one of which was invalid, but general verdict form did not preclude reasonable probability that jury relied on invalid basis for conviction).

1.28

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 [her] 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) (discussing the breadth of 18 U.S.C. § 3501(a)); *United States v. Iwegbu*, 6 F.3d 272, 274 (5th Cir. 1993) (concluding that "once an issue arises as to the voluntariness of a confession," the district court should sua sponte give the instruction required by 18 U.S.C. § 3501(a)). *But see United States v. Guanespen-Portillo*, 514 F.3d 393, 405 (5th Cir. 2008) (failure to give instruction sua sponte not plain error where evidence "does not clearly raise an issue of voluntariness").

1.29

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 [her] 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. 1.28 but adds a last sentence when there are multiple defendants. Although the instruction has been approved, *United States v. Watson*, 591 F.2d 1058, 1061 n.2 (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). The Supreme Court has emphasized that the appropriate redaction of directly accusatory information in a manner which does not create an obvious basis from which a jury could infer a defendant's guilt, coupled with a limiting instruction such as this Instruction, generally will suffice to avoid a violation of the Sixth Amendment Confrontation Clause. *Samia v. United States*, 143 S. Ct. 2004, 2012, 2017 (2023); *see also United States v. Shah*, 95 F.4th 328, 372 (5th Cir. 2024) (use of co-defendant statement that did not directly inculpate defendants, coupled with limiting instruction, did not violate Confrontation Clause, except with regard to defendant against whom such statement was used during cross-examination); *United States v. Burden*, 964 F.3d 339, 345–46 (5th Cir. 2020) (limiting instruction adequate to prevent prejudice of co-defendant's statement that did not name defendant by name). *But see United States v. Gibson*, 875 F.3d 179, 194–95 (5th Cir. 2017) (discussing *Bruton* issues in context of references to corporate actors).

Potential *Bruton* error is particularly present when the government is permitted to read the factual bases of co-defendant plea agreements as evidence at trial:

> When the Government re-charges offense conduct in a successive prosecution yet multiple defendants in that successive case already have pled guilty to the recharged offense conduct, the peril of a *Bruton* violation, even inadvertent, is high. District judges, unsurprisingly, will need to be attentive to redactions, limiting instructions, and possibly severance.

United States v. Perry, 35 F.4th 293, 334 (5th Cir. 2022) (failing to redact defendant's address in co-defendant's factual basis was *Bruton* error, though harmless on specific facts of case) (citing *United States v. Nutall*, 180 F.3d 182, 188 (5th Cir. 1999)). *But see Hemphill v. New York*, 142 S. Ct. 681, 691–94 (2022) (holding that reading the factual basis of a non-testifying witness' guilty plea violated the Confrontation Clause).

1.30

ENTRAPMENT

The defendant asserts that he [she] 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.

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:

1. was not induced to commit the offense by a government agent; or
2. had a predisposition or intention to commit that offense prior to being approached by a government agent.

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

Note

There is no statutory defense of entrapment; it stems from *Sorrells v. United States*, 53 S. Ct. 210 (1932) (government must disprove inducement and predisposition, as Congress does not want to implant crime in innocent mind). An earlier version of this instruction, that required the government to prove that the defendant was predisposed apart from government inducement, 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, 310–11 (5th Cir. 1996). In resolving whether a prior version of this jury instruction misstated the law, the Fifth Circuit suggested that between the requirements of predisposition and lack of inducement,

the word "and" be replaced with "or." *United States v. Thompson*, 130 F.3d 676, 689 n.29 (5th Cir. 1997). That suggested change was made.

If there is sufficient evidence for a reasonable jury to rule in favor of the defendant on an entrapment theory, it is generally reversible error to refuse to submit a requested entrapment instruction to the jury. *See United States v. Theagene*, 565 F.3d 911, 918–24 (5th Cir. 2009); *United States v. Smith*, 481 F.3d 259, 262 (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.' . . . This requires the defendant to make a prima facie showing of (1) his [her] lack of predisposition to commit the offense and (2) some governmental involvement and inducement more substantial than simply providing an opportunity or facilities to commit the offense.'' *Theagene*, 565 F.3d at 918 (citations omitted). "A defendant who meets this burden is entitled to an entrapment instruction, whereupon the burden shifts to the government to prove beyond a reasonable doubt that the defendant was disposed to commit the offense before the government first approached him." *Id.* (citation omitted); *see also United States v. Cawthon*, 637 F. App'x 804, 805–06 (5th Cir. 2016) (discussing the required two prongs of predisposition and inducement); *United States v. Macedo-Flores*, 788 F.3d 181, 188 (5th Cir. 2015) ("Only after the defendant has made a prima facie showing of entrapment by showing both elements—lack of predisposition and governmental inducement—is the defendant entitled to an entrapment instruction by the court.") (citing *United States v. Stephens*, 717 F.3d 440, 444 (5th Cir. 2013)).

The measure of sufficiency of a defendant's prima facie showing is viewed in the light most favorable to the defendant. *Cawthon*, 637 F. App'x at 805. When examining a defendant's predisposition to commit the offense, the court should consider, among other things (1) the defendant's eagerness to participate in the transaction; (2) the defendant's ready response to the government's inducement offer; and (3) whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. *Macedo-Flores*, 788 F.3d at 187 (citing first *United States v. Chavez*, 119 F.3d 342, 346 (5th Cir. 1997), and then *Matthews v. United States*, 108 S. Ct. 883 (1988)).

For a discussion of the timing issue, *see Jacobson v. United States*, 112 S. Ct. 1535, 1540–42 (1992) (where the government "has induced an individual to break the law, and the defense of entrapment is at issue, as it was in this case, 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*).

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 or she was involved in one or more of the acts essential to the commission of the charged crime and alternatively contends that he or she was in any event entrapped. In *Matthews*, 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." 108 S. Ct. at 886. 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 or she 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). In fact, the reliance defense is required by the constitutional guarantee of due process. *See Cox v. Louisiana*, 85 S. Ct. 476 (1965); *Raley v. Ohio*, 79 S. Ct. 1257 (1959). 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). In order to invoke this defense, the government official must be "a federal government official empowered to render the claimed erroneous advice, or an authorized agent of the federal government who has been granted the authority from the federal government to render such advice." *Id.* at 467 (citations omitted) (holding state officer on federal-state task force who holds no federal commission, where federal funding is only form of federal authorization, is insufficient); *United States v. Viola*, 768 F. App'x 238, 240 (5th Cir. 2019).

This circuit has never recognized the defense of sentencing entrapment; a circuit split exists as to that issue. *See Macedo-Flores*, 788 F.3d at 187 n.3 (collecting cases); *United States v. Sain*, 858 F. App'x 730, 732 (5th Cir. 2021) (acknowledging defense not recognized in this circuit at this time).

1.31

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) (approving a similar instruction); *see also United States v. Ramirez-Rizo*, 809 F.2d 1069, 1071–72 (5th Cir. 1987) (concluding that a failure to give this instruction is not reversible error per se, but rather that the failure must be considered within the context of the entire trial, with the key consideration being whether the absence of the instruction prevented the jury from considering the defendant's theory of defense).

See Perry v. New Hampshire, 132 S. Ct. 716, 728 n.7 (2012) (citing an earlier version of this instruction, among others, as a safeguard that "caution[s] juries against placing undue weight on eyewitness testimony of questionable reliability"); *Watkins v. Sowders*, 101 S. Ct. 654, 658 (1981) ("Where identification evidence is at issue, however, no such special considerations justify a departure from the presumption that juries will follow instructions.").

1.32

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 [she] is on trial by accident or mistake.

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

Note

Fed. R. Evid. 105, 404(b). *See United States v. Beechum*, 582 F.2d 898, 911, 917 (5th Cir. 1978) (en banc) (setting out test to determine whether prior acts are admissible and noting that limiting instructions can "allay . . . the undue prejudice engendered by [such] evidence"); *see also United States v. Williams*, 30 F.4th 263, 267–68 (5th Cir. 2022) (applying *Beechum* and Rule 404(b) regarding the introduction of prior acts evidence); *United States v. Jones*, 930 F.3d 366, 373–75 (5th Cir. 2019) (applying *Beechum* and Rule 404(b) to the introduction of a prior conviction); *United States v. Juarez*, 866 F.3d 622, 626–30 (5th Cir. 2017) (applying *Beechum* and Rule 404(b)). This instruction has been cited with approval. *United States v. Pompa*, 434 F.3d 800, 806 (5th Cir. 2005) (approving of the 2001 version of this instruction); *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) (approving of an earlier version of this pattern instruction); *United States v. Chiak*, 137 F.3d 252, 258 n.3 (5th Cir. 1998) (approving 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. Valenzuela*, 57 F.4th 518, 523 (5th Cir. 2023) (concluding that any misuse of Rule 404(b) evidence was mitigated by the use of the second sentence of Instruction 1.21 that the defendant was "not on trial for any other act, conduct or offense not alleged in the indictment"); *United States v. Naidoo*, 995 F.3d 367, 378 (5th Cir. 2021) (per curiam); *United States v. Ricard*, 922 F.3d 639, 654 (5th Cir. 2019); *Juarez*, 866 F.3d at 628–29; *United States v. Valas*, 822 F.3d 228, 240–41 & n.3 (5th Cir. 2016) (applying the pattern instruction); *United States v. Ebron*, 683 F.3d 105, 132 (5th Cir. 2012); *United States v. Finley*, 477 F.3d 250, 262–63 (5th Cir. 2007); *United States v. Walters*, 351 F.3d 159, 165–69 (5th Cir. 2003); *United States v. Taylor*, 210 F.3d 311, 318 (5th Cir. 2000).

In *United States v. Peterson*, 244 F.3d 385, 392–93 (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 of the defendants] could not be considered, even for 'other, very limited purposes,' against" his codefendants. *Id*. at 395. *See also United States v. Ledezma-Cepeda*, 894 F.3d 686, 690–92 (5th Cir. 2018) (limiting instructions dispelled prejudice of Rule 404(b) evidence admitted only against one defendant).

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 (finding no error from the failure to issue, sua sponte, a limiting instruction after each piece of similar act evidence was introduced when it was included in the final jury instructions); *see also 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, 117–18 (5th Cir. 1978); *United States v. Garcia*, 530 F.2d 650, 655–56 (5th Cir. 1976).

1.33

POSSESSION

"Possession," as that term is used in these instructions, may be one of two kinds: actual possession or constructive possession.

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

Mere touching or physical contact alone is insufficient by itself to establish possession.

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 have cited this instruction, absent the "mere touching" sentence, with approval. *See United States v. Jones*, 833 F. App'x 528, 547 (5th Cir. 2020) (per curiam); *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) (per curiam); *United States v. Bradford*, 54 F. App'x 592, at *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 "mere touching" sentence was added in 2024 in reaction to *United States v. Smith*, 997 F.3d 215, 219–24 (5th Cir. 2021). Although the *Smith* Court approved the 2019 instruction without the "mere touching" language because it was already incorporated in the "dominion and control" concepts, the Fifth Circuit noted that it had "endorsed jury instructions that prevent a jury from convicting on a possession charge for mere touching alone." *Id.* at 223–24.

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 (5th Cir. 2011) (finding no reversible error to include constructive possession instruction when evidence supported constructive possession, even though the case was primarily an actual possession case); *United States v. Loudd*, No. 07-20916, 2009 WL 122561, *1 (5th Cir. Jan. 20, 2009) (unpublished) ("'[A] constructive possession instruction is not improper if the evidence supports it, even if the Government is seeking to prove actual possession.'") (citing *United States v. Munoz*, 150 F.3d 401, 415–16 (5th Cir. 1998)); *United States v. Horace*, 227 F. App'x 350, 352

(5th Cir. 2007) (finding that the evidence lent permissible inference to theory of constructive possession); *United States v. Diaz-Rivera*, 229 F. App'x 330, 331 (5th Cir. 2007) (per curiam) (same); *United States v. Fields*, 72 F.3d 1200, 1212 (5th Cir. 1996) (same); *United States v. Ortega*, 859 F.2d 327, 329–31 (5th Cir. 1988) (instructing on constructive possession was error, but not plain error, when no evidence existed of constructive possession and government case was based solely on actual possession).

With regard to offenses involving contraband hidden in a vehicle (or similar location), "[k]nowledge of the presence of a controlled substance often may be inferred from the exercise of control over a vehicle in which the illegal substance is concealed." *United States v. Lara*, 23 F.4th 459, 471 (5th Cir. 2022) (citations omitted). "However, when the contraband was smuggled in hidden compartments which were not clearly visible or readily accessible to the defendant, control of the vehicle does not support an inference of guilty knowledge; it is at least a fair assumption that a third party might have concealed the controlled substances in the vehicle with the intent to use the unwitting defendant as the carrier in a smuggling enterprise. Accordingly, in such cases, [the Fifth Circuit] also requires circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge." *Id*. (cleaned up) (holding that such circumstantial evidence need only prove a general consciousness of guilt).

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 [she] 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 United States v. Pennington, 20 F.3d 593, 598 (5th Cir. 1994). For similar standards involving child pornography, *see United States v. Waguespack*, 935 F.3d 322, 332 (5th Cir. 2019). For firearms, *see Flores-Abarca v. Barr*, 937 F.3d 473, 483 (5th Cir. 2019) ("The driver of a vehicle can transport passengers and their possessions without having the 'power and intent to exercise control over' every object in the vehicle.") (citing *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2010)).

If contraband is found in a jointly occupied location, the jury must find some other indicator of possession besides joint possession allowing them to infer that the defendant had "knowing dominion or control over the contraband." *United States v. Moreland*, 665 F.3d 137, 150 (5th Cir. 2011); *see also United States v. Fields*, 977 F.3d 358, 365–66 (5th Cir. 2020) (same). In cases of joint occupancy of an area where contraband is found, the Fifth Circuit will affirm a finding of constructive possession only when there is some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the illegal item. *See United States v. Huntsberry*, 956 F.3d 270, 279–81 (5th Cir. 2020).

1.34

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) and *United States v. Rahim*, 860 F. App'x 47, 53–54 (5th Cir. 2021). *See also United States v. Aldawsari*, 740 F.3d 1015, 1019–20 (5th Cir. 2014) (affirming district court's similar jury instruction, which adequately distinguished "mere preparation" from "some preparation").

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 (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. Hill*, 63 F.4th 335, 361–62 (5th Cir. 2023) (discussing elements of attempt and finding sufficient evidence of substantial step in attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) established by defendant's participation prior to day of attempt by recruiting an accomplice, providing a telephone, and driving accomplice to a planning meeting).

"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). 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). For an example under 18 U.S.C. § 2422, *see United States v. Crocker*, 822 F. App'x 288, 289–90 (5th Cir. 2020) (per curiam) (evidence "that Crocker went to a hotel to meet [an undercover agent] and [an] eight-year-old girl" was sufficient to establish a "substantial step"). For an example under 18 U.S.C. § 1512(c)(2) (attempting to obstruct justice by means of encouraging victim-witness to lie), *see United States v. Robinson*, 87 F.4th 658, 669–71 (5th Cir. 2023).

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 and explaining 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, 512–13 (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).

1.35

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 _____ (*list the lesser crime*), your verdict must be not guilty of all of the charges.

Note

Federal Rule of Criminal Procedure 31(c) provides: "A defendant may be found guilty of any of the following: (1) an offense 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. *Id.* An offense is not a lesser included offense if it contains an additional statutory element that is not included in the greater offense. *Id.*

See Carter v. United States, 120 S. Ct. 2159, 2168–2172 (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 § 2113(a)); *United States v. Nickless*, 599 F. App'x 222, 222–23 (5th Cir. 2015) (holding that transferring obscene material to a minor, in violation of 18 U.S.C. § 1470, is not a lesser-included offense of using a facility of interstate commerce to knowingly attempt to persuade, induce, entice, or coerce an individual, under the age of 18, to engage in illegal sexual

activity in Texas, in violation of 18 U.S.C. § 2422(b)); *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 the defendant of the greater offense" (quoting *United States v. Lucien*, 61 F.3d 366, 372 (5th Cir. 1995)); *see also United States v. McElwee*, 646 F.3d 328, 341–42 (5th Cir. 2011). *Compare United States v. Mays*, 466 F.3d 335, 342 (5th Cir. 2006) (concluding that 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), *with United States v. Ambriz*, 727 F.3d 378, 381–83 (5th Cir. 2013) (holding that possession of a controlled substance is not a lesser included offense of distribution of a controlled substance).

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).

"Both the government and a criminal defendant may demand an instruction on lesser included offenses." *United States v. Rodriguez*, 831 F.3d 663, 669–70 (5th Cir. 2016).

1.36

INSANITY

The defendant claims that he [she] 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; and

Second, that because of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality of his [her] acts, or was unable to appreciate that his [her] acts were wrong. Mental disease or defect do not otherwise constitute a defense.

On the issue of insanity, it is the defendant who must prove his [her] 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 [her] 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 only by reason of insanity. No matter which verdict you choose, your vote must be unanimous as to this verdict.

Note

The insanity defense is one of the few federal defenses that is codified. *See* 18 U.S.C. § 17. The Supreme Court has upheld the constitutionality of placing the burden of proof at "clear and convincing evidence" rather than the standard preponderance. *See Leland v. Oregon*, 72 S. Ct. 1002, 1007–09 (1952).

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 n.2 (5th Cir. 1993), *aff'd* 114 S. Ct. 2419 (1994). 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. §§ 17, 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*, 114 S. Ct. at 2428. The Court did, however, recognize that an instruction "of some form may be necessary under certain limited circumstances." *Id.* One such instance might be where a witness or prosecutor states to the jury that a defendant would go free after a not guilty by reason of insanity verdict. *Id.* There, a district court might need to "intervene with an instruction to counter such a misstatement." *Id*.

Clear and convincing evidence, in the context of an insanity defense, is "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." *United States v. Barton*, 992 F.3d 66, 69 n.6 (5th Cir. 1993) (quoting *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992)).

See United States v. Jenkins, 592 F. App'x 311, 311–12 (5th Cir. 2015); *United States v. Long*, 562 F.3d 325, 331–45 (5th Cir. 2009); *United States v. Eff*, 524 F.3d 712, 717–20 (5th Cir. 2008); *United States v. Dixon*, 185 F.3d 393, 397–407 (5th Cir. 1999).

See 18 U.S.C. § 4242(b) (providing that the jury shall be instructed on insanity only if the defense has been appropriately raised).

1.37

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, 137 n.2 (5th Cir. 1995), approved an instruction in substantially the same form.

For cases discussing when an alibi instruction is appropriate, *see United States v. Valas*, 822 F.3d 228, 237–39 (5th Cir. 2016) (summarizing case law and citing *United States v. Laury*, 49 F.3d 145, 152 (5th Cir. 1995), among other cases).

1.38

JUSTIFICATION, DURESS, OR COERCION

The defendant claims that if he [she] committed the acts charged in the indictment, he [she] did so only because he [she] 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 [her] actions were excused by duress or coercion [justified by necessity].

The defendant's actions were committed under duress [justified] [necessary], and therefore he [she] 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 that the defendant must prove by a preponderance of the evidence are as follows:

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

Second: That the defendant had not recklessly or negligently placed himself [herself] in a situation where he [she] would likely be forced to choose the criminal conduct;

Third: That the defendant had no reasonable legal alternative to violating the law, that is a reasonable opportunity both to refuse to do the criminal act and also to avoid the threatened harm; and

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

Note

The burden is on the defendant to present proof of all the elements in order to present a duress or justification defense to the jury. *United States v. Mora-Carrillo*, 80 F.4th 712, 715–16 (5th Cir. 2023) (court did not abuse its discretion to instruct on duress defense in unlawful reentry case where defendant failed to produce sufficient evidence that he was in imminent danger at the time he committed the offense of unlawful reentry); *United States v. Penn*, 969 F.3d 450, 455–57 (5th Cir. 2020) (discussing applicability of justification defense in charge of knowing possession of a firearm as a prohibited person, in violation of 18 U.S.C. § 922(g)). For additional cases discussing the elements of this defense, *see United States v. Montes*, 602 F.3d 381, 389–90 (5th Cir. 2010) (felon in possession), *United States v. Wyly*, 193 F.3d 289, 300 (5th Cir. 1999) (court instructed on duress defense in mail fraud and money laundering case where defendant claimed

threats and intimidation by co-defendant sheriff), and *United States v. Posada-Rios*, 158 F.3d 832, 873–75 (5th Cir. 1998) (drug conspiracy).

In the context of felon-in-possession offenses under 18 U.S.C. § 922(g), there is a fifth element for the duress and necessity defenses for continuing crimes; that the defendant immediately cease his commission of the offense when the duress or necessity subsides. *See United States v. Penn*, 969 F.3d 450, 455-57 (5th Cir. 2020) ("A defendant must act promptly to rid himself of the firearm once the circumstances giving rise to the justification subside.") The Supreme Court held that the same is true for a continuing crime like prison escape in violation of 18 U.S.C. § 751(a). *See United States v. Bailey*, 100 S. Ct. 624, 635 (1980) ("An escapee who flees from a jail that is in the process of burning down may well be entitled to an instruction on duress or necessity . . . but he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."). As with any affirmative defense, the trial court may refuse to give the justification or duress instruction if the defendant fails to submit sufficient evidence such that a reasonable juror could find the defense. *See United States v. Freeman*, No. 20-50181, 2021 WL 2908510, at *2–3 (5th Cir. July 9, 2021) (unpublished) (rejecting defendant's request for instruction on the defense of duress or justification due to defendant's failure to establish that he did not negligently or recklessly place himself in the situation that forced him to possess the firearm, and his failure to present evidence that he had no reasonable alternative, such as calling the police); *Posada-Rios*, 158 F.3d at 873 ("[A] defendant must present evidence of each of the elements of the defense before it may be presented to the jury."); *United States v. Liu*, 960 F.2d 449, 455 (5th Cir. 1992).

1.39

SELF-DEFENSE—DEFENSE OF THIRD PERSON

The defendant has offered evidence that he [she] 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 or herself only where he or she acts in reasonable self-defense, rather than plain self-defense (which already call 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).

The *Branch* Court held that "the defendant bears the initial burden of production." 91 F.3d at 712 (citing *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984)). "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*. at 714 n.1.

As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his or her favor. *United States v. Stone*, 960 F.2d 426, 432 (5th Cir. 1992) (citing *United States v. Kim*, 884 F.2d 189, 193 (5th Cir. 1989)).

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

1.40

MATERIALITY

As used in these instructions, a representation [statement] [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.

The government can prove materiality in either of two ways.

First, a representation [statement] [pretense] [promise] is "material" if a reasonable person would attach importance to its existence or nonexistence in determining his [her] choice of action in the transaction in question.

Second, a statement could be material, even though only an unreasonable person would rely on it, if the person who made the statement knew or had reason to know his [her] victim was likely to rely on it.

In determining materiality, you should consider that the naiveté, carelessness, negligence, or stupidity of a victim does not excuse criminal conduct, if any, on the part of the defendant.

Note

This instruction is intended when a private person or business is the intended victim of an alleged fraud offense. The first paragraph of this instruction is derived from *United States v. Davis*, 226 F.3d 346, 358 (5th Cir. 2000) (quoting *United States v. Neder*, 119 S. Ct. 1827, 1837 (1999)); *United States v. Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980)); s*ee also United States v. Greenlaw*, 84 F.4th 325, 340–43 (5th Cir. 2023) (applying the same definition of materiality in the context of wire and securities fraud); *United States v. Gas Pipe, Inc.*, 997 F.3d 231, 236–37 (5th Cir. 2021) (using the same definition of materiality).

The second paragraph comes from *Neder*, 119 S. Ct. at 1840 n.5 (1999) (quoting Restatement (Second) of Torts § 538 (1977)); *see also United States v. Richards*, 204 F.3d 177, 191–92 (5th Cir. 2000) (applying definition of materiality from footnote 5 of *Neder*), *overruled on other grounds by United States v. Cotton*, 122 S. Ct. 1781 (2002).

The Supreme Court has sometimes read "materiality" into federal criminal statutes even when that word does not appear in the language defining the offense. *See, e.g.*, *Neder*, 119 S. Ct. at 1839–40 (holding that materiality is an element of mail, wire, and bank fraud, as there is a presumption that Congress intends to incorporate the well-settled meaning of common law terms); *United States v. Guadin*, 115 S. Ct. 231, 2313 (1995) (holding that the false statement statute, 18 U.S.C. § 1001, required that the government prove materiality even before Congress amended the statute in 1996 to include that word as an element of the offense); *see also Gas Pipe, Inc.*, 997 F.3d at 236–37 (discussing whether materiality is required with regard to charge of felony misbranding, in violation of 21 U.S.C. § 333, but not resolving the issue because any error in refusing this instruction was harmless).

1.41

"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, 744–45 (5th Cir. 1994) (explaining that this instruction is the "correct" definition of "knowingly"); *see also United States v. Xie*, 942 F.3d 228, 239 (5th Cir. 2019) (approving the same instruction); *United States v. Daniel*, 933 F.3d 370, 379 (5th Cir. 2019) (same).

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, 905–06 (5th Cir. 1999); *United States v. Sanchez-Sotelo*, 8 F.3d 202, 211–12 (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 Ruan v. United States*, 142 S. Ct. 2370, 2377–79 (2022) ("knowingly" *mens rea* applied to absence-of-authorization element of statute prohibiting the dispensing of a controlled substance); *Rehaif v. United States*, 139 S. Ct. 2191, 2195–97, 2200 (2019) ("knowingly" *mens rea* applied to status of belonging to a category of persons barred from possessing a firearm); *see also United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996).

For cases when a statute contains no *mens rea*, judges are cautioned to nevertheless consider whether scienter should be inferred. *See, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2009–11 (2015); *Morissette v. United States*, 72 S. Ct. 240, 264–73 (1952). *But see United States v. Hansen*, 143 S. Ct. 1932, 1944–46 (2023) (finding no explicit *mens rea* necessary because the use of the words "encourage" or "induce" in 8 U.S.C. § 1324(a)(1)(A)(iv) incorporated common law "attributes of solicitation and facilitation"); *United States v. Shah*, 95 F.4th 328, 351–52 (5th Cir. 2024) (finding no *mens rea* in prosecution under Anti-Kickback Statute (42 U.S.C. § 1320a-7b) with respect to payment being made under a federal healthcare program because such element establishes jurisdiction only). When an indictment includes a "knowingly" *mens rea* even where not required by statute, the district court must still instruct the jury on the basis of the offense as indicted; to omit the "knowingly" *mens rea* from the jury instruction constitutes a constructive amendment. *See United States v. Sanders*, 966 F.3d 397, 405–09 (5th Cir. 2020).

1.42

DELIBERATE IGNORANCE

You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her]. 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 [herself] to the existence of a fact.

Note

The Fifth Circuit has held that this instruction "is a correct statement of the law as enunciated by the Supreme Court." *United States v. Kahn*, 768 F. App'x 266 (5th Cir. 2019) (citing *United States v. Brooks*, 681 F.3d 678, 702 (5th Cir. 2012)); *see also United States v. Martinez*, 921 F.3d 452, 477–78 (5th Cir. 2019).

The deliberate ignorance instruction should rarely be given—only when the facts and statute under which the defendant is being prosecuted justify it. *See United States v. Araiza-Jacobo*, 917 F.3d 360, 366 (5th Cir. 2019) (citing *United States v. Nguyen*, 493 F.3d 613, 619 (5th Cir. 2007)); *United States v. Ricard*, 922 F.3d 639, 655 (5th Cir. 2019) ("[Although this instruction] guards against a defendant who 'choos[es] to remain ignorant so he can plead lack of positive knowledge in the event he should be caught[,]' . . . [t]he danger of such an instruction . . . is that, when a defendant must have acted knowingly or willfully, 'the jury might convict for negligence or stupidity'" (internal quotations omitted)); *see also United States v. Lee*, 966 F.3d 310, 326 (5th Cir. 2020) ("It is troubling that an instruction that should be given rarely has become commonplace. With someone's liberty on the line, there must be a compelling justification for an instruction that runs the risk of confusing the jury and convicting a defendant who merely should have been aware of criminal conduct. Prosecutors and district courts should carefully scrutinize the facts before deciding they warrant the instruction. The key is whether there is evidence showing the defendant took proactive steps to ensure his ignorance." (cleaned up and internal quotations omitted)).

The instruction is properly given if the evidence shows that "(1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposefully contrived to avoid learning of the illegal conduct." *United States v. Oti*, 872 F.3d 678, 697 (5th Cir. 2017) (citations omitted). "The instruction is appropriate *only* in the circumstances where a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate indifference." *Id*. (emphasis in original) (quotation omitted); *see also Lee*, 966 F.3d at 325–26 (finding that deliberate ignorance instruction was improperly given where, although there was sufficient evidence that defendants were subjectively aware of high probability of the existence of illegal conduct, the evidence was not sufficient to show that both defendants purposefully contrived to avoid learning of illegal where they had different roles in pain management clinic).

The instruction should not be given "when the evidence raises only the inferences that

the defendant had actual knowledge or no knowledge at all of the facts in question." *Araiza-Jacobo*, 917 F.3d at 366 (quoting *Oti*, 872 F.3d at 697).

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) (citing *United States v. Farfan-Carreon*, 935 F.2d 678, 681 n.5 (5th Cir. 1991)); *see also United States v. Alaniz*, 726 F.3d 586, 612 (5th Cir. 2013). Such a balancing instruction would state that 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." *Vasquez*, 677 F.3d at 696.

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).

1.43

"WILLFULLY"—TO ACT

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). 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 or her 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 *Cheek* 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).

For a more recent discussion of these principles in the context of charges concerning tax and campaign finance laws, *see United States v. Stockman*, 947 F.3d 253, 262 (5th Cir. 2020) (drawing on *Pomponio* and *Simkanin* to uphold the use of the historical jury instruction, *supra*, with the addition for false tax return charges of the phrase "with the intent to violate a known legal duty," without the need for the addition of a "good faith" jury charge.); *see also United States v. Smukler*, 991 F.3d 472, 482–88 (3d Cir. 2021) (applying the heightened *Cheek* definition of willfulness for false statements under 18 U.S.C. § 1001 in the context of federal election law, but declining to adopt the same heightened standards for substantive violations of the same election law provisions).

In Brief for the United States in Opposition, *Natale v. United States*, 134 S. Ct. 1875 (2014) (mem.), the Solicitor General noted that "it is now the view of the United States that the "willfully" element of §§ 1001 and 1035 requires proof that the defendant made a false statement with the knowledge that his conduct was unlawful."

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 or her 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 undertaken 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 or her 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 Fifth Circuit has applied these principles in the context of healthcare fraud and kickbacks in *United States v. Nora*, 988 F.3d 823 (5th Cir. 2021). There the Court approved the historical definition of willfulness in the context of fraud charges under 18 U.S.C. §§ 1347 and 1349 as well as kickbacks in Medicare program payments under 42 U.S.C. § 1320a-7b. *Id.* at 829–30 (citing approvingly the definition that willfulness 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.") (quoting *United States v. Ricard*, 922 F.3d 639, 648 (5th Cir. 2019)). The Court noted that the heightened standard applicable to offenses under the Internal Revenue Code would not apply because Congress had specifically amended the statutes at issue in *Nora* to provide that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." *Id.* at 830 n.3 (citing18 U.S.C. § 1347(b) and 42 U.S.C. § 1320a-7b(h)). *See United States v. Shah*, 95 F.4th 328, 377 (5th Cir. 2024) (affirming denial of good-faith and advice-of-counsel instructions in kickback prosecution as the jury was instructed on willfulness and knowledge); *see also United States v. Beaulieu*, 973 F.3d 354, 361–62 (5th Cir. 2020) (reciting different definition of "willful" applicable in contempt proceedings).

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. 2.12).

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 paying 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.").

1.44

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, 2320 (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).

Transmission by means of the internet may constitute transportation in interstate commerce. *See, e.g.*, *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002). Moreover, use of the internet, cell phones or hotels that service interstate travelers may constitute use of the means or facilities of interstate commerce. *United States v. Marek*, 238 F.3d 310, 318–19 (5th Cir. 2001) (en banc) (noting that use of a telephone satisfies the interstate commerce requirement); *see also United States v. Shah*, 95 F.4th 328, 358 (5th Cir. 2024) (use of the internet to move funds constitutes the use of the facilities of interstate commerce, even if the transfer takes place wholly within one state).

For a discussion of proper jury instructions for "interstate commerce" or "foreign commerce," *see United States v. Vargas*, 6 F.4th 616, 621–25 (5th Cir. 2021) (discussing jury instructions charging "interstate commerce" as in indictment while proof offered related to foreign commerce).

1.45

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, 139–40 (5th Cir. 1994); *United States v. De La Rosa*, 911 F.2d 985 (5th Cir. 1990) (concluding that "'[f]oreign commerce' means to or from the United States"); Note to Instruction No. 1.44, Interstate Commerce.

1.46

COMMERCE—DEFINED

Commerce includes travel, trade, transportation, and communications.

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).

1.47

"AFFECTING COMMERCE"—DEFINED

"Affecting commerce" means that there is any effect at all on interstate or foreign commerce, however minimal.

Note

See Taylor v. United States, 136 S. Ct. 2074, 2079 (2016) (individual impact on interstate commerce can be minimal, as long as the activity substantially affects interstate commerce in the aggregate); *see also United States v. Jackson*, 88 F.4th 596, 601–02 (5th Cir. 2023) (finding evidence sufficient to establish an effect on interstate commerce from interruption of store's participation in commerce for limited period of time with an estimated loss of $600, based on the aggregate effect such attempted robberies would have); *United States v. Avalos-Sanchez*, 975 F.3d 436, 442–43 (5th Cir. 2020) (finding sufficient factual basis for guilty plea under plain error review to satisfy commerce element of Hobbs Act charge arising from armed home invasion of wrong house, where intended victims were engaged in the drug trade). This definition also derives from the instructions addressing 18 U.S.C. § 844(i), the arson statute, at Instruction No. 2.37B; 18 U.S.C. § 1951, the Hobbs Act, at Instructions Nos. 2.73A, 2.73B, and 2.73C; and production of false identification documents, 18 U.S.C. § 1028(a), at Instruction No. 2.48A.

In *Taylor*, the Supreme Court held that stealing or attempting to steal drug proceeds in a Hobbs Act case affects commerce as a matter of law. 136 S. Ct. at 2081. However, unlike the unqualified words "affecting commerce" in the Hobbs Act, which signals Congress' intent to invoke its full Commerce Clause authority, the arson statute requires that a building be "used" in commerce or in an activity affecting commerce, and this "qualification is most sensibly read to mean active employment for commercial purposes." *Jones v. United States*, 120 S. Ct. 1904, 1910 (2000) (holding that the arson statute does not reach the arson of an owner-occupied private residence); *see also Russell v. United States*, 105 S. Ct. 2455, 2457 (1985) (rental of real estate is covered by the arson statute); *United States v. Torres*, 8 F.4th 413, 416–17 (5th Cir. 2021) (discussing degree of effect on commerce required by 18 U.S.C. § 844(i), and affirming conviction for bombing of a church).

Generally, if something has been manufactured or transported in interstate commerce, even without regard to a defendant's actions, the element has been satisfied. *See, e.g.*, *United States v. Kuban*, 94 F.3d 971, 973 (5th Cir. 1996).

District courts are encouraged to consider carefully crafting the proper "affecting commerce" definition required by Fifth Circuit and Supreme Court precedent for the particular offense charged.

1.48

"FIREARM" AND "AMMUNITION"—DEFINED

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 any destructive device.

The term "ammunition" means completed rounds or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm.

Note

"Firearm" as regulated by the Gun Control Act of 1968 is defined in 18 U.S.C. § 921(a)(3), which states that "'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device"—the term, however, "does not include an antique firearm." *Id*.; *see United States v. Cooper*, 714 F.3d 873, 881 (5th Cir. 2013) (an inoperable firearm may nonetheless support a firearms conviction); *United States v. Ruiz*, 986 F.2d 905, 910 (5th Cir. 1993) (holding that, even when a "guns hammer was filed down . . . so as to make it inoperable," it was nonetheless a "firearm" as defined in § 921(a)(3) because "the filing down of the gun's hammer did not change the fact that the gun was designed to expel a projectile, but rather it merely temporarily altered the gun's capability to accomplish the purpose for which it was designed"); *see also United States v. Guillen-Cruz*, 853 F.3d 768, 772 (5th Cir. 2017) ("[A] rifle magazine is plainly not a 'firearm' or 'the frame or receiver' of a firearm or a 'muffler or firearm silencer.' . . . Nor is a magazine a 'destructive device.'"); *United States v. Castillo-Rivera*, 853 F.3d 218, 225 (5th Cir. 2017) ("[A]n air gun is not a firearm within the federal definition.").

The term "frame or receiver" is undefined. The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") "previously defined a 'frame or receiver' in 1978 as: 'That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.'" *VanDerStok v. Garland*, 86 F.4th 179, 184 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024). In 2022, the ATF, by way of a Final Rule, amended this definition to include "a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." *Id*. at 188. The ATF's Final Rule "also supplements the definition of 'firearm' to include a 'weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by action of an explosive.'" *Id*. at 185. As amended, these definitions encompass, *inter alia*, "ghost guns" (privately made firearms lacking serial numbers), which "are often made from readily purchasable 'firearm parts kits, standalone frame or receiver parts, and easy-to-complete frames or receivers.'" *Id*. In *VanDerStok*, the Fifth Circuit, affirming the district court, held that the ATF, in issuing its Final Rule, violated the Administrative Procedure Act, as it "lacked congressional authorization to promulgate" its new definitions of "frame or

receiver" and "firearm." *Id*. at 188. The Supreme Court initially stayed the district court's order vacating the final rule, *Garland v. VanDerStok*, 144 S. Ct. 44 (2023), and subsequently granted certiorari, *Garland v. VanDerStok*, 144 S. Ct. 1390 (2024), as to the questions of (1) whether "a weapons parts kit" is a "firearm" regulated by the Gun Control Act of 1968, and (2) whether "a partially complete, disassembled, or nonfunctional frame or receiver" is a "frame or receiver" regulated by this same act.

The terms "firearm silencer" and "firearm muffler" are defined in 18 U.S.C. § 921(a)(25) as "any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." *Id*.; *see Paxton v. Dettelbach*, No. 3-10802, 2024 WL 3082331 (5th Cir., Jun. 21, 2024) (noting that "[a] silencer is a device that attaches to the muzzle of a firearm and makes the firearm quieter when discharged").

"Destructive device" is defined in 18 U.S.C. § 921(a)(4) as "any explosive, incendiary, or poison gas" bomb, grenade, rocket (having a propellant charge of more than four ounces), missile (having an explosive or incendiary charge of more than one-quarter ounce), mine, or similar device. *Id*. § 921(a)(4)(A). The term "destructive device" also includes "any type of weapon" (other than a shotgun or a shotgun shell) "which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter" as well as "any combination of parts either designed or intended for use in converting any device into any destructive device . . . and from which a destructive device may be readily assembled." *Id*. § 921(a)(4)(B)–(C); *see United States v. York*, 600 F.3d 347, 354 (5th Cir. 2010) (holding "that a Molotov cocktail falls within the definition of a destructive device under section 921(a)(4)(A) because it is an incendiary bomb"); *United States v. Gresham*, 118 F.3d 258, 265 (5th Cir. 1997) ("Under the plain language of the statute, therefore, the component parts of a destructive device constitute 'firearms,' for purposes of § 922(g)(1)."). The statute excludes from the term "destructive device" any device "which is neither designed nor redesigned for use as a weapon" and several other specified categories of objects. 18 U.S.C. § 921(a)(4)(C). For purposes of a substantially similar definition of "destructive device" under 26 U.S.C. § 5845(f), the Fifth Circuit held that the statutory exclusion is an affirmative defense, not an element of the offense. *See United States v. Brannan*, 98 F.4th 636, 639 (5th Cir. 2024).

"Antique firearm" is defined in 18 U.S.C. § 921(a)(16) as "any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898," a replica of such a firearm "if such replica" "is not designed or redesigned for using" or "uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available," or "any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition." *Id*. § 921(a)(16)(A)–(C). "Antique firearm," however, does "not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof." *Id*. § 921(a)(16)(C).

"Ammunition" is defined in 18 U.S.C. § 921(a)(17)(A). The definition of "ammunition" covers "completed rounds." *United States v. Chambers*, 408 F.3d 237, 240 (5th Cir. 2005).

"Firearm" as regulated by the National Firearms Act of 1934 is defined as: "(1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer . . . ; and (8) a destructive device." 26 U.S.C. § 5845(a). This definition of firearm excludes many "antique firearm[s]." *Id*. Section 5845 also defines, *inter alia*, the terms "machinegun" (which is discussed further in Instruction No. 2.43I "Possession of a Machinegun"), "rifle," "shotgun," "any other weapon," "destructive device," and "antique firearm." *Id*. § 5845(b)–(g). The definition, however, does not include "a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition." *Id*. § 5845(e); *see Mock v. Garland*, 75 F.4th 563, 570 (5th Cir. 2023) ("[T]he NFA specifically exempts 'a pistol or a revolver having a rifled bore' from its coverage.").

1.49

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.

"[T]ape recordings which are only partially intelligible are admissible unless [the unintelligible] portions are so substantial as to render the recording as a whole untrustworthy." *United States v. Murray*, 988 F.2d 518, 525 (5th Cir. 1993) (quoting *United States v. Nixon*, 777 F.2d 958, 973 (5th Cir. 1985)). Transcripts are admissible to aid the jury in understanding a recording and to identify speakers where appropriate. *See id.* (citing *United States v. Wilson*, 578 F.2d 67, 69 (5th Cir. 1978)); *see also United States v. Rena*, 981 F.2d 765, 767–70 (5th Cir. 1993) (discussing the use of recordings and transcripts).

"Whether the jury should have use of transcripts is a matter left to the sound discretion of the trial court." *Id.* (citing *United States v. Larson*, 722 F2d 139, 144 (5th Cir. 1983).

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).

1.50

TRANSCRIPT OF FOREIGN LANGUAGE—TAPE RECORDED CONVERSATION

Among the exhibits admitted during the trial were recordings that contained conversations in the _____ (*name foreign language*) language. You were also provided an English language transcript of those conversations, which has been admitted into evidence. The transcript was provided to you by the government [defendant] so that you can consider the content of the conversations on the recordings. The accuracy of the transcript is not disputed in this case.

Although some of you may speak _____ (*name foreign language*), it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the admitted transcript and disregard any different meaning.

[Among the exhibits admitted during the trial were recordings that contained conversations in the _____ (*name foreign language*) language. You were also provided with an English language transcript of those conversations by the government [defendant]. The accuracy of that transcript is disputed. [You were also provided with two English language transcripts of those conversations, one from the government and one from the defendant, both of which have been admitted into evidence]. There is a difference of opinion as to what is said on the recording. The accuracy of the [each] transcript is disputed by the other party. You may disregard any portion of a [either or both] transcript if you believe it reflects something different from what is on the tape.

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript 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 quality of the recording, 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.

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.]

Note

"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.'" *United States v. Booker*, 334 F.3d 406, 412 (5th Cir. 2003) (citing *United States v. White*, 219 F.3d 442, 448 (5th Cir. 2000) (finding no abuse of discretion in the admission of the translation of a Spanish language tape, half of which was conceded to be unintelligible, based on testimony from an FBI agent regarding the accuracy of the translation and a cautionary instruction); *see also United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1224 (5th Cir. 1994) (requiring the defendant to raise specific objections to the identifications of specific speakers).

See United States v. Franco, 136 F.3d 622, 626 (9th Cir. 1998) (holding that where there is no dispute as to the accuracy of the translation of a tape-recording of a foreign language conversation, the jury may be instructed that "it is not free to disagree" with the transcript, as would be the case with an English tape). *But see United States v. Chavez*, 976 F.3d 1178, 1200–03, 1213 (10th Cir. 2020) (holding that the district court erred under the best-evidence rule in admitting transcripts of Spanish-language audio recordings without also admitting the original recordings into evidence, and jury instruction that the jury "should rely" on transcripts "exacerbated" the error); *United States v. Marchan*, 935 F.3d 540, 548–49 (7th Cir. 2019) (holding that the district court did not err in permitting the jury to hear a Spanish-language audio recording of a transaction when it provided a limiting instruction that jurors were to determine the accuracy of the translation in light of the translator's qualifications and the circumstances surrounding the production of the recording and translation, but they were not to rely on their own Spanish-language skills).

1.51

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 has been admitted.

Note

The Committee has included three instructions regarding the charts or summaries that are typically used in trial settings: (1) charts or summaries not received into evidence, but simply used as pedagogical devices (Instruction No. 1.50); (2) charts or summaries admitted into evidence to summarize voluminous data which may or may not be admitted into evidence (Instruction No. 1.51); and (3) summary witness testimony and accompanying charts admitted based on other admitted evidence (Instruction No. 1.52).

"Allowing the use of charts as pedagogical devices intended to present the government's version of the case is within the bounds of the trial court's discretion to control the presentation of evidence under Federal Rule of Evidence 611(a)." *United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006) (cleaned up) (quoting *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000))."[S]uch charts are not admitted into evidence and should not go to the jury room absent consent of the parties." *Id.* (quoting *Taylor*, 210 F.3d at 315).

"[T]he 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." *Id.* (citing *United States v. Buck*, 324 F.3d 786, 790 (5th Cir. 2003)); *see also United States v. Ogba*, 526 F.3d 214, 225 (5th Cir. 2008) (jury should be "forewarned that the charts are not independent evidence") (quoting *Taylor*, 210 F.3d at 315). For a more recent discussion of these principles, *see United States v. Baker*, 923 F.3d 390, 396–98 (5th Cir. 2019) (approving limiting instruction that reminded jury that demonstrative evidence was used as an illustration and was not in itself evidence); *see also United States v. Nicholson*, 961 F.3d 328, 335–38 (5th Cir. 2019) (same).

This instruction is not appropriate when summary testimony, written summaries, or summary charts have been received into evidence. In those circumstances, *see* Instruction Nos. 1.51 and 1.52.

1.52

SUMMARIES AND CHARTS RECEIVED IN EVIDENCE PURSUANT TO FEDERAL RULE OF EVIDENCE 1006

Certain charts and summaries of other records have been received into evidence. They should be considered like any other evidence in the case. You should give them only such weight as you think they deserve.

[The charts and summaries include inferences or conclusions drawn from the records underlying them. It is up to you to determine if these inferences or conclusions are accurate.]

[The underlying records are the best evidence of what occurred.]

Note

See United States v. Mazkouri, 945 F.3d 293, 301 n.1 (5th Cir. 2019) (endorsing this instruction).

The Committee has included three instructions for the charts or summaries that are typically used in trial settings. *See* Note to Instruction No. 1.50 for further explanation.

Under Federal Rule of Evidence 1006, a party "may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006.

"[B]ecause summaries are elevated under Rule 1006 to the position of evidence," courts must take care "to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes." *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018) (quoting *United States v. Smyth*, 556 F.2d 1179, 1184 n.12 (5th Cir. 1977)).

"Fifth Circuit precedent conflicts on whether [R]ule 1006 allows the introduction of summaries of evidence that is already before the jury, or whether instead is limited to summaries of voluminous records that have not been presented in court." *United States v. Armstrong*, 619 F.3d 380, 383 (5th Cir. 2010); *see also id.* at 383 n.1 (citing cases on both sides); *cf. United States v. Valencia*, 600 F.3d 389, 417–18 (5th Cir. 2010) (to *require* admission of underlying records "would contravene the plain language and purposes of Rule 1006").

If only the summary is admitted under Rule 1006, and not the underlying data, then no special instruction is necessarily required. *See United States v. Williams*, 264 F.3d 561, 574–75 (5th Cir. 2001). *But cf. United States v. Whitfield*, 590 F.3d 325, 364–65 (5th Cir. 2009) (suggesting that summary chart be accompanied by cautionary instruction when underlying evidence is also admitted). If the court decides that an instruction is appropriate, it may use the one above, which has previously been approved by the court. *See Spalding*, 894 F.3d at 186 n.18.

If the chart or summary incorporates inferences or conclusions drawn from the underlying

evidence, the first bracketed instruction should be included. *See id*. (approving similar instruction). If the underlying records are admitted into evidence, the second bracketed instruction may be included.

1.53

SUMMARY WITNESS TESTIMONY AND CHARTS BASED ON OTHER EVIDENCE

Summary testimony by a witness [and charts or summaries prepared or relied upon by the witness] have been received into evidence for the purpose of explaining facts disclosed by testimony and exhibits which are also in evidence in this case. If you find that such summary testimony [and charts] correctly reflect the other evidence in the case, you may rely upon them. But if and to the extent that you find they are not in truth summaries of the evidence in the case, you are to disregard them. The best evidence of what occurred are the underlying records themselves.

Note

The Committee has included three instructions for the charts or summaries that are typically used in trial settings. *See* Note to Instruction No. 1.50 for further explanation.

In complex cases, the Fifth Circuit has allowed witnesses and charts to summarize other evidence. However, the Court "has properly expressed some reluctance to generally endorse the use of summary evidence." *United States v. Whitfield*, 590 F.3d 325, 364 (5th Cir. 2009); *see also United States v. Fullwood*, 342 F.3d 409, 413–14 (5th Cir. 2003).

The Fifth Circuit summarized its precedent as follows:

> We allow summary witness testimony in limited circumstances in complex cases, but have repeatedly warned of its dangers. While such witnesses may be appropriate for summarizing voluminous records, as contemplated by Rule 1006, rebuttal testimony by an advocate summarizing and organizing the case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of Evidence or our precedent. In particular, summary witnesses are not to be used as a substitute for, or a supplement to, closing argument.

United States v. Baker, 923 F.3d 390, 396 (5th Cir. 2019) (cleaned up).

Summary witness testimony in particular "must have an adequate foundation in evidence that is already admitted, and should be accompanied by a cautionary jury instruction." *Id.* (quoting *United States v. Armstrong*, 619 F.3d 380, 383 (5th Cir. 2010)); *United States v. Nguyen*, 504 F.3d 561, 572 (5th Cir. 2007); *see also United States v. Nicholson*, 961 F.3d 328, 335–38 (5th Cir. 2020) (approving use of summary witness in tax prosecution accompanied by cautionary instruction that the summary and chart were "no better than the underlying testimony and the documents upon which they are based and are not themselves independent evidence.").

"'The presence of an inference' in a summary chart is not per se 'prejudicial.'" *United States v. Spalding*, 894 F.3d 173, 186 (5th Cir. 2018) (quoting *Armstrong*, 619 F.3d at 384). There is no harm when the exhibit does not suggest any conclusions unsupported by the evidence, the

district court properly instructs the jury, and the defendant conducts a full cross-examination of the charts' author. *See id.*(citing, *inter alia*, *United States v. Winn*, 948 F.2d 145, 159 n.36 (5th Cir. 1991)).

The above instruction is substantially identical to that approved in *Winn*, 948 F.2d at 157 n.30. *See also Armstrong*, 619 F.3d at 384 (approving similar instruction).

1.54

MODIFIED—"ALLEN" CHARGE

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 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 also remember 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 evidence 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

"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) (citing *United States v. Rivas*, 99 F.3d 170, 175 (5th Cir. 1996)). "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. Eghobor*, 812 F.3d 352, 358–59 (5th Cir. 2015); *United States v. Fields*, 483 F.3d 313, 339–40 (5th Cir. 2007).

See United States v. Cabello, 33 F.4th 281, 292 n.3 (2022) (endorsing this instruction in dicta as "perfectly ordinary" and "of the sort [the Fifth Circuit has] approved time and again") and *United States v. Jordan*, 958 F.3d 331 (5th Cir. 2020) (citing this instruction); *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).

For other cases discussing whether the circumstances surrounding the giving of an *Allen* charge are coercive, *see United States v. Richardson*, 672 F. App'x 368, 371 (5th Cir. 2016); *United States v. Andaverde-Tinoco*, 741 F.3d 509, 517–18 (5th Cir. 2013); and *United States v. Winters*, 105 F.3d 200, 203–04 (5th Cir. 1997).

2.01A

BRINGING ALIENS TO 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 to 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 [attempted to bring] an alien to 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.

[*Fourth*: That the defendant caused any person serious bodily injury during and in relation to the offense [placed in jeopardy the life of any person].]

[*Fourth*: That the death of any person resulted from the offense.]

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 to 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 to the United States at a place other than a designated port of entry or a place other than as designated by the Commissioner, meaning "the Commissioner of the Immigration and Naturalization Service." 8 U.S.C. § 1101(a)(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).

The definition of "alien" in 8 U.S.C. § 1101(a)(3) also includes someone who is not a "national." A "national" is a person who "owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). Permanent allegiance is "the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the

protection he receives" until "by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign." *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154 (1872). 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 8 U.S.C. § 1101(a)(22) may be given. *See Omolo v. Gonzales*, 452 F.3d 404, 408 (5th Cir. 2006).

The statute describes two aggravating factors that raise the statutory maximum penalty for this offense: whether the defendant caused serious bodily injury, *see* 8 U.S.C. § 1324(a)(1)(B)(iii), and whether death resulted, *see* 8 U.S.C. § 1324(a)(1)(B)(iv). If charged in the indictment, these aggravating factors must be submitted as additional elements or special interrogatories. *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

The Fifth Circuit declined to resolve whether, to support an enhancement, a resulting death must have been reasonably foreseeable. *See United States v. Ruiz-Hernandez*, 890 F.3d 202, 210 (5th Cir. 2018); *United States v. De Jesus-Ojeda*, 515 F.3d 434, 444–45 (5th Cir. 2008). *Cf. Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (holding that "death results" language in federal drug statute requires proof of "but-for" causation but declining to reach question of foreseeability).

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). The Fifth Circuit has stated in dicta that the conspiracy provision of § 1324 does not require an overt act. *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 363–64 (5th Cir. 2014); *see also Whitfield v. United States*, 125 S. Ct. 687, 691 (2005) (setting out general rule for determining whether conspiracy statute requires overt act); *United States v. Shabani*, 115 S. Ct. 382, 385 (1994) (same).

2.01B

TRANSPORTING ALIENS 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 [come to] [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 [moved] [attempted to transport or move] the alien within the United States with intent to further the alien's unlawful presence.

[*Fourth*: That the defendant committed the offense for the purpose of commercial advantage or private financial gain.]

[*Fourth*: That the defendant caused any person serious bodily injury during and in relation to the offense [placed in jeopardy the life of any person].]

[*Fourth*: That the death of any person resulted from the offense.]

[A person acts with "reckless disregard" when he [she] 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.]

[The term "commercial advantage" means that the defendant participated in an alien smuggling venture and that members of that venture received or negotiated payment in return for the transportation or movement of the aliens. The government need not prove that the defendant was going to directly benefit financially from his [her] part in the venture.

The term "private financial gain" means any monetary benefit obtained by the defendant for his [her] conduct, whether conferred directly or indirectly. It includes a promise to pay money in the future.]

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 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

See United States v. Irias-Romero, 82 F.4th 422, 425 (5th Cir. 2023) (setting out elements of offense) and *United States v. Sheridan*, 838 F.3d 671, 672–73 (5th Cir. 2016) (approving this instruction).

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); *see also United States v. Carmona-Ramos*, 638 F. App'x 355 (5th Cir. 2016) (includes a "willfulness" element, citing *Romero-Cruz*); *United States v. Williams*, 132 F.3d 1055, 1059 (5th Cir. 1998). However, in *United States v. Rivera*, 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." 879 F.2d 1247, 1251 (5th Cir. 1989), *overruled on other grounds by United States v. Cotton*, 122 S. Ct. 1781, 1785 (2002). 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, which did not use the term "willfully" as an element of the offense. 132 F.3d at 1061–62. With regard to this element, the Fifth Circuit has suggested in dicta that a "Good Samaritan" defense may be available to allow a defendant "to argue that scienter is lacking if that person acts out of necessity to save an alien from death or serious bodily injury rather than to further the alien's unlawful presence in the United States." *Irias-Romero*, 82 F.4th at 426 n.2 (collecting cases from other circuits).

Some cases may warrant a willful ignorance instruction. *See United States v. Mata*, 839 F. App'x 862, 869 (5th Cir. 2020). *But see United States v. Kuhrt*, 788 F.3d 403, 417 (5th Cir. 2015) (finding that it arguably was error for the district court to give the deliberate ignorance instruction, but the error was harmless). The Fifth Circuit has repeatedly cautioned against using the deliberate ignorance instruction except in narrowly defined circumstances. *See* Note to Instruction No. 1.42, Deliberate Ignorance.

The statute describes aggravating factors that raise the statutory maximum penalty: whether the offense was done for the purpose of commercial advantage or private gain, *see* 8 U.S.C. § 1324(a)(1)(B)(i), whether the defendant caused serious bodily injury, *see* 8 U.S.C. § 1324(a)(1)(B)(iii), and whether death resulted, *see* 8 U.S.C. § 1324(a)(1)(B)(iv). If charged in the indictment, these aggravating factors must be submitted as additional elements or special interrogatories. *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*. The instructions defining "commercial advantage" and "private financial gain" were approved in *United States v. Gaspar-Felipe*, 4 F.4th 330, 340–41 (5th Cir. 2021). Note, however, that for defendants charged with aiding

and abetting under 8 U.S.C. § 1324(a)(1)(v)(A)(II), the statute does not provide for enhanced sentences based on financial gain. *See* 8 U.S.C. § 1324(a)(1)(B)(ii); *Williams*, 449 F.3d at 645–46; *United States v. Nolasco-Rosas*, 286 F.3d 762, 766 (5th Cir. 2002). *Williams* also discusses the special unanimity rules that may apply for aiding and abetting offenses under the statute. 449 F.3d at 647–48.

For a discussion of the definition of "alien," *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

The Fifth Circuit has held that although alienage is an element of the transportation offense, it is not an element of the conspiracy-to-transport offense. *See United States v. Foreman*, 84 F.4th 615, 622–23 (5th Cir. 2023) (in conspiracy case, jury must find only that Defendant entered into "an *agreement* to transport an alien within the United States" (emphasis added)). For an additional discussion of conspiracy charges under § 1324, *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

2.01C

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.

[*Fifth*: That the defendant committed the offense for the purpose of commercial advantage or private financial gain.]

[*Fifth*: That the defendant caused any person serious bodily injury during and in relation to the offense [placed in jeopardy the life of any person].]

[*Fifth*: That the death of any person resulted from the offense.]

[The term "commercial advantage" means that the defendant participated in an alien smuggling venture and that members of that venture received or negotiated payment in return for the transportation or movement of the aliens. The government need not prove that the defendant was going to directly benefit financially from his [her] part in the venture.

The term "private financial gain" means any monetary benefit obtained by the defendant for his [her] conduct, whether conferred directly or indirectly. It includes a promise to pay money in the future.]

[A person acts with "reckless disregard" when he [she] 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.]

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

The Fifth Circuit approved this instruction in *United States v. Toure*, 965 F.3d 393, 403 (5th Cir. 2020). In that case, the Court also approved the inclusion of the following instruction in response to a defense request: "the mere act of providing shelter to an alien is not, alone, sufficient to prove beyond a reasonable doubt that the defendant harbored an alien." *Id.*; *see also United States v. Anderton*, 901 F.3d 278, 283 (5th Cir. 2018) (furnishing housing without more is not illegal "harboring" under § 1324(a)) (citing *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 529–30 (5th Cir. 2013) (en banc)).

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).

For a discussion of the definition of "alien," *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

For a discussion of the aggravating factors raising the statutory maximum penalty for this offense, and aiding and abetting and conspiracy offenses under the statute, *see* Notes to Instruction Nos. 2.01A, Bringing Aliens to the United States, and 2.01B, Transporting Aliens Within the United States.

2.01D

ENCOURAGING OR INDUCING ILLEGAL ENTRY
8 U.S.C. §§ 1324(a)(1)(A)(iv), 1324(a)(1)(B)

Title 8, United States Code, Section 1324(a)(1)(A)(iv), makes it a crime for a person to encourage [induce] an alien to come to [enter] [reside in] the United States, knowing or in reckless disregard of the fact that such coming to [entry] [residence] is or will be 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 defendant encouraged [induced] an alien to come to [enter] [reside in] the United States; and

Second: That the defendant knew [recklessly disregarded the fact that] such coming to [entry] [residence] was [would be] in violation of United States law.

[*Third*: That the defendant committed the offense for the purpose of commercial advantage or private financial gain.]

[*Third*: That the defendant caused any person serious bodily injury during and in relation to the offense [placed in jeopardy the life of any person].]

[*Third*: That the death of any person resulted from the offense.]

To "encourage" means to knowingly instigate, help, or advise. To "induce" means to knowingly bring about, to effect or cause, or to influence an act or course of conduct.

[The term "commercial advantage" means that the defendant participated in an alien smuggling venture and that members of that venture received or negotiated payment in return for the transportation or movement of the aliens. The government need not prove that the defendant was going to directly benefit financially from his [her] part in the venture.

The term "private financial gain" means any monetary benefit obtained by the defendant for his [her] conduct, whether conferred directly or indirectly. It includes a promise to pay money in the future.]

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

Note

The Supreme Court has explained that the phrase "encourages or induces" in § 1324(a)(1)(A)(iv) "incorporat[es] common-law liability for solicitation and facilitation." *United States v. Hansen*, 143 S. Ct. 1932, 1942 (2023). In light of this reading, the Court upheld the statute

against a First Amendment overbreadth challenge. *See id.* at 1946; *cf. United States v. Anderton*, 901 F.3d 278, 283–84 (5th Cir. 2018) (on plain error review, upholding statute against constitutional vagueness challenge and citing with approval instructions defining "encourage" and "induce" as stated above).

For a discussion of the definition of "alien," *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

For a discussion of the aggravating factors raising the statutory maximum penalty for this offense, and aiding and abetting and conspiracy offenses under the statute, *see* Notes to Instruction Nos. 2.01A, Bringing Aliens to the United States; and 2.01B, Transporting Aliens Within the United States.

2.02A

ILLEGAL ENTRY
8 U.S.C. § 1325(a)(1)

Title 8, United States Code, Section 1325(a)(1) makes it a crime [felony] for an alien to enter [attempt to enter] the United States at a time and place other than as designated by immigration officers after a previous conviction under this statute.

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: The defendant was an alien;

Second: The defendant knowingly entered [attempted to enter] the United States;

Third: The defendant entered [attempted to enter] at a time or place other than as designated by immigration officers; and

Fourth: The defendant was previously convicted of a violation of 8 U.S.C. § 1325.

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

Note

The allegation of a prior conviction enhances the offense from a Class B misdemeanor to a felony, entitling the defendant to a jury. Accordingly, the prior conviction is included in the elements above. *See United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004) ("[B]ecause a subsequent commission under 8 U.S.C. § 1325(a) changes the nature of the crime, the prior commission must be charged.").

For a discussion of the definition of "alien," *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue. *See United States v. Vasquez-Hernandez*, 924 F.3d 164, 169 (5th Cir. 2019) (qualifying for asylum would not change defendant's alien status).

A "designated port of entry" as defined by 8 C.F.R. § 100.4 is a place chosen by the Department of Homeland Security whereby an alien arriving by vessel, by land, or by any means of travel other than aircraft may enter the United States. The designation of such a port of entry may be withdrawn whenever, in the judgment of the Commissioner of the Bureau of Customs and Border Protection, such action is warranted. *See* 8 C.F.R. § 100.4 (2015). The ports are listed according to location by districts and are designated either Class A, B, or C. Class A means that the port is a designated port of entry for all aliens. *Id*. Class B means that the port is a designated

port of entry for aliens who at the time of applying for admission are lawfully in possession of valid Permanent Resident Cards or valid non-resident aliens' border-crossing identification cards or are admissible without documents under the documentary waivers. *Id*. Class C means that the port is a designated port of entry only for aliens who are arriving in the United States as crewmen as that term is defined in § 101(a)(10) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(10)) with respect to vessels. 8 C.F.R. § 100.4.

2.02B

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

Title 8, United States Code, Section 1325(a)(2) makes it a crime [felony] for an alien to elude examination [inspection] by immigration officers after a previous conviction under Title 8, United States Code, Section 1325.

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

First: The defendant was an alien;

Second: The defendant knowingly eluded examination [inspection] by immigration officers; and

Third: The defendant was previously convicted of a violation of 8 U.S.C. § 1325.

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

Note

The allegation of a prior conviction enhances the offense from a Class B misdemeanor to a felony, entitling the defendant to a jury. Accordingly, the prior conviction is included in the elements above. *See United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004) ("[B]ecause a subsequent commission under 8 U.S.C. § 1325(a) changes the nature of the crime, the prior commission must be charged.").

For a discussion of the definition of "alien," *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

This statute requires neither proof of "entry" nor proof of specific intent. *United States v. Montes-De Oca*, 820 F. App'x 247, 250–52 (5th Cir. 2020).

2.02C

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

Title 8, United States Code, Section 1325(a)(3) makes it a crime [felony] for an alien to attempt to enter [to obtain entry to] the United States by a willfully false or misleading representation [the willful concealment of a material fact], after a previous conviction under this statute.

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: The defendant was an alien;

Second: The defendant attempted to enter [obtained entry into] the United States;

Third: The defendant made a false or misleading representation [concealed a material fact] for the purpose of gaining entry;

Fourth: The defendant acted willfully, that is, he [she] deliberately and voluntarily made the representation knowing it was false [concealed a material fact]; and

Fifth: The defendant was previously convicted of a violation of 8 U.S.C. § 1325.

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

[Concealments are "material" if they had a tendency to influence the decisions of the _____ (*identify relevant federal agency*).]

Note

The allegation of a prior conviction enhances the offense from a Class B misdemeanor to a felony, entitling the defendant to a jury. Accordingly, the prior conviction is included in the elements above. *See United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004) ("[B]ecause a subsequent commission under 8 U.S.C. § 1325(a) changes the nature of the crime, the prior commission must be charged.").

For a discussion of the definition of "alien," *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

For a further definition of materiality, *see* Instruction 1.40.

2.02D

MARRIAGE FRAUD
8 U.S.C. § 1325(c)

Title 8, United States Code Section 1325(c) makes it a crime for any individual to knowingly marry for the purpose of evading any provision of the immigration laws.

For you to find the defendant guilty of this charge, the government must prove the following beyond a reasonable doubt:

First: That the defendant knowingly married a person; and

Second: That he [she] knowingly entered in the marriage for the purpose of evading a provision of the United States immigration laws.

Note

A similar instruction was approved by the Fifth Circuit in *United States v. Ortiz-Mendez*, 634 F.3d 837 (5th Cir. 2011).

The elements of this offense are set out in *United States v. Daniel*, 933 F.3d 370, 377 (5th Cir. 2019) (this case also addresses conspiracy and aiding and abetting offenses).

The validity of the marriage is immaterial. *Lutwak v. United States*, 73 S. Ct. 481, 486 (1953).

The Government does not need to show that the defendant lacked an intent to establish a life with his [her] spouse. It is sufficient for the Government to show that the defendant entered the marriage with the purpose of evading immigration laws. In deciding whether the defendant's purpose was to evade immigration laws, intent to establish a life with the spouse is one of many factors that can be considered. *Ortiz-Mendez*, 634 F3d at 840; *see also United States v. Ongaga*, 820 F.3d 152, 161 (5th Cir. 2016).

For purposes of the statute of limitations, marriage fraud is not a continuing offense. *Ongaga*, 820 F.3d at 160.

2.03

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

Title 8, United States Code, Section 1326(a), makes it a crime for an alien who has previously been deported, removed, excluded, or denied admission, to enter [attempt to enter] [to be found in] the United States without consent of the Secretary of the Department of Homeland Security [Attorney General 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 was an alien at the time alleged in the indictment;

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

[*Alternate Second*: That the defendant had previously been denied admission to the United States];

[*Alternate Second*: That the defendant departed the United States while an order of exclusion, deportation, or removal was outstanding];

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

In order to prove the third element (*mens rea*), the government must show that the defendant had the general intent to reenter, i.e., the defendant is here voluntarily. *See United States v. Berrios-Centeno*, 250 F.3d 294, 297–98 (5th Cir. 2001). Specific intent is not an element of this crime. *See United States v. Trevino-Martinez*, 86 F.3d 65, 69 (5th Cir. 1996). Attempted illegal reentry into the United States is also a general intent offense and thus, 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, 449 (5th Cir. 2004).

The Fifth Circuit has adopted the following standard for determining whether 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 the 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) (same).

For a discussion of the definition of "alien," *see* Note to Instruction No. 2.01A, Bringing Aliens to the United States.

An alien within the United States is not "found in" the United States if he [she] approaches a recognized port of entry and presents his [her] identity card to immigration officials seeking admission. *See United States v. Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2000).

"A § 1326 offense begins at the time the defendant illegally re-enters the country and does not become complete unless or until the defendant is found by [immigration authorities] in the United States." *United States v. Ponce*, 896 F.3d 726, 728 (5th Cir. 2018) (quoting *United States v. Compian-Torres*, 712 F.3d 203, 207–08 (5th Cir. 2013)).

Actual reentry requires physical presence in the United States and freedom from official restraint, while attempted reentry only requires that a previously deported alien 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" under § 1326(a) 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, 389–90 (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 consent for readmission 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.

2.04

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 [herself] may also be accomplished by him [her] 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 [herself] in some way with the crime and participate in it with the intent to bring about the crime.

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 _____ (*list offense*) 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. Though the defendant must share the same criminal intent for the crime as the principal, his [her] aid may relate to only one of the crime's phases or elements.

Note

This instruction, without the last sentence, was cited with approval in *United States v. Hill*, 35 F.4th 366, 393-94 (5th Cir. 2022) and *United States v. Bowens*, 907 F.3d 347, 351–52 (5th Cir. 2018). For further discussion of the requirements of liability under an aiding and abetting theory of liability, *see United States v. Nora*, 988 F.3d 823, 830 (5th Cir. 2021), *United States v. Nicholson*, 961 F.3d 328, 338 (5th Cir. 2020), *United States v. Warren*, 986 F.3d 557, 563–64 (5th Cir. 2021), *United States v. Fields*, 977 F.3d 358, 362 (5th Cir. 2020), *United States v. Daniels*, 930 F.3d 393, 403–04 (5th Cir. 2019), and *United States v. Scott*, 892 F.3d 791, 798 (5th Cir. 2018).

"The statute [18 U.S.C. § 2] 'comprehends all assistance rendered by words, acts, encouragement, support, or presence … even if that aid relates to only one (or some) of the crime's phases or elements.'" *United States v. Daniel*, 933 F.3d 370, 377 (5th Cir. 2019) (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1246–47 (2014)). "It is not necessary . . . that one charged as an aider or abettor commit the overt acts that . . . accomplish the offense or that he has knowledge of the particular means his principal . . . employ to carry out the criminal activity." *United States v. Sanders*, 952 F.3d 263, 277–78 (5th Cir. 2020).

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. *United States v. Diaz*, 941 F.3d 729, 741 (5th Cir. 2019); *United States v. Turner*, 620 F. App'x 249, 255–56 (5th Cir. 2015); *United States v. Lombardi*, 138 F.3d 559 (5th Cir. 1998).

Neither misprision of a felony nor accessory after the fact is a lesser-included offense 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 Bowens*, 907 F.3d at 351; *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).

When a prosecution is for aiding and abetting an 18 U.S.C. § 924(c) offense—using or carrying a firearm when engaged in a crime of violence or drug trafficking offense—the prosecution must show that the accused knew that the principal would use or carry a firearm in advance of the predicate offense and in sufficient time to withdraw from it. *See Rosemond*, 134 S. Ct. at 1249–51. "Advance knowledge" means "knowledge at a time the accomplice can do something with it—most notably, opt to walk away." 134 S. Ct. at 1249–50. In *United States v. Baker*, 912 F.3d 297, 314 (5th Cir. 2019), the Fifth Circuit concluded that "an express 'advance

knowledge' instruction is necessary only for 'combination offenses.'" *See also United States v. Jordan*, 945 F.3d 245, 262 (5th Cir. 2019) (holding that "when a combination crime is involved, an aiding and abetting conviction requires that the defendant's intent 'go to the specific and entire crime charged'"); *United States v. Carbins*, 882 F.3d 557, 565-66 (5th Cir. 2018) (applying *Rosemond* to an aggravated identity theft offense under 18 U.S.C. § 1028A, and finding that a reasonable jury could infer that the defendant had advance knowledge that his theft of government money involved the unauthorized use of the identities of real people and the ability to walk away from the scheme).

For a discussion of whether *Rosemond*'s advance knowledge requirement applies in the context of aiding and abetting possession with intent to distribute in violation of 21 U.S.C. § 841, *see United States v. Cabello*, 33 F.4th 281, 288–92 (5th Cir. 2022) (holding no advance knowledge required for "possession" offense on plain-error review and rejecting argument that district court required to do so sua sponte).

2.05

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*).

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. Alvarez*, 561 F. App'x 375, 390–91 (5th Cir. 2014); *United States v. Avants*, 367 F.3d 433 (5th Cir. 2004).

2.06

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; 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.

An "authority" includes a federal judge or some other person in civil or military authority under the United States.

Note

The elements of this offense are set forth in *United States v. Walkes*, 410 F. App'x 800, 803–04 (5th Cir. 2011); *United States v. Adams*, 961 F.2d 505 (5th Cir. 1992); and *United States v. Salinas*, 956 F.2d 80 (5th Cir. 1992).

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).

2.07

FORCIBLY ASSAULTING A FEDERAL OFFICER
18 U.S.C. §§ 111(a), 111(b)

Title 18, United States Code, Section 111(a)(1) makes it a crime for anyone to forcibly assault, [resist] [oppose] [impede] [intimidate] [interfere with] any person designated as a federal officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while the officer is engaged in the performance of his [her] 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] a federal officer, as described below;

Second: That the federal officer was forcibly assaulted [resisted] [opposed] [impeded] [intimidated] [interfered with] while engaged in the performance of his [her] official duty or on account of the performance of official duties; and

Third: That the defendant did such acts intentionally;

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

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

The term "forcible assault" means any intentional attempt or threat to inflict injury upon someone else when a defendant has the apparent present ability to do so. This includes any intentional display of force that would cause a reasonable person to expect immediate bodily harm, regardless of whether the victim was injured, or the threat or attempt was actually carried out.

[The term "deadly or dangerous weapon" means any object capable of inflicting death or bodily injury. For such a weapon to have been "used," the government must prove not only that the defendant possessed the weapon but also that the defendant intentionally displayed it while carrying out the forcible assault. The term "bodily injury" means an injury that is painful and obvious, or an injury for which medical attention would ordinarily 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*).

[If applicable: A federal officer includes a state law enforcement officer acting in cooperation with, and under the control of, federal officers in a matter involving the enforcement of federal laws.]

It is not necessary to prove 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 person assaulted was, in fact, a federal officer acting in the course of his [her] 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 as to whether the defendant knew the person to be a federal officer and only committed such an act because of a reasonable, good faith belief that the defendant needed to defend himself [herself] against an assault by a private citizen.]

Note

This statute has been interpreted as creating three separate offenses: (1) simple misdemeanor assault; (2) more serious felony assaults not involving a dangerous weapon; and (3) serious felony assaults with a deadly or dangerous weapon. *See United States v. Ramirez*, 233 F.3d 318, 321 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 122 S. Ct. 1781, 1784 (2002). For a discussion of the various elements of these offenses, *see United States v. Hernandez-Hernandez*, 817 F.3d 207, 212–13 (5th Cir. 2016). Simple assault has a one-year maximum penalty, felony assault without a dangerous weapon has an 8-year maximum penalty, and assault with a deadly weapon or that inflicted bodily injury has a 20-year maximum penalty. If the evidence does not support the elements necessary for felony assault in offense two or three, it may be necessary to instruct on the lesser included offense of simple assault.

Without the fourth element or alternative fourth element, the above instructions define "simple assault," which is a misdemeanor. A "simple assault" does not involve physical contact, the use of a dangerous weapon or bodily injury, or intent to commit another felony. *See Ramirez*, 233 F.3d at 321–22 (finding that resisting arrest, though without any physical contact, met the definition of simple assault); *see also United States v. Hazelwood*, 526 F.3d 862, 865 (5th Cir. 2008). A 'simple assault' includes any forcible action proscribed under this section, with no requirement of underlying assaultive conduct. *See United States v. Williams*, 602 F.3d 313, 315–18 (5th Cir. 2010).

The second offense is a felony and carries a maximum penalty of eight years imprisonment. This crime does not require use of a deadly weapon, bodily harm, or the creation of apprehension in the victim. It does, however, require forcible physical contact or the intent to commit another felony. *See Ramirez*, 233 F.3d at 322 (holding that hurling a mixture of human waste that strikes the victim is an offense under this second category of assault). The fourth element above, involving physical contact, should be given in this situation.

The third offense carries a maximum penalty of twenty years confinement. The alternative fourth element above, concerning using a deadly weapon or inflicting bodily injury, and the accompanying bracketed definitions, should be given when describing the third offense.

Brandishing a weapon, even if the weapon is not put to use, constitutes "use" under § 111(b). *United States v. Williams*, 520 F.3d 414, 421 (5th Cir. 2008) (noting 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). 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 (2023); *United States v. Hernandez-Hernandez*, 817 F.3d 207, 216–17 (5th Cir. 2016) (citing this Instruction and definition of "bodily injury" with approval).

For all three forms of these offenses, there is no requirement that the defendant know the victim is a federal officer. *See United States v. Feola*, 95 S. Ct. 1255, 1264 (1975); *United States v. Moore*, 958 F.2d 646, 649 (5th Cir. 1992); *see also United States v. Lopez-Sanchez*, No. 21-60082, 2021 WL 5119714 at *1–*2 (5th Cir. Nov. 3, 2021) (unpublished) (per curiam). However, ignorance of official status in certain circumstances may negate the *mens rea* necessary for this offense. *See Feola*, 95 S. Ct. at 1264 (concluding ignorance of official status may negate *mens rea* where, for instance, "an officer fails to identify himself or his purpose, and his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property."); *see also United States v. Alvarado,* 630 F. App'x 271, 274 (5th Cir. 2015) (citing *United States v. Kleinebreil*, 966 F.2d 945, 951 (5th Cir. 1992)); *United States v. Young*, 464 F.2d 160, 163 (5th Cir. 1972) (explaining the jury must be allowed to consider knowledge of official status where "defendant asserts a lack of intention or willfulness based upon ignorance of the identity of the victim and ignorance of the victim's official privilege to interfere with the defendant's person or freedom of movement . . ."). "The Government sufficiently refutes a claim of self-defense to a [Section] 111 charge if it shows that 'the defendant knew of the victim's status or that the defendant's actions were not reasonably justified.'" *United States v. Booker*, No. 23-60076, 2023 WL 6878904, at *1 (5th Cir. Oct. 18, 2023) (unpublished) (quoting *Moore*, 958 F.2d at 649). When self-defense or other justifiable action is raised by the evidence, the last paragraph of the instruction is appropriate. For discussions on self-defense and knowledge of an officer's status, *see Lopez-Sanchez*, 2021 WL 5119714 *2, n. 2.

Section 111 expands its reach to "any person assisting such an officer or employee in the performance of such duties or on account of that assistance." *See* 18 U.S.C. §§ 111, 1114. A state officer "acting in cooperation with and under control" of a federal officer is considered a federal agent under 18 U.S.C. § 111. *See United States v. Hooker*, 997 F.2d 67, 74 (5th Cir. 1993) (holding assault against state narcotics officer violated § 111 because the officer was acting in cooperation with federal officers when he was assaulted). There must be "some mutual contemporaneous involvement" to show the person was assisting the federal officer in the performance of his or her official duties. *See United States v. Reed*, 375 F.3d 340, 345 (5th Cir. 2004) (holding city police detective who was a member of a joint FBI-city police department task force was not a "federal officer" where he was assaulted while pursuing the defendant; the federal officer was en route to the crime scene, and the city police detective provided no support or assistance to federal officers before or during the assaultive conduct). Cooperation can exist even though the federal officer is not present at the time of the assault. *See United States v. Jacquez-Beltran*, 326 F.3d 661, 663 (5th Cir. 2003).

If an issue arises as to whether a lesser-included offense instruction is warranted, *see United States v. Nunez*, 180 F.3d 227, 232 (5th Cir. 1999) (vacating conviction where the indictment only charged defendant with resisting arrest by means of a firearm, but the jury instructions broadened the charged offense to allow conviction for a separate offense, "resisting arrest").

2.08A

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 question 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 Section 152.

"18 U.S.C. §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 18 U.S.C. § 152(7), *see United States v. West*, 22 F.3d 586, 589–90 (5th Cir. 1994), and *United States v. Moody*, 923 F.2d 341, 346–50 (5th Cir. 1991).

2.08B

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 [or as or through an agent, proxy, or 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.

Note

See United States v. Nill, 518 F.2d 793, 800 (5th Cir. 1975) (reversing conviction for bankruptcy fraud because "[i]t has been held that to establish fraud it is necessary to show a false representation of a material fact made with knowledge of its falsity and with the intent to deceive"); *see also* Note to Instruction No. 2.08A.

There are no decisions in the Fifth Circuit as to whether materiality is an element of this offense. This is an unsettled area. The Eighth and Eleventh Circuit Pattern Jury Instructions do list materiality as an element of § 152(4). The First and Seventh Circuit Pattern Jury Instructions do not list materiality as an element of § 152(4). The Committee has opted to not include materiality as an element, but district courts are advised to monitor caselaw regarding this section. Note that in *United States v. Mays*, 852 F. App'x 801, 802–03 (5th Cir. 2021), the Fifth Circuit stated that the elements of the similar offense under the *third* paragraph of 18 U.S.C. § 152(3) (false declaration) include that the false declaration concerned a material fact, citing *United States v. Grant*, 850 F.3d 209, 214 (5th Cir. 2017).

2.09A

BRIBING A PUBLIC OFFICIAL/JUROR
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 [juror].

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 or juror*), a public official [person who has been selected to be a public official] [juror]; and

Second: That the defendant did so corruptly with intent to influence an official act by the public official [person selected to be a public official] [juror] [persuade the public official [person selected to be a public official] [juror] to omit [do] an act in violation of his [her] lawful duty] [persuade the public official [person selected to be a public official] [juror] to do an act in violation of his [her] lawful duty]. The defendant only needs to have promised something of value to the public official [person selected to be a public official] [juror], he [she] need not succeed in influencing that person.

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

The definition of "public official" includes a "juror." 18 U.S.C. § 201(a)(1).

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 a violation of § 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 (3). *See also Franco*, 632 F.32d 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"), *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"), and *United States v. Wilson*, 408 F. App'x 798, 806 (5th Cir. 2010) (holding that a construction manager for waterway improvements employed by the United States Army Corps of Engineers as part of post-Katrina rebuilding is a "public official").

For a discussion of the scope of "official act," *see McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016) ("In sum, an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official. To qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'"). *See also United States v. Parker*, 133 F.3d 322, 325–26 (5th Cir. 1998).

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)*; see also United States v. Tomblin*, 46 F.3d 1369, 1380 (5th Cir. 1995).

2.09B

RECEIVING BRIBE BY A PUBLIC OFFICIAL/JUROR
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] [juror] 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 [her] performance of an official act [persuaded to omit any act in violation of his [her] official duty] [persuaded to do any act in violation of his [her] 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 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.

With regard to the second element, the defendant needs only to have promised to be influenced. The defendant need not have actually committed the promised act or intended to commit the promised act [omitted the promised act or intended to omit the promised act].

Note

The definition of "public official" includes a "juror." 18 U.S.C. § 201(a)(1).

This instruction charges a violation of §§ 201(b)(2)(A) or (C) but does not charge a violation of § 201(b)(2)(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 (3). "[P]erson 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 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 McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016) ("In sum, an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official. To qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'")*;see also 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). The exchange need not involve the actual commission of an official act by the bribed official; it is sufficient that the official promises to be influenced by the bribe in his or her official actions even if he or she has no intention of actually fulfilling his or her end of the bargain. *See United States v. Nagin*, 810 F.3d 348, 351 n.3 (5th Cir. 2016).

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)*;see also United States v. Tomblin*, 46 F.3d 1369, 1380 (5th Cir. 1995).

2.09C

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

Title 18, United States Code, Section 201(c)(l)(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] [juror]; 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 [her] 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.]

[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.]

In regard to the second element, the term "for" ["because of"] mandates a specific connection between the gratuity and a specific official act performed or to be performed. However, no overt, explicit, or specific agreement to exchange the thing of value for the official act is required. On the other hand, showing that a gratuity was given to a person because of that person's official position is not enough.

Note

"Public official" and "official act" are defined by 18 U.S.C. §§ 201(a)(1) and (3). 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 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.").

An illegal gratuity under this statute requires proof of a connection between the gratuity and a specific official act performed or to be performed, though no overt quid pro quo agreement is required. *See Sun-Diamond Growers of Cal.*, 119 S. Ct. at 1406; *see also United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 848 F.3d 366, 377, 379 (5th Cir. 2017). A jury charge is incorrect when it requires that a gratuity was given only because of the public official's official position. A jury charge must make clear that the gratuity must be given in exchange for "some particular official act to be identified and proved." *See Sun-Diamond Growers of Cal.*, 119 S. Ct. at 1407.

2.09D

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

Title 18, United States Code, Section 201(c)(l)(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] [juror];

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 [her] 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.

[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.]

In regard to the third element, the term "for" ["because of"] mandates a specific connection between the gratuity and a specific official act performed or to be performed. However, no overt, explicit, or specific agreement to exchange the thing of value for the official act is required. On the other hand, showing that a gratuity was given to a person because of that person's official position is not enough.

Note

See Note to Instruction No. 2.09C, Illegal Gratuity to a Public Official, 18 U.S.C. § 201(c)(1)(A).

2.10

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 _____ (*name of person*); 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 financial institution listed in 18 U.S.C. § 20, 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"; *see also United States v. Tomblin*, 46 F.3d 1369, 1380 (5th Cir. 1995). If the prosecution seeks a felony conviction, the jury must determine that the value exceeds $1,000. If there is an issue as to whether the value exceeds $1,000, a lesser included offense instruction may have to be given. *See* Instruction No. 1.35 (Lesser Included Offense).

2.11

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;

Second: That the defendant specifically intended by the conspiracy to hinder [prevent] [interfere with] _____'s (*name victim*) enjoyment of a right secured by the Constitution or laws of the United States; and

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 _____ (*name victim*) 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.]

[*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 _____ (*name victim*) 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). For a discussion of the evidentiary requirements for the "under color of law" requirement, *see United States v. Davis*, 971 F.3d 524, 528–30 (5th Cir. 2020).

See the definition under Instruction No. 2.12, Deprivation of Civil Rights, 18 U.S.C. § 242; *see also United States v. Martinez-Mercado*, 919 F.3d 91, 99–100 (1st Cir. 2019); *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.*, *Martinez-Mercado*, 919 F.3d at 104; *United States v. Gonzalez*, 906 F3d 784, 792 (9th Cir. 2018); *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 held that an overt act is required. *See United States v. Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991); *United States v. McKenzie*, 769 F.2d 602, 606 (5th Cir. 1985).

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; *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

2.12

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, _____ (*name alleged victim*), 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 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_____(*name alleged victim*) 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 _____ (*name of victim*) 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 [her] 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 [her] official capacity or else claimed to do so, but

abused or misused his [her] power by going beyond the bounds of lawful authority. [A private citizen 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 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 the defendant's alleged victim. Consent that is the product of official intimidation, harassment, or coercion is not true consent at all.]

Note

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 42 U.S.C. § 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. Douglas*, 957 F.3d 602, 608–09 (5th Cir. 2020), the Fifth Circuit discussed the color-of-law requirement in the context of the United States Sentencing Guidelines and opined that private jailers can be held liable under this statute for improper conduct in the private prison setting. For discussion of the "under color of law" requirement. *See United States v. Davis*, 971 F.3d 524, 528–30 (5th Cir. 2020).

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 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. 1.43), *abrogated on other grounds*, *United States v. Garcia-Martines,* 624 F. App'x 874, 879 n.12 (5th Cir. 2015).

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.

Where the statute's enhancement provision does not define the enumerated offense, the court must define it according to its generic, contemporary meaning and should rely on a uniform definition. *Guidry*, 456 F.3d at 509–10 (citing *United States v. Dominguez-Ochoa*, 386 F.3d 639, 643–43 (5th Cir. 2004)); *Taylor v. United States*, 110 S. Ct. 2143 (1990). The court should "not use the common law definition of any term where it would be inconsistent with the statute's purpose, notably where the term's definition has evolved." *Guidry,* 456 F.3d at 509 (citing *Moskal v. United States*, 111 S. Ct. 461 (1990)); *see also Taylor*, 110 S. Ct. 2143; *Perrin v. United States*,

100 S. Ct. 311 (1979).

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), and *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). *But see United States v. Shaw*, 891 F.3d 441, 446–52 (3d Cir. 2018) (discussing circuit split on definition).

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

For a discussion of "kidnapping," *see Guidry*, 456 F.3d at 509–11.

The term "foreseeable" is not unduly technical or outside the common understanding of a jury and thus requires no definition. *United States v. Moore*, 708 F.3d 639, 647 (5th Cir. 2013).

2.13

CONSPIRACY TO DEFRAUD THE GOVERNMENT WITH RESPECT TO CLAIMS
18 U.S.C. § 286

Title 18, United States Code, Section 286, makes it a crime for anyone to enter into any agreement, combination, or conspiracy to defraud the United States or any department or agency thereof by obtaining [aiding to obtain] the payment [allowance] of any false, fictitious, or fraudulent claim.

The defendant is charged with conspiring to _____ (*describe the object of the conspiracy as alleged in the indictment or narrowed to evidence at trial*).

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 with the intent to further the unlawful purpose; and

Third: The agreement was to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any claim based on a false, fictitious, or fraudulent [material] representation.

[A representation 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.]

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 [her] 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 interest, 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.

Note

When there is a broad conspiracy alleged in the indictment, but only a narrow conspiracy proved at trial, a defendant may argue that such a variance substantially prejudiced his or her case and necessitates a reversal. *See United States v. Austin*, 774 F.2d 99, 101 (5th Cir. 1985). This can be cured by the trial judge instructing the jury not to consider certain allegations in the indictment and a careful delimitation of the conspiracy charge submitted to the jury to remove any danger of transference of guilt. *Id*.

The term "materiality" is not included in the statute. There is authority requiring proof of materiality under Section 286. *See United States v. Saybolt*, 577 F.3d 195, 201–04 (3d Cir. 2009). This derives from the fact that the statute requires a conspiracy "to defraud," which in turn implicitly requires materiality. *See Neder v. United States*, 119 S. Ct. 1827, 1841 (1999) (noting that "the common law could not have conceived of 'fraud' without proof of materiality"). Prior to *Neder*, the Fifth Circuit had held that materiality is not an element of a violation under 18 U.S.C. § 287, a similar statute that also does not expressly state that "materiality" is an essential element of the offense. *United States v. Upton*, 91 F.3d 677, 691–92 (5th Cir. 1996) (also not requiring materiality). *But see United States v. Foster*, 229 F.3d 1196, 1196 n.1 (5th Cir. 2000) (recommending, in dicta, that a materiality instruction should be included).

The Fifth Circuit addressed the issue of materiality in *United States v. Barrera*, 444 F. App'x 16 (5th Cir. 2011). If the court determines that materiality is an element of the offense, the bracketed word "material" in the third element, as well as the definition of "material," should be read to the jury. Moreover, the following language from *Barrera* may be included:

> Furthermore, where the conspiracy allegedly involves the making of false and fraudulent statements, § 286 requires proof that "the conspirators agreed that those statements or representations would have a material effect on the Government's decision to pay a false, fictitious, or fraudulent claim."

Id. at 23 (quoting *Saybolt*, 577 F.3d at 205).

2.14

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 presented 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.

Note

The term "material" is not included in the statute. *See* 18 U.S.C. § 287. The Fifth Circuit has previously not included materiality when reciting the elements of this offense. *See United States v. Clark*, 577 F.3d 273, 285 (5th Cir. 2009); *United States v. Burns*, 162 F.3d 840, 850 (5th Cir. 1998); *United States v. Upton*, 91 F.3d 677, 681 (5th Cir. 1996). Materiality was held to be "an element of the federal mail fraud, wire fraud, and bank fraud statutes," which include similar language, in *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, 1196 n.1 (5th Cir. 2000).

2.15A

CONSPIRACY TO COMMIT OFFENSE
18 U.S.C. § 371

Title 18, United States Code, Section 371, makes it a crime for two or more persons to conspire 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 of the conspiracy 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 agreed 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 at least 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.

The overt act need not be of a criminal nature so long as it is done in furtherance 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 and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him [her] for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government does not need to prove that the alleged conspirators entered into any formal agreement, or that they directly stated between themselves all the details of the scheme. Likewise, the government does not need to 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

18 U.S.C. § 371 contains two conspiracy offense: a general, federal conspiracy offense and a specific, conspiracy offense where the object of the conspiracy is to defraud the United States. The general conspiracy offense is addressed by this instruction; the specific conspiracy offense is addressed by Instruction No. 2.15B.

This instruction has been cited with approval in *United States v. Sanjar*, 876 F.3d 725, 743 (5th Cir. 2017), *United States v. Brooks*, 681 F.3d 678, 698 (5th Cir. 2012), *United States v. Coleman*, 609 F.3d 699, 705 n.2 (5th Cir. 2010), and *United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009).

For the elements of the offense, *see United States v. Delgado*, 984 F.3d 435, 450 (5th Cir. 2021), *United States v. Ricard,* 922 F.3d 639, 647–48 (5th Cir. 2019), *United States v. Martinez*, 900 F.3d 721, 728 (5th Cir. 2018), *United States v. Njoku*, 737 F.3d 55, 63–66 (5th Cir. 2013), *United States v. Coleman,* 609 F.3d 699, 703–704 (5th Cir. 2010), and *United States v. Peterson*, 244 F.3d 385, 389 (5th Cir. 2001). The Fifth Circuit in *United States v. Daniel* laid out what is essentially the same three elements, but with slightly different wording for element number two. 933 F.3d 370, 377 (5th Cir, 2019) (holding that the second element is "the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy") (quoting *United States v. Ongaga*, 820 F.3d 152, 157 (5th Cir. 2016)).

The language at the end of the third element, elaborating on the overt act requirement, is taken from *United States v. Romans*, 823 F.3d 299, 310 (5th Cir. 2016) (citing *United States v. Pomranz*, 43 F.3d 156, 160 (5th Cir. 1995)).

The Supreme Court has reiterated the fundamental conspiracy principle that "[a]lthough conspirators must 'pursue the same criminal objective,' 'a conspiracy [need] not agree to commit or facilitate each and every part of the substantive offense. A defendant must merely reach an agreement with the 'specific intent that the underlying crime *be committed*' by some member of the conspiracy." *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016).

Conspiracy to commit a particular substantive offense requires at least the degree of criminal intent necessary to commit the substantive offense itself. *See United States v. Fisch,* 851 F.3d 402, 406–07 (5th Cir. 2017) (citing *Peterson,* 244 F.3d at 389); *United States v. Soape*, 169 F.3d 257, 264 (5th Cir. 1999); *United States v. Bordelon*, 871 F.2d 491, 493–94 (5th Cir. 1989); and *United States v. Massey*, 827 F.2d 995, 1001–02 (5th Cir. 1987). "Conspiracy has two intent elements – intent to further the unlawful purpose and the level of intent required for proving the underlying substantive offense." *United States v. Nora*, 988 F.3d 823, 830 (5th Cir. 2021) (cleaned up) (holding insufficient evidence to establish conspiracy to commit heath care fraud and to pay kickbacks). 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 "premeditation and malice aforethought," further instruction on intent would be necessary. *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.

For multiple conspiracies or a conspirator's liability for a substantive count, *see* Instruction Nos. 2.16 and 2.17.

2.15B

CONSPIRACY TO DEFRAUD
18 U.S.C. § 371 (SECOND CLAUSE)

Title 18, United States Code, Section 371, makes it a crime for two or more persons to conspire to defraud the United States or any of its agencies 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 by_____ (*describe*), 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 at least 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.

The overt act need not be of a criminal nature so long as it is done in furtherance 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 and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him [her] for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government does not need to prove that the alleged conspirators entered into any formal agreement, or that they directly stated between themselves all the details of the scheme. Likewise, the government does not need to 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 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.

Note

For the scope of the conspiracy to defraud the government clause, *see United States v. Green*, 47 F.4th 279, 289–92 (5th Cir. 2022) (affirming conviction for conspiracy to defraud the government by interfering with the lawful function of the IRS, holding, *inter alia*, that proof of actual interference is not necessary as the "central feature of a conspiracy is the agreement, not whether the object was achieved," and that whether the IRS complied with its own administrative procedures was not relevant to whether the conspiracy targeted interference with the agency's lawful functions) (cleaned up); and *United States v. Herman*, 997 F.3d 251, 273–75 (5th Cir. 2021) (affirming conviction for conspiracy to defraud the government by filing false tax returns and rejecting the argument that fraud must be directed to a foreseeable governmental proceeding, as held in *Marinello v. United States*, 138 S. Ct. 1101 (2018), with respect to 26 U.S.C. § 7212(a), because of "well settled" jurisprudence defining the § 371 offense).

The definition of "defraud" is derived from *Hammerschmidt v. United States*, 44 S. Ct. 511, 512 (1924). *See also United States v. Gas Pipe, Inc.*, 997 F.3d 231, 235–36 (5th Cir. 2021).

See Notes for Instruction No. 2.15A.

2.16

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 under 18 U.S.C. § 371 or another statute, 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. Shows Urquidi*, 71 F.4th 357, 382 n.6 (5th Cir. 2023). 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).

The primary factors the Fifth Circuit requires to be used in determining whether a single conspiracy or multiple conspiracies are "(1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of the participants in the various dealings." *See United States v. Shah*, 84 F.4th 190, 223–24 (5th Cir. 2023); *United States v. Warren*, 986 F.3d 557, 562–63 (5th Cir. 2021); *United States v. Chapman,* 851 F.3d 363, 377–79 (5th Cir. 2017); *United States v. Ongaga,* 820 F.3d 152, 157–59 (5th Cir. 2016); *United States v. Rojas,* 812 F.3d 382, 406–07 (5th Cir. 2016); *United States v. Simpson*, 741 F.3d 539, 548–49 (5th Cir. 2014).

This instruction was cited with approval in *United States v. Jones*, 969 F.3d 192, 196 (5th Cir. 2020), *United States v. 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).

In view of the trial court's multiple conspiracies charge, it was not error to refuse a requested jury instruction that the jury must unanimously agree that the defendant participated in one particular conspiracy out of several. *See United States v. Dvorin,* 817 F.3d 438, 447–48 (5th Cir. 2016); *United States v. Royal*, 972 F.2d 643, 648 (5th Cir. 1992).

2.17

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, and 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] _____ both 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. Gonzales*, 841 F. 3d 339, 350–53 (5th Cir. 2016). *See also United States v. Thomas*, 348 F.3d 78, 84–85 (5th Cir. 2003).

"In *Pinkerton*, the Supreme Court held that conspirators are criminally liable for substantive crimes committed by other conspirators in furtherance of the conspiracy, unless the crime 'did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.' A substantive conviction cannot be upheld solely under *Pinkerton* unless the jury was given a *Pinkerton* instruction." *United States v. Baker*, 923 F.3d 390, 406 (5th Cir. 2019) (internal citations omitted); *see also United States v. Martinez*, 900 F.3d 721, 730 n.7 (5th Cir. 2018).

The current Pattern Jury Instructions restore "foreseeability" and "in furtherance of" as independent requirements. Previously, a 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 both be proved). However, the Fifth Circuit, more recently, citing *Armstrong*, stated that "[t]he better course is for district courts to follow the updated pattern and instruct the jury in the conjunctive . . . ." *United States v. Sanjar*, 876 F.3d 725, 742–43 (5th Cir. 2017) (citing PATTERN JURY INSTRUCTIONS: FIFTH CIRCUIT (CRIMINAL) § 2.17 (2015)); *see also United States v. Portillo*, 969 F.3d 144, 166 (5th Cir. 2020) (affirming conviction of conspiracy on *Pinkerton* liability because charged crimes were both reasonably foreseeable and in furtherance of the conspiracy).

This instruction was approved against a challenge that the second paragraph did not sufficiently distinguish between two conspiracies and the multiple substantive counts relating to each. *See United States v. Alaniz*, 726 F.3d 586, 613–14 (5th Cir. 2013).

A defendant is not liable under the *Pinkerton* theory for an additional conspiracy offense committed by his or her 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).

2.18

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 [she] can show that at some point he [she] 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 [she] took some affirmative step to terminate or abandon his [her] 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 [she] 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 the 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 say upon which side it weighs more heavily, 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 or she 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 or her 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. *See Smith v. United States*, 133 S. Ct. 714, 717 (2013) ("Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws. A defendant who withdraws outside the relevant statute of limitations period has a complete defense to prosecution.").

The third situation would not apply to conspiracies such as drug-trafficking conspiracies charged under 21 U.S.C. §§ 846 or 963 or money-laundering conspiracies charged under 18 U.S.C.

§ 1956(h), which do not require proof of an overt act. *See United States v. Salazar*, 751 F.3d 326, 331 (5th Cir. 2014) ("If the conspiracy does not even require the commission of an overt act, a defendant can never timely withdraw and can never negate liability as to the conspiracy charge."); *see also Whitfield v. United States*, 125 S. Ct. 687, 691 (2005); *United States v. Shabani*, 115 S. Ct. 382, 386 (1994).

The judge might wish to add language to the opening paragraph explaining which situation applies in the case and emphasizing whether withdrawal is raised as a defense to the conspiracy charge itself or merely to his or her co-conspirator's substantive offenses that allegedly occurred after withdrawal. *See Smith v. United States*, 133 S. Ct. 714, 719–20 (2013) (explaining that in some cases, "[w]ithdrawal terminates the defendant's liability for post withdrawal acts of his co-conspirators, but he remains guilty of conspiracy"); *Salazar*, 751 F.3d at 330–31.

The components of withdrawal are stated in the following cases: *United States v. McClaren*, 13 F.4th 386, 407 (5th Cir. 2021); *United States v. Hoffman*, 901 F.3d 523, 544–45 (5th Cir. 2018); *United States v. Heard*, 709 F.3d 413, 428 (5th Cir. 2013); *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).

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 or she 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*, 133 S. Ct. at 720; *United States v. Freeman*, 434 F.3d 369, 383 (5th Cir. 2005); *Schorovsky*, 202 F.3d at 729. As with any affirmative 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. *United States v. Rojas,* 812 F.3d 382, 405–06 (5th Cir. 2016).

2.19

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.

However, the government is not required 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 the government proves 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.

A defendant may still violate § 471 even if he or she manufactured counterfeit money that "was not in any condition for circulation." *United States v. Ndemba*, 463 F. App'x 396, 401 (5th Cir. 2012).

2.20

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.

However, the government does not need 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 the government proves beyond a reasonable doubt that the accused acted with intent to cheat someone.

Note

The court in *Lewis v. United States* rejected a challenge to a jury charge that closely tracked this one because "[i]t is well-settled that a district court does not err by giving a charge that tracks this Circuit's pattern jury instructions and that is a correct statement of the law." *Lewis v. United States*, No. 4:12CR98(1), 2021 WL 2673569, at *3 (E.D. Tex. May 25, 2021).

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 considered "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 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 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.

2.21A

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 [she] 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 (5th Cir. 1987).

2.21B

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 publish as true any false, forged, altered, or counterfeited writing, 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 false [forged] [altered] [counterfeited]; 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.

2.22A

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 proved 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 anything 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.

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 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.

2.22B

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

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 proved 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 anything 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] 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. 2.22A, 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.

If the prosecution seeks a felony conviction, the jury must determine that the value exceeds $1,000. *See* 18 U.S.C. § 510(c). If there is an issue as to whether the value exceeds $1,000, a lesser included offense instruction may have to be given. *See* Instruction No. 1.35 (Lesser Included Offense).

2.23A

SECURITIES OF THE STATES AND PRIVATE ENTITIES
18 U.S.C. § 513(a)

Title 18, United States Code, Section 513(a), makes it a crime for anyone to make [utter] [possess] a counterfeited [forged] security of a State [or political subdivision thereof or of an organization] with the intent to deceive another person [organization] [government].

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 [uttered] [possessed] a security;

Second: That the defendant knew that the security was counterfeited [forged];

Third: That the counterfeited [forged] security was of a State [or political subdivision thereof or of an organization]; and

Fourth: That the defendant did so with the intent to deceive another person [organization] [government].

The term "utter" means putting a check [bond] [security] in circulation by means of an assertion or misrepresentation that the instrument is genuine.

The term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety.

The term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents.

The term "security" means, in relevant part, a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest of coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participating in any profit-sharing agreement, collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate or certificate of interest in tangible or intangible property.

Note

The elements of this offense are set out in *United States v. Chappell*, 6 F.3d 1095, 1098 (5th Cir. 1993) (discussing conditions that require the victim be connected to interstate commerce and conditions warranting separate charges under 18 U.S.C. § 513). *See also United States v. Robinson*, 318 F. App'x 280 (5th Cir. 2009).

The Fifth Circuit has explained the presence of a *mens rea* requirement for two different elements of forgery under 18 U.S.C § 513. *See United States v. Young*, 282 F.3d 349, 353 (5th Cir. 2002) (affirming jury instruction that defendant had to know that the check was not intended for her and had to intend to deceive the organization in order to be convicted). *Young* also discusses the meaning of the term "forgery" under 18 U.S.C § 513, holding that signing one's own name with the intent of having the signature taken as the signature of another person with the same name still constitutes forgery.

For a definition of "State" and "organization," *see* 18 U.S.C. §§ 513(c)(4) & (5).

2.23B

SECURITIES OF THE STATES AND PRIVATE ENTITIES
18 U.S.C. § 513(b)

Title 18, United States Code, Section 513(b), makes it a crime for anyone to make [receive] [possess] [sell] [otherwise transfer] an implement designed for making a counterfeit or forged security with the intent that it be so used.

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 [received] [possessed] [sold] [otherwise transferred] an implement;

Second: That the implement was designed for making a counterfeit or forged security; and

Third: That the defendant intended that the implement be used to make a counterfeit or forged security.

The term "counterfeit" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety.

The term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents.

The term "security" means, in relevant part, a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest of coupon, bill, check, draft, warrant, debit instrument as defined in § 916(c) of the Electronic Fund Transfer Act, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participating in any profit-sharing agreement, collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate or certificate of interest in tangible or intangible property.

Note

The Fifth Circuit has held that the language of § 513(b) plainly refers to future use of the implement. *United States v. Mancillas*, 172 F.3d 341, 342–43 (5th Cir. 1999) (setting out the elements of the offense).

2.24A

SMUGGLING
18 U.S.C. § 545

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 and cheat the United States.

"Merchandise" means goods, wares, and chattels of every description, and includes merchandise the 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."

2.24B

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 [brought] (*describe merchandise*) into the United States;

Second: That the defendant's importation [bringing] 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).

The term "law" includes not only statutes, but substantive agency regulations having the force and effect of law. *See United States v. Mitchell*, 39 F.3d 465, 476 (4th Cir. 1994) (holding that importation of animal hides and horns 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 or she acts knowing that his or her 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. 2.24A, 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.

2.25

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 mechanical 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 watercraft 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).

2.26

SMUGGLING GOODS FROM THE UNITED STATES
18 U.S.C. § 554

Title 18, United States Code, Section 554, makes it a crime for anyone to knowingly [fraudulently] export [send] [attempt to export] [attempt to send] any merchandise [article or object] from the United States contrary to any law or regulation 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 knowingly [fraudulently] exported [sent] [attempted to export] [attempted to send] merchandise as described in the indictment;

Second: That the defendant's exportation [sending] was contrary to (describe the law[s] or regulation[s] in detail); and

Third: That the defendant knew the exportation [sending] of the merchandise was contrary to law or regulation.

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

To "export" means to send or carry from the United States to another country.

Note

If the indictment alleges receipt, concealment, purchase, sale, or facilitation of the transportation, concealment, or sale of merchandise (knowing prior to exportation, the goods were intended for illegal exportation) the jury should be charged accordingly. *See United States v. Bernardino*, 444 F. App'x 73 (5th Cir. 2011) (denying defendant's request that jury instruction should have required both knowledge that weapons required an export license and an intention to export the weapons without the license). The approach in *Bernadino* was followed in *United States v. Cardenas*, 810 F.3d 373, 374 (5th Cir. 2016).

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 definition of "export" is taken from *United States v. Castro-Trevino*, 464 F.3d 536, 541 n.13 (5th Cir. 2006).

2.27

THEFT OF GOVERNMENT MONEY OR PROPERTY
18 U.S.C. § 641 (FIRST PARAGRAPH)

Title 18, United States Code, Section 641 (first paragraph), makes it a crime for anyone to embezzle [steal] [knowingly convert to his [her] use or the use of another] 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;

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];

Third: That the defendant did so knowing the money [property] [thing of value] was not his [hers] and with intent to deprive the owner of the use [benefit] of the money [property] [thing of value]; 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, 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 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 that has lawfully come within the possession or control of the person taking it. [However, the defendant cannot be found guilty if he [she] believes that the property has been abandoned by the government.]

[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. 108-275, § 4, 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. Section 641 permits the aggregation of multiple thefts to reach the threshold amount of $1,000, and it converts each misdemeanor into a separate felony. *United States v. Lagrone*, 773 F.3d 673, 677 (5th Cir. 2014); *see also United States v. Feaster*, 798 F.3d 1374, 1378 (11th Cir. 2015) (citing *Lagrone* with approval). A defendant may be charged with a felony for each theft or series of thefts that exceed $1,000 in the aggregate. *Id*. 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, 564–65 (5th Cir. 1938) (finding that the predecessor to § 641 should be construed more broadly than the common law crime of larceny in order to cover situations not envisioned at common law).

For a discussion of the elements of the offense, *see United States v. Fairley*, 880 F.3d 198 (5th Cir. 2018); *United States v. Linares*, 691 F. App'x 196, 197 (5th Cir. 2017) (quoting this instruction with approval); and *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 or she wrote it). This instruction was also approved in *United States v. Pruett*, 681 F.3d 232, 247 (5th Cir. 2012) (excluding evidence of prior § 641 conviction pursuant to Federal Rule of Evidence 609(a)(2)), 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 the *mens rea* required by the statute, *see Morissette v. United States*, 72 S. Ct. 240, 253–54 (1952) (indicating that abandonment is a defense), *United States v. Page*, 732 F. App'x 276, 280–81 (5th Cir. 2018) (finding sufficient evidence of intent in testimony regarding defendant's unauthorized use of veteran's social security number in application for veteran's benefits), and *United States v. Marler*, 707 F. App'x 825, 826 (5th Cir. 2018) (finding sufficient evidence for reasonable jury to find that defendant knew he was not entitled to his deceased wife's veteran's benefits).

The first paragraph of § 641 may be charged in two manners. The alternative manner would read: "Whoever without authority sells, conveys, or disposes of any record, voucher, money or thing of value of the United States . . . ."

The second paragraph of § 641, prohibiting receiving, concealing, or retaining something of value belonging to the United States, is a separate offense requiring different jury instructions. *See Fairley*, 880 F.3d at 208–12 (finding plain error when trial court mixed first paragraph and second paragraph elements).

For a discussion of whether federal funds given to state programs retain their federal

character, *see United States v. Osborne*, 886 F.3d 604, 617–18 (6th Cir. 2017) (holding that there was insufficient federal supervision and control for funds allocated to Air National Guard recruitment programs to retain their federal character), and *United States v. Long*, 996 F.2d 731 (5th Cir. 1993) (holding that funds a university received from a state agency retained their federal character, as the federal government exercised control over the ultimate disposition of funds).

For a discussion of the extent of "a thing of value of the United States," *see United States v. Sanders*, 793 F.2d 107, 108–109 (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"), and *United States v. Barnes*, 761 F.2d 1026, 1032–33 (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, 471 (5th Cir. 1978)).

If it is disputed that the property stolen had a value of more than $1,000, the court should consider giving Lesser Included Offense Instruction No. 1.35. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

The Fifth Circuit has held that a unanimity of theory instruction addressing the different verbs of the first paragraph of § 641 is not required because the verbs are alternative means of committing the offense, not elements. *United States v. Coffman*, 969 F.3d 186, 190–92 (5th Cir. 2020) (rejecting argument that "the district court erred by failing to instruct the jury that it must unanimously agree whether she engaged in embezzling or stealing"); *United States v. Sila*, 978 F.3d 264, 270 (5th Cir. 2020) (explaining that "stealing or converting public funds are different means of violating § 641, but § 641 is violated all the same, and the Government need not separately prove that a defendant either stole or converted public funds").

For a discussion on when a unanimity of theory instruction is required for § 641, *see Sila*, 978 F.3d at 267–70 (indicating that a unanimity of theory instruction as to the location of the crime would have been required if the government had alleged two offenses in two separate locations or one offense that occurred across two locations).

2.28

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] [someone connected in any capacity] of 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 or 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 or 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" 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 whether the property stolen has a value of more than $1,000 is disputed, the court should consider giving Lesser Included Offense Instruction No. 1.35. *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

2.29

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 [misapply] 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] [someone connected in any capacity] of 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.

[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. 2.28, 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 causal 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).

If whether the property stolen had a value of more than $1,000 is disputed, the court should consider giving Lesser Included Offense Instruction No. 1.35. *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

2.30A

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 [hers] 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 "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.

[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.]

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 words, waybills, 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. 1.44, 1.45, and 1.46, respectively.

If whether the property stolen had a value of more than $1,000 is disputed, the court should consider giving Lesser Included Offense Instruction No 1.35. *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

2.30B

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 [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 that are moving as [a part of] interstate [foreign] commerce.

The interstate [foreign] nature of a shipment begins 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.

With respect to the eighth paragraph of § 659 regarding "prima facie evidence," *see* Note to Instruction No. 2.30A, Theft from Interstate Shipment.

Definitions of "Interstate Commerce," "Foreign Commerce," and "Commerce" are in Instruction Nos. 1.44, 1.45, and 1.46.

If whether the property stolen had a value of more than $1,000 is disputed, the court should consider giving a lesser included offense instruction, Instruction No. 135. *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

2.31

THEFT WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION
18 U.S.C. § 661

Title 18, United States Code, Section 661, makes it a crime for anyone to take [carry away], with intent to steal or purloin, any personal property of another, when the offense is committed within the special maritime and territorial jurisdiction 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 personal property described in the indictment belonged to someone other than the defendant;

Second: That the defendant took and carried away such property;

Third: That the defendant acted with intent to steal or purloin the property;

Fourth: That the offense occurred within the special maritime and territorial jurisdiction of the United States; and

[*Fifth*: That the value of the property was more than $1,000.]

[*Fifth*: That the property was taken from the person of another.]

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.

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

Note

"Special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7; charges should be included as necessary to fit the particular situation. *See United States v. Griffin*, 527 F.2d 434 (5th Cir. 1976) (applying § 641's definition of "value" to § 661).

If whether the property stolen had a value of more than $1,000 is disputed, or whether it was taken from the person of another, the court should consider giving Instruction No. 1.35, Lesser Included Offense. *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

2.32

THEFT OR EMBEZZLEMENT FROM EMPLOYEE BENEFIT PLAN
18 U.S.C. § 664

Title 18, United States Code, Section 664, makes it a crime for anyone to steal or embezzle any of the property [monies] [funds] [securities] [premiums] [credits] [other assets] of any employee welfare benefit plan, employee pension benefit plan, or of any fund connected therewith.

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] the property [monies] [funds] [securities] [premiums] [credits] [other assets] described in the indictment;

Second: That at the time alleged such property belonged to or was connected with _____ (*name of plan*); and

Third: That _____ (*name of plan*) was an employee welfare benefit plan or employee pension benefit plan or a fund connected therewith.

The term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of Title I of the Employee Retirement Income Security Act of 1974, also known as ERISA.

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. No particular type of moving or carrying away is required.]

Note

If there is an issue as to whether the employee benefit plan is subject to Title I of ERISA, *see United States v. Wofford*, 560 F.3d 341, 346–50 (5th Cir. 2009). The government must prove beyond a reasonable doubt that the plan was an "employee benefit plan" subject to Title I of ERISA. In this regard, an "employee benefit plan" subject to Title I of ERISA is: (1) any plan, fund or program, (2) which is established or maintained by an employer or by an employee organization, (3) that by its express terms or as a result of surrounding circumstances either (a) provides retirement income to employees, or (b) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. An employee benefit plan subject to Title I of ERISA does not cease being subject to the requirements of Title I of ERISA because of the failure of a plan sponsor, administrator, or other fiduciary of the plan to maintain

the plan in accordance with applicable laws and regulations. *See Wofford*, 560 F.3d at 346 ("[A] qualified plan that loses tax qualified status remains subject to Title I of ERISA.").

It is unsettled whether the Fifth Circuit requires an "intent to injure or defraud" under 18 U.S.C. § 664, although the Fifth Circuit does require an "intent to injure or defraud" under 18 U.S.C. § 656. *See United States v. McCord*, 33 F.3d 1434, 1448 (5th Cir. 1994). The Fifth Circuit has found it unnecessary to address the question of the required intent under 18 U.S.C. § 664 when "sufficient evidence was available for a conviction even if specific intent were required." *See United States v. Osorio*, 482 F.2d 1343, 1344 (5th Cir. 1973).

In cases involving abstraction or conversion from an employee benefit plan, the instructions should be modified to include the *mens rea* of willfulness.

2.33A

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 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. The object of the fraud must be to obtain money or property.]

[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, 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

This instruction has been cited with approval by *United States v. Thomas*, 847 F.3d 193, 198–204 (5th Cir. 2017) (holding contractor for traffic court in City of New Orleans to be an "agent" of local government entity receiving federal funds).

The statute broadly defines "agent" as "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." 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 or she 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). However, § 666 does not require the "agent" to have "direct authority over the ultimate decision targeted by the bribe." *United States v. Shoemaker*, 746 F.3d 614, 621–22 (5th Cir. 2014).

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); *Thomas*, 847 F.3d at 202–204; *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)).

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).

"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 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 also 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)).

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). Courts may use more than one traditional valuation method to determine the transactional value of intangible items. *See United States v. Delgado*, 984 F.3d 435, 447 (5th Cir. 2021) (explaining that *Marmolejo* instructs "courts to look at 'traditional valuation *methods*'—using the plural—rather than bind them to a single, inflexible method") (citing *Marmolejo*, 89 F.3d at 1194).

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.

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, 909 (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)).

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, 3510–11 (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").

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).

To obtain by fraud property in violation of 18 U.S.C. § 666(a)(1)(A), the fraudulent activity must aim to obtain money or property. *Kelly v. United States*, 140 S. Ct. 1565, 1573–74 (2020) (holding that officials did not violate § 666(a)(1)(A) because their scheme to realign lanes on the George Washington Bridge was not aimed at obtaining money or property). In other words, a property fraud conviction under this statute "cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id.* at 1573.

2.33B

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 for the benefit of any person [demanded for the benefit of any person] [accepted] [agreed to accept] _____ (*describe thing of value*) from _____ (*name 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.

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

The term "intent to be influenced or rewarded" means that the defendant must have had a specific intent to act [refrain from acting] on a person's behalf in exchange for a thing of value received from a person. This statute does not criminalize soliciting [demanding] [accepting] [agreeing to accept] mere gratuities or gifts with no intent to act [refrain from acting] on a person's behalf in exchange for the thing of value. Bribery requires a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.

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

It is not necessary for the government 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.

It is also not necessary for the government to prove that the defendant who solicited [demanded] [accepted] [agreed to accept] the bribe benefitted from the bribe or that the bribe was successfully obtained.

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. 2.33A, Theft Concerning Programs Receiving Federal Funds.

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.*

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 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.'"). *See also United States v. Tomblin*, 46 F.3d 1369, 1380 (5th Cir. 1995).

"[A]nything of value" includes intangible items, such as furnishing sexual services. *See United States v. Barraza*, 655 F.3d 375, 383–84 (5th Cir. 2011) (describing sexual favors as "a thing of value").

The transactional element may be satisfied by looking to the amount of the bribe; thus, if the amount of the bribe is $5,000 or greater, the jury can reasonably conclude that the transactional element is satisfied. *United States v. Richard*, 775 F.3d 287, 294 (5th Cir. 2014). The transactional element may also be satisfied by using other "traditional valuation methods," either alone or in addition to looking at the bribe amount. *United States v. Delgado*, 984 F.3d 435, 447 (5th Cir. 2021) ("[T]here is no rule that the bribe amount is always dispositive of the value of a bribery transaction under § 666(a)(1)(B)."). Valuation methods that account for information other than the bribe amount may be appropriate "because the utility of . . . the bribe amount will vary depending on the circumstances of the transaction." *Id.*

"Agent" is defined in 18 U.S.C. § 666 (d)(1). "Government agency" is defined in 18 U.S.C. § 666 (d)(2). For a discussion of who may qualify as an agent, *see United States v. Shoemaker*, 746 F.3d 614, 621–22 (5th Cir. 2014).

In *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022), the Fifth Circuit held that federal program bribery under 18 U.S.C. § 666(a) requires a quid pro quo and that the district court's jury instruction was faulty for not including that concept, resulting in reversal. *See also United States v. Jordan*, No. 22-40519, 2023 WL 6878907, at *8 (5th Cir. Oct. 18, 2023) (per curiam) (unpublished) (finding the failure to instruct as to quid pro quo harmless). The Committee has revised the instruction accordingly by adding a definition of "intent to be influenced or rewarded" that requires a quid pro quo. *See Snyder v. United States*, 144 S. Ct. 1947 (2024) (holding that 18 U.S.C. § 666 (a)(1)(B) does not make it a federal crime for a state or local official to accept a gratuity for his past official act).

2.33C

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] _____ (*describe thing of value*) to _____ (*name 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.

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

The term "intent to influence or reward" means that the defendant must have had a specific intent to give [offer] [agree to give] a thing of value to any person in exchange for an agent acting [refraining from acting] on the defendant's behalf. This statute does not criminalize giving [offering to give] [agreeing to give] mere gratuities or gifts to a person when no action [omission] is requested in return. Bribery requires a quid pro quo—a specific intent to give or receive something of value in exchange for an official act. 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.

It is also not necessary to prove that the defendant giving [offering] [agreeing to give] the bribe benefitted from the bribe or that the bribe was successfully obtained by the agent of the organization [State government] [local government] [Indian tribal government] [any agency thereof].

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. 2.33A and 2.33B, Theft or Bribery Concerning Programs Receiving Federal Funds.

In *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022), the Fifth Circuit held that federal program bribery under 18 U.S.C. § 666(a) requires a quid pro quo and that the district court's jury instruction was faulty for not including that concept, resulting in reversal. *See also United States v. Jordan*, No. 22-40519, 2023 WL 6878907, at *8 (5th Cir. Oct. 18, 2023) (per curiam) (unpublished) (finding the failure to instruct as to quid pro quo harmless). The Committee has revised the instruction accordingly by adding a definition of "intent to be influenced or rewarded" that requires a quid pro quo. *See Snyder v. United States*, 144 S. Ct. 1947 (2024) (holding that 18 U.S.C. § 666 (a)(1)(B) does not make it a federal crime for a state or local official to accept a gratuity for his past official act).

2.34

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 [her] 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 [her] 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, 633–34 (1980). *See also United States v. Taylor*, 933 F.2d 307, 309–10 (5th Cir. 1991); *United States v. Harper*, 901 F.2d 471, 473 (5th Cir. 1990).

This instruction charges a 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, 1031 (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, 75 (5th Cir. 1976) (the validity of the conviction for which the defendant has been confined is not an element of this offense). "To prove an attempt, the Government must show that 'the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense' and that 'the defendant had engaged in conduct which constitutes a substantial step toward commission of a crime.'" *United States v. Franco*, 430 F. App'x 299, 300 (5th Cir. 2011) (quoting *United States v. Partida*, 385 F.3d 546, 560 (5th Cir. 2004)).

In §751(a) cases where the defense of duress or necessity is raised, a threshold requirement must be met: "[I]n 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 (noting that "escape from federal custody as defined in § 751(a) is a continuing offense"); *see also United States v. Smithers*, 27 F.3d 142, 145 n.18 (5th Cir. 1994); Instruction No. 1.38, Justification, Duress, or Coercion.

2.35

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 [she] 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 [her] do so.

"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. 2.34, 18 U.S.C. § 751(a), Escape.

The definition of "escape" comes from *United States v. Bailey*, 100 S. Ct. 624, 633 (1980).

An 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 court held that aiding an escape ends once immediate active pursuit of the escapee has ended, or once the escapee has reached temporary safety.

2.35A

HIGH SPEED FLIGHT FROM IMMIGRATION CHECKPOINT
18 U.S.C. § 758

Title 18, United States Code, Section 758, makes it a crime to flee [evade] a checkpoint operated by the Immigration and Naturalization Service [any Federal law enforcement agency] in a motor vehicle and flee Federal [State] [local] law enforcement agents above the legal speed limit.

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 fled [evaded] a checkpoint operated by the Immigration and Naturalization Service [any Federal law enforcement agency] in a motor vehicle; and

Second: That the defendant fled from Federal [State] [local] law enforcement agents above the legal speed limit.

Note

The functions of the Immigration and Naturalization Service have been transferred to the Department of Homeland Security. *See* 6 U.S.C. § 202(3).

2.36A

DEALING IN EXPLOSIVE MATERIALS WITHOUT LICENSE
18 U.S.C. §§ 842(a)(1), 844(a)(1)

Title 18, United States Code, Sections 842(a)(1) and 844(a)(1), make it a crime to be in the business of [importing] [manufacturing] [dealing in] explosive materials without a federal license. _____ (*name explosive material*) is an explosive material 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 was a person engaged in the business of [importing] [manufacturing] [dealing in] explosive materials as named in the indictment at wholesale or retail on _____ (*date listed in the indictment*); and

Second: That the defendant engaged in such business without a license issued under federal law.

"Importer" means any person engaged in the business of importing or bringing explosive materials into the United States for purposes of sale or distribution.

"Manufacturer" means any person engaged in the business of manufacturing explosive materials for purposes of sale or distribution or for his [her] own use.

"Dealer" means any person engaged in the business of distributing explosive materials at wholesale or retail.

Note

The definition of "explosive material" is found in 18 U.S.C. § 841(c)–(f). It does not include commonly used mixtures such as gasoline or fertilizer, which do not typically function by explosion. *See United States v. Lorence*, 706 F.2d 512, 515 (5th Cir. 1983) (citing legislative history). Pursuant to 18 U.S.C. § 841(d) and 27 C.F.R. § 555.23, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") publishes a list of explosive materials covered under § 841 annually in the Federal Register. The list from 2023 may be found at 88 Fed. Reg. 88655 (Dec. 22, 2023), and ATF posts the Federal Register entry each year at www.atf.gov.

Although the list is "comprehensive," it "is not all-inclusive." Fed. Reg. at 88656. "[T]he fact that an explosive material is not on the annual list does not mean that it is not within coverage of the law if it otherwise meets the statutory definition of 'explosives' in 18 U.S.C. [§] 841." *Id.* Thus, if the indictment alleges dealing in an explosive material not listed in the Federal Register entry, delete the second sentence and include the following after the second element: "The term 'explosive material' means explosives, blasting agents, and detonators. The term 'explosive' means any chemical compound mixture or device, the primary or common purpose of which is to function by explosion. The term 'blasting agent' means any material or mixture, consisting of fuel

and oxidizer, intended for blasting. The term 'detonator' means any device containing a detonating charge that is used for initiating detonation in an explosive."

A defendant may be convicted of multiple counts of engaging in the business of dealing in explosive materials if the counts are spatially and temporally distinct such that they constitute different courses of conduct. *Cf. United States v. Womack*, 654 F.2d 1034, 1041 (5th Cir. 1981) (discussing manufacturing explosive materials under § 842(a)(1)).

2.36B

FALSE STATEMENTS IN CONNECTION WITH EXPLOSIVE MATERIALS
18 U.S.C. §§ 842(a)(2), 844(a)(1)

Title 18, United States Code, Sections 842(a)(2) and 844(a)(1), make it a crime for anyone to knowingly make a false statement for the purpose of obtaining explosive materials.

_____ (*name explosive material*) is an explosive material 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 made a false [fictitious] oral [written] statement;

Second: That the defendant knew the statement was false;

Third: That the statement was made for the purpose of obtaining an explosive material; and

Fourth: That the statement was intended to deceive or likely to deceive the listener.

A statement is "false" ["fictitious"] if it was untrue when made and was then known to be untrue by the person making it.

A false [fictitious] 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

Section 842(a)(2) also prohibits additional conduct, such as knowingly withholding information for the purpose of obtaining explosive materials and making false statements for the purpose of obtaining an explosive-material license. Therefore, this instruction may need to be altered according to the indictment.

The definition of "explosive material" is found in 18 U.S.C. § 841(c)–(f). It does not include commonly used mixtures such as gasoline or fertilizer, which do not typically function by explosion. *See United States v. Lorence*, 706 F.2d 512, 515 (5th Cir. 1983) (citing legislative history). *See* Instruction No. 2.36A.

Although the list is "comprehensive," it "is not all-inclusive." 88 Fed. Reg. 88655 (Dec. 22, 2023). "[T]he fact that an explosive material is not on the annual list does not mean that it is not within coverage of the law if it otherwise meets the statutory definition of 'explosives' in 18 U.S.C. [§] 841." *Id.* at 88656. Thus, if the indictment alleges false statements in connection with an explosive material not listed in the Federal Register entry, delete the second sentence and include the following after the third element:

> "The term 'explosive material' means explosives, blasting agents, and detonators. The term 'explosive' means any chemical compound mixture or device, the primary or common purpose of which is to function by explosion. The term 'blasting agent' means any material or mixture, consisting of fuel and oxidizer, intended for blasting. The term 'detonator' means any device containing a detonating charge that is used for initiating detonation in an explosive."

2.36C

UNLAWFUL DISTRIBUTION OF EXPLOSIVE MATERIALS
18 U.S.C. §§ 842(d), 844(a)(1)

Title 18, United States Code, Sections 842(d) and 844(a)(1), make it a crime for a person to knowingly distribute explosive materials to [a person in the prohibited category, e.g., a convicted felon] when the distributor knows that such a person is [a member of a prohibited category, e.g., a convicted felon].

_____ (*name explosive material*) is an explosive material 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 distributed an explosive material as named in the indictment to _____ (*name of person receiving the explosive material*);

Second: That at the time of the distribution to _____ (*name of person receiving the explosive material*), he [she] was _____ (*identify prohibited category into which the person falls; e.g., a convicted felon*); and

Third: That at the time of the distribution, the defendant knew that _____ (*name of the person receiving the explosive material*) was _____ (*identify prohibited category into which the person falls; e.g., a convicted felon*).

To "distribute" something simply means to deliver or transfer possession of it to someone else, with or without any financial interest in the transaction.

Note

The instruction mentions convicted felons, but there are eight other prohibited classes of people, for example certain categories of aliens. *See* 18 U.S.C. § 842(d)(1)–(9). The instruction may have to be altered based upon the indictment.

The definition of "explosive material" is found in 18 U.S.C. § 841(c)–(f). It does not include commonly used mixtures such as gasoline or fertilizer, which do not typically function by explosion. *See United States v. Lorence*, 706 F.2d 512, 515 (5th Cir. 1983) (citing legislative history). *See* Instruction No. 2.36A.

Although the list is "comprehensive," it "is not all-inclusive." 88 Fed. Reg. 88655 (Dec. 22, 2023). "[T]he fact that an explosive material is not on the annual list does not mean that it is

not within coverage of the law if it otherwise meets the statutory definition of 'explosives' in 18 U.S.C. [§] 841." *Id.* at 88656. Thus, if the indictment alleges distribution of an explosive material not listed in the Federal Register entry, delete the second sentence and include the following after the third element:

> "The term 'explosive material' means explosives, blasting agents, and detonators. The term 'explosive' means any chemical compound mixture or device, the primary or common purpose of which is to function by explosion. The term 'blasting agent' means any material or mixture, consisting of fuel and oxidizer, intended for blasting. The term 'detonator' means any device containing a detonating charge that is used for initiating detonation in an explosive."

2.36D

POSSESSION OF EXPLOSIVES BY A PROHIBITED PERSON
18 U.S.C. §§ 842(i)(1), 844(a)(1)

Title 18, United States Code, Sections 842(i)(1) and 844(a)(1), make it a crime for a person convicted of a felony to knowingly possess an explosive that has been shipped or transported in interstate or foreign commerce.

_____ (*name explosive*) is an explosive 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 an explosive as named in the indictment;

Second: That before the defendant possessed the explosive, the defendant had been convicted of a crime punishable by imprisonment for a term in excess of one year; and

Third: That the explosive possessed traveled in [affected] interstate [foreign] commerce; that is, before the defendant possessed the explosive, it had traveled at some time from one state to another [between any part of the United States and any other country].

Note

The instruction mentions convicted felons, but there are other prohibited classes of people, for example certain categories of aliens. *See* 18 U.S.C. § 842(i)(1)–(7). The instruction may have to be altered based upon the indictment.

This instruction is substantially similar to Instruction No. 2.43D, Possession of a Firearm by a Convicted Felon. Section 842 can be read in *pari materia* with 18 U.S.C. § 922, the analogous firearm statute. *United States v. Fillman*, 162 F.3d 1055, 1057 (10th Cir. 1998) (holding that although § 842(i) and related statutes do not define "indictment," its definition is the same as the one given in § 921(a)(14)); *see also United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004) ("A further word is required as to the second element of the statute (i.e., that the defendant knowingly possessed an explosive) . . . . Indeed, we have found a *mens rea* requirement in the felon-in-possession-of-a-firearm statute, 18 U.S.C. § 922(g)(1), which is nearly identical to § 842(i)(1).").

In *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019), the Court held that in a prosecution pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2), the government must prove that a defendant knew he or she possessed a firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. The court may wish to consider whether this instruction

should also require the government to prove not only that the defendant knowingly possessed the explosive, but that he knew he had a prior felony. *See United States v. Mink*, 9 F.4th 590, 611–12 (8th Cir. 2021) (holding, as to a conviction under § 842(i), that failure to instruct the jury on defendant's knowledge of his status as a felon was plain error after *Rehaif*, but that such error did not affect the defendant's substantial rights in that case).

"Explosives" is defined in 18 U.S.C. § 841(d). *See also* Instruction No. 2.36A.

However, the term "explosives" is narrower than the term "explosive materials" as used in that statute. The list published each year contains "not only explosives, but also blasting agents . . . which are defined as explosive materials in 18 U.S.C. [§] 841(c)." 88 Fed. Reg. 88655-56 (Dec. 22, 2023). The list also states that it includes "detonators," which are separately defined as "explosive materials" under § 841(c), but "detonators" are explicitly listed as examples of "explosives" under the definition in § 841(d). When reading the list to determine whether a particular chemical compound or device is an "explosive," note that "[m]aterials constituting blasting agents are marked by an asterisk." *See id.*

Although the list is "comprehensive," it "is not all-inclusive." *Id.* "[T]he fact that an explosive material is not on the annual list does not mean that it is not within coverage of the law if it otherwise meets the statutory definition of 'explosives' in 18 U.S.C. [§] 841." *Id.* Thus, if the indictment alleges possession of an explosive not listed in the Federal Register entry, delete the following:

"_____ (*name explosive*) is an explosive within the meaning of this law."

After the third element, include the following:

"The term 'explosive' means any chemical compound mixture or device, the primary or common purpose of which is to function by explosion."

2.37A

DESTRUCTION OF GOVERNMENT PROPERTY BY FIRE OR EXPLOSION
18 U.S.C. §§ 844(f)(1), 844(f)(2), 844(f)(3)

The defendant is charged with maliciously damaging or destroying, by means of fire [an explosive], any building, vehicle, or other real or personal property in whole or in part owned by [possessed by] [leased to] the United States [any department or agency of the United States] [any institution or organization receiving Federal financial assistance].

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

First: That the defendant damaged or destroyed property;

Second: That the defendant did so by means of fire [an explosive];

Third: That the property was, in whole or in part, owned by [possessed by] [leased to] the United States [any department or agency of the United States] [any institution or organization receiving Federal financial assistance]; and

Fourth: That the defendant acted maliciously;

[*Fifth*: The defendant's conduct directly or proximately caused personal injury to any person [creates a substantial risk of injury] [caused the death of any person, including any public safety officer performing duties.]]

The term "explosive" means _____ (*insert appropriate definition from 18 U.S.C. § 844(j) or 18 U.S.C. § 232(5)*).

"Property" includes buildings, vehicles, or other personal or real property. The term "department" means one of the executive departments. The executive departments are: the Department of State; the Department of the Treasury; the Department of Defense; the Department of Justice; the Department of the Interior; the Department of Agriculture; the Department of Commerce; the Department of Labor; the Department of Health and Human Services; the Department of Housing and Urban Development; the Department of Transportation; the Department of Energy; the Department of Education; the Department of Homeland Security; the Department of Veterans Affairs.

The term "agency" of the United States includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest.

Maliciously means that the defendant acted either intentionally or with willful disregard of the likelihood that damage will result, and not mistakenly or carelessly. The defendant need not have intended to injure or kill anyone.

[A proximate cause is one that played a substantial part in bringing about the death [injury], so that the death [injury] was the direct result or a reasonably probable consequence of the defendant's acts. "Substantial" means that the defendant's conduct has such an effect in producing the death [injury] as to lead a reasonable person to regard his [her] conduct as a cause of the death [injury]. An event such as the death [injury] of the victim may have more than one cause. The government need not prove that the defendant's conduct was the only cause of his [her] death [injury]; it need only prove that the defendant's conduct was a substantial factor in causing his [her] death [injury].]

[Personal injury means any injury, no matter how temporary. It includes physical pain as well as any burn, cut, abrasion, bruise, disfigurement, illness or impairment of a bodily function.]

Note

The term "explosive" is defined in 18 U.S.C. § 844(j).

The term "agency" is defined in 18 U.S.C. § 6.

The defendant acts maliciously if he or she acts either intentionally or in "willful disregard of the likelihood of damaging a building." *United States v. York*, 600 F.3d 347, 353 (5th Cir. 2010). To determine whether a defendant showed "willful disregard," relevant factors include: whether "the fire was intentionally set," whether the defendant had a motive, and any "evidence of preparation for the offense." *Id.*

In *United States v. Severns*, 559 F.3d 274, 281–82 (5th Cir. 2009), a case addressing 18 U.S.C. § 844(i), the Fifth Circuit discussed both the elements of bodily injury and of direct or proximate result of an action.

"Personal injury" is not defined in this section but is defined elsewhere in Title 18. *See* 18 U.S.C. §§ 831(f)(4); 1365(g)(4); 1515(a)(5); 1864(d)(2).

The fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges that the defendant's conduct caused injury or death. *See Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000); *Alleyne v. United States*, 133 S. Ct. 2151 (2013). The judge may consider substituting the fifth element for a special interrogatory.

2.37B

ARSON OF PROPERTY USED IN INTERSTATE COMMERCE OR USED IN AN ACTIVITY AFFECTING INTERSTATE COMMERCE 18 U.S.C. § 844(i)

Title 18, United States Code, Section 844(i) makes it a crime for anyone maliciously to damage or destroy [attempt to damage or destroy] by means of fire [an explosive] any building [vehicle] [real or personal property] used in interstate [foreign] commerce or used in any activity affecting 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 maliciously damaged [destroyed] [attempted to damage or destroy] _____ (*name real or personal property alleged in the indictment*);

Second: That the defendant did so [attempted to do so] by means of fire [an explosive]; and

Third: That at the time of the fire [explosion] [defendant's attempted fire or explosion], _____ (*name real or personal property alleged in the indictment*) was used in interstate [foreign] commerce or was used in an activity affecting interstate [foreign] commerce.

[*Fourth*: That _____ (*name person alleged in the indictment*) suffered personal injury [died] as a foreseeable result of the fire [explosion] [defendant's attempt].]

Maliciously means that the defendant acted either intentionally or with willful disregard of the likelihood that damage will result, and not mistakenly or carelessly. [The defendant need not have intended to injure or kill anyone.]

The term "explosive" means _____ (*insert appropriate definition from 18 U.S.C. § 844(j) or 18 U.S.C. § 232(5)*).

A piece of property is "used in an activity affecting interstate [foreign] commerce" if the property is actively employed for a commercial purpose, and that active employment has an effect on interstate [foreign] commerce. A piece of property is not used in an activity affecting interstate [foreign] commerce if the property merely has a passive, passing, or past connection to commerce. The defendant need not have been aware that the property was used in an activity affecting interstate [foreign] commerce for you to find him [her] guilty.

[Business-related property, as opposed to residential property, is considered as being used in or affecting interstate commerce if, at the time it was damaged or destroyed, it was actively used for some commercial purpose. Even if the property was vacant at the time it was destroyed, it may still be used in or affecting interstate commerce if the owner was actively seeking to rent or similarly use the property.]

[Property used for residential purposes may also be considered as being used in or affecting interstate commerce in some circumstances. Rental property is included as property affecting interstate commerce. Even if the property was vacant at the time it was destroyed, it may still be property affecting interstate commerce if you find that the owner did not intend to remove it from the rental market. However, a privately-owned, owner-occupied residence not used for any commercial purpose does not satisfy this element.]

[Personal injury means any injury, no matter how temporary. It includes physical pain as well as any burn, cut, abrasion, bruise, disfigurement, illness, or impairment of a bodily function.]

Note

For the definitions of "Interstate Commerce," "Foreign Commerce," "Commerce," and "Affecting" Commerce, *see* Instruction Nos. 1.44, 1.45, 1.46, and 1.47, respectively.

The elements of the offense are discussed in *United States v. Nguyen*, 28 F.3d 477, 480–81 (5th Cir. 1994); *United States v. Pazos*, 24 F.3d 660, 664–65 (5th Cir. 1994); *United States v. El-Zoubi*, 993 F.2d 442, 445–46 (5th Cir. 1993).

The offense carries enhanced penalties (1) "if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection" or (2) "if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection." 18 U.S.C. § 844(i). If the indictment contains one of these enhancements, the trial judge should either add personal injury or death as a fourth element to the charge or include a special instruction on the verdict form asking the jury whether they find the supporting fact of personal injury or death. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013); *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

For a brief discussion of the personal injury enhancement, *see United States v. Severns*, 559 F.3d 274, 281–82 (5th Cir. 2009). Personal injury is not defined in this section, but it is defined elsewhere in Title 18. *See* 18 U.S.C. §§ 831(f)(4); 1365(g)(4); 1515(a)(5); and 1864(d)(2).

"Explosive" for the purposes of this instruction is defined in 18 U.S.C. § 844(j). This definition differs from the definition of "explosive" used in 18 U.S.C. § 842. *See United States v. Lorence*, 706 F.2d 512, 515 (5th Cir. 1983); Instruction Nos. 2.36A, 2.36B, and 2.36C.

"Maliciously" is not defined by the statute, but it retains its common-law meaning. *United States v. Monroe*, 178 F.3d 304, 307–08 (5th Cir. 1999). The defendant acts maliciously if he or she acts either intentionally or in "willful disregard of the likelihood of damaging a building." *United States v. York*, 600 F.3d 347, 353 (5th Cir. 2010). To determine whether a defendant showed "willful disregard," relevant factors include: whether "the fire was intentionally set," whether the defendant had a motive, and any "evidence of preparation for the offense." *Id.*

The statute does not require knowledge of the property's relation to interstate commerce. *United States v. Jimenez*, 256 F.3d 330, 338 n.9 (5th Cir. 2001).

The use of the damaged or destroyed property need only have "an effect on interstate commerce, not a substantial effect" to be covered under the statute. *United States v. Dawes*, 80 F. App'x 325, 327 (5th Cir. 2003).

An issue that may arise in prosecutions under § 844(i) is whether a particular residential property is "used in an activity affecting interstate commerce." *See Jimenez*, 256 F.3d at 336–38 (discussing Supreme Court and Fifth Circuit cases). The Supreme Court addressed the issue in *Russell v. United States*, 105 S. Ct. 2455 (1985), where the Court held that a two-unit rental property was "used in an activity affecting interstate commerce" because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Id.* at 2457. Later, in *Jones v. United States*, 120 S. Ct. 1904 (2000), the Court read the word "used" in § 844(i) "to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 1910. Although the homeowner in that case used the home as collateral to obtain and secure a mortgage from an out-of-state lender, used the home to obtain a casualty insurance policy from an out-of-state insurer, and obtained natural gas for the home from an out-of-state company, the Court held that the home was not "used" in an activity affecting interstate commerce because the home was only "actively employed" as a private residence for the owner. *Id.* The Fifth Circuit held in *Jimenez*, 256 F.3d at 339, that an owner-occupied home with a one-room office was "used in an activity affecting interstate commerce" when the home office was "where business records and supplies were stored, where employee paychecks were written and picked up, and where business vehicles occasionally parked overnight" for the resident-owner's company. A seemingly critical fact in *Jimenez* was that the home address was listed on the company's tax forms, which made the case "quickly distinguishable from the garden-variety situation of a lawyer or salesperson who occasionally works from home." *Id.*

A church is "used in an activity affecting interstate [foreign] commerce" when its "interstate connections are direct, regular and substantial." *United States v. Torres*, 8 F.4th 413, 417 (5th Cir. 2021) (affirming conviction under 18 U.S.C. § 844(i) based on the defendant detonating a bomb outside a church's administrative building). "Because the church uses the building to rent its facilities, operate its child care programs, and process the paperwork related to funeral services, '[t]his is not a case where the government relies only on passive activities, such as the purchase of utility services or insurance from an out-of-state provider, to demonstrate the building's use in and effect on interstate commerce.'" *Id.* (quoting *United States v. Rayborn*, 312 F.3d 229, 234 (6th Cir. 2002)).

2.38

THREATS AGAINST THE PRESIDENT AND SUCCESSORS
18 U.S.C. § 871

Title 18, United States Code, Section 871, makes it a crime for anyone to knowingly and willfully make a threat to injure, kill, or kidnap the President [Vice President] [President-elect] [Vice President-elect] [any other officer next in the order of succession to the office] 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 [Vice President] [President-elect] [Vice President-elect] [any other officer next in the order of succession to the office] 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 [Vice President] [President-elect] [Vice President-elect] [any other officer next in the order of succession to the office], 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

For cases discussing 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), and *United States v. Rogers*, 488 F.2d 512, 514 (5th Cir. 1974) (per curiam), *rev'd on other grounds by Rogers v. United States*, 95 S. Ct. 2091 (1975).

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Supreme Court held that a jury considering a charge of a threatening communication under 18 U.S.C. § 875(c) must be instructed that the defendant "transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 2012. The Court held that it was error to instruct the jury that the communication would be a "threat" under an objective standard—that is, that a reasonable person would regard the communication as a threat—without regard to the defendant's culpable mental state. *Id.*

In *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), the Supreme Court held that statutes criminalizing threatening speech are consistent with the First Amendment only if the statute requires proof of a subjective mental state of at least recklessness. *Id.* at 2117–19. "In the threats context, it means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id.* at 2117 (quoting *Elonis,* 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part)).

The Committee believes that this Instruction comports with the standards of *Elonis* and *Counterman* and the explicit elements of the statute by requiring the mental states of knowledge and willfulness, as set out in the second and third paragraphs.

In addition to the *mens rea* required by *Elonis* and *Counterman*, a jury still must find that the communication is a "threat." Under 18 U.S.C. § 875(c), a communication so qualifies if "in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001) (quoting *United States v. Myers*, 104 F.3d 76, 79 (5th Cir. 1997))*; see also United States v. Perez*, 43 F.4th 437, 443 (5th Cir. 2022) (citing *Morales* for definition of a "true threat."). Following *Elonis*, at least one court of appeals has upheld the validity of the objective standard as applied to the definition of "threat," thus it remains an additional element. *See United States v. Ehmer*, 87 F.4th 1073, 1121 (9th Cir. 2023) ("But contrary to what Patrick and Thorn contend, this reliance on an objective standard in describing an *additional* element that must be met with respect to the defendant's 'speech or expressive conduct' does not in any way detract from the district court's inclusion of a fully sufficient subjective scienter requirement."); *see also United States v. Hunt*, 82 F.4th 129, 134–35 (2d Cir. 2023) (so holding for definition of threat under 18 U.S.C. § 115 (threatening federal officials)). The definitions of the President's successors can be found in § 871(b).

2.39

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 that the defendant knew contained a threat to injure [kidnap] the person of another, as charged in the indictment;

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, 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

For a discussion on the breadth of what can constitute a "thing of value," s*ee United States v. Fagan*, 821 F.2d 1002, 1015 n.9 (5th Cir. 1987) (discussing whether victim's freedom to testify in a civil suit was a "thing of value" to him).

This instruction has received approval from the Fifth Circuit. *See United States v. Skelton*, 514 F.3d 433, 445–46 (5th Cir. 2008) (holding that this instruction constitutes a correct statement of the law); *United States v. Daughenbaugh*, 49 F.3d 171, 173 n.2 (5th Cir. 1995) (approving substantially similar instruction on the definition of threat under 18 U.S.C. § 876); *United States*

v. Turner, 960 F.2d 461, 464 & n.3 (5th Cir. 1992) (district court did not err in giving instruction that tracked Fifth Circuit Pattern Jury Instruction).

Unlike § 875(b), an 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) (using a definition of "threat" under § 875(c) similar to the one defined in *Daughenbaugh*); *see also United States v. Perez*, 43 F.4th 437, 443 (5th Cir. 2022) (citing *Morales* for definition of a "true threat.").

The Supreme Court discussed the necessary *mens rea* for threats under § 875(c) in *Elonis v. United States*, 135 S. Ct. 2001 (2015). In *Elonis*, the Supreme Court held the following: Because subsection (c) of the statute contains no mental state, a court should read into the subsection "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 2012 (quoting *Carter v. United States*, 120 S. Ct. 2159, 2162 (2000)). Thus, the government must prove the defendant intended his or her communication to be a threat or had knowledge that the communication would be viewed as a threat.

In *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), the Supreme Court held that statutes criminalizing threatening speech are consistent with the First Amendment only if the statute requires proof of a subjective mental state of at least recklessness. *Id.* at 2117–19 ("In the threats context, it means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'")

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) necessarily incorporates the intent required by *Elonis*—that the defendant intended the threat to be taken as a threat. *See United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("Extortion only works if the recipient of the communication fears that not paying will invite an unsavory result. Thus, to intend to extort one must necessarily intend to instill fear of harm . . . . In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); *accord United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case).

See Notes to Instructions Nos. 2.38 and 2.40 on 18 U.S.C. § 871, Threats Against the President and Successors, and on 18 U.S.C. § 876(b), Mailing Threatening Communications, respectively.

For the definition of "kidnap" *see* Instruction No. 2.54 on 18 U.S.C. § 1201(a)(1).

Definitions of "Interstate Commerce," "Foreign Commerce," and "Commerce" are in Instructions Nos. 1.44, 1.45, and 1.46, respectively.

2.40

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 that the defendant knew contained a threat, as charged in the indictment;

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 intent 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 kidnapping 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 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

These instructions may also be used for 18 U.S.C. § 876(c) if the defendant did not intend to extort money or a thing of value with the threatening communication. If so, the third element of the instruction should not be given. *See United States v. Stoker*, 706 F.3d 643, 647–648 (5th Cir. 2013) (discussing the elements of § 876(c)).

The elements of this offense are discussed in *United States v. Stotts*, 792 F.2d 1318, 1323 (5th Cir. 1986) (proof that defendant wrote communication is not a required element of the

offense); *United States v. Fagan*, 821 F.2d 1002, 1015 n.9 (5th Cir. 1987) (discussing breadth of "thing of value" in a § 875(b) case); *United States v. DeShazo*, 565 F.2d 893, 894–95 (5th Cir. 1978) (explaining present intent to actually do injury is not required); *see also United States v. Daughenbaugh*, 49 F.3d 171, 173 n.2 (5th Cir. 1995) (approving substantially similar instruction on the definition of threat); *United States v. Turner*, 960 F.2d 461, 464 & n.3 (5th Cir. 1992) (district court did not err in giving instruction that tracked the Fifth Circuit Pattern Jury Instruction).

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Supreme Court held that a jury considering a charge of a threatening communication under 18 U.S.C. § 875(c) must be instructed that the defendant "transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 2012. The Court held that it was error to instruct the jury that the communication would be a "threat" under an objective standard that a reasonable person would regard the communication as such without regard to the defendant's culpable mental state. In *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), the Supreme Court held that statutes criminalizing threatening speech are consistent with the First Amendment only if the statute requires proof of a subjective mental state of at least recklessness. *Id.* at 2117–19 ("In the threats context, it means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'") Whether *Elonis* requires an element of intent, or, after *Counterman*, at least recklessness with regard to whether the communication is a "true threat," is an issue that has not been resolved definitively among the circuit courts of appeals. *See United States v. Curtin*, 78 F.4th 1299, 1305-06 nn. 2–3 (11th Cir. 2023) (noting varying approaches among the courts for purposes of § 876(c)).

See Notes to Instructions Nos. 2.38 and 2.39 on 18 U.S.C. § 871, Threats Against the President and Successors, and 18 U.S.C. § 875(b), Interstate Transmission of Extortionate Communication, respectively.

For the definition of "kidnap," *see* Instruction No. 2.54 on 18 U.S.C. § 1201(a)(1).

The Fifth Circuit has not addressed whether 18 U.S.C. § 876 applies strictly to natural persons, though several other circuit courts have, and those courts have reached varying conclusions. In *United States v. Bly*, 510 F.3d 453, 460–64 (4th Cir. 2007), the Fourth Circuit held that the University of Virginia qualifies as a "person" under § 876(b). *Contra United States v. Carlson*, 787 F.3d 939, 947 (8th Cir. 2015) (holding that § 876 "requires the intent to extort from a natural person").

Note also the *Apprendi* issue in § 875(c), if the threat is mailed to certain federal officials.

2.41

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 [she] was a citizen of the United States;

Second: That the defendant was not a citizen of the United States at the time he [she] made the representation; and

Third: That the defendant knew he [she] 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 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. Anguiano-Morfin*, 713 F.3d 1208, 1210 (9th Cir. 2013); *United States v. Romero-Avila*, 210 F.3d 1017, 1020 (9th Cir. 2000).

Opinions upholding § 911 guilty pleas and sentences include *United States v. Suarez-Vega*, 762 F. App'x 209 (5th Cir. 2019); *United States v. Lara*, 714 F. App'x 247 (5th Cir. 2018); *United States v. Gonzalez-Lopez*, 612 F. App'x 247 (5th Cir. 2015); *United States v. Rodriguez*, 603 F. App'x 506 (5th Cir. 2015).

See Instruction Nos. 1.41 "Knowingly"—To Act and 1.43 "Willfully"—To Act.

2.42

FALSE IMPERSONATION OF FEDERAL OFFICER OR EMPLOYEE—DEMANDING OR OBTAINING ANYTHING OF VALUE 18 U.S.C. § 912 (SECOND CLAUSE)

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. *See United States v. Ferris*, 52 F.4th 235, 239 (5th Cir. 2022). This Instruction pertains only to the offense defined in the second clause, namely demanding or obtaining property through a pretended character. The Fifth Circuit requires allegation and proof of an intent to defraud and an overt act consistent with the assumed character to complete the offense.

The "intent to defraud" does "not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *United States v. Lepowitch*, 63 S. Ct. 914, 916 (1943); *see United States v. Randolph*, 460 F.2d 367, 370 (5th Cir. 1972) (same).

The overt act may be any act consistent with the defendant's impersonation of a federal officer, not "an overt act that asserted authority" as a federal agent. *Ferris*, 35 F.4th at 240. The act requirement is further discussed in *United States v. Cohen*, 631 F.2d 1223, 1224 (5th Cir. 1980).

For an instruction for the first clause of 18 U.S.C. § 912, *see* Instruction 2.42A.

2.42A

FALSE IMPERSONATION OF FEDERAL OFFICER
18 U.S.C. § 912 (FIRST CLAUSE)

Title 18, United States Code, Section 912, makes it a crime for a person to falsely assume or pretend to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and to act as such.

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 or pretended to be an officer or employee acting under the authority of the United States or any department, agency or officer of the United States;

Second: That while acting in such an assumed or pretended character, the defendant engaged in any overt act consistent with the assumed character; and

Third: That while acting in such an assumed or pretended character, the defendant acted with the intent to deceive another to act differently than he or she would have absent the deception.

The _____ (*name of department, agency, or officer*) is a[n] [department] [agency] [officer] of the United States.

Note

The Fifth Circuit treats 18 U.S.C. § 912 as incorporating two separate offenses: the offense described in this Instruction for false impersonation, and the offense in Instruction No. 2.42 for demanding or obtaining any money, paper, document, or other valuable thing in such pretended character. *See United States v. Ferris*, 52 F.4th 235, 239 (5th Cir. 2022); *United States v. Cortes*, 600 F.2d 1054, 1056 (5th Cir. 1978). The Court in *Ferris* held harmless any error resulting from a "likely incorrect" jury charge, the second element of which required only that the defendant commit any act. *See* 52 F.4th at 240. The Court recognized its prior holding that required a jury to consider whether the defendant engaged in "any overt act consistent with the assumed character," as provided for in the second element of this Instruction. *Id.* (citing *United States v. Cohen*, 631 F.2d 1223, 1224 (5th Cir. 1980)). It further cited to *United States v. Tullos*, 356 F. App'x 727, 728 (5th Cir. 2009) for confirmation on all three elements. *See* 52 F.4th at 241.

Prior to a 1948 amendment to the statute deleting the phrase "intent to defraud," the Supreme Court held that, in a case brought pursuant to the first clause of § 912, the phrase does "not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *United States v. Lepowitch*, 63 S. Ct. 914, 916 (1943) (noting that more than deceitful conduct is required under the second clause). In *United States v. Randolph*, 460 F.2d 367, 370–71 (5th Cir. 1972), the Fifth Circuit held that in the absence of an allegation that the defendant impersonated a U.S. Army officer with intent to defraud, the indictment which charged the defendant pursuant to the first

clause of § 912 was fatally defective. However, it defined the phrase "intent to defraud" exactly as the Court had in *Lepowitch*—requiring only an intent to deceive. *Id.* Because the phrase "intent to defraud" is a term of art that frequently means the intent to wrongfully deprive another of property, the Committee has not included that phrase in this instruction. *See also Wilkes v. United States*, 105 S. Ct. 364, 364 (1984) (White, J., dissenting from denial of certiorari) (noting that seven circuits have held that the government need not prove intent to defraud); *United States v. Gayle*, 967 F.2d 483, 486–87 (11th Cir. 1992) (overruling Fifth Circuit cases *Randolph*, and *Honea v. United States*, 344 F.2d 798 (5th Cir. 1965), which had been binding precedent in the Eleventh Circuit, and noting that the Fifth Circuit's interpretation of the "intent to defraud" element is "contrary" to the analyses of all the other circuits).

The statute requires that the government prove any act consistent with the defendant's impersonation of a federal officer, not "an overt act that asserted authority" as a federal agent. *Ferris*, 52 F.4th at 240. The act requirement is further discussed in *Cohen*, 631 F.2d at 1224.

Generally, a defendant will not have a First Amendment defense to this statute. *See Ferris*, 52 F.4th at 241 n.3 (discussing such claim and noting that because the instruction requires that the government prove an act "beyond mere boasting that he was an FBI agent, we need not explore this possibility").

2.43A

DEALING IN FIREARMS WITHOUT LICENSE
18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D)

Title 18, United States Code, Sections 922(a)(1)(A) and 924(a)(1)(D), make it a crime to engage in the business of dealing in firearms 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 [her] conduct was unlawful.

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 to predominantly earn a 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 his [her] personal collection of firearms.

[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 principal 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 his [her] personal collection of firearms.]

The term "to predominantly earn a 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.

[The term "with the principal 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

Definitions of "Firearm" and "Ammunition" are in Instruction No. 1.48.

This instruction applies to a defendant who is a "dealer," as defined by 18 U.S.C. § 921(a)(11)(A), as "any person engaged in the business of selling firearms at wholesale or retail." The statute contains two additional definitions of dealer. *See* 18 U.S.C. §§ 921(a)(11)(B)–(C) (person who repairs firearms or a pawnbroker, respectively). Congress amended the statutory text of 18 U.S.C. § 921(a)(21)(C), which defines the term "engaged in the business" as "applied to a dealer in firearms" under § 921(a)(11)(A), by striking "with the principal objective of livelihood and profit" and inserting "to predominantly earn a profit." Pub. L. 117–159 § 12002(1), effective June 25, 2022. A court instructing on a case involving conduct occurring before that date should use the 2019 version of this instruction, included in brackets above.

A defendant can also 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 importing or manufacturing 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). The definitions of "engaged in the business" as applied to an importer or manufacturer of firearms or ammunition are found in 18 U.S.C. § 921(a)(21). *See* 18 U.S.C. § 921(a)(21)(A) (manufacturer of firearms), 921(a)(21)(B) (manufacturer of ammunition), 921(a)(21)(E) (importer of firearms), and 921(a)(21)(F) (importer of ammunition).

Willfulness is an element of this offense. *See* 18 U.S.C. § 924(a)(1)(D). *Bryan v. United States*, 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. See* Instruction No. 1.43 "Willfully"—to Act.

A number of factors may be considered in determining whether the defendant was "engaged in the business" of dealing in firearms, including: (1) the quantity and frequency of sales; (2) the location of the sales; (3) conditions under which the sales occurred; (4) the defendant's behavior before, during, and after the sales; (5) the price charged; (6) the characteristics of the firearms sold; and (7) the intent of the seller at the time of the sales. *United States v. Brenner*, 481 F. App'x 124, 127 (5th Cir. 2012) (explaining that "the jury must examine all circumstances" in determining whether the defendant was "engaged in the business" of dealing in firearms); *see also United States v. Garcia*, No. 21-51065, 2023 WL 116727, *1 (5th Cir. Jan. 5, 2023) (unpublished) (for recent application).

2.43B

FALSE STATEMENT TO FIREARMS DEALER
18 U.S.C. §§ 922(a)(6), 924(a)(2)

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 [fictitious];

Third: That the statement was made in connection with the acquisition of a firearm [ammunition] from a federally-licensed firearms dealer;

Fourth: That the statement was intended or was likely to deceive a federally-licensed firearms dealer; and

Fifth: That the alleged false statement was material to the lawfulness of the sale or disposition of the firearm [ammunition].

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.

The Government does not need to prove that the defendant knew the seller was a federally-licensed firearms dealer.

Note

Definitions of "Firearm" and "Ammunition" are in Instruction No. 1.48.

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.

A defendant can also violate 18 U.S.C. § 922(a)(6) by knowingly furnishing or exhibiting a false, fictitious, or misrepresented identification to a federally-licensed firearms dealer in

connection with the acquisition of a firearm or ammunition. Therefore, this instruction may need to be altered according to the indictment.

In *United States v. Diaz*, 989 F.3d 390, 393–94 (5th Cir. 2021), the Fifth Circuit held that the government need not prove that the defendant knew the seller was a federally-licensed firearms dealer as an element of this offense.

"Straw purchases" violate § 922(a)(6). *See Abramski v. United States*, 134 S. Ct. 2259 (2014); *United States v. Ortiz-Loya*, 777 F.2d 973, 979 (5th Cir. 1985); *see also United States v. Fields*, 977 F.3d 358, 364 (5th Cir. 2020) ("[I]ntentionally providing a false answer regarding the actual purchaser violates § 922(a)(6) as a materially false statement intended to deceive the dealer.").

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"), 921(a)(11) (defining "dealer"), and 921(a)(13) (defining "collector"). Therefore, the instruction may need to be altered according to the indictment.

The defendant is entitled to a duress defense, for which he [she] has the burden of proof by a preponderance of the evidence. *Dixon v. United States,* 126 S. Ct. 2437, 2441 (2006) (defendant claimed she received firearm while under indictment, in violation of 18 U.S.C. §§ 922(n) and 922(a)(6) and punished under § 924(a)(1)(D), because her boyfriend threatened to kill her if she did not buy guns for him). *See* Instruction No. 1.38, Justification, Duress, or Coercion.

For a definition of "materiality," *see* Instruction No. 1.40.

2.43C

UNLAWFUL SALE OR DISPOSITION OF FIREARM OR AMMUNITION 18 U.S.C. §§ 922(d), 924(a)(8)

Title 18, United States Code, Sections 922(d) and 924(a)(8), make it a crime for a person knowingly to sell or otherwise dispose of a firearm [ammunition] to [a person in a prohibited category, e.g., a convicted felon] when the seller knows or has reasonable cause to believe that such 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], _____ (*name of person receiving the firearm*) 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*).

Note

Definitions of "Firearm" and "Ammunition" are in Instruction No. 1.48.

The instruction mentions convicted felons, but there are other prohibited classes of persons, for example, a person who is a fugitive from justice and a person who is an alien illegally in the United States. *See* 18 U.S.C. § 922(d)(1)-(11). 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 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"); *United*

States v. Lopez, 2 F.3d 1342, 1354 (5th Cir. 1993) (explaining in dicta in a case involving a charge pursuant to 18 U.S.C. § 922(q) that § 922(d) "deals with transfers, not mere possession" of firearms), *aff'd on other grounds*, 115 S. Ct. 1624 (1995).

In *Abramski v. United States*, 134 S. Ct. 2259, 2272 (2014), a case charging violations of 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A), the Supreme Court explained that § 922(d) "prevents a private person from knowingly selling a gun to an ineligible owner no matter when or how he acquired the weapon: it thus applies not just to a straw purchaser, but also to an individual who bought a gun for himself and later decided to resell it" to an unauthorized individual. *Id.*

The *mens rea* requirement of "knowledge" is set forth at 18 U.S.C. § 924(a)(2). *See* Instruction No. 1.41 "Knowingly"—To Act.

2.43D

POSSESSION OF A FIREARM BY A CONVICTED FELON
18 U.S.C. §§ 922(g)(1), 924(a)(8), 924(e)

Title 18, United States Code, Sections 922(g)(1) and 924(a)(8), 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;

Third: That the defendant knew he [she] had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year; and

Fourth: 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].

[*If the government has charged the defendant under the Armed Career Criminal Act, see the Note for more detailed instructions.*]

Note

Definitions of "Interstate Commerce," "Foreign Commerce," "Commerce," "Affecting Commerce," and "Firearm" and "Ammunition" are in Instruction Nos. 1.44, 1.45, 1.46, 1.47, and 1.48, respectively.

This instruction applies to 18 U.S.C. § 922(g)(1) offenses. For a complete list of categories of prohibited persons, *see* §§ 922(g)(1) through (g)(9). If the defendant is charged under another subsection of § 922(g), the second and third elements, as well as any stipulations, should be modified accordingly. In *United States v. Tucker*, 47 F.4th 258, 260–62 (5th Cir. 2022), the Fifth Circuit determined that an "adjudication" with respect to 18 U.S.C. § 922(g)(4), which prohibits a person who has been adjudicated as a mental defective or who has been committed to a mental institution from possessing a firearm, requires "judicial process," rather than "ex parte, often-unreviewable opinions of medical professionals."

In *Rehaif v. United Stat*es, 139 S. Ct. 2191, 2200 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed a firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. *See United States v. Trevino*, 989 F.3d 402, 405 (5th Cir. 2021) (holding that "an individual who mistakenly believes he is not within a prohibited class—such as a 'defendant who does not know that he is an

alien "illegally or unlawfully in the United States"'—'does not have the guilty state of mind that the statute's language and purposes require'" (quoting *Rehaif*, 139 S. Ct. at 2198)). The government, however, is not required to prove that the defendant knew that the law prohibited him or her from possessing a firearm. *Id*. at 405 (citing *Rehaif*, 139 S. Ct. at 2195–96) ("[A] mistake concerning a defendant's knowledge that the law prohibits convicted felons from possessing firearms does not negate any element of [§ 922(g)(1)].").

Willfulness is not an element of this offense. *See* 18 U.S.C. § 924(a)(8). The element of knowledge, however, applies both to the conduct (possession) and to the status (e.g., being a convicted felon) elements in 18 U.S.C. §§ 922(g)(1) through (9).

In *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Court interpreted 18 U.S.C. § 922(g)(9)'s prohibition on possession of a firearm by a person who has been convicted of a misdemeanor domestic violence offense to include reckless as well as knowing or intentional assaults. The definition of "misdemeanor crime of domestic violence" is in § 921(a)(33)(A).

The government need not prove that the defendant knew that the firearm was "in or affecting" interstate or foreign commerce. *See Rehaif*, 139 S. Ct. at 2196. Nor is the government 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 a firearm and ammunition, is only one offense. *See United States v. Meza*, 701 F.3d 411, 433 (5th Cir. 2012); *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. *Villegas*, 494 F.3d at 515; *see United States v. Talbert*, 501 F.3d 449, 450 (5th Cir. 2007).

The determination of 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 United States v. Broadnax*, 601 F.3d 336, 345 (5th Cir. 2010). "Whether a prior offense qualifies under 18 U.S.C. § 922(g)(1) as a 'crime punishable by imprisonment for a term exceeding one year' is determined by the law of the jurisdiction in which the crime was committed." *United States v. Johnson*, 990 F.3d 392, 401 (5th Cir. 2021) (quoting *United States v. Daugherty*, 264 F.3d 513, 515 (5th Cir. 2001)); *see* 18 U.S.C. § 921(a)(20). The issue is informed by the definition in 18 U.S.C. § 921(a)(20)(A)-(B). *See also United States v. Chenoweth*, 459 F.3d 635, 636–38 (5th Cir. 2006) (reversing conviction where defendant had his rights restored in a certificate sent to him by the state of Ohio); *United States v. Huff*, 370 F.3d 454, 458–59 (5th Cir. 2004); *United States v. Richardson*, 168 F.3d 836, 839–40 (5th Cir. 1999).

For a definition of conviction for purposes of 18 U.S.C. § 922(g)(1), *see* § 921(a)(20). *See also* 18 U.S.C. § 921(a)(33) (for definitions applicable to misdemeanor crime of domestic violence).

If a defendant admits or stipulates that he or she has been previously convicted of a crime punishable by more than one year of 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, 655–56 (1997); *United States v. Cheever*, 368 F.3d 120, 120–22 (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).

Likewise, if a defendant admits or stipulates that he or she knew that he or she was previously convicted of a crime punishable by more than one year of imprisonment, the following language may be included in the charge:

> "The parties have stipulated that the defendant knew that he [she] was previously convicted in a court of a crime punishable by imprisonment for a term in excess of one year. You are to take that fact as proven."

This stipulation does not eliminate the need to charge on the third element, but will "keep the jury ignorant of the inculpatory details otherwise required to prove knowledge of felon status." *See United States v. Staggers*, 961 F.3d 745, 754 (5th Cir. 2020). However, by stipulating to being previously convicted of a felony, without stipulating to having knowledge of that conviction, the stipulation provides sufficient evidence that the defendant was a felon and knew that he or she was a felon. *United States v. Robinson*, 87 F.4th 658, 667 (5th Cir. 2023) ("[Defendant] stipulated at trial that he had a prior felony. This satisfies the first element—that he was a felon—as well as the second—that he knew his status."); *United States v. Kieffer*, 991 F.3d 630, 635 (5th Cir. 2021) ("Because [defendant] stipulated to being a felon at trial, there was sufficient evidence to establish that he knew he was a felon.").

The element of possession can be satisfied by proof of actual or constructive possession. *See United States v. Smith*, 997 F.3d 215, 219 (5th Cir. 2021); *United States v. Milton*, 670 F. App'x 341 (5th Cir. 2016); *United States v. Jordan*, 622 F. App'x 345, 347–48 (5th Cir. 2015); *Meza*, 701 F.3d at 419–22. "Actual possession occurs when a 'defendant knowingly has direct physical control over a thing at a given time.'" *United States v. Fields*, 977 F.3d 358, 365 (5th Cir. 2020) (quoting *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998)); *see United States v. Freeman*, 56 F.4th 1024, 1026 (5th Cir. 2023) (discussing, in the absence of direct evidence, circumstantial evidence sufficient to establish possession). "Constructive possession is 'ownership, dominion[,] or control over a thing, or control over the premises where the thing is found.'" *Fields*, 977 F.3d at 365 (quoting *Munoz*, 150 F.3d at 416); *see also United States v. Smith*, 997 F.3d 215, 224 (5th Cir. 2021) (holding that merely touching a firearm does not amount to possession). "Constructive possession need not be exclusive, it may be joint with others." *United States v. Huntsberry*, 956 F.3d 270, 279 (5th Cir. 2020) (quoting *United States v. McKnight*, 953 F.3d 898, 901 (5th Cir. 1992)). But when contraband is found in a jointly occupied location,

"something else (e.g., some circumstantial indicium of possession) is required besides mere joint occupancy before constructive possession is established." *Id*. at 279–80 (quoting *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993)). *See also* Instruction No. 1.33, 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) (quoting *United States v. Rawls*, 85 F.3d 240, 243–44 & n.2 (5th Cir. 1996) (Garwood, J., specially concurring)). This element is met where the government proves the firearm possessed was manufactured out of state. *See United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005); *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 showed only that the component parts of the ammunition passed through interstate commerce. The jury charge also required the jury to find only 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).

For a discussion of when a defendant may be entitled to a jury instruction on the affirmative defense of justification, *see United States v. Penn*, 969 F.3d 450, 455–57 (5th Cir. 2020). *See also* Instruction No. 1.38, Justification, Duress, or Coercion.

Note on Armed Career Criminal Act

The Armed Career Criminal Act ("ACCA") "mandates a *minimum* sentence of fifteen years if the § 922(g) offender has three prior convictions for 'violent felon[ies]' . . . or 'serious drug offense[s]' that were 'committed on occasions different from one another.'" *Wooden v. United States*, 142 S. Ct. 1063, 1068 (2022) (citing 18 U.S.C. § 924(e)(1) and holding that the defendant's ten convictions for breaking into ten units of a single storage facility in a single evening were not committed on different occasions).

In *Wooden*, the Supreme Court interpreted the phrase "committed on occasions different from one another" according to its ordinary meaning, rejecting the government's argument that the phrase encompassed only offenses committed at the same exact moment. *Id.* at 1069–74. The Court did not decide whether the Fifth or Sixth Amendment requires that such occasions be charged in the indictment and the supporting facts be proved to the jury. *Id.* at 1087 n.7 (Gorsuch, J., concurring). It did, however, acknowledge that an ACCA "occasions inquiry" can be intensely factual in nature. *Id.* at 1070–71.

The Fifth Circuit has held that *Wooden* did not abrogate circuit precedent holding that the jury need not be charged with such a determination. *See United States v. Kerstetter*, 82 F.4th 437, 440 (5th Cir. 2023). In *Erlinger v. United States*, 144 S. Ct. 1840 (2024), however, the Supreme Court reversed a similar holding by the Seventh Circuit, *United States v. Erlinger*, 77 F.4th 617, 621 (7th Cir. 2023). The Court held that defendants are entitled under the Fifth and Sixth Amendments to have a unanimous jury determine beyond a reasonable doubt whether their past offenses were committed on separate occasions for ACCA purposes. The *Erlinger* Court noted that the jury may consider whether the crimes were "committed close in time," the "proximity of

their location," the "character and relationship" of the offenses, whether the conduct was "similar or intertwined," and whether the offenses shared "a common scheme or purpose" comprising a single criminal episode. *Erlinger*, 144 S. Ct. at 1851, 1855 (quoting *Wooden*, 142 S. Ct. at 1071).

In response to *Erlinger*, the Committee considered a fifth element that would enable a jury to make the appropriate finding for an ACCA enhancement, which would be utilized only if the jury has found the defendant guilty of being a felon in possession of a firearm. If the court is concerned that it prejudices the defendant to "regale juries with details" of his or her past misconduct, the court can employ tools such as bifurcation. *See Erlinger*, 144 S. Ct. at 1859. The court may first task the jury with assessing whether the government has proven the elements of the section 922(g) charge. Then, if the jury finds the defendant guilty, the court may ask the jury to consider evidence regarding whether the defendant's prior offenses occurred on different occasions for purposes of applying the ACCA. The government reported that it "generally agrees to bifurcation in ACCA cases like this." *Id*. The Committee recommends the following Instruction on this issue:

> If you find that the defendant is guilty of this crime, you have one more task. I will instruct you as to the _____ (*provide number*) offenses for which the defendant was convicted prior to committing this offense. You must then determine whether the government has proven beyond a reasonable doubt that the defendant committed [at least three of] those offenses on occasions different from one another.
>
> Here, the government has presented evidence that the defendant was convicted of the following offenses:
>
> > _____ (*list name of violent felony or serious drug offense, jurisdiction, and date convicted*)
> >
> > _____ (*list name of violent felony or serious drug offense, jurisdiction, and date convicted*)
> >
> > _____ (*list name of violent felony or serious drug offense, jurisdiction, and date convicted*)
>
> In determining whether [at least three of] the defendant's prior offenses were committed on occasions different from one another, you may consider a range of circumstances, including whether the crimes were committed close in time, the proximity of their location, the character and relationship of the offenses, whether the conduct was similar or intertwined, and whether the offenses shared a common scheme or purpose comprising a single criminal episode.

Whether a prior conviction qualifies as an ACCA offense is a question of law for the court. *See, e.g., Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (concerning the information that a district court can consider when determining whether a past conviction "qualifies as an ACCA predicate"); *Almendarez-Torres v. United States*, 118 S. Ct 1219 (1998); *see also Erlinger*, 144 S. Ct. at 1856 ("[O]ur precedents have consistently read *Almendarez-Torres* as permitting a judge to

find only the fact of a prior conviction and the elements required to sustain it."). If the defendant has more than three convictions that qualify, the jury need find only that three were committed on separate occasions.

2.43E

POSSESSION OR SALE OF A STOLEN FIREARM
18 U.S.C. §§ 922(j), 924(a)(2)

Title 18, United States Code, Sections 922(j) and 924(a)(2), make it a crime for anyone to knowingly receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, [pledge or accept as security for a loan any stolen firearm or stolen ammunition,] which has been shipped or transported in interstate or foreign commerce [which is moving as, which is a part of, or which constitutes interstate or foreign commerce], either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was 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 possessed [received] [concealed] [stored] [bartered] [sold] [disposed of] a stolen firearm [ammunition];

[*First*: That the defendant knowingly pledged [accepted as security for a loan] any stolen firearm [ammunition]];

Second: That the defendant knew or had reasonable cause to believe that the firearm [ammunition] was stolen; and

Third: That the firearm [ammunition] was moving as [was part of] [constituted] [had been shipped or transported in] interstate or foreign commerce, either before or after it was stolen.

[The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States.]

Note

Definitions of "Firearm" and "Ammunition" are in Instruction No. 1.48.

The definition of "ammunition" may also need to be included based upon the indictment. *See* 18 U.S.C. § 921(a)(17)(A).

United States v. Hagman, 740 F.3d 1044 (5th Cir. 2014), held that exchanging money for stolen firearms did not constitute bartering for the purposes of § 922(j). Rather, "bartering" is "the exchang[ing] of one commodity for another without the use of money." *Id.* at 1051.

United States v. Arteaga, 436 F. App'x 343, 349 (5th Cir. 2011), explained that the element that the defendant knew an item was stolen, "because [of its] nature, must largely be proved by circumstantial evidence." This may include evidence such as the defendant's payment of a fraction of the market rate for the item or the defendant's inability to produce a proper chain of title. *Id.* (citing *United States v. Mitchell*, 876 F.2d 1178, 1181 (5th Cir. 1989)).

The *mens rea* requirement of "knowledge" is set forth at 18 U.S.C. § 924(a)(2). *See* Instruction No. 1.41 "Knowingly"—To Act.

Definitions of "Interstate Commerce," "Foreign Commerce," and "Commerce" are contained in Instruction Nos. 1.44, 1.45, and 1.46, respectively.

The element of possession can be satisfied by proof of actual or constructive possession. *See United States v. Milton*, 670 F. App'x 341 (5th Cir. 2016) (citation omitted); *United States v. Jordan*, 622 F. App'x 345, 347–48 (5th Cir. 2015); *United States v. Meza*, 701 F.3d 411, 419–22 (5th Cir. 2012); *United States v. De Leon*, 170 F.3d 494, 498 (5th Cir. 1999); *see also* Instruction No. 1.33, Possession. "Actual possession occurs when a 'defendant knowingly has direct physical control over a thing at a given time.'" *United States v. Fields*, 977 F.3d 358, 365 (5th Cir. 2020) (quoting *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998)). "Constructive possession of a firearm can be proven by ownership, dominion, or control over a firearm, or over the premises in which it was concealed or discovered." *Hagman*, 740 F.3d at 1049 & n.2; *see also United States v. Smith*, 997 F.3d 215, 224 (5th Cir. 2021) (holding that merely "touching" a firearm does not amount to possession).

2.43F

THEFT OF A FIREARM FROM A FEDERAL FIREARMS LICENSEE
18 U.S.C. §§ 922(u), 924(i)(1)

Title 18, United States Code, Sections 922(u) and 924(i)(1), make it a crime for anyone to knowingly steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported 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 stole [unlawfully took] [carried away] a firearm;

Second: That firearm was stolen [unlawfully taken] [carried away] from a person [the premises of a person] who is licensed to engage in the business of importing, manufacturing, or dealing in firearms;

Third: That the stolen firearm was in the licensed firearms dealer's business inventory; and

Fourth: That the stolen firearm was shipped or transported in interstate or foreign commerce.

Note

Definitions of "Firearm" and "Ammunition" are in Instruction No. 1.48.

The Fifth Circuit has not yet spoken on 18 U.S.C. § 922(u). However, the Eighth Circuit has approved a substantially similar instruction. *See United States v. Glinn*, 863 F.3d 985, 988–89 (8th Cir. 2017).

The *mens rea* requirement of "knowledge" is set forth at 18 U.S.C. § 924(i)(1). *See* Instruction No. 1.41 "Knowingly"—To Act.

Definitions of "Interstate Commerce," "Foreign Commerce," and "Commerce" are contained in Instruction Nos. 1.44, 1.45, and 1.46, respectively.

2.43G

POSSESSION OF A FIREARM WITH OBLITERATED OR ALTERED SERIAL NUMBER 18 U.S.C. §§ 922(k), 924(a)(1)(B)

Title 18, United States Code, Section 922(k), makes it a crime for a person to knowingly transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered, or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered, and has, at any time, been shipped or transported 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 possessed [received] a firearm;

Second: That the serial number of the firearm had been removed [obliterated] [altered];

Third: That the defendant knew that the serial number had been removed [obliterated] [altered]; and

Fourth: That such firearm had been shipped or transported in interstate [foreign] commerce.

Note

Definitions of "Interstate Commerce," "Foreign Commerce," "Commerce," "Affecting Commerce," and "Firearm" are in Instruction Nos. 1.44, 1.45, 1.46, 1.47, and 1.48, respectively.

A defendant can also violate 18 U.S.C. § 922(k) by knowingly transporting, shipping, or receiving a firearm with a removed, obliterated, or altered serial number in interstate or foreign commerce. Therefore, this instruction may need to be altered according to the indictment.

The element of possession can be satisfied by proof of actual or constructive possession. *See United States v. McCowan*, 469 F.3d 386, 390 (5th Cir. 2006); *see also* Instruction No. 1.33, Possession.

The third element of the instruction is compelled by *United States v. Hooker*, 997 F.2d 67, 74 (5th Cir. 1993); *see United States v. Johnson*, 381 F.3d 506, 509–11 (5th Cir. 2004) (reversing conviction because of insufficient evidence of knowledge of obliteration).

This instruction can be easily modified for section 922(p)(1), manufacturing, importing, or possessing any firearm that is not detectable by a walk-through metal detector.

2.43H

FALSE STATEMENT IN REQUIRED INFORMATION KEPT BY A FIREARMS DEALER 18 U.S.C. § 924(a)(1)(A)

Title 18, United States Code, Section 924(a)(1)(A), makes it a crime for any person to knowingly make a false statement or representation with respect to information required to be kept in any record that a licensed firearms dealer is required by federal law to keep.

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 dealer*) was a federally licensed firearms dealer at the time the alleged offense occurred;

Second: That the defendant made a false statement or representation in a record that _____ (*name of dealer*) was required by federal law to maintain in his [her] [its] firearms records; and

Third: That the defendant knew that the statement or representation was false.

_____ (*name of record*) is a firearms record which a federally licensed firearms dealer is required by federal law to keep or maintain.

A statement is "false or fictitious" if it was untrue when made and was then known to be untrue by the person making it.

Note

For a discussion of the elements of the offense and the sufficiency of evidence for the first and second elements, *see United States v. Heon Jong Yoo*, 813 F. App'x 949 (5th Cir. 2020).

"Straw purchases" violate § 922(a)(6). *See Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014); *United States v. Ortiz-Loyal*, 777 F.2d 973, 979 (5th Cir. 1985).

An untruthful answer on a Bureau of Alcohol, Tobacco, Firearms and Explosives Firearms Transaction Record ("Form 4473") violates 18 U.S.C. § 922(a)(6) as well as § 924(a)(1)(A). *United States v. Fields*, 977 F.3d 358, 364 (5th Cir. 2020) (listing the elements of both offenses).

2.43I

POSSESSION OF A MACHINEGUN
18 U.S.C. §§ 922(o)(1), 924(a)(2)

Title 18, United States Code, Section 922(o)(1), makes it a crime for a person to knowingly transfer or possess a "machinegun."

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 [transferred] a machinegun; and

Second: That the defendant knew it was a machinegun or was aware of the firearm's essential characteristics that made it a machinegun as defined.

A "machinegun" is any weapon that shoots, is designed to shoot, or can be readily restored to shoot multiple shots automatically, without manual reloading, by a single function of the trigger.

Note

"To obtain a conviction under 18 U.S.C. § 922(o), the government must prove that the defendant knowingly possessed a machine gun." *United States v. Montgomery*, 998 F.2d 1014 (5th Cir. 1993); *see* 18 U.S.C. § 924(a)(2); *United States v. Delgado*, 361 F. App'x 562, 563 (5th Cir. 2010).

A "machinegun" is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b); *see* 18 U.S.C. § 921(a)(24). In *Garland v. Cargill*, 144 S. Ct. 1613 (2024), the Supreme Court held that the Bureau of Alcohol, Tobacco, Firearms, and Explosives exceeded its statutory authority by issuing a rule that classified a bump stock as a "machinegun" under 26 U.S.C. § 5845(b), affirming *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023), and noting the same definition for the offense in 18 U.S.C. § 922(o). The Supreme Court determined that "[a] semiautomatic rifle equipped with a bump stock does not fire more than one shot 'by a single function of the trigger,'" and, even if it did, "it would not do so 'automatically.'" *Cargill*, 144 S. Ct. at 1620.

"The term 'trigger' is not defined by statute" but has been interpreted to mean "any 'mechanism . . . used to initiate the firing sequence.'" *United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003) (quoting *United States v. Jokel*, 969 F.2d 132, 135 (5th Cir. 1992)). The Fifth Circuit has held that a "switch" attached to a firearm that "caused the original trigger to function in rapid succession," *id*. at 744, constituted the weapon's "trigger" for definitional purposes because operating the weapon "required only one action—pulling the switch [the defendant] installed—to fire multiple shots. This distinction is expressly contemplated by § 5845(b), which speaks of 'shoot[ing] automatically more than one shot . . . by a *single* function of the trigger.'"

Id. at 745; *see Cargill*, 57 F.4th at 462 (noting that, in *Camp*, the court "held that the weapon was a machinegun . . . because the gun had been modified such that it had a new trigger").

Section 5845(b) further clarifies that the term "machinegun" also includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845(b); *see VanDerStok v. Garland*, 86 F.4th 179, 204 (5th Cir. 2023) (Oldham, J., concurring) ("For example, a semi-automatic rifle like an AR-15 can be 'converted' to function as a fully automatic machine gun. Such conversions can be accomplished by filing away internal parts of a semi-automatic firearm. . . . Or by replacing them."), *cert. granted*, 144 S. Ct. 1390 (2024).

Unlike many other firearms offenses, § 922(o)(1) does not include as an element of the offense that the machinegun was transported in interstate commerce. The Fifth Circuit has held that § 922(o) is a rational exercise of Congress's Commerce Clause power, as "the transfer and possession of machineguns," even transfers or possessions that may "conceivably be characterized as exclusively intrastate or noncommercial," "has a substantial effect on interstate commerce." *United States v. Knutson*, 113 F.3d 27, 30 (5th Cir. 1997); *see Bezet v. United States*, 714 F. App'x 336, 342 (5th Cir. 2017) ("The vast majority of machinegun possessions involve the channels or instrumentalities of interstate commerce, and the remainder have a substantial effect on interstate commerce."); *see also United States v. Kirk*, 105 F.3d 997, 998 (5th Cir. 1997) (lacking precedential value, however, because the en banc court was equally divided).

The Fifth Circuit held that "machineguns" are not protected by the Second Amendment because they "are dangerous and unusual." *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016); *see District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

This provision does not apply to "a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof" or "any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect." 18 U.S.C. § 922(o)(2)(A)–(B). These exceptions establish affirmative defenses to the offense defined in § 922(o)(1). *See United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997).

2.44A

USING OR 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 federal drug-trafficking crime [crime of violence].

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 federal 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 _____.

[*Second*: That the defendant aided and abetted_____ (*name associate*) in committing the drug-trafficking crime [crime of violence] alleged in Count ____, and knew in advance that _____ (*name associate*) would be armed.].

To prove the defendant "used" a firearm during and in relation to a federal 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].

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].

Note

18 U.S.C. § 924(c)(1) can be violated in two ways: either (1) by using or carrying a firearm during and in relation to a drug-trafficking crime or crime of violence or (2) by possessing a firearm

in furtherance of such a crime. This instruction covers the "using or carrying" offense; Instruction No. 2.44B covers the possession offense.

In this statute, "use" is given its "'ordinary or natural' meaning." *Watson v. United States*, 128 S. Ct. 579, 580–83 (2007); *see Bailey v. United States*, 116 S. Ct. 501, 506 (1995); *Smith v. United States*, 113 S. Ct. 2050, 2054–58 (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. Such "use" does not, however, include the mere receipt of a firearm in exchange for narcotics. *See Watson*, 128 S. Ct. at 582–83.

The term "carry" contemplates movement. *See United States v. Sanders*, 157 F.3d 302, 305–06 (5th Cir. 1998). *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 carrying on the person as well as in the trunk or glove box of an automobile. The firearm need not be easily accessible to be "carried"; instead, "the firearm must either be transported by the defendant or within his or her reach during and in relation to the predicate crime." *Smith*, 481 F.3d at 264. The simultaneous sale of a gun and drugs qualifies as carrying a gun in relation to a drug crime. *United States v. Benitez*, 809 F.3d 243, 248 (5th Cir. 2015). For an approved instruction on the difference between "use" and "carry" *see United States v. Chavez*, 119 F.3d 342, 348–49 (5th Cir. 1997).

The Fifth Circuit has upheld the pattern jury charge's definition of the "in relation to" element. *See United States v. Harris*, 477 F.3d 241, 243–44 (5th Cir. 2007). 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. The firearm 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) (same; crime of violence). *Muscarello* notes that "Congress added these words in part to prevent prosecution where guns 'played' no part in the crime." 118 S. Ct. at 1918.

This instruction presumes that the predicate drug offense or crime of violence is charged in another count of the indictment. If the predicate federal drug offense or crime of violence is not so charged, this instruction must be amended to list the elements of the uncharged drug-trafficking crime or crime of violence. *See United States v. Nelson*, 27 F.3d 199, 202–03 (6th Cir. 1994); *cf. United States v. Wilson*, 884 F.2d 174, 176 n.2 (5th Cir. 1989) (requiring proof of federal predicate drug-trafficking offense at trial even though defendant had previously pleaded guilty to related state trafficking offense). *See also United States v. Montemayor*, 55 F.4th 1003, 1009–10 (5th Cir.

2022) (one drug trafficking conspiracy can support only one firearms conviction under this statute).

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).

A "crime of violence" is a federal felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" 18 U.S.C. § 924(c)(3)(A). Although the statute also includes a second definition, to include any federal felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *see* 18 U.S.C. § 924(c)(3)(B), that second definition was held by the Supreme Court to be unconstitutionally vague. *See United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

"Whether a particular offense is a crime of violence is a question of law for the court to resolve." *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017). The court applies the "categorical approach" to determine whether a federal felony may serve as a predicate for conviction and sentence under § 924(c)(3)(A). The relevant inquiry is not how a particular defendant may commit the crime but whether the federal felony at issue always meets the elements test. *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). If the federal statute sets forth disjunctive or alternative elements, the court may employ the "modified categorical approach," whereby the offense of conviction may be determined by consulting an array of sources. *Mathis v. United States*, 136 S. Ct. 2243, 2249, 2256 (2016). These include the "charging documents, plea agreements, transcripts of plea colloquies, findings of facts and conclusions of law from a bench trial, and jury instructions and verdict forms[.]" *In re Hall*, 979 F.3d 339, 343 (5th Cir. 2020).

The Fifth Circuit has held that specific crimes qualify as "crimes of violence" under the elements test of § 924(c) or similar statutes. Capital kidnapping resulting in death is a "crime of violence." *In re Hall*, 979 F.3d at 346 (citing *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (en banc) (reckless manslaughter is a crime of violence pursuant to similar language in guideline § 2L1.2(b)(A)(ii))). These decisions precede *Borden v. United States*, 141 S. Ct. 1817 (2021), where the Supreme Court held that offenses with the *mens rea* of recklessness do not qualify as violent felonies under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and should be evaluated in light thereof.

Carjacking pursuant to 18 U.S.C. § 2119 and bank robbery pursuant to 18 U.S.C. § 2113 both meet the definition of "crime of violence" in § 924(c)(3)(A). *See United States v. Jones*, 854 F.3d 737, 740–41 (5th Cir. 2017); *United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017) (interpreting similar language in guideline § 4B1.2(a)(1)). However, conspiracy to commit bank robbery does not. *United States v. Kieffer*, 991 F.3d 630, 637 (5th Cir. 2021) (citing *United States v. Reece*, 938 F.3d 630, 636 (5th Cir. 2019)). Nor does RICO conspiracy. *United States v.*

McClaren, 13 F.4th 386, 413–14 (5th Cir. 2021), *cert. denied sub nom. Fortia v. United States*, 142 S. Ct. 1244 (2022).

The substantive offense of Hobbs Act robbery pursuant to 18 U.S.C. § 1951 qualifies as a "crime of violence" under § 924(c)(3)(A). *See Buck*, 847 at 274–75. Similarly, "because there is no distinction between those convicted of aiding and abetting and those convicted as a principal under federal law, aiding and abetting a crime of violence qualifies as a crime of violence as well." *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023). In contrast, conspiracy to commit Hobbs Act robbery fails to satisfy that same statutory definition. *United States v. Lewis*, 907 F.3d 891, 893 (5th Cir. 2018). Likewise, attempted Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3)(A) because a defendant may (1) intend to unlawfully take personal property by means of actual or threatened force and (2) complete a substantial step toward that end without using, attempting to use, or even threatening to use force against another person or another person's property. *Taylor*, 142 S. Ct. at 2022.

The Fifth Circuit has held that attempted murder under 18 U.S.C. § 1114 qualifies as a "crime of violence" as defined in § 924(c)(3)(A). *United States v. Smith*, 957 F.3d 590, 596 (5th Cir. 2020). However, this holding should be weighed against the reasoning in *Taylor*, 142 S. Ct. at 2021–23.

Each of the penalty enhancements in § 924(c)(1)(A) or (B) should be charged as an element of an offense. *See Alleyne v. United States*, 133 S. Ct. 2151, 2163–64 (2013). Enhancements for prior convictions under § 924(c)(1)(C) need not be charged as elements of the offense.

For purposes of the enhancement in § 924(c)(1)(A)(ii), the term "brandished" is defined in § 924(c)(4).

In *Dean v. United States*, 129 S. Ct. 1849 (2009), the Court applied the "discharge" clause in § 924(c)(a)(A)(iii) when, in the course of an armed robbery, the gun was discharged accidentally.

For purposes of the enhancement in § 924(c)(1)(B)(ii), the term "machinegun" is defined in § 921(a)(23), and the terms "firearm silencer or firearm muffler" are defined in § 921(a)(24).

If the defendant is charged with aiding and abetting a violation of § 924(c)(1), the court should instruct the jury using the alternate version of element two. In such cases, the government must prove that the defendant actively participated in the underlying offense with advance knowledge that a confederate would use or carry a gun during the crime's commission. *United States v. Smith*, 609 F. App'x 180, 188 (5th Cir. 2015) (citing *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014)). "Advance knowledge" means "knowledge at a time the accomplice can do something with it—most notably, opt to walk away." *Rosemond*, 134 S. Ct. at 1249–50. "[I]f a defendant continues to participate in a crime after a gun was displayed or used by a confederate,

the jury can permissibly infer from his failure to object or withdraw that he had such knowledge." *Id.* at 1250 n.9.

The Fifth Circuit has held that, if the government seeks more than one § 924(c) conviction, it must prove a separate use or possession of a separate firearm for each predicate offense. *United States v. Campbell*, 775 F.3d 664, 670 (5th Cir. 2014) (possession); *United States v. Phipps*, 319 F.3d 177, 186–89 (5th Cir. 2003) (use). However, if the indictment alleges one offense but multiple firearms, jurors do not have to unanimously agree which weapon was used in connection with the drug-trafficking or violent crime, unless an enhanced firearm-type penalty is sought. *United States v. Suarez*, 879 F.3d 626, 633–34 (5th Cir. 2018).

2.44B

POSSESSING A FIREARM IN FURTHERANCE OF THE 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 possess a firearm in furtherance of a federal drug-trafficking crime [crime of violence].

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 federal drug-trafficking crime [crime of violence]; and

Second: That the defendant knowingly possessed a firearm, and that possession was in furtherance of the defendant's commission of the crime charged in Count _____.

[*Second*: That the defendant aided and abetted _____ (*name associate*) in committing the drug-trafficking crime [crime of violence] alleged in Count ____, and knew in advance that _____ (*name associate*) would be armed.].

To prove the defendant possessed a firearm "in furtherance" of the drug-trafficking crime [crime of violence], the government must prove that the defendant's possession of the firearm furthered, advanced, or helped forward that crime.

Note

18 U.S.C. § 924(c)(1) can be violated in two ways: either (1) by using or carrying a firearm during and in relation to a drug-trafficking crime or crime of violence or (2) by possessing a firearm in furtherance of such a crime. This instruction covers the possession offense; Instruction No. 2.44A covers the "using or carrying" offense.

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 or crime of violence. *See United States v. O'Brien*, 130 S. Ct. 2169, 2175 (2010), and *United States v. McGilberry*, 480 F.3d 326, 329–30 (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).

United States v. Ceballos-Torres, 218 F.3d 409 (5th Cir. 2000), analyzes the meaning of "in furtherance" at length, determining that "using the dictionary definition of 'in furtherance' is the appropriate way to construe the statute." *Id.* at 415. Thus, firearm possession that furthers, advances, or helps forward the drug-trafficking offense violates the statute. *Id.* Although it is technically a correct statement of the law that it "is not necessary to prove that the defendant intended to possess the firearm in furtherance of the crime of violence," the court of appeals has found that adding this language to the court's instruction "unnecessarily confuse[s] the issue," and emphasized that such a statement "should not be used in this circuit." *United States v. Smith*, 878 F.3d 498, 501 (5th Cir. 2017).

The court may consider a number of factors in determining whether a firearm is possessed "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. Moya*, 18 F.4th 480, 483 (5th Cir. 2021); *United States v. Sharp*, 6 F.4th 573, 580 (5th Cir. 2021); *United States v. Nunez-Sanchez*, 478 F.3d 663, 669 (5th Cir. 2007). *See United States v. Yanez-Sosa*, 513 F.3d 194, 203–04 (5th Cir. 2008), for additional instructions on this element.

The mental state requirement in § 924(c)(1)(A) is "knowing possession with a nexus linking the defendant and firearm to the offense." *United States v. Johnson*, 943 F.3d 214 (5th Cir. 2019) (quoting *United States v. Smith*, 878 F.3d 498, 502 (5th Cir. 2017)).

This instruction presumes that the predicate drug offense or crime of violence is charged in another count of the indictment. If the predicate federal drug offense or crime of violence is not so charged, this instruction must be amended to list the elements of the uncharged drug-trafficking crime or crime of violence. *See United States v. Nelson*, 27 F.3d 199, 202–03 (6th Cir. 1994); *cf. United States v. Wilson*, 884 F.2d 174, 176 n.2 (5th Cir. 1989) (requiring proof of federal predicate drug-trafficking offense at trial even though defendant had previously pleaded guilty to related state trafficking offense); *see also United States v. Montemayor*, 55 F.4th 1003, 1009–10 (5th Cir. 2022) (one drug trafficking conspiracy can support only one firearms conviction under this statute).

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).

A "crime of violence" is a federal felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" 18 U.S.C. § 924(c)(3)(A). Although the statute also includes a second definition, to include any federal felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *see* 18 U.S.C. § 924(c)(3)(B), that

second definition was held by the Supreme Court to be unconstitutionally vague. *See United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

"Whether a particular offense is a crime of violence is a question of law for the court to resolve." *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017). The court applies the "categorical approach" to determine whether a federal felony may serve as a predicate for conviction and sentence under § 924(c)(3)(A). The relevant inquiry is not how a particular defendant may commit the crime but whether the federal felony at issue always meets the elements test. *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). If the federal statute sets forth disjunctive or alternative elements, the court may employ the "modified categorical approach," whereby the offense of conviction may be determined by consulting an array of sources. *Mathis v. United States*, 136 S. Ct. 2243, 2249, 2256 (2016). These include the "charging documents, plea agreements, transcripts of plea colloquies, findings of facts and conclusions of law from a bench trial, and jury instructions and verdict forms[.]" *In re Hall*, 979 F.3d 339, 343 (5th Cir. 2020).

The Fifth Circuit has held that specific crimes qualify as "crimes of violence" under the elements test of § 924(c) or similar statutes. Capital kidnapping resulting in death is a "crime of violence." *In re Hall*, 979 F.3d at 346 (citing *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (en banc) (reckless manslaughter is a crime of violence pursuant to similar language in guideline § 2L1.2(b)(A)(ii))). These decisions precede *Borden v. United States*, 141 S. Ct. 1817 (2021), where the Supreme Court held that offenses with the *mens rea* of recklessness do not qualify as violent felonies under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and should be evaluated in light thereof.

Carjacking pursuant to 18 U.S.C. § 2119 and bank robbery pursuant to 18 U.S.C. § 2113 both meet the definition of "crime of violence" in § 924(c)(3)(A). *See United States v. Jones*, 854 F.3d 737, 740–41 (5th Cir. 2017); *United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017) (interpreting similar language in guideline § 4B1.2(a)(1)). However, conspiracy to commit bank robbery does not. *United States v. Kieffer*, 991 F.3d 630, 637 (5th Cir. 2021) (citing *United States v. Reece*, 938 F.3d 630, 636 (5th Cir. 2019)). Nor does RICO conspiracy. *United States v. McClaren*, 13 F.4th 386, 414 (5th Cir. 2021).

The substantive offense of Hobbs Act robbery pursuant to 18 U.S.C. § 1951 qualifies as a "crime of violence" under § 924(c)(3)(A). *See Buck*, 847 at 274–75. Similarly, "because there is no distinction between those convicted of aiding and abetting and those convicted as a principal under federal law, aiding and abetting a crime of violence qualifies as a crime of violence as well." *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023). In contrast, conspiracy to commit Hobbs Act robbery fails to satisfy that same statutory definition. *United States v. Lewis*, 907 F.3d 891, 893 (5th Cir. 2018). Likewise, attempted Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3)(A) because a defendant may (1) intend to unlawfully take personal property by means of actual or threatened force, and (2) complete a substantial step toward that end without using, attempting to use, or even threatening to use force against another person or another person's property. *Taylor*, 142 S. Ct. at 2022.

The Fifth Circuit has held that attempted murder under 18 U.S.C. § 1114 qualifies as a "crime of violence" as defined in § 924(c)(3)(A). *United States v. Smith*, 957 F.3d 590, 596 (5th Cir. 2020). However, this holding should be weighed against the reasoning in *Taylor*, 142 S. Ct. at 2021–23.

Each of the penalty enhancements in § 924(c)(1)(A) or (B) should be charged as an element of an offense. *See Alleyne v. United States*, 133 S. Ct. 2151, 2163–64 (2013). Enhancements for prior convictions under § 924(c)(1)(C) need not be charged as elements of the offense.

For purposes of the enhancement in § 924(c)(1)(A)(ii), the term "brandished" is defined in § 924(c)(4).

In *Dean v. United States*, 129 S. Ct. 1849 (2009), the Court applied the "discharge" clause in § 924(c)(a)(A)(iii) when, in the course of an armed robbery, the gun was discharged accidentally.

For purposes of the enhancement in § 924(c)(1)(B)(ii), the term "machinegun" is defined in § 921(a)(23), and the terms "firearm silencer or firearm muffler" are defined in § 921(a)(24).

If the defendant is charged with aiding and abetting a violation of § 924(c)(1), the court should instruct the jury using the alternate version of element two. In such cases, the government must prove that the defendant actively participated in the underlying offense with advance knowledge that a confederate would possess a gun during the crime's commission. *United States v. Smith*, 609 F. App'x 180, 188 (5th Cir. 2015) (citing *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014)). "Advance knowledge" means "knowledge at a time the accomplice can do something with it—most notably, opt to walk away." *Rosemond*, 134 S. Ct. at 1249–50. "[I]f a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge." *Id.* at 1250 n.9.

The Fifth Circuit has held that, if the government seeks more than one § 924(c) conviction, it must prove a separate use or possession of a separate firearm for each predicate offense. *United States v. Campbell*, 775 F.3d 664, 670 (5th Cir. 2014) (possession); *United States v. Phipps*, 319 F.3d 177, 186–89 (5th Cir. 2003) (use). However, if the indictment alleges one offense but multiple firearms, jurors do not have to unanimously agree which weapon was used in connection with the drug-trafficking or violent crime, unless an enhanced firearm-type penalty is sought. *United States v. Suarez*, 879 F.3d 626, 633–34 (5th Cir. 2018).

For the definition of "Possession," *see* Instruction No. 1.33.

2.45

FALSE STATEMENTS TO FEDERAL AGENCIES AND AGENTS
18 U.S.C. §§ 1001(a)(2), 1001(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 statement [made or used any writing or document];

Second: That the statement was false, fictitious, or fraudulent [the writing or document made or used was false, fictitious, or fraudulent];

Third: That the statement was material [the false, fictitious, or fraudulent statement or entry was material];

Fourth: That the defendant made the statement knowing that it was false [knowing the writing or document contained a false, fictitious, or fraudulent statement or entry];

Fifth: That the defendant made the false statement willfully for the purpose of misleading the _____ (*name of agency of the executive, legislative, or judicial branch of the United States government*); and

Sixth: That the statement pertained to a matter within the jurisdiction of _____, part of the 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 agency of the executive, legislative, or judicial branch of the United States government*).

It is not necessary to show that the _____ (*name of agency of the executive, legislative, or judicial branch of the United States government*) was in fact misled.

Note

See United States v. Ricard, 922 F.3d 639, 650 (5th Cir. 2019); *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 (a) does not apply "to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or document submitted by such party or counsel to a judge

or magistrate in that proceeding." 18 U.S.C. § 1001(b) (preserving 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 the 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").

The question of whether a false statement is made in a "matter within the jurisdiction" of a federal branch of the United States is one of fact. *See, e.g.*, *United States v. Taylor*, 582 F.3d 558, 562 (5th Cir. 2009). 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 *Taylor*, 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. *Taylor*, 582 F.3d at 562. In *United States v. Smith*, the court reaffirmed the expansive approach taken in *Taylor* relative to whether a false statement is within the jurisdiction of a federal agency, finding the requirement established notwithstanding that the federal agency in question "had no direct authority over disbursement of the funds and no power to punish individuals making fraudulent claims." *Smith*, 519 F. App'x 853, 857–58 (5th Cir. 2013) ("We recognized in *Taylor* that a false statement may fall 'within the jurisdiction of a federal agency' if it has the potential to 'contravene the intent' of an agency program."). The *Smith* court further emphasized and explained its rejection of the narrower approach reportedly taken by the Ninth and Sixth Circuits, while also noting the Eleventh Circuit's similar rejection. *Id.* at 857 nn. 2–3.

The definition of materiality is from *United States v. Gaudin*, 115 S. Ct. 2310, 2313 (1995). Additionally, "[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*, 898 F.3d 636, 643 (5th Cir. 2018); *United States v. Richardson*, 676 F.3d 491, 505 (5th Cir. 2012). Moreover, a statement is material if it has a "natural tendency to influence, or be capable of influencing, the decision" of a government agency, but "actual influence is not required*." See United States v. Tantillo,* 686 F. App'x 257, 262 (5th Cir. 2017).

"[A] defendant need not personally make the false statement; it is sufficient that he or she 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 it 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. Bowser*, 964 F.3d 26, 32–33 (D.C. Cir. 2020); *United States v. Moore*, 446 F.3d 671, 678 (7th Cir. 2006).

In certain contexts, a heightened *mens rea* of willfulness may apply. *See United States v. Smukler*, 991 F.3d 472, 488 (3d Cir. 2021) (district court erred by failing to include heightened standard of willfulness in the context of federal election law and should have instructed that the defendant must have known of the statutory obligation to disclose, attempted to frustrate those obligations and knew that the conduct was unlawful).

2.46

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, 516 (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, 1450 (5th Cir. 1994); *United States v. Chaney*, 964 F.2d 437, 444–45 (5th 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). For a definition of "materiality," see Instruction No. 1.40.

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.

2.47

FALSE STATEMENT TO A BANK
18 U.S.C. § 1014

Title 18, United States Code, Section 1014, makes it a crime for anyone to knowingly make a false statement [report] to a federally insured bank [willfully to overvalue any land, property or security] 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 [report] [overvalued any land, property or security] to _____ (*name bank*), as charged;

Second: That the defendant knew the statement [report] was false when the defendant made it [willfully overvalued the land, property or security in a submission];

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. *Wells*, 117 S. Ct. at 927–31.

Judges should be aware that *United States v. Sandlin* has condensed the scienter requirement of this statute to "knowingly 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."). The Committee has amended this instruction to make the statutory distinction clearer.

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, 135–36 (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.

See Instruction Nos. 1.41 "Knowingly"—To Act and 1.42 Deliberate Ignorance.

2.48A

PRODUCTION OF FALSE DOCUMENT
18 U.S.C. §§ 1028(a)(1), 1028(b), 2326

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 [an authentication feature] [a 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 [she] 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 identification 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.

[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. *See 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). Additionally, the *Apprendi* doctrine requires a fourth element if the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. If these are disputed issues, the court should consider giving the Lesser Included Offense Instruction No. 1.35.

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 or her 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. 1.44, 1.45, and 1.46.

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)).

In *United States v. Achaval*, 547 F. App'x 470, 473 (5th Cir. 2013), the court declined (as unnecessary) to decide whether to adopt the definition of "*appears to be* issued by or under the authority of the United States" utilized by the Fourth and Seventh Circuits. *See United States v. Jaensch*, 665 F.3d 83, 91–93 (4th Cir. 2011) (a document "appears to be issued by or under the authority of the United States Government when a reasonable person of ordinary intelligence would believe [it] was issued by or under the authority of the United States government"); *United States v. Spears*, 697 F.3d 592, 599–600 (7th Cir. 2012) (same), *vacated on other grounds and reinstated in part, Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc).

2.48B

POSSESSION OF FALSE DOCUMENT WITH INTENT TO DEFRAUD UNITED STATES
18 U.S.C. §§ 1028(a)(4), 1028(b), 2326

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 such document or feature be used 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 knowingly possessed an identification document [an authentication feature] [a false identification document];

Second: That he [she] 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.

[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 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. *See 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). Additionally, the *Apprendi* doctrine requires a fourth element if the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. If these are disputed issues, the court should consider giving Lesser Included Offense Instruction No. 1.35.

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 or her 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. 1.44, 1.45, and 1.46.

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In *United States v. Achaval*, 547 F. App'x 470, 473 (5th Cir. 2013), the court declined (as unnecessary) to decide whether to adopt the definition of "*appears to be* issued by or under the authority of the United States" utilized by the Fourth and Seventh Circuits. *See United States v. Jaensch*, 665 F.3d 83, 91–93 (4th Cir. 2011) (a document "appears to be issued by or under the authority of the United States Government when a reasonable person of ordinary intelligence would believe [it] was issued by or under the authority of the United States government"); *United States v. Spears*, 697 F.3d 592, 599–600 (7th Cir. 2012) (same), *vacated on other grounds and reinstated in part*, 729 F.3d 753 (7th Cir. 2013) (en banc).

2.48C

AGGRAVATED IDENTITY THEFT
18 U.S.C. § 1028A(a)(1)

Title 18, United States Code, Section 1028A(a)(l), makes it a crime for anyone to knowingly transfer [possess] [use] without lawful authority, a means of identification of another person during and in relation to a felony relating to theft of government money or property [mail, wire, or healthcare fraud] [false statements to the government].

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 transferred [possessed] [used] a means of identification of another person;

Second: That the defendant did so without lawful authority;

Third: That the defendant transferred [possessed] [used] the means of identification of another person during and in relation to _____ (*describe the offense enumerated in* § 1028A(c)); and

Fourth: That the defendant knew that the means of identification in fact belonged to another real person, living or dead.

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, or employer or taxpayer identification number.

"Without lawful authority" means that the defendant transferred, possessed, or used another's means of identification either without that person's permission, beyond the scope of that person's legally obtained permission, or having obtained that person's permission illegally.

Identity theft is committed when a defendant uses the means of identification itself in a manner to defraud or deceive. It is not enough to be a violation of this law that the use of a means of identification was helpful or even necessary to accomplish the charged conduct unless the accused used that means of identification to deceive about the identity of the person performing the actions or receiving the benefits or services.

Note

The definition of "means of identification" is from 18 U.S.C. § 1028(d)(7)(A). In the appropriate case, the definitions included in 18 U.S.C. § 1028(d)(7)(B) through (D) should be considered.

"Without lawful authority" does not require actual theft or misappropriation of a person's means of identification. It includes situations where a defendant gains lawful possession of the means of identification but proceeds to use that identification unlawfully and beyond the scope of permission granted or in excess of the authority granted. *United States v. Mahmood*, 820 F.3d 177, 187–89 (5th Cir. 2016).

In *Dubin v. United States*, 143 S. Ct. 1557, 1563 (2023), the Supreme Court held that a defendant did not "use" a patient's means of identification "in relation to" healthcare fraud by using the patient's name and Medicaid reimbursement number when overbilling Medicaid for services performed by the psychological testing company he managed. The government's expansive interpretation of the statute would impose a mandatory minimum sentence of two years any time a name or other means of identification happens to be part of the payment or billing method used in the commission of a predicate fraud offense. Instead, the Court defined "use" and "in relation to" as reproduced in the last paragraph of this instruction. Borrowing from the Sixth Circuit, the Court explained that the relevant language in § 1028A(a)(1) "covers misrepresenting *who* received a certain service, but not fraudulent claims regarding *how* or *when* a service is performed." *Id.* at 1568 (emphasis in original); *see also United States v. Croft*, 87 F.4th 644, 648–49 (5th Cir. 2023) (finding evidence sufficient where defendant used means of identification to misrepresent the identity of the persons teaching courses when the qualifications of such persons was essential to approval of the applications for approval for funding). A trial judge may wish to additionally instruct as follows:

> In other words, the defendant "uses" the means of identification to deceive someone else by misrepresenting who is participating in the underlying criminal conduct.

While the *Dubin* Court did not find it necessary to define the other two verbs in the first element of this statute, it noted that "transfer" and "possess" "are most naturally read in the context of § 1028A(a)(1) to connote theft." *Dubin*, 143 S. Ct. at 1570. The Government agreed at oral argument that these two verbs "refer to circumstances in which the information is stolen." *Id.*

The statute criminalizes as aggravated identity theft the use of another person's identity during and in relation to a large number of felony offenses listed in 18 U.S.C. § 1028A(c)(1) through (11). The introductory paragraph and the third element should reflect the appropriate offense.

The fourth element is required by *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1889–94 (2009). *See also United States v. Carbins*, 882 F.3d 557, 563–64 (5th Cir. 2018) (quoting *Flores-Figueroa*, 129 S. Ct. at 1894); *United States v. Broussard*, 675 F. App'x 454, 456–57 (5th Cir. 2017); *United States v. Biyiklioglu*, 652 F. App'x 274, 282–83 (5th Cir. 2016).

2.48D

POSSESSION OF AN IDENTIFICATION DOCUMENT OR AUTHENTICATION FEATURE WHICH WAS STOLEN OR PRODUCED WITHOUT LAWFUL AUTHORITY
18 U.S.C. §§ 1028(a)(6), 1028(b), 2326

Title 18, United States Code, Section 1028(a)(6) makes it a crime for anyone to knowingly possess an identification document [authentication feature] of the United States [a sponsoring entity of an event designated as a special event of national significance] that was stolen [produced without lawful authority], knowing that the document [feature] was stolen [produced without lawful authority].

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 an identification document [authentication feature];

Second: That the identification document [authentication feature] is or appears to be an identification document [authentication feature] of the United States [a sponsoring entity of an event designated as a special event of national significance], that is, _____ (*specify issuing authority*);

Third: That the identification document [authentication feature] was stolen [produced without lawful authority]; and

Fourth: That the defendant knew that the identification document [authentication feature] was stolen [produced without lawful authority].

The term "identification document" means a document made or issued by or under the authority of the United States Government or a sponsoring entity of an event designated as a special event of national significance 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 "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 "issuing authority" means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and includes

the United States Government or a sponsoring entity of an event designated by the President as a special event of national significance.

[The term "produce" includes alter, authenticate, or assemble.]

["Produced without lawful authority" means that the issuing authority did not produce the identification document [authentication feature] or authorize its production.]

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

In *United States v. Achaval*, 547 F. App'x 470, 473 (5th Cir. 2013), the court found it unnecessary to decide whether to adopt the definition of "appears to be issued by or under the authority of the United States Government" utilized by the Fourth and Seventh Circuits. *See id.* (citing *United States v. Jaensch*, 665 F.3d 83, 91–93 (4th Cir. 2011) (an identification document is not issued by the United States government but "appears to be issued by or under the authority of the United States Government" when "a reasonable person of ordinary intelligence would believe [it] was issued by or under the authority of the United States government") and *United States v. Spears*, 697 F.3d 592, 599–600 (7th Cir. 2012) (same), *vacated on other grounds and reinstated in part*, 729 F.3d 753 (7th Cir. 2013) (en banc)). The Fifth Circuit noted that a document's "level of completion" bears upon the "appears to be issued" requirement. *Achaval,* 547 F. App'x at 473–74 (upholding conviction under 18 U.S.C. § 1028(a)(1) where defendant forged military identification documents in his own name).

See also United States v. Svoboda, 633 F.3d 479, 481 (6th Cir. 2011) (affirming § 1028(a)(6) conviction where defendant forged a driver's license purporting to be issued by the Department of Homeland Security).

2.49A

USE OF UNAUTHORIZED ACCESS DEVICE
18 U.S.C. §§ 1029(a)(2), 2326

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 [her] 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 [her] 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). However, account numbers, which could have been used in connection with other codes to obtain access to those accounts, are not themselves "access devices" when the account numbers are used solely to originate paper transactions. *See United States v. Hughey*, 147 F.3d 423, 434–36 (5th Cir. 1998).

A "counterfeit access device" under § 1029(a)(1) includes an otherwise legitimate device procured by the use of false information. *See United States v. Soape*, 169 F.3d 257, 263–64 (5th Cir. 1999).

On "unauthorized access device," *see United States v. Inman*, 411 F.3d 591, 594–95 (5th Cir. 2005) (differentiating between a counterfeit access device and an unauthorized access device).

For cases describing the "intent to defraud," *see United States v. Swenson*, 25 F.4th 309, 318–21 (5th Cir. 2022) (discussing "intent to defraud" in the context of mail fraud statute); *see also United States v. Evans*, 892 F.3d 692, 712–14 (5th Cir. 2018) ("'[I]ntent to defraud' requires 'an intent to (1) deceive, and (2) cause some harm to result from the deceit.'") (quoting *United States v. Moser*, 123 F.3d 813, 820 (5th Cir. 1997)).

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," "Commerce," and "Affecting" Commerce are in Instruction Nos. 1.44, 1.45, 1.46, and 1.47, respectively.

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. § 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. 1.35.

2.49B

POSSESSION OF COUNTERFEIT OR UNAUTHORIZED ACCESS DEVICES
18 U.S.C. §§ 1029(a)(3), 2326

Title 18, United States Code, Section 1029(a)(3), makes it a crime for anyone to possess fifteen or more counterfeit or unauthorized access devices with the 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 knowingly possessed fifteen or more access devices;

Second: Those devices were counterfeit or unauthorized;

Third: The defendant possessed those devices with the intent to defraud; and

Fourth: The defendant's conduct affected interstate or foreign commerce.

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 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 "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device.

[The term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.]

The government is not required to prove that the defendant knew that his [her] 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 [her] actions or intended or anticipated 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.

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

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, 553–54 (5th Cir. 1987). However, account numbers, which could have been used in connection with other codes to obtain access to those accounts, are not themselves "access devices" when the account numbers are used solely to originate paper transactions. *See United States v. Hughey*, 147 F.3d 423, 434–36 (5th Cir. 1998).

A "counterfeit access device" under § 1029(a)(1) includes an otherwise legitimate device procured by the use of false information. *See United States v. Soape*, 169 F.3d 257, 262–64 (5th Cir. 1999).

On "unauthorized access device," *see United States v. Inman*, 411 F.3d 591, 594–95 (5th Cir. 2005) (differentiating between a counterfeit access device and an unauthorized access device).

For cases describing the "intent to defraud," *see United States v. Swenson*, 25 F.4th 309, 318–21 (5th Cir. 2022) (discussing "intent to defraud" in the context of mail fraud statute); *see also United States v. Evans*, 892 F.3d 692, 712–14 (5th Cir. 2018) ("'[I]ntent to defraud' requires 'an intent to (1) deceive, and (2) cause some harm to result from the deceit.'") (quoting *United States v. Moser*, 123 F.3d 813, 820 (5th Cir. 1997)). "Intent to defraud" may be established with circumstantial evidence. *United States v. Ismoila*, 100 F.3d 380, 387 (5th Cir. 1996).

The definitions of "Interstate Commerce," "Foreign Commerce," "Commerce," and "Affecting" Commerce"—Defined are in Instruction Nos. 1.44, 1.45, 1.46, and 1.47, respectively. For more on "affecting commerce," *see United States v. Anderson*, 560 F.3d 275, 279 (5th Cir. 2009).

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. § 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. 1.35.

2.49C

POSSESSION OR TRAFFICKING OF DEVICE-MAKING EQUIPMENT
18 U.S.C. § 1029(a)(4)

Title 18, United States Code, Section 1029(a)(4), makes it a crime for anyone to knowingly, and with intent to defraud, produce, traffic in, have control or custody of, or possess device-making equipment.

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 [trafficked in] [had custody of] [had control of] [possessed] device-making equipment;

Second: That the defendant acted with intent to defraud; and

Third: That the defendant's conduct affected interstate [foreign] commerce.

The government is not required to prove that the defendant knew that his [her] 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 [her] 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 "device-making equipment" means any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device.

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 "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or counterfeit access device.

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

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, 553 (5th Cir. 1987); *see also United States v. Soape*, 169 F.3d 257, 262–63 (5th Cir. 1999) ("access device" and "counterfeit access device" include credit cards issued by reason of submission of false information). However, account numbers, which could have been used in connection with other codes to obtain access to those accounts, are not themselves "access devices" when the account numbers are used solely to originate paper transactions. *See United States v. Hughey*, 147 F.3d 423, 434–36 (5th Cir. 1998).

Though the Fifth Circuit has not addressed the question, courts have generally held that "access devices" only include instruments or codes that grant access to a particular account rather than merely enabling unauthorized use of some services. For example, the Tenth Circuit has held that cloned satellite TV equipment was not an "access device." *United States v. McNutt*, 908 F.2d 561, 563–64 (10th Cir. 1990) (although the equipment enabled use of another's TV signal, it could not allow access or cause any additional charges to anyone's account); *see also United States v. Jackson*, 484 F. Supp. 2d 572, 576 (W.D. Tex. 2006) (improperly obtained complimentary airline tickets enabled boarding of flights but were not associated with any customer or company account).

For cases describing the "intent to defraud," *see United States v. Swenson*, 25 F.4th 309, 318–21 (5th Cir. 2022) (discussing "intent to defraud" in the context of mail fraud statute). *See also United States v. Evans*, 892 F.3d 692, 712–714 (5th Cir. 2018) ("'[I]ntent to defraud' requires 'an intent to (1) deceive, and (2) cause some harm to result from the deceit.'") (quoting *United States v. Moser*, 123 F.3d 813, 820 (5th Cir. 1997)). In the context of prosecutions for wire fraud under 18 U.S.C. § 1343, the jury instruction must define "intent to defraud" as requiring an intent both to deceive and to cheat by causing harm. *United States v. Greenlaw*, 84 F.4th 325, 350–52 (5th Cir. 2023); *see also United States v. Saini*, 23 F.4th 1155, 1160–61 (9th Cir. 2022) (applying the conjunctive definition in the context of 18 U.S.C. § 1029(a)(3)–(4)).

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, 1003 (5th Cir. 1987).

Definitions of "Interstate Commerce," "Foreign Commerce," "Commerce," and "Affecting" Commerce are in Instruction Nos. 1.44, 1.45, 1.46, and 1.47, respectively.

2.50

FALSE STATEMENTS RELATING TO HEALTH CARE MATTERS
18 U.S.C. §§ 1035(a)(1), 1035(2)

Title 18 U.S.C. Section 1035, makes it a crime for anyone, in any matter involving a health care benefit program, to knowingly and willfully (1) falsify, conceal, or cover up by any trick, scheme, or device a material fact; or (2) make any materially false, fictitious, or fraudulent statements or representations, or make or use any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services.

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 falsified [concealed] [covered up] a fact by any trick, scheme, or device;

[*First*: That the defendant made any false [fictitious] [fraudulent] statement or representation [made or used any false writing] [made or used any false document] knowing the same to contain any false, fictitious or fraudulent statement or entry];

Second: That the fact [false, fictitious, or fraud statement or representation] [false writing or document] was material;

Third: That the defendant did so in connection with the delivery of [payment for] health care benefits, items, or services involving a health care benefit program; and

Fourth: That the defendant did so knowingly and willfully.

A "health care benefit program" is defined as "any public or private plan or contract, affecting commerce, under which any medical benefit item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit item, or service, for which payment may be made under the plan or contract."

A statement, representation, or entry is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A statement, representation, or entry 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 statement, representation, or entry is "material" if it has a natural tendency to influence, or is capable of influencing, the institution to which it is addressed.

Note

For cases that set forth the elements of an offense charged under 18 U.S.C. § 1035, *see United States v. Hamilton*, 37 F.4th 246, 260 (5th Cir. 2022), *United States v. Dailey*, 868 F.3d 322, 329–30 (5th Cir. 2017), *United States v. Megwa*, 656 F. App'x 674, 680 (5th Cir. 2016), and *United States v. Delgado*, 668 F.3d 219, 225–26 (5th Cir. 2012).

By statutory definition the only type of health care benefit programs covered by the statute are those that affect commerce. *See* 18 U.S.C. § 1035(b) (incorporating by reference 18 U.S.C. § 24(b)). Congress used the phrase "affecting commerce" to provide the federal jurisdictional element that connects the offense to interstate commerce. *See United States v. Mann*, 493 F.3d 484, 494 (5th Cir. 2007) (reading "affecting commerce" in 18 U.S.C. § 1951, the Hobbs Act, to require proof of an effect on interstate commerce); *see also United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995) (statutes containing a "jurisdictional element which would ensure, through case-by-case inquiry, that the [prohibited act] in question affects interstate commerce" pass muster under the Commerce Clause). Since the object of § 1035 must be a "health care benefit program," and since health care benefit programs must, by definition, "affect commerce," it would appear that proof of an effect on interstate commerce is both a jurisdictional requirement and an essential element of the offense. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008) (discussing whether the "affecting commerce" element in § 1347 is fairly included in "health care benefit program" or must be separately included as an element in the jury charge); *United States v. Westbrook*, 119 F.3d 1176, 1191 (5th Cir. 1997) (holding in the context of a money laundering prosecution under 18 U.S.C. § 1956 that the Government is required to provide proof of some effect on interstate commerce when a statute has an "affecting commerce" like requirement); *United States v. Ogba*, 526 F.3d 214, 238 (5th Cir. 2008) (interstate commerce showing satisfied for offense charged under 18 U.S.C. § 1347 because payments were received through Medicare system).

See Instruction Nos. on Interstate Commerce—Defined, Foreign Commerce—Defined, Commerce—Defined, and "Affecting Commerce"—Defined at 1.44, 1.45, 1.46, and 1.47 respectively.

See Instruction Nos. 1.41 "Knowingly"—To Act and 1.43 "Willfully"—To Act.

The definition of "health care benefit program" is provided in 18 U.S.C. § 24(b).

The definition of "false" comes from *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994).

The definition of materiality is from *United States v. Gaudin*, 115 S. Ct. 2310, 2313, 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. Radley*, 632 F.3d 177, 185 (5th Cir. 2011) ("The test for materiality is whether a misrepresentation 'has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed.'") (citations omitted). For a further definition of "materiality," *see* Instruction No. 1.40.

2.51

TRANSMISSION OF WAGERING INFORMATION
18 U.S.C. § 1084

Title 18, United States Code, Section 1084, makes it a crime for anyone to use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.

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*);

Fourth: That betting or wagering on the sporting events or contests described in the indictment is illegal in either _____ or _____ (*name states or state and foreign place*); and

Fifth: 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 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). However, § 1084(b) excludes the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a state or

foreign country where betting on that sporting event or contest is legal into a state or foreign country where such betting is also legal. *See Murphy v. Nat'l Collegiate Athletic Ass'n.*, 138 S. Ct. 1461, 1483 (2018) (describing federal regulation of gambling as based on legality in the state).

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, 24–25 (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. 1.44, 1.45, and 1.46. 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, 139 (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 instruction may need to be altered accordingly.

2.52A

MURDER (FIRST DEGREE)
18 U.S.C. § 1111

Title 18, United States Code, Section 1111(a), makes it a crime for anyone to murder another human being with premeditation [in the commission of certain felonies] [in the attempted commission of certain felonies].

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 _____ (*name of alleged victim*);

Second: That the defendant killed _____ (*name of alleged victim*) with malice aforethought;

Third: That the killing was premeditated [perpetrated by poison] [perpetrated by lying in wait]; and

[Third: That the killing was committed in the perpetration of [attempt to perpetrate] arson [escape] [murder] [kidnapping] [treason] [espionage] [sabotage] [aggravated sexual abuse] [sexual abuse] [child abuse] [burglary] [robbery] [a pattern or practice of assault or torture against a child or children]; 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 acted out of spite, hatred, malevolence, or ill will toward the victim.

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 before, during, and after the killing which shed light on the defendant's state of mind, before and at the time of the killing.

Note

18 U.S.C. §1111(a) defines two types of murder as murder in the first degree: (1) premeditated killings; and (2) killings while in the commission or attempted commission of certain felonies (felony-murder rule).

This instruction applies to every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premediated killing.

This instruction also applies to the felony-murder rule. The felony murder rule encompasses murders committed while in the commission or attempted commission of certain felonies. Felony Murder, 2 Subst. Crim. L. § 14.5 (3d ed.). 18 U.S.C § 1111 enumerates the following felonies as qualifying for first degree murder: any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or felonies perpetrated as part of a pattern or practice of assault or torture against a child or children. If felony murder is charged, the alternative third element should be given. The jury charge should also instruct on the elements of the charged felony.

Additional definitions were added in subsection (c) in a 2003 amendment for "assault," "child," "child abuse," "pattern or practice of assault or torture," "serious bodily injury," and "torture." 18 U.S.C. §1111(c).

The Fifth Circuit cited the instruction regarding "premeditated murder" with approval in *United States v. Agofsky*, 516 F.3d 280, 282 n.2 (5th Cir. 2008); s*ee also United States v. Reff*, 479 F.3d 396, 402 (5th Cir. 2007).

For further context on what constitutes a sufficient period of time for premeditation, *see United States v. Burden*, 964 F. 3d 339, 350 (5th Cir. 2020) ("[N]o particular period of time is necessary for…deliberation and premeditation…just that there must be some appreciable time for reflection and consideration before execution of the act.") (brackets and citation omitted).

If appropriate, use Instruction No. 1.35 for Lesser Included Offense, Instruction No. 2.52B for Second Degree Murder, and Instruction No. 2.53 for Voluntary Manslaughter. *See United States v. Snarr*, 704 F.3d 368, 388–92 (5th Cir. 2013) (analyzing and affirming trial court's refusal to give lesser included offense instruction); *Reff*, 479 F.3d at 402; *United States v. Harris*, 420 F.3d 467, 476–78 (5th Cir. 2005); *see generally United States v. Browner*, 889 F.2d 549 (5th Cir. 1989). For an extended discussion of this statute as well as the state of mind for the lesser included offenses *see United States v. Chagra*, 638 F. Supp. 1389, 1399–1404 (W.D. Tex. 1986).

For a discussion of the appropriateness of giving affirmative defense instructions *see Mathews v. United States*, 108 S. Ct. 883, 886 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"); *United States v. Branch*, 91 F.3d 699, 712 (5th Cir. 1996) ("the merest scintilla of evidence in a defendant's favor does not warrant a jury instruction regarding an affirmative defense for which the defendant bears the initial burden of production . . . . [T]here must be evidence sufficient for a reasonable jury to find in [the defendant's] favor.

We have insisted that the evidence be sufficient to raise a factual question for a reasonable jury."); s*ee also Frascarelli v. U.S. Parole Comm'n*, 857 F.3d 701, 707 (5th Cir. 2017); *United States v. Herbert*, 813 F.3d 551, 560 n.5 (5th Cir. 2015). For a recent discussion of a defendant's right to jury instructions on a theory of "imperfect self-defense," *see United States v. Britt*, 79 F.4th 1280, 1289–93 (10th Cir. 2023) (finding district court abused its discretion in refusing to provide requested jury instruction).

For a discussion of liability under *Pinkerton v. United States*, 66 S. Ct. 1180 (1946), and caution regarding the use of special interrogatories for the jury in cases involving alternative possible theories of liability, *see United States v. Gonzales*, 841 F.3d 339, 344–53 (5th Cir. 2016).

2.52B

MURDER (SECOND DEGREE)
18 U.S.C. § 1111

Title 18, United States Code, Section 1111(a), 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 _____ (*name of alleged victim*);

Second: That the defendant killed _____ (*name of alleged victim*) 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 acted out of spite, hatred, malevolence, or ill will toward the victim.

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 before, during, and after the killing which tend to shed light on the defendant's state of mind, before and at the time of the killing.

Note

If applicable, use Instruction Nos. 1.35 and 2.53 for Lesser Included Offense and Voluntary Manslaughter. When Voluntary Manslaughter is also charged, this instruction should inform the jury that the Government bears the burden to prove absence of "heat of passion" beyond a reasonable doubt. *Frascarelli v. United States Parole Comm'n*, 857 F.3d 701, 707 (5th Cir. 2017).

"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. Harrelson*, 766 F.2d 186, 189 (5th Cir. 1985); *see also United States v. Browner*, 889 F.2d 549, 551–52 (5th Cir. 1989). When "the crime is attempted second-degree murder, the Government must prove defendant had the specific intent to kill." *United States v. White*, 762 F. App'x 212, 213 (5th Cir. 2019). For a discussion of the statute as well as the varying intent requirements and issues associated with lesser included offenses, see the note to Instruction No. 2.52A.

For a detailed discussion of "deliberately," *see United States v. Shaw*, 701 F.2d 367, 393 (5th Cir. 1983), *abrogated on other grounds by Greer v. Miller*, 107 S. Ct. 3102 (1987).

2.53

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 _____ (*name of alleged victim*);

Second: That the defendant did so without malice, that is, upon a sudden quarrel or while in the heat of passion; and

Third: That the killing took place within the territorial [special maritime] jurisdiction of the United States.

"Heat of passion" means a passion of fear or rage in which the defendant loses his [her] normal self-control. This loss of self-control is the result of circumstances that would provoke such a passion in an ordinary person, but did not justify the use of deadly force.

Note

The language of this instruction was referenced in *United States v. Harris*, 420 F.3d 467, 476 (5th Cir. 2005).

A defendant may argue that he [she] was not acting in heat of passion, but rather lawfully in self-defense or defense of another. *See* Instruction No. 1.39.

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) (*Browner I*) (conviction for voluntary manslaughter reversed and new trial ordered for failure to instruct on lesser included offense of involuntary manslaughter).

Heat of passion is described in *Browner*, 889 F.2d at 552.

2.54

KIDNAPPING
18 U.S.C. §§ 1201(a)(1), 1201(g)

Title 18, United States Code, Section 1201(a)(1), makes it a crime for anyone to unlawfully kidnap [seize] [confine] [inveigle] [decoy] [abduct] [carry away] another person in or affecting interstate or foreign commerce for some purpose or benefit [ransom] [reward].

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] [decoyed] [abducted] [carried away] _____ (*the person described in the indictment*), as charged;

Second: That the defendant kidnapped [seized] [confined] [inveigled] [decoyed] [abducted] [carried away] _____ for some reward or purpose or benefit;

Third: That the defendant transported [seized] [confined] [kidnapped] [abducted] [carried away] _____ (*person described in indictment*) without their consent; and

Fourth: The defendant willfully transported _____ (*the person described in the indictment*), and such transportation was in interstate or foreign commerce [the defendant traveled in interstate or foreign commerce in committing or in furtherance of the commission of the offense] [the defendant used the mail or any means, facility or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense];

[*Fifth*: the death of any person results from the defendant's conduct]

To "kidnap" a person means to unlawfully hold, keep, detain, or confine the person against his [her] will and without his [her] consent. Involuntariness or coercion in connection with the victim's detention is an essential part of the offense.

[To "inveigle" a person means to lure, entice, or lead the person astray by false representations, promises, or other deceitful means.]

You need not unanimously agree on why the defendant kidnapped the person in question, as long as you each find that he [she] had some purpose or derived some benefit from the kidnapping.

The government need not prove that the defendant knew he [she] was transporting _____ (*the person described in the indictment*) in interstate [foreign] commerce, only that he [she] did. The person need not be alive when transported across a State boundary.

[The government has alleged that the defendant's actions resulted in a person's death. The government bears the burden of proving each element of the offense beyond a reasonable doubt. If you find that the first four elements of the crime were proven beyond a reasonable doubt, you must then determine whether the government proved beyond a reasonable doubt that the defendant's actions caused a person's death. If you find that the government proved beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form. If, on the other hand, you find that the government failed to prove beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form.]

Note

This section provides for several bases for jurisdiction. In addition to the instruction above, these include 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)(1). *United States v. Meyer*, 63 F.4th 1024 (5th Cir. 2023) (clarifying that the statute allows for the "offender's own interstate or foreign travel" to supply the "jurisdictional hook" as long as the travel is committed or in furtherance of the commission of the offense). Other jurisdictional circumstances may be found in subsection (e) or subsections (a) (2)–(5). If these are charged, the instruction should be modified accordingly.

In several cases, the Fifth Circuit has stated to prove a violation of 18 U.S.C. § 1201(a)(1) the Government must prove "(1) the transportation in interstate [or foreign] commerce (2) of an unconsenting person who is (3) held for ransom or reward or otherwise, (4) such acts being done *knowingly and willfully*." *See U.S. v. Mitchell*, 732 F. App'x 298 (5th Cir. 2018); *U.S. v. Garza-Robles*, 627 F.3d. 161 (5th Cir. 2010); *U.S. v. Barton*, 257 F.3d 433 (5th Cir. 2001). *But see U.S. v. Sneezer*, 983 F.2d 920 (9th Cir. 1992) (disagreeing with including the phrase "knowingly and willingly": "Some cases in this and other circuits have stated that §1201(a) includes 'knowing and willful' kidnapping as an element . . . . *United States v. Crosby*, 713 F.2d 1066, 1070 (5th Cir. 1983); *Hattaway v. U.S.*, 399 F.2d 431, 433 (5th Cir. 1968). However, these cases are inapposite because they were based on interpretations of an earlier version of §1201(a). In 1972, the statute was amended to remove the word "knowingly" from the statute and to make subsections (1) and (2) two separate bases for kidnapping a federal crime, with the word "willful" appearing only in subsection (1). We believe that the removal of the word knowingly and the placement of the word 'willfully' only in subsection (a)(1) indicates that Congress intended subsection (a)(2) to be a general intent crime. The cases that refer to §1201(a) as a specific intent crime do not address the fact that the statute has changed.").

There are also a number of penalty enhancements and mandatory minimum penalties 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); *Alleyne v. United States*, 133 S. Ct. 2151, 2163–64 (2013). If these are disputed issues, the court should consider giving a lesser included instruction. *See* Instruction No. 1.35.

Consent is a complete defense. *See Hattaway v. United States*, 399 F.2d 431, 433 (5th Cir. 1968).

Definitions of "Interstate Commerce," "Foreign Commerce," and "Commerce" can be found in Instruction Nos. 1.44, 1.45, and 1.46. The definition of "willfully" can be found in Instruction No. 1.43. Transporting a victim from a foreign country to the United States qualifies as 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). Furthermore, a defendant does not have to transport the victim personally in interstate commerce as long as the victim is transported in interstate commerce by associates of the defendant. *See United States v. Jackson*, 978 F.2d 903, 910 (5th Cir. 1992).

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). The statute includes no requirement of an extended duration of the requisite restraint. *See United States v. Anderson*, 819 F. App'x 220, 223-24 (5th Cir. 2020) (rejecting assertion that confinement must be for an extended period of time or that it extend beyond that necessary to commit another crime (i.e., robbery)). *But see Chatwin v. United States*, 66 S. Ct. 233, 235 (1946) (holding that an "act of holding a kidnapped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period.").

The Fifth Circuit has interpreted the phrase "for ransom, reward or otherwise" in the statute as comprehending any purpose at all. *Webster*, 162 F.3d at 328–30; *see also United States v. Miles*, 829 F. App'x 686, 687 (5th Cir. 2020) (finding no plain error in jury instruction that followed statute in incorporating "ransom or reward" in light of strong evidence that kidnapping was committed for some purpose or benefit); *United States v. Williams*, 998 F.2d 258, 262 (5th Cir. 1993) (approving a charge using the term "for immoral purposes" because sexual gratification is a purpose or benefit). The jury does not need to be unanimous 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, 638–40 (5th Cir. 2001).

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, 86–87 (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).

An instruction is warranted to inform the jury that a defendant is criminally liable for kidnapping when the defendant joins the conspiracy after the victim was transported in foreign or interstate commerce. *See United States v. Garza-Robles*, 627 F.3d 161, 169 (5th Cir. 2010); *United States v. Barksdale-Contreras*, 972 F.2d 111, 114 (5th Cir. 1992).

It is currently unanswered whether an individual who is not a biological parent of a child, but is acting *in loco parentis*, is exempted from prosecution. The Fifth Circuit has referenced cases

in the Tenth and Eighth Circuits, which found an exemption. *United States v. Maitland*, 690 F. App'x 181 (5th Cir. 2017) (citing *United States v. Floyd*, 81 F.3d 1517, 1522–25 (10th Cir. 1996); *Miller v. United States*, 123 F.2d 715, 716–18 (8th Cir. 1941)).

2.55

HOSTAGE TAKING
18 U.S.C. § 1203

Title 18, United States Code, Section 1203(a), makes it a crime for anyone to seize or detain, and threaten to kill, injure or continue to detain another person in order to compel a third person or governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained.

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 seized or detained another person;

Second: That the defendant threatened to kill, injure, or continue to detain another person; and

Third: That the defendant made the threat[s] with the purpose of compelling a third person or government entity to do or abstain from doing any act as a condition for the release of another person. The condition for release may be explicit or implicit.

[*Fourth*: That the defendant's actions resulted in the death of any person.]

A person is seized or detained when the person is held or confined against [his [her] will by physical restraint, fear, or deception for an appreciable period of time. [The fact that a person may initially agree to accompany the hostage taker does not prevent a later seizure or detention.]

Note

To "seize" or "detain" is not limited to violence, physical force, or threat. To frighten or deceive as a form of mental restraint are sufficient to satisfy this element of the crime. *See United States v. Ibarra-Zelaya*, 465 F.3d 596, 603 (5th Cir. 2006) (holding that an armed defendant who transferred illegal aliens from one location to another will satisfy the element to "seize" or "detain" element); *United States v. Sanchez-Angeles*, 138 F. App'x 642, 644 (5th Cir. 2005) (holding that illegal aliens had been seized or detained where they did not pay their smuggling fee and were locked in a room guarded by armed individuals); *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991). The term "detention" has been used by courts as a synonym for confinement. *See Carrion-Caliz*, 944 F.2d at 225 (stating "The act of holding a person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against that person's will and with a willful intent so to confine the victim"). In *Carrion-Caliz*, 944 F.2d at 225, the Fifth Circuit concluded it is not necessary to be seized or detained at inception; it is sufficient when a person voluntarily accompanies the hostage taker and is later held against his or her will.

The paragraph in instruction after element fourth requires that the victim be held for "an appreciable" amount of time because the degree of time is a necessary element. *See United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991); *see also United States v. Spezzia*, 307 F. App'x 853, 854 (5th Cir. 2009).

An implicit inference can be made to threaten or continue to detain. *See Ibarra-Zelaya*, 465 F.3d at 603 (holding that the appellants' demand to the aliens' families that they send money was a threat that the aliens would not be released if payment was not received and the presence of guns was an implicit threat of continued detention); *United States v. Rivera-Benito*, 136 F. App'x 690, 692 (5th Cir. 2005) (holding that an illegal alien was later confined when her initial smuggling fee had been increased and she would not be released until the fee was paid).

The threat made to compel a third person does not have to be directly communicated. *See Ibarra-Zelaya*, 465 F.3d at 604 (holding that evidence showed a communication was attempted to the aliens' relatives when the appellants told the aliens to call their families telling them to pay their smuggling fee and on one occasion called the relatives themselves requesting payment); *United States v. De Jesus-Batres*, 410 F.3d 154 (5th Cir. 2005) (holding that the defendants demanding the aliens call their relatives to demand additional smuggling fees was sufficient to constitute a threat to compel a third person to act).

Demanding a ransom is not an element of §1203. *United States v. Cedillo-Narvaez*, 761 F.3d 397, 402 (5th Cir. 2014); *United States v. Rivera-Benito*, 136 F. App'x 690, 691 (5th Cir. 2005).

The offense carries a maximum penalty of life imprisonment. It carries an enhanced penalty of death "if the death of any person results." 18 U.S.C § 1203. If the indictment contains this enhancement, the trial judge should add the fourth element to the charge. While the instruction for the fourth element includes "resulting," which implies causation, further instruction may be warranted to ensure the jury is informed as to the "but-for" causation requirement. *See United States v. Burrage*, 134 S. Ct. 881 (2014).

Conduct outside the United States is under the jurisdiction of § 1203 if the hostage or offender is a United States national, the offender is found in the United States, or if the hostage taking is done to compel action by the United States Government. 18 U.S.C. § 1203(b)(1); s*ee also United States v. Santos-Rivera*, 183 F.3d 367, 369–72 (5th Cir. 1999).

2.56

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 or bring about some financial gain to the person engaged in the scheme. [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 and 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 have 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

For the elements of mail fraud, *see United States v. Swenson*, 25 F.4th 309, 316–19 (5th Cir. 2022) (providing overview of Fifth Circuit jurisprudence as to each element); *United States v. Hoffman*, 901 F.3d 523, 536 (5th Cir. 2018); *United States v. Evans*, 892 F.3d 692, 697, 711 (5th Cir. 2018); *United States v. Imo*, 739 F.3d 226, 236 (5th Cir. 2014); *United States v. Read*, 710 F.3d 219, 227 (5th Cir. 2012); *McMillan*, 600 F.3d at 447; s*ee 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."). For a discussion of aiding and abetting mail fraud and conspiracy (multiple or single), *see United States v. Warren*, 986 F.3d 557 (5th Cir. 2021).

The federal fraud statutes protect only traditional property interests (money or property) and do not extend to intangible interests such as the right to control the use of one's assets or the deprivation of intangible interests such as economically valuable information. *Ciminelli v. United States*, 143 S. Ct. 1121, 1126–28 (2023).

The federal fraud statutes require both deception in the form of false statements or misrepresentations and an intent to deprive another of property interests, in other words, to "cheat" the victim. *See United States v. Greenlaw*, 84 F.4th 325, 350–51 (5th Cir. 2023), *petition for cert. filed* (U.S. Dec. 12, 2023) (No. 23-631). This Instruction, therefore, requires that the government prove an "intent to defraud," as both an intent to deceive and to cheat, or cause a harm to property interests by such deception. *See id.* In *Greenlaw*, the Fifth Circuit also recognized that the

disjunctive "or" in the definition of "scheme to defraud" ("to deprive another of money *or* property or bring about some financial gain to the person engaged in the scheme") could also be questioned but declined to address the issue in light of prior case law finding such disjunctive phrasing consistent with a requirement that the victim be deprived of money or property for the benefit of the defendant and in light of the harmlessness of the error in *Greenlaw*. *Id.* at 352. The Committee awaits further guidance before additional amendment of this Instruction.

"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) ("Any 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. Traxler*, 764 F.3d 486, 488–91 (5th Cir. 2014); *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 n.3 (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). However, where the mailings predate the events giving rise to the alleged fraud, the government must present sufficient evidence regarding the defendant's conduct or state of mind around the time of the mailings. *See United States v. Swenson*, 459 F.Supp.3d 819, 827 (S.D. Tex. 2020), *aff'd*, 25 F.4th 309 (5th Cir. 2022).

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 ("Both 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.

Section 1343, wire fraud, does not require an intent to obtain property directly from a victim. It is sufficient for a conviction if the defendant intended to deceive the victims out of their money for his or her own financial benefit. *See United States v. Baker*, 923 F.3d 390, 405 (5th Cir. 2019). 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 Committee believes that the *Baker* case is equally applicable to mail fraud cases. Moreover, the Note to Instruction No. 2.57, 18 U.S.C. § 1343, Wire Fraud, should also be consulted.

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) ("We hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."); s*ee also United States v. Radley*, 632 F.3d 177, 185 (5th Cir. 2011). "The test for materiality is whether a misrepresentation 'has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed,'" *Radley*, 632, F.3d at 185 (quoting *United States v. Valencia*, 600 F.3d 389, 426 (5th Cir. 2010)). For a further definition of "materiality," *see* Instruction No. 1.40.

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. § 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. 1.35.

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 jury charge only if the indictment alleges § 1346. *See United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003). In *Skilling v. United States*, the Supreme Court held that "honest services" fraud under § 1346 consists only of bribery of public figures and kickbacks by private fiduciaries, not undisclosed self-dealing even by fiduciaries. 130 S. Ct. 2896, 2931–32 (2010); *see also United States v. Barraza*, 655 F.3d 375, 382 (5th Cir. 2011); *compare with United States v. Hager*, 879 F.3d 550, 555 (5th Cir. 2018) (per curiam) (holding that the defendant stole intangible proprietary business information there was no need to consider "honest services" fraud); *see also Ciminelli*, 143 S. Ct. at 1127–28 (discussing limited scope of "honest services" fraud); *Percoco v. United States*, 143 S. Ct. 1130, 1136–37 (2023) (same).

Section 1346 reaches both private and public sector fraud in the form of bribes or kickbacks when committed by an individual with a fiduciary duty to the public or private entity. *See Skilling*, 130 S. Ct. at 2930–31 n.41 & 2934 n.45. The Fifth Circuit has held that § 1346 prosecutions may involve bribery and kickbacks as defined by federal or state law. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012). In *United States v. Jordan*, 364 F.Supp.3d 670 (E.D. Tex. 2019), the court rejected the government's argument that an honest services prosecution need not show a violation of any particular bribery statute applicable to the defendant. *Id*. at 677 (also rejecting defense suggestion that the court in *United States v. Nagin*, 810 F.3d 348, 351 (5th Cir. 2016), by referencing 201(b) in a case against a state official, was inconsistent with *Teel*).

In *Percoco*, the Supreme Court held that Section 1346 permissibly reaches honest services fraud committed by a private individual even if not a public official elected to or holding office or appointment within a government agency, as long as the individual is acting as agent for a government entity. *See Percoco*, 143 S .Ct. at 1137–38. The Supreme Court did not, however, provide specific guidance on appropriate jury instructions to delineate the necessary agency relationship. *Id.* at 1138–39. The Committee awaits further discussion of *Percoco* in the appellate courts before amendment.

2.57

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 or bring about some financial gain to the person engaged in the scheme. [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 and 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

On the elements of a wire fraud offense, *see United States v. Sanders*, 952 F.3d 263, 277 (5th Cir. 2020), *United States v. Hoffman*, 901 F.3d 523, 540–50 (5th Cir. 2018), *United States v. Spalding*, 894 F.3d 173, 181–82 (5th Cir. 2018) (accepting three elements of offense), *United States v. Hager*, 879 F.3d 550, 553–56 (5th Cir. 2018), *United States v. Harris*, 821 F.3d 589, 598–602 (5th Cir. 2016), *United States v. Nagin*, 810 F.3d 348, 351 (5th Cir. 2016) ("A conviction for honest-services wire fraud requires proof that the defendant used wire communications in interstate commerce to carry out a 'scheme or artifice to defraud'"), *United States v. Stanford*, 805 F.3d 557, 566–67 (5th Cir. 2015) (accepting above instructions), *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); s*ee 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).

The federal fraud statutes protect only traditional property interests (money or property) and do not extend to intangible interests such as the right to control the use of one's assets or the deprivation of intangible interests such as economically valuable information. *Ciminelli v. United States*, 143 S. Ct. 1121, 1126–28 (2023). Confidential business information is a cognizable property right protected by § 1343. *United States v. Hager*, 879 F.3d 550, 555 (5th Cir. 2018).

Section 1343 does not require an intent to obtain property directly from a victim. It is sufficient for a conviction if the defendant intended to deceive the victims out of their money for his or her own financial benefit. *See United States v. Baker*, 923 F.3d 390, 405 (5th Cir. 2019).

The federal fraud statutes require both deception in the form of false statements or misrepresentations and an intent to deprive another of property interests, in other words, to "cheat" the victim. *See United States v. Greenlaw*, 84 F.4th 325, 350–51 (5th Cir. 2023), *petition for cert. filed* (U.S. Dec. 12, 2023) (No. 23-631). This Instruction, therefore, requires that the government prove an "intent to defraud," as both an intent to deceive and to cheat, or cause a harm to property interests by such deception. *See id.* In *Greenlaw*, the Fifth Circuit also recognized that the disjunctive "or" in the definition of "scheme to defraud" ("to deprive another of money *or* property or bring about some financial gain to the person engaged in the scheme") could also be questioned but declined to address the issue in light of prior case law finding such disjunctive phrasing consistent with a requirement that the victim be deprived of money or property for the benefit of the defendant and in light of the harmlessness of the error in *Greenlaw*. *Id.* at 352. The Committee awaits further guidance before additional amendment of this Instruction.

In wire fraud schemes, "the 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 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).

"Once membership in a scheme to defraud is established, a knowing participant is liable for any wire communication 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) ("[W]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."); s*ee also Radley*, 632 F.3d at 185. "The test for materiality is whether a misrepresentation 'has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed.''' *Id*. (quoting *Valencia*, 600 F.3d at 426). For a further definition of "materiality," *see* Instruction No. 1.40.

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 jury charge only if the indictment alleges § 1346. *See United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003). In *Skilling v. United States*, the Supreme Court held that "honest services" fraud under § 1346 consists only of bribery and kickbacks, not undisclosed self-dealing. 130 S. Ct. 2896, 2931–32 (2010); *see also 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. The Fifth Circuit has

held that § 1346 prosecutions may involve bribery and kickbacks as defined by federal or state law. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012).

In *Percoco v. United States*, 143 S. Ct. 1130 (2023), the Supreme Court held that Section 1346 permissibly reaches honest services fraud committed by a private individual even if not a public official elected to or holding office or appointment within a government agency, as long as the individual is acting as agent for a government entity. *See Percoco*, 143 S. Ct. at 1137–38. The Supreme Court did not, however, provide specific guidance on appropriate jury instructions to delineate the necessary agency relationship. *Id.* at 1138–39. The Committee awaits further discussion of *Percoco* in the appellate courts before amendment.

The Note to Instruction No. 2.56, 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.

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. § 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. 1.35.

2.58A

BANK FRAUD
18 U.S.C. § 1344(1) [18 U.S.C. § 1346]

Title 18, United States Code, Section 1344(1) makes it a crime for anyone to knowingly execute a scheme or artifice to defraud a financial 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 knowingly executed a scheme or artifice;

Second: That the scheme or artifice was to defraud a financial institution, as alleged in the indictment;

Third: That the defendant had the intent to defraud the financial institution;

Fourth: That the scheme or artifice to defraud was material [employed a false material representation] [concealed a material fact]; and

Fifth: That the defendant placed the financial institution at risk of civil liability or financial loss.

A "scheme or artifice" means any plan, pattern, or course of action intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived. [Such a scheme or artifice can involve a scheme to deprive a financial institution 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].]

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 artifice, or that the alleged scheme or artifice actually succeeded. What must be proved beyond a reasonable doubt is that the accused knowingly executed a scheme that was substantially similar to the scheme alleged in the indictment.

[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 scheme [representation] [concealment] is "material" if it has a natural tendency to influence or is capable of influencing, the institution to which it is addressed.

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

However, 'a scheme to defraud' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss.

"Financial institution" means _____ (*insert appropriate definition from 18 U.S.C. § 20*).

To prove that "the defendant placed the financial institution at risk of civil liability or financial loss," it is not necessary for the government to demonstrate that the financial institution actually suffered civil liability or financial loss, or that it faced a substantial likelihood of risk of loss.

Note

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court distinguished between offenses under §§ 1344(1) and 1344(2). In light of *Loughrin*, the Committee separated and substantially revised the instructions for the two offenses.

The *Loughrin* Court made clear that "the whole sum and substance" of § 1344(1) is the requirement that "a defendant intend to 'defraud a financial institution.'" 134 S. Ct. at 2389–90. For offenses charged under § 1344(2), however, the Court similarly made clear that the government need prove neither intent to defraud a financial institution nor that the defendant placed the financial institution at risk. *See Loughrin*, 134 S. Ct. at 2387, 2395 n.9 (upholding conviction under § 1344((2)). Accordingly, these two elements have been removed from the instruction for that offense. *See* Instruction No. 2.58B.

One of the first post-*Loughrin* case is *United States v. Perez-Ceballos*, 907 F.3d 863, 867–69 (5th Cir. 2018) (discussing the jurisdictional issue of an FDIC-insured bank, noting the evidence required to prosecute a § 1344(1) case, and discussing *Loughrin*'s holding).

In *Shaw v. United States*, 137 S. Ct. 462 (2016), the Supreme Court noted that "for purposes of the bank fraud statute [§ 1344(2)], a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution.'" *Id*. at 466. The Court further held that "the statute, while insisting upon 'a scheme to defraud,' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Id*. at 467.

Because materiality is an element of the § 1344, the court must submit the question of materiality to the jury. *See Neder v. United States*, 119 S. Ct. 1827, 1841 (1999) ("[W]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."). In *Neder*, the Supreme Court stated that the scheme to defraud in § 1344 must "*employ* material falsehoods." *Id*. at 1839 (emphasis in original). However, the Ninth Circuit has held that, under § 1344(1) "[i]t is the materiality of the scheme or artifice that must be alleged; the materiality of a specific statement need not be pleaded." *Cf. United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005); *see also United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992) ("[O]ne need not make a false representation to execute a scheme to defraud."). Bracketed material is included in the instruction for use depending on whether false representations are at issue.

The definition of "materiality" in this instruction was described as the "general" definition by the Supreme Court. *Neder*, 119 S. Ct. at 1837. The definition of materiality in this instruction was also adopted in a bank fraud context in *United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995) (§ 1344(2) case) (citing *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992)). For a further definition of "materiality," *see* Instruction No. 1.40.

The definitions of "intent to defraud" and "scheme or artifice" 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)); s*ee also United States v. Pettigrew*, 77 F.3d 1500, 1512–13 (5th Cir. 1996). The Fifth Circuit has followed the Fourth Circuit in holding that § 1344 may be violated even when the principal target is a third party. *United States v. Morganfield*, 501 F.3d 453, 464 (5th Cir. 2007).

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 jury charge only if the indictment alleges a violation of § 1346. *See United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003). In *Skilling v. United States*, the Supreme Court held that "honest services" fraud under § 1346 consists only of bribery and kickbacks, not undisclosed self-dealing. 130 S. Ct. 2896, 2931–32 (2010); *see also 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. The Fifth Circuit has held that § 1346 prosecutions may involve bribery and kickbacks as defined by federal or state law. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012).

The definition of a "false statement" is derived from *United States v. Dillman*, 15 F.3d 384, 392–93 (5th Cir. 1994) (citing *United States v. Gunter*, 876 F.2d 1113, 1120 (5th Cir. 1989)); s*ee also 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.").

A jury need not unanimously agree as to which alleged statement was false. *United States v. Duruisseau,* 796 F. App'x 827, 737 (5th Cir. 2019).

For a definition of "financial institution," *see* 18 U.S.C. § 20. The appropriate definition should be included in the instruction, depending on the sort of financial institution alleged in the indictment. The requirement of FDIC insurance, which is part of the definition of "financial institution" found in § 20(1), may be proved by the testimony of a bank officer. *United States v. Sanders,* 343 F.3d 511, 516–17 (5th Cir. 2003).

The discussion of the "financial risk" element is derived from *Morganfield*, 501 F.3d at 465–66. *See also United States v. McCauley*, 253 F.3d 815, 820 (5th Cir. 2001) (citing cases).

For a definition of "knowingly," *see* Instruction No. 1.41 "Knowingly – to Act."

Section 1344 includes attempts. If an attempt is charged, *see* Instruction No. 1.34 "Attempt."

A sixth 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. § 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. 1.35.

2.58B

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 a scheme or artifice to obtain any money[ies], 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 a scheme or artifice;

Second: That the scheme or artifice was executed to obtain money[ies] or other property from a financial institution, as alleged in the indictment;

Third: That the scheme or artifice was executed by means of false or fraudulent pretenses [false or fraudulent representations] [false or fraudulent promises]; and

Fourth: That the false or fraudulent pretenses [representations] [promises] were material.

A "scheme or artifice" means any plan, pattern, or course of action intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived. 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 artifice, or that the alleged scheme or artifice actually succeeded. What must be proved beyond a reasonable doubt is that the accused knowingly executed a scheme that was substantially similar to the scheme alleged in the indictment.

A scheme or artifice is executed "by means" of false or fraudulent pretenses, representations, or promises when the false or fraudulent pretenses, representations, or promises were the mechanism inducing the bank to part with the money[ies], funds, assets, securities, or other property under its control.

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 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 representation [pretense] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the institution to which it is addressed.

"Financial institution" means ____ (*insert appropriate definition from 18 U.S.C. § 20*).

Note

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court distinguished between offenses under § 1344(1) and § 1344(2). In light of *Loughrin*, the Committee separated and substantially revised the instructions for the two offenses.

The *Loughrin* Court made clear that, for offenses charged under § 1344(2), the Government need prove neither intent to defraud the financial institution nor that the defendant placed the financial institution at risk. *See id*. at 2384, 2395 n.9 (upholding conviction under § 1344(2) where the fraud was directed at a retailer rather than at a bank). Accordingly, these elements have not been included in this instruction. *Cf.* Instruction No. 2.58A (retaining these elements for charges under § 1344(1)).

In *Shaw v. United States*, 137 S. Ct. 462 (2016), the Supreme Court noted that "for purposes of the bank fraud statute [§ 1344(2)], a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution.'" *Id*. at 466. The Court further held that "the statute, while insisting upon 'a scheme to defraud,' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Id*. at 467.

Because materiality is an element of the § 1344, the court must submit the question of materiality to the jury. *See Neder v. United States*, 119 S. Ct. 1827, 1841 (1999) ("[W]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."). The definition of "materiality" in this instruction was described as the "general" definition by the Supreme Court. *Neder*, 119 S. Ct. at 1837. The definition of materiality in this instruction was also adopted 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)). For a further definition of "materiality," *see* Instruction No. 1.40 *Sse also United States v. Dureisseau*, 796 F. App'x 827, 834–35 (5th Cir. 2019) (holding that *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019), does not alter the relevant law applicable to this statute and declining to require that the government prove that a defendant had knowledge that his representations were both false and material).

The definition of "scheme or artifice" is 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, 1512–13 (5th Cir. 1996).

While a defendant may not be convicted of bank fraud under § 1344(2) merely for presenting 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 followed the Fourth Circuit in holding that § 1344 may be violated even when the principal target is a third party. *Id*. at 464–65.

The definition for a "false statement" is derived from *United States v. Dillman*, 15 F.3d 384, 392–93 (5th Cir. 1994) (citing *United States v. Gunter*, 876 F.2d 1113, 1120 (5th Cir. 1989));

s*ee also 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").

For a definition of "financial institution," *see* 18 U.S.C. § 20. The appropriate definition should be included in the instruction, depending on the sort of financial institution alleged in the indictment. The requirement of FDIC insurance, which is part of the definition of "financial institution" found in § 20(1), may be proved by the testimony of a bank officer. *United States v. Sanders*, 343 F.3d 511, 516–17 (5th Cir. 2003).

For a definition of "knowingly," *see* Instruction No. 1.41 "Knowingly – to Act."

Section 1344 includes attempts. If an attempt is charged, *see* Instruction No. 1.34 "Attempt."

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. § 2326. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2351–63 (2000). If there are disputed issues, the court should consider giving a lesser included instruction. *See* Instruction No. 1.35.

2.59

HEALTH CARE FRAUD
18 U.S.C. § 1347(a)

Title 18, United States Code, Section 1347(a), makes it a crime for anyone to knowingly and willfully execute or attempt to execute a scheme or artifice (1) to defraud any health care benefit program, or (2) to obtain any of the money or property owned by or under the custody or control of any health care benefit program 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 and willfully executed [attempted to execute] a scheme or artifice to defraud a health care benefit program, _____ (*name the health care benefit program*) [to obtain money or property from a health care benefit program, _____ (*name the health care benefit program*)], by means of false or fraudulent pretenses [false or fraudulent representations] [false or fraudulent promises] in connection with the delivery of or payment for health care benefits, items, or services;

Second: That the defendant acted with a specific intent to defraud a health care benefit program;

Third: That the false or fraudulent pretenses [representations] [promises] that the defendant used were material; and

Fourth: That the operation of the health care benefit program affected interstate commerce.

[*Fifth*: That serious bodily injury [death] resulted from the defendant's conduct.]

The word "knowingly" as used in these instructions means that the act was done voluntarily and intentionally, not because of mistake or accident.

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

A "scheme or artifice" means any plan, pattern, or course of action involving a false or fraudulent pretense, representation, or promise intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.

A "health care benefit program" is defined as "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service, for which payment may be made under the plan or contract."

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.

The government does not have to prove that the defendant had actual knowledge of the applicable health care fraud statute or a specific intent to violate it.

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 the 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.

"Affecting commerce" means that there is any effect at all on interstate or foreign commerce, however minimal.

"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. "Commerce" includes travel, trade, transportation, and communication. Only a minimal effect is required in order to show that the health care benefits program "affected interstate commerce." Proof that the money obtained through execution of the scheme was paid through a financial institution insured by the FDIC, for example, is sufficient to establish that the activity "affected interstate commerce."

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

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

In *United States v. Mahmood*, 820 F.3d 177, 185–86 (5th Cir. 2016), the Fifth Circuit restated the elements of health care fraud. *Id.* (citing *United States v. Umawa Oke Imo*, 739 F.3 226, 35–36 (5th Cir. 2014)); *see also United States v. Ganji*, 880 F.3d 760, 777 (5th Cir. 2018); *United States v. Sanders*, 952 F.3d 263, 277 (5th Cir. 2020).

Materiality is included as an element of the offense under the rationale of *Neder v. United States*, 119 S. Ct. 1827 (1999). As an element of the charged offense, the court must submit the

question of materiality to the jury. *See United States v. Foster*, 229 F.3d 1196, 1197 n.1 (5th Cir. 2000). For a further definition of "materiality," *see* Instruction No. 1.40.

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts that would result in enhanced penalties, e.g., where the violation "results in serious bodily injury" or "results in death." 18 U.S.C. § 1347(a); *see Apprendi v. New Jersey*, 120 S. Ct. 2348, 2351–63 (2000).

The government does not have to prove that the defendant had actual knowledge of or specifically intended to violate the applicable health care fraud statutes. *Imo*, 739 F.3d at 236. However, two recent cases discuss the factual showing necessary for a district judge to properly instruct the jury on deliberate ignorance in cases charging heath care fraud. *United States v. Mazkouri*, 945 F.3d 293, 302 (5th Cir. 2019); s*ee also United States v. Ahmed*, 794 F. App'x 362, 364–65 (5th Cir. 2019) (providing a broad discussion of the deliberate ignorance instruction and cautioning that the instruction should rarely be given).

The definition of "health care benefit program" is derived from 18 U.S.C. § 24(b); s*ee also United States v. Anderson*, 980 F.3d 423, 427–28 (5th Cir. 2020) (holding third-party administrator of private health care program is itself a "health care benefit program" when the administrator processes claims, makes available its network of providers, and pays claims in accordance with private health care plan in exchange for an administrative fee).

The definition of "willfully" is derived from *United States v. Ricard*, 922 F.3d 639, 648 (5th Cir. 2019), *United States v. St. John*, 625 F. App'x 661, 666 (5th Cir. 2015); s*ee also United States v. Nora*, 988 F.3d 823, 830 (5th Cir. 2021) (providing general discussion of willfulness and holding that, "[n]either conspiracy [to commit health care fraud] nor aider and abettor liability lowers [the willfulness] *mens rea* requirement").

The definitions for "intent to defraud" and "scheme or plan to defraud" 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)); s*ee also United States v. Pettigrew*, 77 F.3d 1500, 1513 (5th Cir. 1996).

The definition for a "false statement" is derived from *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994); *see also United States v. Gunter*, 876 F.2d 1113, 1120 (5th Cir. 1989); *United States v. Loeffel*, 172 F. App'x 612, 617 (5th Cir. 2006).

The definition of "serious bodily injury" is found in 18 U.S.C. § 1365(h)(3).

"Affecting commerce" means that there is any effect at all on interstate or foreign commerce, however minimal. *See* Instruction No.1.47.

By statutory definition the only type of health care benefit programs covered by the statute are those that affect commerce. 18 U.S.C. § 24(b). Congress used the phrase "affecting commerce" to provide the federal jurisdictional element that connects the offense to interstate commerce. *See United States v. Mann*, 493 F.3d 484, 494 (5th Cir. 2007) (reading "affecting commerce" in 18

U.S.C. § 1951, the Hobbs Act, to require proof of an effect on interstate commerce); *see also United States v. Lopez*, 514 U.S. 549, 561 (1995) (statutes containing a "jurisdictional element which would ensure, through case-by-case inquiry, that the [prohibited act] in question affects interstate commerce" pass muster under the Commerce Clause). Since the object of the fraud must be a "health care benefit program," and since health care benefit programs must, by definition, "affect commerce," it would appear that proof of an effect on interstate commerce is both a jurisdictional requirement and an essential element of the offense. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008) (the "affecting commerce" language in § 1347 creates an element which the Government must prove beyond a reasonable doubt); *United States v. Ogba*, 526 F.3d 214, 238 (5th Cir. 2008) (interstate commerce showing satisfied because payments received through Medicare system).

2.60

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.

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 group with specific sexual interests]. 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, 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 group with specific sexual interests 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, 742 (5th Cir. 1986), *United States v. Arthur*, 51 F.4th 560, 570 (5th Cir. 2022), and *United States v. Easley*, 927 F.2d 1442, 1446–47 (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).

For a discussion on "serious value", *see Arthur*, 51 F.4th at 570 (affirming use of Instruction 2.60 regarding "serious value" in a case involving a conviction under 18 U.S.C. § 1462).

In cases involving material designed for and primarily disseminated to a clearly defined group with specific sexual interests, 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 963−64.

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.

Knowledge of the sexually explicit nature of material is the required scienter for 18 U.S.C. §§ 1461 and 1462. *Hamling*, 94 S. Ct. at 2908–11; *United States v. Inv. Enters., Inc.*, 10 F.3d 263, 267 n.5 (5th Cir. 1993); *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 the only scienter required for conviction under §§ 1462 and 1465).

2.61

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.

[Include definition of obscenity as stated in Instruction No. 2.60, 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 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. 1.44, 1.45, and 1.46.

"Interactive computer service" is defined in 47 U.S.C. § 230(f)(2).

Section 1462 does not punish mere possession of obscene materials, but rather the trafficking in commerce of obscene materials. *United States v. Whorley*, 550 F.3d 326, 330 (4th Cir. 2008). It includes both knowingly taking and receiving from a carrier or interactive computer service any prescribed obscene material in the statute. *Id.* at 333 ("Section 1462, however . . . does not criminalize every receipt of obscene materials, but only the 'knowing' receipt of them").

See Note following Instruction No. 2.60, 18 U.S.C. § 1461, Mailing Obscene Material.

2.62

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.

[Include definition of obscenity as stated in Instruction No. 2.60, 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 articles 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. 1.44, 1.45, and 1.46.

See Note following Instruction No. 2.60, 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.

2.63A

CORRUPTLY OBSTRUCTING ADMINISTRATION OF JUSTICE
18 U.S.C. §§ 1503(a), 1503(b)

Title 18, United States Code, Section 1503, makes it a crime for anyone to corruptly 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 he [she] influenced [obstructed] [impeded] [endeavored to influence [obstruct] [impede]] the due administration of justice in that proceeding; and

Fourth: 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.

The "due administration of justice" refers to the performance of acts required by law in the discharge of duties, such as appearing as a witness and giving truthful testimony when subpoenaed.

[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 [she] 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

Section 1503 consists of two clauses. One enumerates specific conduct, such as threats and killings. The other consists of the "omnibus clause," or the catchall provision, which prevents individuals from "endeavoring to influence, obstruct, or impede the due administration of justice." *See United States v. Aguilar*, 115 S. Ct. 2357, 2361-62 (1995).

This instruction applies only to the omnibus clause. 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. Williams*, 874 F.2d 968, 977 (5th Cir. 1989).

Section 1503 imposes a "nexus" requirement, that is, "the act must have a relationship in time, causation, or logic with the judicial proceeding." *See United States v. Bedoy*, 827 F.3d 495, 504 (5th Cir. 2016) (citing *Aguilar*, 115 S. Ct. at 2362) (internal quotation marks omitted). The proscribed endeavor "must have the 'natural and probable effect' of interfering with the due

administration of justice." *Aguilar*, 115 S. Ct. at 2362 (concluding "uttering false statements to an investigating agent . . . who might or might not testify before a grand jury, is not sufficient . . . ."); *see also United States v. Fisch*, 851 F.3d 402, 407 (5th Cir. 2017); *Richardson*, 676 F.3d at 502 (finding defendant acted corruptly to obstruct justice when he represented himself as an attorney, despite the fact that his endeavor "may not have ultimately affected the decision to dismiss" the case); *see also Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018) (extending *Aguilar*'s interpretation of § 1503's Omnibus Clause to the Omnibus Clause in 26 U.S.C. § 7212, thus, charges of attempting to interfere with administration of internal revenue laws requires a "nexus" between the defendant's conduct and a particular administrative proceeding).

Section 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) (finding a judicial proceeding was "pending" where the defendant had approached a witness and endeavored to intimidate her into lying, as a superseding indictment was filed), *vacated on other grounds sub nom. Reed v. United States*, 114 S. Ct. 1289 (1994); *see also Marinello*, 138 S. Ct. at 1110 (finding that, under the Omnibus Clause in 26 U.S.C. § 7212, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, it was then reasonably foreseeable by the defendant).

The omnibus clause of § 1503 includes all endeavors regardless of the doctrine of impossibility or the technicalities of the law of attempt. *See Richardson*, 676 F.3d at 503. The term "endeavor" makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice but is foiled in some way. *Aguilar*, 115 S. Ct. at 2363.

A defendant's specific intent to obstruct justice "can be proven by showing the defendant's endeavors had the 'natural and probable effect of interfering with the due administration of justice.'" *See Fisch*, 851 F.3d at 407. "[A]n unsuccessful endeavor to obstruct justice violates § 1503; justice need not actually have been obstructed." *Williams*, 874 F.2d at 981.

"[T]he defendant must have knowledge that his [her] actions are likely to affect the judicial proceeding, as opposed to some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority." *See Bedoy*, 827 F.3d at 504 (internal quotation marks omitted). The nexus requirement is satisfied where a rational jury could find the defendant understood the investigating agents were "integrally involved" in a grand jury investigation. *See id.* at 506. The *Bedoy* court concluded that the investigating agents were not required to explicitly state they had been subpoenaed to appear before the grand jury. *Id.* at 506.

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." *Richardson*, 676 F.3d at 502–03 (citing *Williams*, 874 F.2d at 977 n.24).

The Fifth Circuit expressly approved this instruction's definition of "corruptly" in *Richardson*, 676 F.3d at 506–08.

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. 2.63B, 18 U.S.C. § 1503(a), Obstructing Administration of Justice by Threats or Force.

See Note to Instruction No. 2.64, Intimidation to Influence Testimony in violation of § 1512, discussing the meaning of "corrupt persuasion" to influence a person's testimony in an official proceeding, which might apply to § 1503.

2.63B

OBSTRUCTING ADMINISTRATION OF JUSTICE BY THREATS OR FORCE
18 U.S.C. §§ 1503(a), 1503(b)

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.

The "due administration of justice" refers to the performance of acts required by law in the discharge of duties, such as appearing as a witness and giving truthful testimony when subpoenaed.

[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 [she] knew was likely to influence [obstruct] [impede] the due administration of justice as to the natural and probable effect of the defendant's actions.]

Note

See Note to Instruction No. 2.63A, 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).

2.63C

CORRUPTLY INFLUENCING A JUROR
18 U.S.C. §§ 1503(a), 1503(b)

Title 18, United States Code, Section 1503(a), makes it a crime for anyone to corruptly 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 _____ (*name juror*) 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 [her] 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.

The term "endeavor" includes all conduct aimed at influencing, intimidating, and impeding jurors. Success of the endeavor is not an element of the crime. For there to be an endeavor, the defendant must have knowingly acted in a way that obstructed or had the natural and probable effect of obstructing justice from being duly administered.

It is not necessary for the government to prove the juror was swayed or changed or prevented in any way, but only that the defendant corruptly tried to do so.

Note

Section 1503 proscribes any corrupt endeavor to influence jurors or court officers. *See* 18 U.S.C. § 1503(a). This instruction applies only to the corrupt endeavor to influence a juror. If the defendant is accused of injuring a juror, officer, or magistrate, the instruction should be modified accordingly.

See Note to Instruction No. 2.63A, 18 U.S.C. § 1503(a), Corruptly Obstructing Administration of Justice.

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); *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

See Note to Instruction No. 2.64, Intimidation to Influence Testimony, discussing the meaning of "corrupt persuasion" to influence a person's testimony in an official proceeding in violation of § 1512, which might apply to § 1503.

2.64

INTIMIDATION TO INFLUENCE TESTIMONY
18 U.S.C. §§ 1512(b)(1), 1512(j)

Title 18, United States Code, Section 1512(b)(1), makes it a crime for anyone to knowingly use intimidation [threaten] [corruptly persuade] another person, or to attempt to do so, [to knowingly engage in misleading conduct toward another person] 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];

[*First*: That the defendant corruptly persuaded [attempted to corruptly persuade] another person;]

[*First*: That the defendant engaged in misleading conduct toward another person;]

Second: That the defendant acted knowingly and with intent to influence [delay] [prevent] the testimony of _____ (*name person*) with respect to _____ (*describe official proceeding named in indictment*), an official proceeding; and

Third: That _____ (*name*) knew or foresaw that ___ (*specify proceeding*) was pending or was likely to be instituted. [However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.].

[The term "intimidation" means the use of any words or actions intended or designed to make another person timid or fearful, make that person refrain from doing something he [she] would otherwise do, or make that person do something that he [she] would otherwise not do.]

[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 "misleading conduct" means _____ (insert applicable definition from 18 U.S.C. § 1515(a)(3).]

To "act with intent to influence the testimony of a witness" means to act for the purpose of getting the witness to change, color, or shade his [her] testimony in some way. However, the government is not required to prove the witness's testimony was, in fact, changed in any way.

"Official proceeding" means _____ (insert applicable definition from 18 U.S.C. § 1515(a)(1).

[When the defendant raises the "truth-seeking" affirmative defense under 18 U.S.C. § 1512(e), add the following: The defendant has the burden of proving, by a preponderance of the evidence, that his [her] conduct consisted solely of lawful conduct and that his [her] sole intention was to encourage, induce, or cause the other person to testify truthfully.]

Note

18 U.S.C. § 1512 addresses incidents where one person exercised direct or indirect force or influence on another with the purpose of corrupting an official proceeding. *See United States v. Ramos*, 537 F.3d 439, 462 (5th Cir. 2008); *see also United States v. Shively*, 927 F.2d 804, 811 (5th Cir. 1991).

An "official proceeding" means a proceeding before a judge or court of the United States, a proceeding before Congress, a proceeding before a Federal Government agency which is authorized by law, or a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official, agency, agent, or examiner appointed by an official or agency. *See* 18 U.S.C. § 1515(a)(1). For a general discussion of § 1512 and a particular discussion of the "intent to influence" and "official proceeding," *see Ramos*, 537 F.3d at 462–64 (holding that an internal, informal investigation conducted by the Department of Homeland Security involving Border Patrol Agents did not constitute an "official proceeding").

As defined in 18 U.S.C. § 1515(a)(3), the term "misleading conduct" means (A) knowingly making a false statement; (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; (C) with the intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity; (D) with the intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or (E) knowingly using a trick, scheme, or device with the intent to mislead. Courts have applied this definition of "misleading conduct" to a wide variety of conduct. *See, e.g.*, *United States v. Carson*, 560 F.3d 566, 573 (6th Cir. 2009) (concluding an officer engaged in misleading conduct when he filed a false arrest report to conceal excessive force); *United States v. Veal*, 153 F.3d 1233, 1245–47 (11th Cir. 1998) (finding defendants employed misleading conduct where they made false statements to internal affairs investigators to conceal civil rights violation), *abrogated on other grounds by Fowler v. United States*, 131 S. Ct. 2045 (2011); *United States v. Gabriel*, 125 F.3d 89, 102 (2d Cir. 1997) (concluding the deletion of subpoenaed documents that would have revealed a fraudulent scheme violated § 1512(b)), *abrogated on other grounds by United States v. Quattrone*, 441 F.3d 153, 176 (2d Cir. 2006); *United States v. Collins*, 395 F. App'x 117, 118 (5th Cir. 2010) (holding jury could have found beyond a reasonable doubt that the defendant knowingly engaged in misleading conduct when he "prevailed upon [the witness and his brother] to write a falsified letter exonerating him . . . .").

The Supreme Court, while interpreting § 1512, has associated the term "corruptly" with "wrongful, immoral, depraved, or evil," and noted that only persons conscious of wrongdoing

can be said to "knowingly . . . corruptly persuade." *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2136 (2005); *see also* 18 U.S.C. § 1515(a)(6) ("the term 'corruptly persuades' does not include conduct which would be misleading conduct but for a lack of a state of mind"). While *Arthur Andersen* may provide enough clarification in future cases, there remains a circuit split over the type of conduct that falls within the ambit of the phrase "corruptly persuade." The Second and Eleventh Circuits interpret "corruptly persuade" as meaning motivated by an improper purpose (such as self-interest in an impeding investigation), while the Third Circuit and the Ninth Circuit have concluded that an individual can persuade another to withhold testimony without doing so corruptly (such as by asking a witness to withhold testimony when that witness possesses a legal right to do so). *Compare United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), *and United States v. Shotts*, 145 F.3d 1289, 1300–01 (11th Cir. 1998), *with United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997), *and United States v. Doss*, 630 F.3d 1181, 1186 (9th Cir. 2011), *as amended on reh'g in part* (Mar. 15, 2011). The latter interpretation of "corruptly persuade" requires something more inherently wrongful about the persuasion itself, *e.g.*, bribery or encouraging someone to testify falsely. The split has not been explicitly resolved, and the Fifth Circuit has yet to clarify its definition.

The *mens rea* requirement of "knowingly" applies equally to all of the enumerated acts that immediately follow in the statutory language. *See Arthur Andersen*, 125 S. Ct. 2129, 2136 (2005) ("Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'").

This offense 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) (enhancement was appropriate where defendant was convicted of using intimidation and threats to cause witness to withhold testimony "in connection with a criminal trial" despite the fact that the trial was not ongoing at the time). In such cases, the second element of the offense should be modified to reflect that the official proceeding was a trial of a criminal case.

This instruction presumes an official proceeding was pending. However, the statute 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. Causey*, 185 F.3d 407, 422 (5th Cir. 1999); *United States v. Greenwood*, 974 F.2d 1449, 1460 (5th Cir. 1992). Nevertheless, there must be a "nexus" between the intimidating act and the proceeding. *See Arthur Andersen,* 125 S. Ct. at 2137; *see also* Instruction No. 2.63A. 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*, 125 S. Ct. at 2137; *see also United States v. Vargas,* 6 F.4th 616, 626 (5th Cir. 2021) ("To be convicted under § 1512, a defendant must be able to foresee an official proceeding when he tampers with a witness, but there is no requirement that the defendant foresee the nature of the authority initiating that proceeding, as the text of § 1512 makes plain."); *United States v. Bedoy*, 827 F.3d 495, 507 (5th Cir. 2016) (sufficient that proceeding was foreseen such that defendant has in contemplation some particular official proceeding).

If the case involves an attempt to intimidate or threaten, Instruction No. 1.34, Attempt, should be added.

Section 1512(e) provides a statutory affirmative defense to obstruction of justice. To successfully assert this affirmative defense, a defendant must prove by a preponderance of the evidence that his conduct was lawful and his "sole intention was to encourage, induce or cause the other person to testify truthfully." 18 U.S.C. § 1512(e); *see United States v. Lowry*, 135 F.3d 957, 959–60 (5th Cir. 1998) (concluding that the trial court committed reversible error erred by excluding evidence that the defendant was trying to encourage witnesses to tell the truth in the face of IRS pressure to do otherwise).

2.65

DESTROYING, ALTERING, OR FALSIFYING A DOCUMENT IN A FEDERAL INVESTIGATION 18 U.S.C. § 1519

Title 18, United States Code, Section 1519 makes it a crime for anyone to knowingly alter [destroy] [mutilate] [conceal] [cover up] [falsify] [make a false entry in] a record [document] [tangible object] with the intent to impede [obstruct] [influence the investigation of [the proper administration of] a matter within the jurisdiction of any department or agency of the United States or any case filed under Title 11, or in relation to [in contemplation of] such a 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 knowingly altered [destroyed] [mutilated] [concealed] [covered up] [falsified] [made a false entry in] a record [document] [tangible object];

Second: That the defendant acted with the intent to impede [obstruct] [influence] the investigation] [the proper administration of] in relation to [in contemplation of] a matter; and

Third: That the matter was within the jurisdiction of _____ (*name of agency or department*), which is an agency [a department] of the United States.

There is no requirement that the matter or investigation have been pending or imminent at the time of the obstruction, but only that the acts were taken in relation to or in contemplation of any such matter or investigation.

The government is not required to prove that the defendant specifically knew the matter or investigation was within the jurisdiction of a department or agency of the United States. In other words, you need not find the defendant knew he [she] was obstructing [impeding] [influencing] a matter that was federal in nature.

A "tangible object" is one used to record or preserve information.

Note

Section 1519 has been construed as criminalizing three circumstances involving a matter within the jurisdiction of a federal agency and a defendant acting with an obstructive intent: "(1) when a defendant acts directly with respect to the investigation or proper administration of any matter, that is, a pending matter, (2) when a defendant acts in contemplation of any such matter, and (3) when a defendant acts in relation to any such matter." *See United States v. McRae*, 702 F.3d 806, 837 (5th Cir. 2012) (citing *United States v. Kernell*, 667 F.3d 746, 753 (6th Cir. 2012) and *United States v. Yielding*, 657 F.3d 688, 711 (8th Cir. 2011)).

Section 1519 contains no materiality element. *United States v. Scott*, 70 F.4th 846, 855 (5th Cir. 2023) (rejecting the defendant's argument that his misrepresentations on the forms were immaterial to the DEA's administration).

The relationship between the United States and the matter being obstructed is a jurisdictional one, which is significant in that the *mens rea* of a federal criminal statute does not ordinarily extend to jurisdictional elements. *See McRae*, 702 F.3d at 835 (citing *United States v. Feola*, 95 S. Ct. 1255, 1260 (1975)).

The Fifth Circuit has held that § 1519 does not require that the defendant know that the investigation is pending, *see United States v. Moore*, 708 F.3d 639, 649 (5th Cir. 2013), and has also implied that the investigation need not even be imminent. *See McRae*, 702 F.3d at 836–37. Other courts, *see e.g.*, *United States v. Singh*, 924 F.3d 1030, 1052 (9th Cir. 2019), considering the issue have turned to the legislative history of § 1519 in which Senator Patrick Leahy clarified that the statute "is specifically meant not to include any technical requirement . . . to tie the obstructive conduct to a pending or imminent proceeding or matter . . . . It is also meant to do away with the distinctions . . . between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquires, regardless of their title." S. Rep. No. 107-146, at 14–15 (2002).

Although the statute on its face does not require a "corrupt" intent like other obstruction of justice statutes, i.e. 18 U.S.C. §§ 1503 and 1512(b), "it still requires some form of obstructive intent, specifically a knowing destruction undertaken with the 'intent to impede, obstruct, or influence the investigation or proper administration of [a] matter.'" *McRae*, 702 F.3d at 838.

Section 1519's "tangible object" extends only to objects "one can use to record or preserve information, not all objects in the physical world." *See Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (reversing Yate's § 1519 conviction for destroying undersized red grouper by throwing them back into the sea after an officer deputized as a federal agent by the National Marine Fisheries Service boarded his vessel and cited him for possession of undersized fish); *United States v. McRae*, 795 F.3d 471, 477 (5th Cir. 2015) (holding that neither the victim's body nor the car in which the body was stored constituted a "tangible object" for purposes of § 1519).

2.65A

FALSE STATEMENT IN APPLICATION OF PASSPORT
18 U.S.C. § 1542 (FIRST PARAGRAPH)

Title 18, United States Code, Section 1542, makes it a crime to willfully and knowingly make a false statement in an application for a passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his [her] own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws.

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 in an application for a United States passport;

Second: That the defendant made the statement intending to get a United States passport for his [her] own use [someone else's use]; and

Third: That the defendant acted willfully and knowingly.

[*Fourth*: That the defendant did so to facilitate an act of international terrorism [to facilitate a drug trafficking crime].]

A statement is false if it was untrue when made, and the person making it knows it is untrue.

[To "facilitate" an act simply means to help or further the accomplishment of that act.]

[An "act of international terrorism" means (1) a criminal act that is violent or dangerous to human life, (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination or kidnapping, and (3) occurs primarily outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

[A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Enforcement Act.]

Note

The second paragraph of this statute prohibits the willful and knowing use or attempted use or furnishing for another to use any passport the issue of which was secured by reason of any false statement. The court would need to modify the above instruction if the second clause is charged.

The optional fourth element is included to comply with *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), where the indictment alleges facts triggering the enhanced penalty under the statute.

The definition of international terrorism comes from § 2331 of this title. If the defendant is charged with violating this statute to facilitate an act of international terrorism, the court may need to further instruct in accordance with 18 U.S.C. § 2331. The definition of a drug trafficking crime comes from § 929 of this title. If the defendant is charged with violating this statute to facilitate a drug trafficking crime, the court may need to further instruct in accordance with 21 U.S.C. § 801 *et seq.*, 21 U.S.C. § 951 *et seq.*, or 46 U.S.C. § 70503.

For a definition of "knowingly," *see* Instruction No. 1.41 "Knowingly"—To Act.

For a definition of "willfully," *see* Instruction No. 1.43 "Willfully"—To Act.

See Browder v. United States, 61 S. Ct. 599, 603 (1941) ("[T]he word 'willful' often denotes an intentional as distinguished from an accidental act. Once the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport in travel is punishable.") (citation omitted).

If a defendant assumes a new name and believes the new name was legally adopted, this is a valid defense and excluding crucial relevant evidence necessary to establish the valid defense is an abuse of discretion. *See United States v. Wasman*, 641 F.2d 326, 329–30 (5th Cir. 1981) (reversing and remanding case for a new trial), *conviction aff'd after remand*, 700 F.2d 663 (11th Cir. 1983), *aff'd*, 104 S. Ct. 3217 (1984).

False statements in violation of this statute need not be material. *United States v. Najera Jimenez,* 593 F.3d 391, 398 (5th Cir. 2010).

2.65B

FALSE STATEMENT IN PASSPORT APPLICATION
18 U.S.C. § 1542 (SECOND PARAGRAPH)

Title 18, United States Code, Section 1542, makes it a crime to willfully and knowingly [use] [attempt to use] [furnish to another for use] any passport the issue of which was secured in any way by reason of any false statement.

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 [attempted to use] [furnished to another] any passport the use of which was secured in any way by reason of any false statement; and

Second: That the defendant acted willfully and knowingly.

[*Third*: That the defendant did so to facilitate an act of international terrorism [to facilitate a drug-trafficking crime].]

A statement is false if it was untrue when made, and the person making it knows it is untrue.

[To "facilitate" an act simply means to help or further the accomplishment of that act.]

[An "act of international terrorism" means (1) a criminal act that is violent or dangerous to human life; (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination or kidnapping; and (3) occurs primarily outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

[A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Enforcement Act.]

Note

The optional third element is included to comply with *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), where the indictment alleges facts triggering the enhanced penalty under the statute.

The definition of international terrorism comes from Section 2331 of this title. If the defendant is charged with violating this statute to facilitate an act of international terrorism, the court may need to further instruct in accordance with 18 U.S.C. § 2331. The definition of a drug trafficking crime comes from Section 929 of this title. If the defendant is charged with violating this statute to facilitate a drug trafficking crime, the court may need to further instruct in accordance with 21 U.S.C. § 801 *et seq.*, 21 U.S.C. § 951 *et seq.*, or 46 U.S.C. § 70503.

For a definition of "knowingly," *see* Instruction No. 1.41 "Knowingly—to Act."

For a definition of "willfully," *see* Instruction No. 1.43 "Willfully—to Act."

See Browder v. United States, 61 S. Ct. 599, 603 (1941) ("[T]he word 'willful' often denotes an intentional as distinguished from an accidental act. Once the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport in travel is punishable.") (citation omitted).

If a defendant assumes a new name and believes the new name was legally adopted, this is a valid defense and excluding crucial relevant evidence necessary to establish the valid defense is an abuse of discretion. *See United States v. Wasman*, 641 F.2d 326, 329–30 (5th Cir. 1981) (reversing and remanding case for a new trial), *conviction aff'd after remand*, 700 F.2d 663 (11th Cir. 1983), *aff'd*, 104 S. Ct. 3217 (1984).

False statements in violation of this statute need not be material—"any false statement, knowingly and willfully made, suffices." *United States v. Najera Jimenez,* 593 F.3d 391, 398 (5th Cir. 2010).

2.65C

FORGERY OF PASSPORT
18 U.S.C. § 1543 (FIRST PARAGRAPH)

Title 18, United States Code, Section 1543, makes it a crime to falsely make [forge] [counterfeit] [mutilate] [alter] a passport [instrument purporting to be a passport] with the intent that it be used.

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 made [forged] [counterfeited] [mutilated] [altered] a [passport] [instrument purporting to be a passport]; and

Second: That the defendant intended that the passport [instrument purporting to be a passport] be used.

[*Third*: That the defendant did so to facilitate an act of international terrorism [to facilitate a drug trafficking crime].]

[An "act of international terrorism" means (1) a criminal act that is violent or dangerous to human life; (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination or kidnapping; and (3) occurs primarily outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

[A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Enforcement Act.]

Note

The optional third element is included to comply with *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), where the indictment alleges facts triggering the enhanced penalty under the statute.

The definition of international terrorism comes from § 2331 of this title. If the defendant is charged with violating this statute to facilitate an act of international terrorism, the court may need to further instruct in accordance with 18 U.S.C. § 2331. The definition of a drug trafficking crime comes from § 929 of this title. If the defendant is charged with violating this statute to facilitate a drug trafficking crime, the court may need to further instruct in accordance with 21 U.S.C. § 801 *et seq.*, 21 U.S.C. § 951 *et seq.*, or 46 U.S.C. § 70503.

2.65D

FALSE USE OF A PASSPORT
18 U.S.C. § 1543 (SECOND PARAGRAPH)

Title 18, United States Code, Section 1543, makes it a crime to falsely [use] [attempt to use] [furnish to another for use] a passport or instrument purporting to be a passport.

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 [attempted to use] [furnished to another for use] a passport [instrument purporting to be a passport]; and

Second: That the defendant acted willfully, that is, he [she] deliberately and voluntarily used [attempted to use] [furnished to another for use] a passport [instrument purporting to be a passport]; and

Third: That the passport [instrument purporting to be a passport] was false [forged] [counterfeited] [mutilated] [altered] [validly issued but had become void by the occurrence of any condition therein prescribed invalidating same].

[*Fourth*: That the defendant did so to facilitate an act of international terrorism [to facilitate a drug trafficking crime].]

[An "act of international terrorism" means (1) a criminal act that is violent or dangerous to human life; (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination or kidnapping; and (3) occurs primarily outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

[A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Enforcement Act.]

Note

For the elements of the offense, *see United States v. Masha*, 990 F.3d 436, 444–45 (5th Cir. 2021).

The optional fourth element is included to comply with *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), where the indictment alleges facts triggering the enhanced penalty under the statute.

The definition of international terrorism comes from § 2331 of this title. If the defendant is charged with violating this statute to facilitate an act of international terrorism, the court may need to further instruct in accordance with 18 U.S.C. § 2331. The definition of a drug trafficking

crime comes from § 929 of this title. If the defendant is charged with violating this statute to facilitate a drug trafficking crime, the court may need to further instruct in accordance with 21 U.S.C. § 801 *et seq.*, 21 U.S.C. § 951 *et seq.*, or 46 U.S.C. § 70503.

2.66

MISUSE OF A PASSPORT
18 U.S.C. § 1544 (FIRST AND SECOND PARAGRAPHS)

Title 18, United States Code, Section 1544, makes it a crime for anyone willfully and knowingly to use [attempt to use] a passport issued or designed for the use of another [in violation of the conditions or restrictions contained in the passport] [in violation of the rules governing the issuance of passports].

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 [attempted to use] a passport;

Second: That the passport was issued or designed for the use of someone other than the defendant [that the use or attempted use violated the conditions or restrictions contained in the passport] [that the use or attempted use violated the rules governing the issuance of passports]; and

Third: That the defendant used [attempted to use] the passport willfully and knowingly, that is, deliberately, voluntarily, and knowing that the passport was issued or designed for the use of someone other than the defendant [with the intent to violate the conditions or restrictions contained in the passport] [with the intent to violate the rules governing the issuance of passports].

[*Fourth*: That the defendant used [attempted to use] the passport to facilitate an act of international terrorism [a drug trafficking crime].]

Note

The offense carries enhanced maximum penalties if the defendant used or attempted to use the passport to facilitate an act of international terrorism or a drug trafficking crime. If the indictment contains one of these enhancements, the trial judge should define "an act of international terrorism" or "a drug trafficking crime" as given in the statute and add facilitation of the appropriate crime as a fourth element or include a special instruction on the verdict form asking the jury whether they find the supporting fact of facilitation. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

For a general discussion of what it means to act "willfully," *see* Instruction No. 1.43.

For a general discussion of the elements of the offense*, see United States v. Masha*, 990 F.3d 436, 443–44 (5th Cir. 2021) (citing this Instruction and holding that evidence is insufficient for conviction under this statute unless government proves that the document misused is an actual passport issued by a sovereign as opposed to a counterfeit document).

In cases involving the furnishing of a passport under paragraph three of this statute, other elements must be considered.

2.67A

COUNTERFEITING IMMIGRATION DOCUMENTS
18 U.S.C. § 1546(a) (FIRST PARAGRAPH, FIRST CLAUSE)

Title 18, United States Code, Section 1546(a), makes it a crime for anyone knowingly to forge [counterfeit] [alter] [falsely make] any immigrant or nonimmigrant visa [permit] [border crossing card] [alien registration receipt card] [document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in 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 knowingly forged [counterfeited] [altered] [falsely made] _____ (*name document alleged in the indictment*); and

Second: That _____ (*name document alleged in the indictment*) is an immigrant or nonimmigrant visa [permit] [border crossing card] [alien registration receipt card] [document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States].

[*Third*: That the defendant forged [counterfeited] [altered] [falsely made] _____ (*name document alleged in the indictment*) to facilitate an act of international terrorism [a drug trafficking crime].]

Note

The offense carries enhanced maximum penalties if the defendant counterfeited the document to facilitate an act of international terrorism or a drug trafficking crime. If the indictment contains one of these enhancements, the trial judge should define "an act of international terrorism" or "a drug trafficking crime" as given in the statute. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

A "document prescribed by statute or regulation for entry into" the United States includes foreign passports. *United States v. Osiemi*, 980 F.2d 344, 347 (5th Cir. 1993).

The Fifth Circuit has held that counterfeiting immigration documents is not a continuing offense, and thus the statute of limitations runs from the date that the defendant used the counterfeit document. *United States v. Tavarez-Levario*, 788 F.3d 433 (5th Cir. 2015).

2.67B

USE OR POSSESSION OF FRAUDULENT IMMIGRATION DOCUMENTS 18 U.S.C. § 1546(a) (FIRST PARAGRAPH, SECOND CLAUSE)

Title 18, United States Code, Section 1546(a), makes it a crime for anyone to use [attempt to use] [possess] any immigrant or nonimmigrant visa [permit] [border crossing card] [alien registration receipt card] [document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States] knowing that it was forged [counterfeited] [altered] [falsely made] [procured by means of a false statement] [procured by fraud] [unlawfully obtained].

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 [uttered] [used] [attempted to use] [possessed] [obtained] [accepted] [received] an immigrant or nonimmigrant visa [permit] [border crossing card] [alien registration receipt card] [document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States];

Second: That the immigrant or nonimmigrant visa [permit] [border crossing card] [alien registration receipt card] [document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States] was forged [counterfeited] [altered] [falsely made] [procured by means of a false statement] [procured by fraud] [unlawfully obtained]; and

Third: That the defendant knew the immigrant or nonimmigrant visa [permit] [border crossing card] [alien registration receipt card] [document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States] was forged [counterfeited] [altered] [falsely made] [procured by means of a false statement] [procured by fraud] [unlawfully obtained].

[*Fourth*: That the defendant used [attempted to use] [possessed] the immigrant or nonimmigrant visa [permit] [border crossing card] [alien registration receipt card] [document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States] to facilitate an act of international terrorism [a drug trafficking crime].]

Note

The elements of the offense are mentioned in *United States v. Gonzalez-Figueroa*, 590 F. App'x 404 (5th Cir. 2014), *United States v. Uvalle-Patricio*, 478 F.3d 699, 702 (5th Cir. 2007).

A "document prescribed by statute or regulation for entry into" the United States includes foreign passports. *United States v. Osiemi*, 980 F.2d 344, 347 (5th Cir. 1993).

The offense carries enhanced maximum penalties if the defendant used or possessed the document to facilitate an act of international terrorism or a drug trafficking crime. If the indictment

contains one of these enhancements, the trial judge should define "an act of international terrorism" or "a drug trafficking crime" as given in the statute and add facilitation of the appropriate crime as a fourth element or include a special instruction on the verdict form asking the jury whether they find the supporting fact of facilitation. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

For a discussion of the terms "use" and "utter," *see United States v. Tavarez-Levario*, 788 F. 3d 433, 438–39 (5th Cir. 2015).

2.67C

FALSE STATEMENTS IN CONNECTION WITH IMMIGRATION DOCUMENTS
18 U.S.C. § 1546(a) (FOURTH PARAGRAPH)

Title 18, United States Code, Section 1546(a), makes it a crime for anyone knowingly to make any false statement of material fact in any application [affidavit] [other document] required by the immigration laws or 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 knowingly made a false statement on an application [affidavit] [other document] required by the immigration laws or regulations of the United States;

Second: That the statement was material; and

Third: That the statement was made under oath or as permitted under penalty of perjury.

[*Fourth*: That the defendant made the statement to facilitate an act of international terrorism [a drug trafficking crime].]

A statement is "material" if it has a natural tendency to influence, or is capable of influencing, a decision of the governmental agency to which it is addressed.

Note

This paragraph also prohibits knowingly presenting any application, affidavit, or other document that contains a false statement. If the indictment alleges that the defendant knowingly presented such a document, the introductory paragraph and the first element should be modified accordingly.

An employer's accurate statements can be considered "false, fictitious or fraudulent" if they were made without any present intention of performance in the future and under circumstances that plainly represented the intent not to perform. *United States v. Anderton*, 901 F.3d 278 (5th Cir. 2018) (employer purposefully incorrectly stated how much he intended to pay his immigrant workers on their I-129 immigration forms when, in fact, he intended to underpay them).

The definition of "material" is derived from *United States v. Gaudin*, 115 S. Ct. 2310, 2313 (1995) (defining a "material statement" in the context of 18 U.S.C. § 1001, making false statements of material fact to federal agencies or agents, as a statement that has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision-making body to which it was addressed") (quoting *Kungys v. United States*, 108 S. Ct. 1537, 1546 (1988)); *United States v. Al-*

Kurna, 808 F.2d 1072, 1075 (5th Cir. 1987) (holding that a statement was material under § 1546(a) because "it was capable of affecting the functioning of a governmental agency").

The offense carries enhanced maximum penalties if the defendant made the false statement to facilitate an act of international terrorism or a drug trafficking crime. If the indictment contains one of these enhancements, the trial judge should define "an act of international terrorism" or "a drug trafficking crime" as given in the statute and add facilitation of the appropriate crime as a fourth element or include a special instruction on the verdict form asking the jury whether they find the supporting fact of facilitation. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

2.68

SEX TRAFFICKING
18 U.S.C. § 1591(a)(1)

Title 18, United States Code, Section 1591(a)(1), makes it a crime for anyone knowingly, in or affecting interstate or foreign commerce, to recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, or solicit a person knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud or coercion, or any combination, would be used to cause such person to engage in a commercial sex act or knowing that the person was under the age of 18 and would be caused to engage in a commercial sex act.

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 recruited [enticed] [harbored] [transported] [provided] [obtained][advertised][maintained][patronized][solicited] by any means _____ (individual named in the indictment);

Second: That the defendant committed such act knowing or in reckless disregard of the fact that means of force, threats of force, fraud, coercion, or any combination of such means, would be used to cause the person to engage in a commercial sex act [the person had not attained the age of 18 years and would be caused to engage in a commercial sex act]; and

Third: That the defendant's acts were in or affected interstate [foreign] commerce.

"Commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

In determining whether the defendant's conduct was "in or affected interstate or foreign commerce," you may consider whether the defendant used means or facilities of interstate commerce, such as telephones, the internet, or hotels that serviced interstate travelers, or whether his [her] conduct substantially affected interstate commerce by virtue of the fact that he [she] purchased items that had moved in interstate commerce.

[If the government proves beyond a reasonable doubt that the defendant had a reasonable opportunity to observe the person recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, then the Government does not have to prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.]

["Coercion" means:

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.]

["Serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.]

Note

A similar jury instruction was approved as correct in *United States v. Garcia-Gonzalez*, 714 F.3d 306, 312 (5th Cir. 2013); *see also United States v. Smith*, 895 F.3d 410, 415 n.1 (5th Cir. 2018) (approving instruction).

A sex act does not have to actually occur to find the defendant guilty of § 1591(a). *See Garcia Gonzalez*, 714 F.3d at 312.

"A conviction may be obtained against a defendant who recklessly disregards a victim's age even if the defendant did not have a reasonable opportunity to observe the victim. Facts other than the victim's appearance or behavior may support a finding of reckless disregard of the victim's age, such as information from the victim, or others, or documentation that would cause a reasonable person to question whether the victim was actually eighteen years old. Circumstances of which a defendant was aware, such as the victim's grade level in school, or activities in which the victim engaged, could also constitute the basis for a finding of reckless disregard." *United States v. Phea*, 755 F.3d 255, 261 (5th Cir. 2014); *see also United States v. O'Neal*, 742 F. App'x 836, 843 (5th Cir. 2018) (finding admission of minor victim's photograph with her sixteenth birthday cake to be plain but harmless error since the defendant "spent significant time" with the victim and his failure to check her ID was "compelling evidence" of reckless disregard); s*ee also United States v. Copeland*, 820 F.3d 809, 813 (5th Cir. 2016) (quoting and adopting reasoning of *United States v. Robinson*, 702 F.3d 22, 32 (2d Cir. 2012)) (affirming jury instruction under §1591(c), which states that "the Government need not prove any *mens rea* with regard to the defendant's awareness of the victim's age if the defendant had a reasonable opportunity to observe the victim").

For definitions of Interstate Commerce—Defined, Foreign Commerce—Defined, Commerce—Defined, and "Affecting Commerce"—Defined, *see* Instructions Nos. 1.44, 1.45,

1.46, and 1.47, respectively. The Fifth Circuit interprets § 1591 broadly to reflect "Congress's clear intent to reach sex trafficking at all levels", including "purely local crimes," in light of the statute's inclusion of the jurisdictional element of the offense being in or affecting interstate or foreign commerce. *See United States v. Renteria*, 84 F.4th 591, 594–96 (5th Cir. 2023).

If multiple acts of different types are charged in the indictment (e.g., recruit, entice, harbor, transport), the unanimity instruction may be appropriate. *See* Instruction No. 1.27.

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 [make or use any other false information, including any book, paper, document, record, recording, or other material] under oath [in any declaration] [certificate] [verification] [statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code] in any proceeding before or ancillary to any court [grand jury] 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 gave the statement [made or used any other information, including any book, paper, document, record, recording, or other material] under oath [in any declaration] [certificate] [verification] [statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code] in any proceeding before or ancillary to any court [grand jury] as charged;

Second: That the statement [any other information, including any book, paper, document, record, recording, or other material] was false as charged in the indictment;

Third: That the defendant knew the statement [any other information, including any book, paper, document, record, recording, or other material knowing that it contained any false material declaration] was false when he [she] made it; and

Fourth: That the false statement was material to any proceeding before or ancillary to any court proceeding [grand jury's inquiry] of the United States.

A statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the court [grand jury].

When reviewing the alleged false statement, you should consider the statement in the context of the sequence of questions asked and answers given. 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 find a particular question was ambiguous and the defendant truthfully answered one reasonable interpretation of the question under the circumstances presented, then the answer would not be false. Similarly, if you find the question was clear but the answer was ambiguous, and one reasonable interpretation of the answer would be truthful, then it 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 if each declaration was material

to the point in question, and each declaration was made within the period of the statute of limitations for the offense charged.]

[You do not need to find that every alleged false statement in Count _____ is false. For you to find the defendant guilty of Count _____, however, you must unanimously agree as to which statement the government has proven the four elements listed.]

Note

The materiality of the alleged false statement is a question for the jury. *See United States v. Gaudin*, 115 S. Ct. 2310, 2314 (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 509, 529–30 (5th Cir. 2006); *see also United States v. Macedo-Flores*, 788 F.3d 181, 189–190 (5th Cir. 2015) (providing commentary on materiality of perjured statements).

The unanimity instruction derives from *United States v. Holley*, 942 F.2d 916, 920 (5th Cir. 1991) and should be given when a particular count alleges more than one false statement.

Under § 1623(c), irreconcilable statements may be prosecuted for perjury without proof as to which of the statements was false. 18 U.S.C. § 1623(c) eliminated the traditional requirement that a perjury conviction could not rest on proving two irreconcilable statements. *See United States v. McAfee*, 8 F.3d 1010, 1014 (5th Cir. 2006) (explaining the government must prove the defendant made two or more statements, "which are inconsistent to the degree that one of them is necessarily false").

Section 1623(d) provides for an affirmative defense of recantation where the defendant makes a declaration and admits it to be false in the same court or grand jury proceeding. *See* 18 U.S.C. § 1623(d). This defense is only effective 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).

As long as a statement is narrowly or literally true, the statement cannot serve as a basis for a perjury conviction under 18 U.S.C. § 1623. This is true even if the statement is evasive 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 or she "does not recall" an answer where falsity is established by circumstantial evidence. *See United States v. Abrams*, 568 F.2d 411, 419 (5th Cir. 1978).

2.70A

THEFT OF MAIL MATTER
18 U.S.C. § 1708 (FIRST PARAGRAPH)

Title 18, United States Code, Section 1708, makes it a crime to steal any letter, postal card, package, bag, or mail from a United States mailbox [post office] [mail or post office station] [letter box] [mail receptacle] [mail route] [authorized depository for mail matter] [letter or mail carrier].

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] [mail or post office station] [letter box] [mail receptacle] [mail route] [authorized depository for mail matter], as described in the indictment; and

Second: That the defendant stole the letter from the mail [post office] [mail or post office station] [letter box] [mail receptacle] [mail route] [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 mail.

Note

The first paragraph of the statute describes two offenses: (1) theft of mail as well as (2) removal of the contents of mail.

Many circuits appear to agree that § 1708 covers mail that has been accidently delivered by the Postal Service to an address different 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 [herself] 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 misdelivered, rather than misaddressed). Other circuits disagree. *See United States 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 or deception as well as secreting, embezzling, or destroying mail. In such a case, the instruction should be so modified.

2.70B

POSSESSION OF STOLEN MAIL
18 U.S.C. § 1708 (THIRD PARAGRAPH)

Title 18, United States Code, Section 1708, makes it a crime to possess any letter, postal card, package, bag, or mail 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] [mail or post station] [letter box] [mail receptacle] [mail route] [authorized depository for mail matter];

Second: That the defendant knew the item was stolen;

Third: That the defendant possessed the _____ (*e.g., checks*) described in the indictment; and

Fourth: That the defendant specifically intended to possess the _____ (*e.g., checks*) 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.

Note

United States v. Hall, 845 F.2d 1281, 1284 (5th Cir. 1988) cites the elements of the offense. *Hall* held that the evidence was sufficient to support a guilty verdict where there was evidence that the check in question had been deposited in the mail, that the addressee never received the check, and that the defendant's fingerprints were found on the check. *See United States v. Estill*, 494 F. App'x 425, 427 (5th Cir. 2012) (per curiam) (finding that undeliverable bulk business mail (UBBM) constituted mail when evidence showed that UBBM was "treated as mail and [was] considered to be 'live' until it [was] removed from the post office for processing and recycling," when USPS had an interest in it and retained control of it, and when defendant "point[ed] to no

evidence showing that UBBM should not be regarded as mail merely because it was destined for destruction or recycling").

In *Barnes v. United States*, 93 S. Ct. 2357 (1973), the Supreme Court found no error in an instruction which stated in part, "Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." *Id.* at 2360–61 & n.3. *See United States v. Pejouhesh*, 603 F. App'x 347, 348 (5th Cir. 2015) (mem.) (per curiam) ("The jury was entitled to infer that, absent a satisfactory explanation, [defendant] knew that the mail that he possessed was stolen." (citing *Barnes*, 93 S. Ct. at 2362–63)). However, the *Barnes* court also noted:

> Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is satisfactory. The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. [T]he burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the Government.

Barnes, 93 S. Ct. at 2363 n.9 (citation and quotations omitted).

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.

2.71

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 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 intentionally 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 the elements of the offense, *see United States v. Akinsuroju*, 166 F. App'x 748, 750 (5th Cir. 2006) (per curiam) (citing *United States v. Roberson*, 650 F.2d 84, 87 (5th Cir. 1981), *abrogated on other grounds*, *United States v. Corral-Franco*, 848 F.2d 536, 541 (5th Cir. 1988)).

On decoy letters, *see United States v. Kent*, 449 F.2d 751 (5th Cir. 1971) (collecting authorities).

For theft of a letter, use Instruction No. 2.70A, 18 U.S.C. § 1708 (First Paragraph), Theft of Mail Matter.

2.72A

PROVIDING CONTRABAND IN PRISON
18 U.S.C. § 1791(a)(1)

Title 18, United States Code, Section 1791 makes it a crime for anyone to provide, or attempt to provide, in violation of a statute or a rule or order issued under a statute, a prohibited object to an inmate of a prison.

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

First: That the defendant knowingly provided, or attempted to provide, an object to an inmate of a prison;

Second: That providing of the object violated a statute, or a rule or order issued under a statute; and

Third: That the object is a prohibited object.

The term "prison" means a Federal correctional, detention, or penal facility or any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General.

Note

The definition of "prohibited object" (and certain terms utilized therein) is found in 18 U.S.C. § 1791(d). An appropriate definition of this term, considering the particular allegations of the indictment or bill of information, should be provided.

This offense prohibits the introduction, or attempted introduction, of anything "into or upon the grounds of any Federal penal or correctional institution . . . without the knowledge and consent of the warden or superintendent" of the facility. 28 C.F.R. § 6.1; *see United States v. York*, 578 F.2d 1036, 1040–41 (5th Cir. 1978). In *United States v. Roybal*, 795 F.2d 382 (5th Cir. 1986), the defendant argued that a conviction under 18 U.S.C. § 1791(a)(1) was not appropriate on the grounds that the warden was aware of the introduction of contraband as part of an undercover investigation. *Id.* at 383. The Fifth Circuit rejected this argument, explaining that it is not a defense where the defendant did not rely on the warden's consent or knowledge—even if the warden may have suspected, or even known that a person would attempt to introduce contraband into the prison. *Id.*

See Instruction No. 1.41 "Knowingly"—To Act.

2.72B

POSSESSING CONTRABAND IN PRISON
18 U.S.C. § 1791(a)(2)

Title 18, United States Code, Section 1791 makes it a crime for an inmate of a prison to make, possess, or obtain, or to attempt to make, possess, or obtain, a prohibited object.

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

First: That the defendant was an inmate of a prison;

Second: That the defendant knowingly made [possessed] [obtained] [attempted to make] [attempted to obtain] [attempted to possess] an object; and

Third: That the object is a prohibited object.

The term "prison" means a Federal correctional, detention, or penal facility or any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General.

Note

The definition of "prohibited object" (and certain terms utilized therein) is found in 18 U.S.C. § 1791(d). An appropriate definition of this term, considering the particular allegations of the indictment or bill of information, should be provided. For a discussion of whether a mobile phone constitutes a "prohibited object" and whether a non-federal inmate is "an inmate of a prison" subject to this provision*, see United States v. Hendrickson*, 949 F.3d 95, 97–100 (3d Cir. 2020).

The double jeopardy clause is not implicated by charging a defendant under 18 U.S.C. § 1791(a)(2) for conduct already subject to prison discipline, including revocation of "good time" credit. *United States v. Buck*, 786 F. App'x 469 (5th Cir. 2019).

See Instruction No. 1.41 "Knowingly"—To Act.

2.73A

EXTORTION BY FORCE, VIOLENCE, OR FEAR
18 U.S.C. §§ 1951(a), 1951(b)(2) (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 [her] 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 [her] 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.] [All that is necessary is that the defendant's acts had an actual effect on interstate commerce. It is not sufficient to merely show that commerce was somehow implicated in the course of events.]

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

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. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997); *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). Interference with commerce is the "express jurisdictional element" of the Hobbs Act. *Robinson*, 119 F.3d at1215.

"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). "To trigger the Hobbs Act, a business's activities need have only a slight effect on interstate commerce. For example, a business might merely purchase or use out-of-state goods or services." *United States v. Jackson*, 88 F.4th 596, 600 (5th Cir. 2023). "To determine a crime's impact on interstate commerce," the Fifth Circuit looks "to whether 'the cumulative effect of all similar instances . . . is substantial.'" *Id.* (quoting *Robinson*, 119 F.3d at 1214). While each alleged act in violation of this statute need not, by itself, have a "substantial" effect, each such act must have an actual effect on interstate commerce, no matter how minimal, for conviction of a substantive count under this statute. *See United States v. Mann*, 493 F.3d 484, 494, 496 (5th Cir. 2007) (reversing convictions where the government presented no evidence of a connection of the charged act in each substantive count with interstate commerce, reasoning that "a generalized connection between the alleged criminal activity and interstate commerce" is insufficient to sustain a conviction for a substantive count alleging extortion because "each Hobbs Act violation must cause interference with interstate commerce; it is not sufficient to show that interstate commerce was somehow implicated in the course of events.").

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. Washington*, 803 F.3d 745, 747 (5th Cir. 2015) (upholding conviction based upon nexus between conduct and interstate commerce where defendant parole officer was accepting heroin money not to enforce parole terms); *see also United States v. Rashad*, 687 F.3d 637, 642 (5th Cir. 2012); *United States v. Tomblin*, 46 F.3d 1369, 1384–85 (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, 1010 (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 plaintiff. *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 attempt to compel a person to recommend that his employer approve an investment opportunity does not constitute the obtaining of property from another under the Hobbs Act. *Sekhar v. United States*, 133 S. Ct. 2720, 2726 (2013) (defendant must pursue something of value from the victim that can be exercised, transferred, or sold). However, manual labor is property which can be obtained through extortion. *United States v. Thompson*, 647 F.3d 180, 186–87 (5th Cir. 2011) (maintenance man coerced to perform work at the home of his boss, the director of a governmental agency).

A defendant can extort property belonging to himself or property to which he claims a right. *United States v. Portillo*, 969 F.3d 144, 167–68 (5th Cir. 2020).

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").

2.73B

AFFECTING COMMERCE BY ROBBERY
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 robbery. Robbery means the unlawful taking or obtaining of or attempting or conspiring to unlawfully take or obtain personal property from the person or in the presence of another, against his [her] will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his [her] person or property [property in his [her] custody or possession] [the person or property of a relative or member of his [her] family] [anyone in his [her] company at the time of the taking or obtaining].

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 obtained [attempted to obtain] [conspired to obtain] personal property from a person or in his [her] presence, against his [her] will;

Second: That the defendant did so by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his [her] person or property [property in his [her] custody or possession] [the person or property of a relative or member of his [her] family] [anyone in his [her] company at the time of the taking or obtaining]; 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 [her] 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 [her] 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.] [All that is necessary is that the defendant's acts had an actual effect on interstate commerce. It is not sufficient to merely show that commerce was somehow implicated in the course of events.]

[A robbery of a business affects commerce if that business bought and sold merchandise that had traveled from another state to this state, or if the robbery affected sales by the business of such merchandise, or if the money proceeds from the business moved in interstate commerce, or if the business served customers who travel in interstate commerce, or if the business routinely wired or electronically transferred money from our state to a bank in another state.]

[A robbery of an individual affects interstate commerce if the robbery depletes the assets of an individual who is directly and customarily engaged in interstate commerce, or the robbery causes or creates the likelihood that the individual will deplete the assets of an entity engaged in

interstate commerce, or the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce.]

[A robbery of a drug dealer affects commerce as a matter of law if the defendant knowingly stole or attempted to steal drugs or drug proceeds.]

The term "personal property" includes money and other tangible things of value.

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, 2314–15 (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). *See* Instruction No. 1.47, "Affecting Commerce"—Defined.

"Commerce" is defined in 18 U.S.C. § 1951(b)(3). The statute requires that commerce or the movement of goods in commerce be affected "in any way or degree." *Id.* § 1951(a). "To trigger the Hobbs Act, a business's activities need have only a slight effect on interstate commerce. For example, a business might merely purchase or use out-of-state goods or services." *United States v. Jackson*, 88 F.4th 596, 600 (5th Cir. 2023). "To determine a crime's impact on interstate commerce," the Fifth Circuit looks "to whether 'the cumulative effect of all similar instances . . . is substantial.'" *Id.* (quoting *Robinson*, 119 F.3d at 1214). While each alleged act in violation of this statute need not, by itself, have a "substantial" effect, each such act must have an actual effect on interstate commerce, no matter how minimal, for conviction of a substantive count under this statute. *See United States v. Mann*, 493 F.3d 484, 494, 496 (5th Cir. 2007) (reversing convictions where the government presented no evidence of a connection of the charged act in each substantive count with interstate commerce, reasoning that "a generalized connection between the alleged criminal activity and interstate commerce" is insufficient to sustain a conviction for a substantive count alleging extortion because "each Hobbs Act violation must cause interference with interstate commerce; it is not sufficient to show that interstate commerce was somehow implicated in the course of events.")

The instructions for intrastate robberies were approved in *Miles*, 122 F.3d at 239, and *Hebert*, 131 F.3d at 522. On the issue of whether robbery of an individual has a sufficient effect on commerce, *see United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

"In order to obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer . . . . it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is 'commerce over which the United States has jurisdiction.'" *Taylor v. United States*, 136 S. Ct. 2074, 2081 (2016) (intrastate robbery of marijuana dealer's drugs or drug proceeds); *see also United States v. Avalos-Sanchez*, 975 F.3d 436, 440–43 (5th Cir. 2020) (interstate-commerce element satisfied in factual basis for guilty plea based on intent to target drug dealer's home to steal drugs on one occasion, even though the actual victims, by reason of mistake, were not the intended target).

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. For additional discussion of attempts, *see United States v. Hill*, 63 F.4th 335, 362 (5th Cir. 2023).

See Note in Instruction No. 2.73A, Extortion by Force, Violence, or Fear, for a discussion of "obtaining property." Be aware that the robbery clause requires that the defendant obtain (or attempt or conspire to obtain) "personal property," while the extortion by force and the extortion under color of official right require that the defendant obtain "property."

2.73C

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 [her] 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 [her] 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.] [All that is necessary is that the defendant's acts had an actual effect on interstate commerce. It is not sufficient to merely 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 the official or his or her 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, so long as 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. 2.73A, 18 U.S.C. § 1951(a), Extortion by Force, Violence, or Fear, and Instruction No. 2.73B, 18 U.S.C. § 1951(a), Affecting Commerce by Robbery.

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 or she 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); *Ocasio v. United States*, 136 S. Ct. 1423, 1434 (2016) ("[T]his Court held in *Evans* that Hobbs Act extortion 'under color of official right' includes the 'rough equivalent of what we would now describe as "taking a bribe."'") (quoting *Evans*, 112 S. Ct. at 1881).

A defendant can extort property belonging to himself or property to which he claims a right. *United States v. Portillo*, 969 F.3d 144, 167–68 (5th Cir. 2020).

It may be prudent to consider the definition of "official act" from the federal bribery statute, as described in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), and the Note to Instruction No. 2.09A.

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, 209 (5th Cir. 1983). Further, a private individual who holds no official position but who conspires with a public official, masquerades as a public official, or speaks for a public official may be convicted of extortion under color of official right. *United States v. Reagan*, 725 F.3d 471, 484–85 (5th Cir. 2013). A bribe-payer may enter a Hobbs Act conspiracy with the public official who is "extorting" him or her. *See Ocasio*, 135 S. Ct. at 1427.

The phrase "wrongful use of otherwise valid official power," as it appears in this Instruction, was cited with approval in *United States v. Partida*, 385 F.3d 546, 559 (5th Cir. 2004).

In *Taylor v. United States*, 136 S. Ct. 2074, 2081 (2016), the Court held that "[i]n order to obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer . . . it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is 'commerce over which the United States has jurisdiction.'" This holding has never explicitly been applied to extortion under color of official right. However, in an opinion rendered before *Taylor*, the Fifth Circuit reached a very similar conclusion under the Commerce Clause to uphold the conviction for extortion of a parole officer extorting proceeds of local drug trafficking from her parolee. *See United States v. Washington*, 803 F.3d 745, 747–48 (5th Cir. 2015).

2.74

INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES
18 U.S.C. § 1952(a)

Title 18, United States Code, Section 1952 makes it a crime for anyone to travel in interstate or foreign commerce, or to use the mail, or any facility in interstate or foreign commerce, with intent to commit or facilitate certain unlawful activity, and thereafter perform or attempt to perform that 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 traveled in interstate commerce [foreign commerce] or that he [she] used [the mail] [any facility] in [interstate commerce] [foreign commerce];

Second: That the defendant did so with the specific intent to [distribute the proceeds of] [commit any crime of violence to further] [promote, manage, establish, or carry on] any unlawful activity; and

Third: That subsequent to the act of travel [use of the mail] [use of any facility] in interstate commerce [foreign commerce] the defendant did knowingly and willfully [distribute the proceeds of] [commit any crime of violence to further] [promote, manage, establish, or carry on] such unlawful activity.

"Commerce" includes travel, trade, transportation and communication.

"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.

"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

The elements for the offense are set forth in *United States v. Bams*, 858 F.3d 937, 946 (5th Cir. 2017), *United States v. Tovar*, 719 F.3d 376, 389–90 (5th Cir. 2013), *United States v. Logan*, 949 F.2d 1370, 1381 (5th Cir. 1991), and *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1350 (5th Cir. 1988).

Section 1952(a)(2) requires that the government prove beyond a reasonable doubt that: (1) the defendant travelled in interstate commerce; (2) with the specific intent to commit any crime of violence to further an unlawful activity; and (3) committed (or attempted to commit) the crime of violence subsequent to the act of travel in interstate commerce. *See United States v. Lott*, 53 F.4th 319, 322 (2022). While the defendant must commit or attempt to commit the crime of violence charged in the indictment, the government is not required to prove that the defendant participated in the unlawful activity he intended to further; the government need only prove the defendant's state of mind—the intent to further the unlawful activity. *Id.*

Definitions of Interstate Commerce, Foreign Commerce, Commerce, and "Affecting Commerce" are found in Instruction Nos. 1.44, 1.45, 1.46, and 1.47.

See Instruction Nos. 1.41 "Knowingly"—To Act and 1.43 "Willfully"—To Act.

Intrastate use of certain facilities of interstate commerce has been found to provide the necessary interstate commerce nexus for purposes of § 1952 and the related "murder-for-hire" statute, 18 U.S.C. § 1958 (formerly 18 U.S.C. § 1952A). *See, e.g.*, *United States v. Nader*, 542 F.3d 713, 717–20 (9th Cir. 2008) (intrastate telephone call satisfied § 1952); *United States v. Marek*, 238 F.3d 310, 316–22 (5th Cir. 2001) (intrastate wire transfer satisfied § 1958); *United States v. Heacock*, 31 F.3d 249, 254–55 (5th Cir. 1994) (intrastate mailing satisfied § 1952).

There is no requirement that the interstate travel or use of interstate facilities be essential to the scheme. It is enough if the interstate travel or use of interstate facilities made the unlawful activity easier. *See United States v. Garrett*, 716 F.2d 257, 265 (5th Cir. 1983); *United States v. Pecora*, 693 F.2d 421, 423 (5th Cir. 1982); *United States v. Perrin*, 580 F.2d 730, 736 (5th Cir. 1978). Nor is it necessary for the defendant to have had knowledge of the use of interstate facilities or specifically intend to use the interstate facilities. *Perrin*, 580 F.2d at 737; *see also United States v. Edelman*, 873 F.2d 791, 794–95 (5th Cir. 1989) (construing former 18 U.S.C. § 1952A, currently 18 U.S.C. § 1958).

The Fifth Circuit applied the foregoing principles in *United States v. Shah*, 95 F.4th 328 (5th Cir. 2024), when the Court held the evidence was sufficient to convict when the defendant received an illegal payment via check that was then deposited into a bank account and cleared through an internet-connected clearance system, and that there was no requirement that the defendant have had knowledge of the interstate nature of the facilities through which the check was cleared.

For purposes of § 1952(a)(2), the term "crime of violence" is defined by 18 U.S.C. § 16(a), which requires that the offense have as an element the use, attempted use, or threatened use of physical force against the person or property of another. *See United States v. Jackson*, 7 F.4th 261, 262 (5th Cir. 2021). Although 18 U.S.C. § 16(b) includes a residual clause, the Supreme Court ruled in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214–16 (2018), that § 16(b) was unconstitutionally vague. "That ruling left only § 16(a) to define a 'crime of violence' under [§ 1952(a)(2)]." *Jackson*, 7 F.4th at 262.

"Unlawful activity" is defined in 18 U.S.C. § 1952(b). The appropriate one(s) should be specified and addressed, as necessary, in the instructions provided to the jury.

For purposes of § 1952(b), satisfying the "business enterprise" aspect of "unlawful activity" requires a "continuous course of business—one that already exists as of the time of the overt act or is intended thereafter. Evidence of an isolated criminal act, or even sporadic acts, will not suffice." *United States v. Roberson*, 6 F.3d 1088, 1094–95 (5th Cir. 1993). The government need not prove, however, that the defendant personally engaged in a continuous course of conduct; it is sufficient for the defendant to have simply participated in such conduct. *See United States v. Ruiz*, 987 F.2d 243, 251 (5th Cir. 1993).

In *United States v. Clark*, the court distinguished circumstances in which government conduct taken solely for the purpose of ensuring the existence of an interstate nexus may provide the necessary interstate element from those in which it may not. 62 F.3d 110, 111–15 (5th Cir. 1995) (defendant's voluntary, interstate conduct taken in response to a government request provided interstate element whereas unilateral conduct by government agent would not).

For purposes of the third element, the court in *Hernandez-Palacios* found that that defendant could not have committed "an act in furtherance of the unlawful activity subsequent to the act of travel since he was detained during the very act of travel." *Hernandez-Palacios*, 838 F.2d at 1350 (defendant detained at El Paso, Texas border checkpoint in bus being utilized to transport marijuana from Mexico into the United States). The subsequent act need not itself be unlawful; rather, it need only make the unlawful activity easier. *See United States v. Jones*, 642 F.2d 909, 913 (5th Cir. 1981).

2.75

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 _____'s (*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 _____ (*name state*); 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).

18 U.S.C. § 1955 is not a specific intent crime. *Davis*, 690 F.3d at 340. Thus, intent to violate federal law is not a necessary element of the crime, nor is intent to violate state law. *United States v. Hawes*, 529 F.2d 472, 481 (5th Cir. 1976) ("It is sufficient that appellants intended to do all of the acts prohibited by the statute and proceeded to do them.").

The government need not prove that the defendant performed any act prohibited by state law; the focus is on the illegal nature of the gambling business, which the government must prove the defendant "conducted," financed," etc. under § 1955(a). *Sanabria v. United States*, 98 S. Ct. 2170, 2182 (1978) ("It is participation in the gambling business that is a federal offense, and it is only the gambling business that must violate state law . . . [P]articipation in a single gambling business is but a single offense, no matter how many state statutes the enterprise violated."); *see also Hawes*, 529 F.2d at 478 (holding that the defendants themselves need not engage in illegal gambling in order to operate a gambling business).

Although a mere bettor or customer does not participate in the "conduct" of the business for purposes of § 1955, a bookmaker who regularly exchanges line information or places/accepts layoff bets with another bookmaker may fall under the statute. *See United States v. Box*, 530 F.2d 1258, 1265–67 (5th Cir. 1976) ("[T]he regular direct exchange of layoff bets and line information can connect otherwise independent gambling operations, which alone would be illegal under state but not federal law (because less than five participants were involved), into one business."). *See id.* for a detailed discussion of factors the Fifth Circuit considers in determining whether an exchange of layoff bets is enough to link two separate bookmaking operations into one business for the purposes of meeting the § 1955 jurisdictional requirement of five participants in one business.

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 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). It is the gambling business that must violate state law—not the individual acts of a particular defendant. *Sanabria*, 98 S. Ct. at 2182.

2.76A

LAUNDERING MONETARY INSTRUMENTS—PROCEEDS OF UNLAWFUL ACTIVITY
18 U.S.C. §§ 1956(a)(1)(A)(i), 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 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 _____ (*insert underlying felony*) is a felony.

The term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition [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] [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 institution," 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 [her] 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

The most commonly charged money laundering statute, 18 U.S.C. § 1956, consists of three subsections. Subsection (a)(1) (to which this instruction applies) covers domestic financial transactions; subsection (a)(2) covers international transportation; transportation, transmission or transfer of monetary instruments; and subsection (a)(3) (Instruction No. 2.76B) covers financial transactions undertaken based on representations made in undercover investigations.

This charge applies to the two more frequently charged subsections of § 1956(a)(1)—(a)(1)(A)(i) and (a)(1)(B)(i)—but would have to be adjusted for indictments charging other subsections of (a)(1). The difference between (a)(1)(A)(i) and (a)(1)(B)(i) is in the *mens rea*

element. For subsection (a)(1)(A)(i), the *mens rea* is intent to promote the carrying on of specified unlawful activity (the "promotion" element). For subsection (a)(1)(B)(i), the *mens rea* is knowledge that the transaction was designed to conceal the proceeds of specified unlawful activity (the "designed to conceal" element).

The elements for an offense charged under § 1956(a)(1) are discussed in *United States v. Valdez*, 726 F.3d 684, 689 (5th Cir. 2013), *United States v. Pennell*, 409 F.3d 240, 243 (5th Cir. 2005), and *United States v. Rivera*, 295 F.3d 461, 468 (5th Cir. 2002). 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).

The definition of "proceeds" was amended by Congress in 2009 in reaction to *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008). *See* 18 U.S.C. § 1956(c)(9).

The judge must determine that the charged "specified unlawful activity" is actually one covered by 18 U.S.C. § 1956(c)(7)(A)–(G), and that the charged "some form of unlawful activity" is actually a felony under federal, state, or foreign law. 18 U.S.C. § 1956(c)(1).

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) (holding 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 proceeds of illegal activity until the unlawful activity is complete." *United States v. Harris*, 666 F.3d 905, 910 (5th Cir. 2012) (holding that the mere payment of the purchase price for drugs does not constitute money laundering); *see also United States v. Anderson*, 932 F.3d 344, 350–51 (5th Cir. 2019) (reversing attempted money laundering convictions due to the lack of a substantial step towards a transaction beyond receiving the proceeds, believed to be drug money).

For a discussion of the element "knowingly attempting to conduct a financial transaction," *see United States v. Delgado*, 256 F.3d 264, 275–76 (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, 186 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* [sic] *activity*.'") (emphasis added in original) (quoting 18 U.S.C. § 1956(a)(1)); *see also United States v. Shah*, 95 F.4th 328 (5th Cir. 2024) (same).

For a detailed discussion of the promotion element of § 1956(a)(1)(A)(i), *see United States v. Stanford*, 823 F.3d 814, 850–51 (5th Cir. 2016) ("Although 'merely providing services to a known drug dealer and accepting the proceeds of the illegal activity as payment is insufficient as

a matter of law to establish criminal liability for money laundering,' one who engages in all of the above and voluntarily joins the conspiracy 'knowing its purpose and with the intent to further the illegal purpose' may be convicted of money laundering."), *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 business 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, 475–76 (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).

The *Cuellar* Court considered the "designed . . . to conceal" element under § 1956(a)(2)(B) and held that the government need not show that the defendant's acts created the appearance of legitimate wealth or converted dirty money into clean. *Cuellar*, 128 S. Ct. at 2000–01. However, the Court added that "merely hiding 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.* 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 effect—of the transportation was to conceal or disguise" the nature, location, source, ownership, or control of the illegal proceeds. *Id. See United States v. Brown*, 553 F.3d 768, 786–87, 786 n.56 (5th Cir. 2008) (applying *Cuellar*'s statutory interpretation of § 1956(a)(2)(B) to § 1956(a)(1)(B)(i)), and *United States v. Demmitt*, 706 F.3d 665, 678–79 (5th Cir. 2013), for a detailed discussion of the "designed . . . to conceal" element; *see also United States v. Cessa*, 861 F.3d 121, 136 (5th Cir. 2017) ("In *Cessa I* [785 F.3d 165, 186 (5th Cir. 2015)] we explicitly approved of a permissive inference instruction on commingling, so long as the instructions 'included . . . language clarifying that the inference was permissive and not mandatory.'" (second alteration in original)).

Also, for a defendant charged with conspiracy to commit a violation of § 1956(a)(1)(B)(i), 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, 351–52 (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 1191–92; *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 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). The Fifth Circuit has rejected a defendant's argument that storing funds given to him by a co-conspirator and later returning the funds was not a "disposition" sufficient to constitute a transaction under § 1956. *United States v. Holt*, 493 F. App'x 515, 520 (5th Cir. 2012) (unpublished).

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, 579–80 (5th Cir. 2000), *amended on reh'g in part by* 244 F.3d 367 (5th Cir. 2001) (per curiam), *abrogated on other grounds by United States v. Longoria*, 298 F.3d 367, 373–74 (5th Cir. 2002) (per curiam). Similarly, a jury instruction on the substantive offense which did not require the jury to unanimously agree on which of the two mental states the defendant possessed was not plain error. *See Valdez*, 726 F.3d at 691–92.

Use Instruction Nos. 1.34, 1.44, 1.45, and 1.46 on Attempt, Interstate Commerce, Foreign Commerce, and Commerce, respectively.

2.76B

LAUNDERING MONETARY INSTRUMENTS—PROPERTY REPRESENTED TO BE PROCEEDS OF UNLAWFUL ACTIVITY 18 U.S.C. §§ 1956(a)(3)(A), 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 a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition [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] [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 [her] 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

The most commonly charged money laundering statute, 18 U.S.C. § 1956, consists of three subsections. Subsection (a)(1) (Instruction No. 2.76A) covers domestic financial transactions; subsection (a)(2) covers international transportations; and subsection (a)(3) (to which this Instruction applies) covers undercover investigations.

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).

For a discussion of the elements of a violation of 18 U.S.C. § 1956(a)(3), *see United States v. Castaneda-Cantu*, 20 F.3d 1325, 1330 (5th Cir. 1994) (per curiam).

The judge must determine that the charged "specified unlawful activity" is actually one covered by 18 U.S.C. § 956(c)(7)(A)–(G). 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, 2000–01, 2006 (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.").

Law enforcement agents do not have to make express representations that the funds to be laundered were proceeds of specified unlawful activity; it is enough that the officer or other authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds. *See Casteneda-Cantu*, 20 F.3d at 1331 ("[W]hen evaluating the representations made by law enforcement agents, language used by a law enforcement agent that might be ambiguous to a person unfamiliar with illicit activity may not be ambiguous to a person involved in an illicit activity.").

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, 1191–92 (5th Cir. 1997); *see also United States v. Ogba*, 526 F.3d 214, 239 (5th Cir. 2008).

See also Instruction Nos. 1.34, 1.44, 1.45 and 1.46 on Attempt, Interstate Commerce, Foreign Commerce, and Commerce, respectively.

2.76C

CONSPIRACY TO COMMIT MONEY LAUNDERING
18 U.S.C. § 1956(h)

Title 18, United States Code, Section 1956(h), makes it a crime for anyone to conspire to commit money laundering.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose.

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 _____ (*specify elements of the offense charged in the indictment*);

Second: That the defendant knew the unlawful purpose of the agreement; and

Third: That the defendant joined in the agreement willfully, that is, with the intent to further the unlawful purpose.

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 [her] 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 an overt act in furtherance of the conspiracy.

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

A similar instruction was used in *United States v. Isgar*, 739 F.3d 829 (5th Cir. 2014). "The elements of a conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), are: (i) 'that there was an agreement between two or more persons to commit money laundering'; and (ii) 'that the defendant joined the agreement knowing its purpose and with the intent to further the illegal purpose.'" *United States v. Alaniz*, 726 F.3d 586, 601 (5th Cir. 2013) (quoting *United States v. Fuchs*, 467 F.3d 889, 906 (5th Cir. 2006)); *see also United States v. Rosbottom*, 763 F.3d 408, 417–18 (5th Cir. 2014) (finding that the instruction correctly described "how the substantive offense could be committed by promotion or by concealment"). "The government need not prove an overt act in furtherance of the conspiracy." *Fuchs*, 467 F.3d at 906 (quoting *Whitfield v. United States*, 125 S. Ct. 687, 694 (2005)).

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, 579–80 (5th Cir. 2000), *amended on reh'g in part by* 244 F.3d 367 (5th Cir. 2001) (per curiam), *abrogated on other grounds by United States v. Longoria*, 298 F.3d 367, 373–74 (5th Cir. 2002) (per curiam). Similarly, a jury instruction on the substantive offense which did not require the jury to unanimously agree on which of the two mental states the defendant possessed was not plain error. *See United States v. Valdez*, 726 F.3d 684, 691–92 (5th Cir. 2013).

For multiple conspiracies or a conspirator's liability for a substantive count, *see* Instruction Nos. 2.16 and 2.17.

For the elements of certain substantive money laundering offenses, *see* Instruction Nos. 2.76A, 2.76B and 2.77.

Defendants charged with participating in a conspiracy to launder money may argue that they did not join the conspiracy. *United States v. Cessa*, 861 F.3d 121, 130 (5th Cir. 2017) (citing *United States v. Cessa* (*Cessa I*), 785 F.3d 165, 175 (5th Cir. 2015)). The burden is on the government to prove that the defendant joined the conspiracy, but subsequent withdrawal from the conspiracy is an affirmative defense, the burden of proof for which falls on the defendant. *See* Instruction No. 2.18.

Knowledge, as an element of money laundering, is almost always proved by circumstantial evidence. *Cessa I*, 785 F.3d at 174. To support a conviction for conspiracy to commit money laundering, there must be evidence beyond that of the bare transaction—enough to infer specific intent to join the conspiracy. *Id.* at 177–80 (holding that merely providing horse training services to a known drug dealer and accepting proceeds of the illegal activity as payment is insufficient as a matter of law to establish criminal liability for joining a money laundering conspiracy, even when the amount of money the defendant earned increased substantially once he started providing services to cartel members).

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*, 125 S. Ct. 687, 691 (2005); *see also United States v. Guillermo Balleza*, 613 F.3d 432, 433 n.1 (5th Cir. 2010) (per curiam). 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.

United States v. Haro, 753 F. App'x 250, 254–55 (5th Cir. 2018) (per curiam, unpublished), provides a thorough discussion of the method of attributing an amount of laundered money to a particular conspiracy defendant; the attributable amount is a question of fact, including the amount attributed to acts or omissions caused by the defendant or, if applicable, by a co-conspirator within the scope of the conspiracy.

2.77

ENGAGING IN MONETARY TRANSACTIONS IN PROPERTY DERIVED FROM SPECIFIED UNLAWFUL ACTIVITY
18 U.S.C. § 1957

Title 18, United State Code, Section 1957, makes it a crime for a person to knowingly engage in, or attempt to engage in, a monetary transaction involving criminally derived property, in excess of $10,000, that is derived from specified criminal activity.

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

First: That the defendant knowingly engaged [attempted to engage] in a monetary transaction;

Second: That the monetary transaction was of a value greater than $10,000;

Third: That the monetary transaction involved criminally derived property;

Fourth: That criminally derived property was derived from specified unlawful activity;

Fifth: That the defendant knew that the monetary transaction involved criminally derived property; and

Sixth: That the monetary transaction took place within the United States [the special maritime and territorial jurisdiction of the United States.]

[*Sixth*: That the monetary transaction took place outside the United States and the special maritime and territorial jurisdiction of the United States, but the defendant is a United States person.]

The term "criminally derived property" means any property constituting or derived from, proceeds obtained from a criminal offense.

The government is not required to prove that the defendant knew that the offense from which the criminally derived property was derived constituted "specific unlawful activity" as defined by the statute creating this offense. The government must prove, however, that the defendant knew that the involved property was obtained or derived from the commission of a crime.

Note

The three elements of a § 1957 offense are: "(1) property valued at more than $10,000 that was derived from a specified unlawful activity, (2) the defendant's engagement in a financial

transaction with the property, and (3) the defendant's knowledge that the property was derived from unlawful activity." *United States v. Davis*, 53 F.4th 833, 843 (5th Cir. 2023) (quoting *United States v. Moparty*, 11 F.4th 280, 298 (5th Cir. 2021)).

The definition of "monetary transaction" is found in 18 U.S.C. § 1957(f), which adopts by reference the definition of "financial institution" found in 18 U.S.C. § 1956. An appropriate definition of these terms, considering the particular allegations of the indictment or bill of information, should be provided.

The definitions of "specified unlawful activity" and "proceeds" are found in 18 U.S.C. § 1957(f), which adopts the meanings given to those terms in 18 U.S.C. § 1956. An appropriate definition of "specified unlawful activity," considering the particular allegations of the indictment or bill of information, should be provided.

The definition of "United States person" is found in 18 U.S.C. § 1957(d)(2), which adopts the meaning given to that term in 18 U.S.C. § 3077 (except that the class of persons described in paragraph (2)(D) of § 3077 is excluded). An appropriate definition of the term, considering the particular allegations of the indictment or bill of information, should be provided.

See Instruction No. 1.41 "Knowingly"—To Act.

Under § 1957(c), there is no requirement that the government prove that the defendant knew that the offense from which the criminally derived property was derived was "specific unlawful activity," as defined by § 1957 (incorporating the definition set forth in 18 U.S.C. § 1956); all that is required is that the defendant knew that the property in question is criminally derived. *See Davis*, 53 F.4th at 844 (citing *United States v Pettigrew*, 77 F.3d 1500, 1513 (5th Cir. 1996)).

See Davis, 53 F.4th at 844, and *United States v. Evans*, 892 F. 3d 692, 708–10 (5th Cir. 2018), regarding elements of the offense and discussing financial transactions involving an account in which "clean" and "tainted" funds have been commingled; *see also Martinez*, 921 F.3d at 476–77 (discussing proof required in commingling case); *Evans*, 892 F.3d at 708–09 (discussing the clean-funds-out-first rule).

See United States v. Davis, 226 F.3d 346, 356 (5th Cir. 2000), and *United States v. Allen*, 76 F.3d 1348, 1360–62 (5th Cir. 1996), regarding when a scheme is deemed to have produced "proceeds."

2.78

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, threaten 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;

Second: That the enterprise was engaged in interstate [foreign] commerce or that its activities affected interstate [foreign] commerce;

Third: That the enterprise was engaged in racketeering activity;

Fourth: That the defendant committed [threatened to commit] [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 [threatening to commit] [attempting to commit] [conspiring to commit] the crime[s] of violence was to gain entrance to, or to maintain, or to increase his [her] 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 [her] 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 [she] 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.]

An "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

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 proved to have been an ongoing organization, formal or informal, that functioned as a continuing unit.

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" 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.

"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.]

Note

For a discussion of the elements of this offense, *see United States v. Shows Urquidi*, 71 F.4th 357, 377 (5th Cir. 2023), *United States v. Velasquez*, 881 F.3d 314, 332 (5th Cir. 2018), *United States v. Jones*, 873 F.3d 482, 489–90 (5th Cir. 2017) (citing this instruction).

"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). While the definition provided in § 1959 is substantially the same as that provided in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, there are two notable differences between the two definitions. First, § 1961, unlike § 1959, includes "any individual" in its list of possible legal entities that may make up an enterprise. Second, 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). For further discussion of the definition of "enterprise" in the context of gangs, *see United States v. Perry*, 35 F.4th 293, 318–23 (5th Cir. 2022), *United States v. McClaren*, 13 F.4th 386, 403 (5th Cir. 2021).

The above instruction provides the required elements with the minimum additional information needed to assist the jury in 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]."

See Turkette, 101 S. Ct. at 2527.

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," and "Affecting Commerce," *see* Instruction Nos. 1.44, 1.45, and 1.46 and 1.47.

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 required nexus with interstate commerce is "minimal," and instrumentalities of interstate commerce, including pagers, telephones, and mobile phones, may be sufficient to affect interstate commerce. *Delgado*, 401 F.3d at 297 (citation omitted).

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. 1.34, Attempt, and 2.15A, Conspiracy. Note that a conviction for conspiracy to violate 18 U.S.C. § 1959 does not require an overt act. *See United States v. Pascacio-Rodriguez*, 749 F.3d 353, 364 n.48 (5th Cir. 2014).

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). "Murder while a gang member is not necessarily a murder for the purpose of maintaining or increasing position in a gang, even if it would have the effect of maintaining or increasing position in a gang." *Id.* at 969 (emphasis in original). 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 that membership." *See United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001).

2.79

RACKETEER INFLUENCED CORRUPT ORGANIZATIONS
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 [collection of an unlawful debt]. 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 [collection of unlawful debt].

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 [her] 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," "Commerce," and "Affecting" Commerce are in Instruction Nos. 1.44, 1.45, 1.46 and 1.47. *See United States v. Velasquez*, 881 F.3d 314, 329 (5th Cir. 2018) (approving instruction on commerce element).

The elements of this offense are discussed in *United States v. Shows Urquidi*, 71 F.4th 357, 374–76, 382–84 (jury instruction) (5th Cir. 2023), *United States v. Nieto*, 721 F.3d 357, 365–66 (5th Cir. 2013), and *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), *United States v. Johnson*, 825 F. App'x 156, 174 (5th Cir. 2020) (citing this Instruction in rejecting an instruction that "two acts of racketeering do not necessarily constitute a pattern of racketeering activity"), *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) and *United States v. McClaren*, 13 F.4th 386, 401 (5th Cir. 2021) ("Finding an enterprise does not require proving a hierarchy, chain of command, role differentiation, membership dues initiation rituals, or unique modus operandi."). [A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *United States v. Perry*, 35 F.4th 293, 18 (5th Cir. 2022) (quoting *Boyle v. United States*, 556 U.S. 938, 944 (2009)). "The term 'enterprise' encompasses 'an amoeba-like infra-structure that controls a secret criminal network' as well as 'a duly formed corporation that elects officers and holds annual meetings.'" *United States v. Jones*, 873 F.3d 482, 490 (5th Cir. 2017)).

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); *Shows Urquidi*, 71 F.4th at 374–76; and *Perry*, 35 F.4th at 317–18 ("The elements of a RICO conspiracy are: (1) an agreement between two or more people to commit a substantive RICO offense; and (2) knowledge of and agreement to the overall objective of the RICO offense. These elements may be established by circumstantial evidence. A co-conspirator needs only to have known of, and agreed to, the overall objective of the RICO offense."); *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 sub nom. Salinas v. United States*, 118 S. Ct. 469 (1997) (holding 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 United States v. Rosenthal*, 805 F.3d 523, 532–33 (5th Cir. 2015) (instructions on conspiracy do not require proof of defendant's operation or management of the enterprise); *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; *Delgado*, 401 F.3d at 297, for a discussion of "affecting" interstate commerce; and *McClaren*, 13 F.4th at 401–02, for a discussion of drug trafficking

activity as a "type of economic activity that has been recognized to substantially affect interstate commerce in the aggregate."

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 or she is the sole owner—whether he or she 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).

"'Racketeering activity' includes state felony offenses involving murder, robbery, and several other serious offenses, as well as serious federal offenses including narcotics violations." *United States v. Perry*, 35 F.4th 293, 318 (5th Cir. 2022). *See* 18 U.S.C.§ 1961(1). "Unlawful debt" is defined in 18 U.S.C. § 1961(6).

2.80A

BANK ROBBERY
18 U.S.C. §§ 2113(a) (FIRST CLAUSE), 2113(d)

The first paragraph of Title 18, United States Code, Section 2113(a) and Section 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 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. 1.35 on Lesser Included Offense.

On the other hand, 18 U.S.C. § 2113(b), bank theft, 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).

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. McLaughlin*, 739 F. App'x 270, 272–73 (5th Cir. 2018) (noting that it "is well-settled that a district court does not err by giving a charge that tracks this Circuit's pattern jury instructions and that is a correct statement of the law"), *United States v. Valentine*, 439 F. App'x 309, 310–11 (5th Cir. 2011), *United States v. Baker*, 17 F.3d 94, 97–98 (5th Cir. 1994), and *United States v. McCarty*, 36 F.3d 1349, 1356–59 (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).

2.80B

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 or she wrote it).

The conduct and expectations of a defendant and his or her 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 or she 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.

For a definition of "steal," *see* Instruction No. 2.27, 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 whether the property stolen had a value of more than $1,000 is disputed, the court should consider giving Instruction No. 1.35, Lesser Included Offense.

2.80C

BANK BURGLARY
18 U.S.C. § 2113(a) (SECOND PARAGRAPH)

The second paragraph of Title 18, United States Code, Section 2113(a) makes it a crime for anyone to enter [attempt to enter] any federally insured bank [credit union] [savings and loan association] [building used in whole or in part as a bank, credit union, or savings and loan association] with the intent to commit in such bank [credit union] [savings and loan association] [building] [part thereof, so used] any larceny [felony affecting such bank [credit union] [savings and loan association] [building] and in violation of any statute 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 [attempted to enter] a federally insured bank [credit union] [savings and loan association] [building used in whole or part as such];

Second: That at the time that the defendant entered [attempted to enter] the federally insured bank [credit union] [savings and loan association] [building used in whole or part as such] he [she] intended to commit therein any larceny [the following felony, in violation of any statute of the United States. _____ (*insert name of federal felony listed in the indictment*);] and

Third: That the felony be one affecting such bank [credit union] [savings and loan association] [building].

[A person commits any "larceny" when he takes and carries away, with intent to steal or purloin, any property [money] [thing of value] of another.]

[I instruct you that _____ (*insert name of federal felony listed in the indictment*) is a felony in violation of a statute of the United States.]

[A person commits the felony of _____ when he (*insert appropriate Instruction*).]

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

United States v. Butler, 949 F.3d 230, 235 (5th Cir. 2020), and *United States v. Dentler*, 492 F.3d 306, 310 (5th Cir. 2007), list the elements of the offense, breaking them down differently than this instruction but including the same information.

The first and second paragraph of § 2113(a) describe two separate offenses with separate elements. *Butler*, 949 F.3d at 235 ("Other than a bank or other covered financial institution being the victim, there is no overlap between these elements."). The lesser-known second paragraph of § 2113(a) "makes it a crime to burglarize a bank—that is, to enter a bank with the intent to commit a felony or larceny inside the bank." *Id.* at 232; *see also Dentler*, 492 F.3d at 310.

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).

The definition of "larceny" stems from 18 U.S.C. § 2113(b), and Instruction No. 2.80B, Bank Theft. For a definition of "steal," *see* Instruction No. 2.27, 18 U.S.C. § 641, Theft of Government Money or Property.

For an attempted bank burglary, *see* Instruction No. 1.34, Attempts.

United States v. Jones, 993 F.2d 58, 61 (5th Cir. 1993), states that when a defendant is charged under the second paragraph of § 2113(a) the government must prove that the defendant had the intent to commit the requisite felony or larceny "when he enters a bank."

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, _____ (*as 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 [she] 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

For a list of elements (for carjacking by force rather than by intimidation), *see United States v. Luan Van Nguyen*, 566 F. App'x 322, 326–27 (5th Cir. 2014) ("(1) the defendant intentionally took a motor vehicle from a person; (2) the motor vehicle had been transported in interstate commerce; (3) the defendant did so by force; (4) the defendant intended to cause death or serious bodily harm; and (5) the defendant possessed such intent when he took the victim's vehicle").

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).

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, 970–72 (1999). Nor does "Section 2119's intent requirement . . . mandate that a defendant intend to kill or cause serious injury *in furtherance of* taking the vehicle;" it is sufficient if the government proves "that at the moment the defendant demand or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver," regardless of whether such action was necessary to effectuate theft of the car. *United States v. Jones*, 75 F.4th 502, 508 (5th Cir. 2023) (italics in original); *see also United States v. Frye*, 489 F.3d 201, 208–09 (5th Cir. 2007) (defendant must possess the intent to cause death or seriously bodily injury at the precise moment he or she demanded or took control of the car by force, violence or intimidation); *United States v. Harris*, 420 F.3d 467, 471 (5th Cir. 2005) (same).

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," "Commerce," and "Affecting Commerce" are contained in Instruction Nos. 1.44, 1.45, 1.46 and 1.47 respectively.

2.82A

SEXUAL ABUSE—THREATS OR FEAR
18 U.S.C. § 2242(1)

Title 18, United States Code, Section 2242(1), makes it a crime for anyone to cause another person to engage in a sexual act by threatening or placing that person in 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 knowingly caused _____ (name of alleged victim) to engage in a sexual act by threatening or placing _____ (name of alleged victim) in fear; and

Second: That the offense was committed within the special maritime and territorial jurisdiction of the United States [in a Federal prison] [in a prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency].

The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus, occurring upon penetration, however slight; (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.

Note

The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 and Instruction No. 1.07.

This instruction requires that the government prove the jurisdictional element beyond a reasonable doubt.

In *United States v. Bell*, the Fifth Circuit held that the government need only prove by a preponderance of the evidence that an offense occurred within the "special maritime and territorial jurisdiction of the United States." 993 F.2d 427, 429 (5th Cir. 1993). Subsequent panel decisions, however, have questioned that holding, and it is probably wrong. *See United States v. Reff*, 479 F.3d 396, 400 (5th Cir. 2007); *United States v. Bailey*, 169 F. App'x 815, 821 (5th Cir. 2006). *But see United States v. Bourgeois*, 537 F. App'x 604, 612 n.18 (5th Cir. 2013) (in a § 3591(a)(2) murder case, citing to *Bell* to say "[a]lthough our precedent requires that jurisdiction be proven by

a preponderance of the evidence, the jury was instructed, without objection from the government, that it had to find jurisdiction beyond a reasonable doubt"). In these cases, the court acknowledged that *Bell* is inconsistent with the Supreme Court's holding that "any element included in the offense-defining part of a criminal statute must be proved beyond a reasonable doubt." *United States v. Perrien*, 274 F.3d 936, 939 n.1 (5th Cir. 2001) (citing *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2356 (2000)); *Bailey*, 169 F. App'x at 821. No panel has explicitly overruled *Bell* because the evidence in each case was sufficient to establish the jurisdictional element beyond a reasonable doubt. *See Reff*, 479 F.3d at 400; *Bailey*, 169 F. App'x at 821.

In *United States v. Montgomery*, the Fifth Circuit clarified that "threat or fear" requires "more than merely a lack of consent," and is distinct from Section 2241's force element. 966 F.3d 335, 339 (5th Cir. 2020) (citing cases). *Cf. United States v. Sadeek*, 77 F.4th 320, 325–26 (5th Cir. 2023) ("[F]or purposes of §2242, fear has a 'very broad' definition and can be 'inferred from the circumstances, particularly a disparity in power between defendant and victim.'" (quoting *United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998))).

The definition of "sexual act" is found in 18 U.S.C. § 2246(2).

This instruction can be modified to instruct the jury on the elements of abusive sexual contact under 18 U.S.C. § 2244(a)(2).

2.82B

SEXUAL ABUSE—VICTIM INCAPABLE
18 U.S.C. § 2242(2)

Title 18, United States Code, Section 2242(2), makes it a crime for anyone to engage in a sexual act with another person if that person is incapable of appraising the nature of the conduct, incapable of declining to participate in the sexual act, or incapable of communicating unwillingness to engage in the sexual act.

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 engaged in a sexual act with _____ (*name of alleged victim*);

Second: That _____ (*name of alleged victim*) was incapable of appraising the nature of the conduct [physically incapable of declining participation in that sexual act] [physically incapable of communicating unwillingness to engage in that sexual act];

Third: That the defendant knew that _____ (*name of alleged victim*) was incapable of appraising the nature of the conduct [physically incapable of declining participation in that sexual act] [physically incapable of communicating unwillingness to engage in that sexual act]; and

Fourth: The offense was committed within the special maritime and territorial jurisdiction of the United States [in a federal prison] [in a prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any federal department or agency].

The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus, occurring upon penetration, however slight; (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.

Note

For a discussion of the elements of this crime, *see United States v. Speights*, 712 F. App'x 423, 426 (5th Cir. 2018) ("To obtain a conviction for sexual abuse under § 2242(2), the Government must prove beyond a reasonable doubt that: (1) the defendant knowingly engaged in a 'sexual act' with the victim; (2) the act took place within the special maritime or territorial jurisdiction of the United States, or certain other locations specified in the statute; and (3) the

defendant knew the victim was either (a) 'incapable of appraising the nature of the conduct' or (b) 'physically incapable of declining participation in, or communicating unwillingness to engage in the 'sexual act.'" (citations omitted)).

The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 and Instruction No. 1.07.

This instruction requires *mens rea* as to incapacitation. Not all circuits, including the Fifth Circuit, have decided whether a defendant must know that the victim was incapacitated to be guilty of this offense. The Fifth Circuit raised, but did not resolve, the question as a matter of first impression in *United States v. Brown*, 774 F. App'x 837, 840–41 (5th Cir. 2019). Instead, the court held that the trial court's finding that § 2242 requires only reckless disregard of the victim's ability to consent was not plain error. *Id.*; *see also United States v. Freeman*, 70 F.4th 1265, 1273 n.3 (10th Cir. 2023) (noting that the Tenth Circuit has not yet determined whether the *mens rea* applies to the element of incapacitation).

The Eighth Circuit held that a defendant must know that the victim is incapacitated. *United States v. Fast Horse*, 747 F.3d 1040, 1042–44 (8th Cir. 2014). While the Seventh Circuit intimated that a defendant must know that the victim was incapable of declining participation in the sexual act, its holding did not specifically address the issue. *United States v. Peters*, 277 F.3d 963, 968 (7th Cir. 2002) (reversing the district court's denial of judgment of acquittal, remarking that the evidence was insufficient not only to show that the victim was incapacitated, but also that the defendant knew that the victim was incapacitated). *But see* Pattern Criminal Jury Instructions of the Seventh Circuit 789–790 (2020) (excluding knowledge requirement for the incapacitation element). The Ninth Circuit's pattern jury instruction on 18 U.S.C. § 2242 does not include a knowledge requirement. Manual of Model Criminal Jury Instructions (Ninth Circuit), § 20.9 (2022).

The definition of "sexual act" is found in 18 U.S.C. § 2246(2).

For a discussion of the burden of proof on the jurisdictional element, *see* Instruction No. 2.82A.

This instruction can be modified to instruct the jury on the elements of abusive sexual contact under 18 U.S.C. § 2244(a)(2).

2.82C

SEXUAL ABUSE OF A MINOR
18 U.S.C. § 2243(a)

Title 18, United States Code, Section 2243(a), makes it a crime for anyone to knowingly engage in a sexual act with another person who has attained the age of twelve years, but has not attained the age of sixteen years, and is at least four years younger than the person so engaging.

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 engaged in a sexual act with _____ (name of alleged victim);

Second: At the time of the sexual act, _____ (name of alleged victim) had reached the age of twelve years but had not yet reached the age of sixteen years;

Third: At the time of the sexual act, _____ (name of alleged victim) was at least four years younger than the defendant; and

Fourth: That the defendant's actions took place within the special maritime and territorial jurisdiction of the United States [in a Federal prison] [in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency].

The government need not prove that the defendant knew the age of the other person engaging in the sexual act [that the requisite age difference existed between the persons so engaging].

The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus, occurring upon penetration, however slight; (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.

Note

The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7, and in Instruction No. 1.07.

The term "sexual act" is defined in 18 U.S.C. § 2246(2). *See Perez-Gonzalez v. Holder*, 667 F.3d 622, 626 (5th Cir. 2012).

It is a defense to the charge of sexual abuse of a minor that the defendant reasonably believed that the victim had attained the age of 16 years. The defendant has the burden of proving by a preponderance of the evidence that he [she] reasonably believed that the victim had attained the age of 16 years. *See* 18 U.S.C. § 2243(d).

See Instruction No. 1.41 "Knowingly"—To Act.

2.82D

SEXUAL ABUSE OF A WARD
18 U.S.C. § 2243(b)

Title 18, United States Code, Section 2243(b), makes it a crime for anyone to knowingly engage in a sexual act with another person who is in official detention and under the custodial, supervisory, or disciplinary authority of the person so engaging.

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 engaged in a sexual act with _____ (name of alleged victim);

Second: At the time, _____ (name of alleged victim) was in official detention at the _____ (name of institution);

Third: At the time, _____ (name of alleged victim) was under the custodial, supervisory, or disciplinary authority of the defendant; and

Fourth: That the defendant's actions took place within the special maritime and territorial jurisdiction of the United States [in a Federal prison] [in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency].

The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus, occurring upon penetration, however slight; (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.

Note

The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 and in Instruction No. 1.07.

The term "sexual act" is defined in 18 U.S.C. § 2246(2). *See Perez-Gonzalez v. Holder*, 667 F.3d 622, 626 (5th Cir. 2012).

The term "official detention" is defined in 18 U.S.C. § 2246(5).

See Instruction No. 1.41 "Knowingly"—To Act.

2.82E

SEXUAL ABUSE—LACK OF CONSENT
18 U.S.C. § 2242(3)

Title 18, United States Code, Section 2242(3), makes it a crime for anyone to knowingly engage in a sexual act with another person without that other person's consent, including doing so through coercion.

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 engaged in a sexual act with _____ (*name of alleged victim*);

Second: That the defendant knew that the sexual act was performed without the consent of _____ (*name of alleged victim*) [that the consent of _____ (*name of alleged victim*) was obtained through coercion]; and

Third: The offense was committed within the special maritime and territorial jurisdiction of the United States [in a Federal prison] [in a prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency].

The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus, occurring upon penetration, however slight; (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.

Note

The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 and Instruction No. 1.07.

The definition of "sexual act" is found in 18 U.S.C. § 2246(2).

For a discussion of the burden of proof on the jurisdictional element, *see* Instruction No. 2.82A.

This instruction can be modified to instruct the jury on the elements of abusive sexual contact under 18 U.S.C. § 2244(a)(2).

18 U.S.C. § 2242(3) does not define "coercion." However, "coercion" is defined elsewhere in Title 18. Under 18 U.S.C. § 1591(e)(2), coercion means:

(A) threats of serious harm to or physical restraint against any person;
(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
(C) the abuse or threatened abuse of law or the legal process.

2.82F

SEXUAL ABUSE OF AN INDIVIDUAL IN FEDERAL CUSTODY
18 U.S.C. § 2243(c)

Title 18, United States Code, Section 2243(c), makes it a crime for anyone, while acting in his or her capacity as a Federal law enforcement officer, to knowingly engage in a sexual act with an individual who is under arrest, under supervision, in detention, or 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 defendant*) knowingly engaged in a sexual act with _____ (*name of alleged victim*);

Second: At the time, _____ (*name of alleged victim*) was under arrest, under supervision, in detention, or in Federal custody; and

Third: At the time, _____ (*name of defendant*) was acting in his [her] capacity as a Federal law enforcement officer.

The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus, occurring upon penetration, however slight; (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.

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

Note

This new instruction is based upon changes to the language of 18 U.S.C. § 2243 effectuated by the Closing the Law Enforcement Consent Loophole Act, which is contained in the Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, § 250, 136 Stat. 49 (2022).

The term "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7 and in Instruction No. 1.07.

The term "sexual act" is defined in 18 U.S.C. § 2246(2). *See Perez-Gonzalez v. Holder*, 667 F.3d 622, 626 (5th Cir. 2012).

The term "official detention" is defined in 18 U.S.C. § 2246(5).

There is no requirement that the government establish the victim's lack of consent.

The term "Federal law enforcement officer" is defined in 18 U.S.C. § 115(c)(1) and 18 U.S.C. § 2246(7).

See Instruction No. 1.41 "Knowingly"—To Act.

2.83

FAILURE TO REGISTER AS A 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 [engages or attempts to engage in intended travel in foreign commerce], to knowingly fail to register [update a registration] [provide information related to intended travel in foreign commerce] 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 and keep a current registration [to provide information relating to intended travel in foreign commerce] 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 for a certain time period if he [she] is a sex offender, which means a person convicted of a sex offense. I hereby instruct you that _____ (indicate offense) is a sex offense requiring registration for _____ (indicate time period of registration).

A sex offender is required to register where he [she] resides, which is the location of his [her] home or other place where he [she] habitually lives. Resides means the location of an individual's home or other place where that individual habitually lives, even if the person has no home or fixed address anywhere or is homeless.

The government must prove beyond a reasonable doubt that the defendant knew he [she] had to register [update a registration] [provide information relating to intended travel in foreign commerce] and that he [she] intentionally did not do so, but the government does not have to prove that the defendant knew he [she] 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 [she] resides. The elements for federal sex offenders are slightly different. Federal sex offenders are also required to update their registration and provide information related to intended travel in foreign commerce. *See* 18 U.S.C. § 2250. The Sex Offender Registration and Notification Act of 2006 (SORNA), 34 U.S.C. §§ 20911–32 (formerly cited as 42 U.S.C.

§§ 16911–29), and its implementing regulations, 28 C.F.R. 72.1–72.3, contain requirements and definitions that will be pertinent to the crime charged. *See United States v. Wampler*, 703 F.3d 815, 817–20 (5th Cir. 2013) (affirming district court's jury instruction which expanded the definition of "resides" provided in SORNA); *see also* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38063–66 (July 2, 2008). In *United States v. Thompson*, 811 F.3d 717, 728–29 (5th Cir. 2016), the Fifth Circuit affirmed the district court's jury instruction regarding definition of "resides" where defendant was homeless or moving from location to location.

The Fifth Circuit has stated that failure to register under 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, 258–62 n.6 (5th Cir. 2009) (upholding criminal provision of SORNA because it regulates the use of a channel of interstate commerce, and upholding SORNA civil provision 42 U.S.C. § 16913 (current version at 34 U.S.C. § 20901), because the registration requirement along with the penalty provided in 18 U.S.C. § 2250 demonstrate a valid regulatory scheme devised by Congress under the "substantially affect" commerce prong).

SORNA's registration requirements are independent of any duty that the defendant has to register under state law. *United States v. Navarro*, 54 F.4th 268, 277 (5th Cir. 2022). However, a defendant may present as an affirmative defense that it "is impossible for an offender to register in the state in which he resides, either because that state lacks proper procedures or does not allow that offender to register." *Id.* at 277 n.10. Additionally, SORNA does not impose liability unless a person, after becoming subject to SORNA's registration requirements, travels across state lines and then fails to register. *Carr v. United States*, 130 S. Ct. 2229, 2230 (2010).

If the defendant admits or stipulates that he [she] has been previously convicted of a sex offense that requires his [her] registration under SORNA, the following language may be included in the charge:

> "The parties have stipulated that the defendant has been convicted of a sex offense which requires him [her] to register under SORNA, as charged. You are to take that fact as proven."

Cf. Old Chief v. United States, 117 S. Ct. 644, 653–54 (1997) (discussing the effect of a stipulation to the prior-offense element under 18 U.S.C. § 922(g)).

Where a defendant does not so stipulate, the district court must determine as a question of law not only whether the prior offense is a "sex offense," but also the appropriate tier classification of that offense under 34 U.S.C. § 20911 in order to determine the duration of the defendant's obligation to so register, in accordance with 34 U.S.C. § 20195. *See United States v. Montgomery*, 966 F.3d 335, 337–39 (5th Cir. 2020) (vacating conviction on stipulated facts where the prior offense of conviction was improperly classified as a Tier III offense); *Navarro*, 54 F.4th at 278–80 (vacating conviction where the prior offense of conviction was improperly classified as a Tier II offense).

A fourth element is necessary under the *Apprendi* doctrine if there is an enhancement for a crime of violence found in § 2250(d). *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2365 (2000). Affirmative defenses to this charge are listed in § 2250(c).

Definitions of "Interstate Commerce," "Foreign Commerce," "Commerce" and "Affecting Commerce" may be found in Instruction Nos. 1.44, 1.45, 1.46, and 1.47, respectively.

The following cases address SORNA's application to offenders with pre-SORNA sex offense convictions: *United States v. Kebodeaux*, 133 S. Ct. 2496, 2500 (2013); *Reynolds v. United States*, 132 S. Ct. 975, 984 (2012); and *Carr*, 130 S. Ct. at 2235–41; *see also Nichols v. United States*, 136 S. Ct. 1113, 1118 (2016) (holding that SORNA, as it existed at the time of the defendant's conduct did not require a sex offender to update his [her] registration when he [she] moved to a foreign country, but noting that the 2016 statutory amendments, codified in § 2250(b), criminalize the knowing failure to provide information required by SORNA related to intended travel in foreign commerce).

2.84

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] [coerce] any minor to engage in sexually explicit conduct for the purpose of producing a visual depiction [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] [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 handheld 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; masturbation, sadistic or masochistic abuse; or lascivious exhibition of the anus, 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 a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the

depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) 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.

"Visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means that is capable of conversion into a visual image, and data that is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

Note

Knowledge of the age of the minor victim is not an element of this 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, 471–72 & nn.5–6 (1994); *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)). However, the Fifth Circuit has held that, where an indictment alleged the defendant knew his victim was a minor, instructing the jury that the defendant could be convicted without knowing his victim was a minor disregarded the indictment and constituted a constructive amendment. *See United States v. Sanders*, 966 F.3d 397, 405–08 (5th Cir. 2020).

There are three ways to satisfy the interstate commerce requirement. 18 U.S.C. § 2251(a).

First, the requirement is established if the maker knows or has reason to know that the depiction will be transported in interstate commerce. This is the only jurisdictional hook that requires the government to prove knowledge. *United States v. Diehl*, 775 F.3d 714, 721 (5th Cir. 2015).

Second, the requirement is established if the depiction was created using materials that were transported in interstate commerce. *United States v. Bailey*, 924 F.3d 1289, 1290 (5th Cir. 2019); *see, e.g.*, *United States v. Renteria*, 84 F.4th 591, 594 n.1 (5th Cir. 2023) (explaining that the statute's "reach extends only to 'purely local crimes' for which the government has established a connection to interstate commerce."); *United States v. McCall*, 833 F.3d 560, 564 (5th Cir. 2016) (jurisdiction established where phone used to record minor was manufactured outside Texas).

Third, the requirement is established if the "depiction has actually been transported in interstate or foreign commerce or mailed." *Diehl*, 775 F.3d at 721 (quoting 18 U.S.C. § 2251(a) (2000)). This includes "transmitting a picture via the internet." *United States v. McGee*, 821 F.3d 644, 647 (5th Cir. 2016); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (same).

For the definitions of interstate and foreign commerce, refer to Instruction Nos. 1.44, 1.45, 1.46, and 1.47.

The definition of "sexually explicit conduct" is found in 18 U.S.C. § 2256(2)(A). In *United States v. Williams*, 128 S. Ct. 1830, 1842, 1846 (2008), the Court rejected constitutional overbreadth and vagueness challenges to the promotion of child pornography statute, 18 U.S.C. § 2252A(a)(3)(B), which also uses the definition of "sexually explicit conduct" contained in § 2256(2)(A)).

The definition of "visual depiction" is found in 18 U.S.C. § 2256(5) and 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 list of factors describing a "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 McCall*, 833 F.3d at 563 (discussing the six *Dost* factors); *Steen*, 634 F.3d at 826 (same); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (same).

The term "producing" is defined in 18 U.S.C. § 2256(3). The Fifth Circuit has interpreted the term "produced" in a related statute, 18 U.S.C. § 2252(a)(4)(B), to include images that are "copied or downloaded onto hard drives, disks, or CDs," explaining that "'[w]hen the file containing the image is copied onto a disk, the original is left intact and a new copy of the image is created, so the process "produces" an image.'" *United States v. Dickson*, 632 F.3d 186, 189 (5th Cir. 2011) (citation omitted).

In *McGee*, the Fifth Circuit rejected the defendant's argument that he had only sought an existing sexually explicit picture from a minor and therefore had not acted with the "purpose of" producing a new picture. However, the Court cautioned that "the jury must have sufficient evidence to draw the inference between a defendant's solicitation of sexual activity and the *production* of a pornographic image, whether through the minor taking and sending a picture or otherwise." 821 F.3d at 647–48 (citing, *inter alia*, *United States v. Palomino-Coronado*, 805 F.3d 127, 132–33 (4th Cir. 2015) (reversing a conviction where the defendant and minor were engaged in a months-long sexual relationship and it was unclear whether the defendant initiated sexual activity specifically for the "purpose of" taking a photograph of it)).

In *United States v. Terrell*, 700 F.3d 755, 763 (5th Cir. 2012), the Fifth Circuit held that "§ 2251(a) does not require that the individual who induces the minor to engage in sexually explicit activities for the purposes of producing depictions of such be the same individual who produces the depictions on an item that has traveled in interstate commerce."

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. *See United States v. Horn*, 187 F.3d 781, 791–92 (8th Cir. 1999); *United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

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, 2365 (2000).

2.85A

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.

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 has been mailed];

[*First*: That the defendant knowingly received [distributed] a visual depiction, as alleged in the indictment, which has 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 handheld 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; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, 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, 467–72 (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 list of factors describing a "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. McCall*, 833 F.3d 560, 563 (discussing the six *Dost* factors); *United States v. Steen*, 634 F.3d 822, 826 (same); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (same).

The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2)(A). In *United States v. Williams*, 128 S. Ct. 1830, 1842, 1846 (2008), the Court rejected constitutional overbreadth and

vagueness challenges to the promotion of child pornography statute, 18 U.S.C. § 2252A(a)(3)(B), which also uses the definition of "sexually explicit conduct" contained in § 2256(2)(A).

The term "computer" is defined in 18 U.S.C. § 1030(e)(1).

The term "minor" is defined in 18 U.S.C. § 2256(1).

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." *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).

Possession of child pornography is not a lesser-included offense of distribution of child pornography. *See United States v. Woerner*, 709 F.3d 527, 539 (5th Cir. 2013).

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 Coal.*, 122 S. Ct. 1389 (2002), rendered the two statutes "functionally identical").

In some circumstances, downloading images and videos containing child pornography from a peer-to-peer network and storing them in a shared folder accessible to other users on the network may amount to "distribution" under 18 U.S.C. § 2252A(a)(2)(B), even in the absence of proof that anyone else accessed the files. *See United States v. Richardson*, 713 F.3d 232, 236 (5th Cir. 2013); *see also United States v. Weast*, 811 F.3d 743, 747–48 (5th Cir. 2016) (finding that the defendant had no expectation of privacy in files shared on peer-to-peer network).

Each "distribution" of a minor engaged in sexually explicit conduct is a violation of § 2252(a)(2). *See Woerner*, 709 F.3d at 541 ("The unit of prosecution for § 2252(a)(2) is each transaction in which one or more depictions of a minor engaged in sexually explicit conduct are distributed.").

Whether a defendant "knowingly received" computer images of child pornography is a highly fact-specific inquiry. *See United States v. Pawlak*, 935 F.3d 337, 350–51 (5th Cir. 2019); *United States v. Winkler*, 639 F.3d 692, 696–99 (5th Cir. 2011).

Use the definitions of "Knowingly," "Interstate Commerce," and "Foreign Commerce" in Instruction Nos. 1.41, 1.44, and 1.45, respectively.

2.85B

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 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 a 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; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, 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.

The term "producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

Note

See Note following Instruction No. 2.85A, 18 U.S.C. § 2252(a)(2), Sexual Exploitation of Children—Receiving and Distributing Material Involving Sexual Exploitation of Minors.

The list of factors describing a "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. McCall*, 833 F.3d 560, 563 (5th Cir. 2016) (discussing the six *Dost* factors); *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011) (same); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (same).

The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2)(A). In *United States v. Williams*, 128 S. Ct. 1830, 1842, 1846 (2008), the Court rejected constitutional overbreadth and vagueness challenges to the promotion of child pornography statute, 18 U.S.C. § 2252A(a)(3)(B), which also uses the definition of "sexually explicit conduct" contained in § 2256(2)(A).

The term "computer" is defined in 18 U.S.C. § 1030(e)(1).

The term "minor" is defined in 18 U.S.C. § 2256(1).

Regarding the jurisdictional hook, images/video being sent through the internet from one state to another is sufficient for transportation in interstate or foreign commerce. *United States v. Crain*, 877 F. 3d 637, 645–46 (5th Cir. 2017).

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); *see also United States v. Waguespack*, 935 F.3d 322, 332 (5th Cir. 2019) (discussing § 2252A(a)(5)(B)).

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).

For a discussion on when images are "produced" for purposes of § 2252(a)(4)(B), *see United States v. Dickson*, 632 F.3d 186, 189 (5th Cir. 2011).

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 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. 1.33, 1.41, 1.44, and 1.45, respectively.

Section 2252(a)(4)(B) "prohibits an individual from 'knowingly' possessing material containing a visual depiction of a minor engaging in sexually explicit behavior" and "does not require that 'a defendant act[ ] with a bad motive or evil intent,' such as to 'satisfy some prurient interest.'" *United States v. Naidoo*, 995 F.3d 367, 375 (5th Cir. 2021) (quoting *United States v. Matthews*, 209 F.3d 338, 351 (4th Cir. 2000) (brackets in original)).

Section 2252(a)(4)(B)'s "use of the phrase '1 or more' dictates that the simultaneous possession of multiple images of or matters containing child pornography constitutes a single violation of the statute." *Naidoo*, 995 F.3d at 381.

A sixth element is necessary under the *Apprendi* doctrine if there is an enhancement based on the age of the minor depicted in the child pornography. *See* 18 U.S.C. § 2252A(b)(2).

2.85C

SEXUAL EXPLOITATION OF CHILDREN—TRANSPORTING OR SHIPPING OF CHILD PORNOGRAPHY (VISUAL DEPICTION OF ACTUAL MINOR [IDENTIFIABLE 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] [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;

[*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 [where such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct].

The term "minor" means any person under the age of eighteen years.

[The term "identifiable minor" means a person who was a minor at the time the visual depiction was created, adapted, or modified [whose image as a minor was used in creating, adapting, or modifying the visual depiction] and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic such as a unique birthmark or other recognizable feature.]

[The Government does not have to prove the actual identity of the identifiable minor.]

"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; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, genitals, or pubic area of any person.

["Sexually explicit conduct" means graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; graphic or lascivious simulated bestiality; masturbation; or sadistic or masochistic abuse; or graphic or simulated lascivious exhibition of the anus, 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.

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)).

The term "child pornography" is defined in 18 U.S.C. § 2256(8)(A) for cases involving visual depictions of actual minors, and in § 2256(8)(C) for cases involving visual depictions made to appear as if an identifiable minor is engaged in sexually explicit conduct. For a case affirming a conviction for violating § 2252A(a)(2)(B) based upon material that contains child pornography as defined in § 2256(8)(A), *see United States v. Knowlton*, 993 F.3d 354, 357 (5th Cir. 2021).

The term "computer" is defined in 18 U.S.C. § 1030(e)(1).

The term "minor" is defined in 18 U.S.C. § 2256(1).

The term "identifiable minor" is defined in 18 U.S.C. § 2256(9).

In cases involving a visual depiction of an actual minor, the definition of "sexually explicit conduct" is found in 18 U.S.C. § 2256(2)(A). Where the government's theory is that the child pornography is of a visual depiction created to appear that an identifiable minor is engaged in sexually explicit conduct, the term is defined in § 2256(2)(B). That alternative definition is included in brackets in the instruction.

In *United States v. Mecham*, 950 F.3d 257, 261–67 (5th Cir. 2020), the Fifth Circuit upheld the constitutionality of the "morphed" child pornography definition of 18 U.S.C. § 2256(8)(C), while noting a split among the federal courts of appeals.

In *Ashcroft v. Free Speech Coal.*, 122 S. Ct. 1389 (2002), the Supreme Court struck down as vague and overbroad the definitions of "child pornography" then found in 18 U.S.C. § 2256(8)(B) and (D). Since then, Congress has amended Section 2256(8)(B) and removed Section 2256(8)(D). The Fifth Circuit has not addressed whether the current definition provided in Section 2256(8)(B) remedies the deficiencies found by the Supreme Court in *Ashcroft*.

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 Government need not present expert testimony to establish that the unlawful image depicts a real child. *United States v. Pawlak*, 935 F.3d 337, 349 (5th Cir. 2019); *United States v. McNealy*, 625 F.3d 858, 865 (5th Cir. 2010); *United States v. Slanina*, 359 F.3d 356, 357 (5th Cir. 2004) (per curiam). Rather, the district court is capable of determining whether the Government has met its burden of showing that the images depict real children. *Pawlak*, 935 F.3d at 349.

The list of factors describing "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. McCall*, 833 F.3d 560, 563 (5th Cir. 2016) (discussing the six *Dost* factors); *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011) (same); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (same).

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 & n.3 (5th Cir. 2002) (noting that the Supreme Court's holding in *Ashcroft v. Free Speech Coal.*, 122 S. Ct. 1389 (2002), 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). The Fifth Circuit has held that "the Commerce Clause authorizes Congress to prohibit local, intrastate possession and production of child pornography where the materials used in the production were moved in interstate commerce [and] that the internet is a means of facility of interstate commerce. *Bond* [*v. United States*], 572 U.S. 844, 854–55 (2014) did not abrogate these cases." *United States v. Zapata*, 698 F. App'x 219, 220 (5th Cir. 2017) (citations omitted, brackets added).

Use the definitions of "Knowingly," "Interstate Commerce," and "Foreign Commerce" in Instruction Nos. 1.41, 1.44, and 1.45, respectively.

2.85D

SEXUAL EXPLOITATION OF CHILDREN—RECEIVING OR DISTRIBUTING CHILD PORNOGRAPHY (VISUAL DEPICTION OF ACTUAL MINOR [IDENTIFIABLE 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[s] 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;]

[*Second*: That the defendant received [distributed] the item[s] using any means or facility of interstate or foreign commerce;] and

Third: That when the defendant received [distributed] the item[s], the defendant knew the item[s] was [were] 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 [where such

visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct].

The term "minor" means any person under the age of eighteen years.

[The term "identifiable minor" means a person who was a minor at the time the visual depiction was created, adapted, or modified [whose image as a minor was used in creating, adapting, or modifying the visual depiction] and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic such as a unique birthmark or other recognizable feature.]

[The Government does not have to prove the actual identity of the identifiable minor.]

"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; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, genitals, or pubic area of any person.

["Sexually explicit conduct" means graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; graphic or lascivious simulated bestiality; masturbation; or sadistic or masochistic abuse; or graphic or simulated lascivious exhibition of the anus, 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.

Note

See Note following Instruction No. 2.85C, 18 U.S.C. § 2252A(a)(1), Sexual Exploitation of Children–Transporting or Shipping of Child Pornography (Visual Depiction Of Actual Minor) [Identifiable Minor]).

The term "computer" is defined in 18 U.S.C. § 1030(e)(1).

The term "child pornography" is defined in 18 U.S.C. § 2256(8)(A) for cases involving visual depictions of actual minors, and in 2256(8)(C) for cases involving visual depictions made to appear as if an identifiable minor is engaged in sexually explicit conduct. For a case affirming a conviction for violating 2252A(a)(2)(B) based upon material that contains child pornography as defined in 2256(8)(A), *see United States v. Knowlton*, 993 F.3d 354, 357 (5th Cir. 2021).

The term "minor" is defined in 18 U.S.C. § 2256(1).

The term "identifiable minor" is defined in 18 U.S.C. § 2256(9).

In cases involving a visual depiction of an actual minor, the definition of "sexually explicit conduct" is found in 18 U.S.C. § 2256(2)(A). Where the government's theory is that the child pornography is of a visual depiction created to appear that an identifiable minor is engaged in sexually explicit conduct, the term is defined in § 2256(2)(B). That alternative definition is included in brackets in the instruction.

In *United States v. Mecham*, 950 F.3d 257, 261–67 (5th Cir.2020), the Fifth Circuit upheld the constitutionality of the "morphed" child pornography definition of 18 U.S.C. § 2256(8)(C), while noting a split among the federal circuit courts of appeals.

The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

The list of factors describing "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. McCall*, 833 F.3d 560, 563 (5th Cir. 2016) (discussing the six *Dost* factors); *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011) (same); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (same).

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).

Receipt can be actual or constructive, but when the government seeks to prove constructive receipt found in a jointly occupied location, "it must present additional evidence of the defendant's knowing dominion or control of the contraband, besides the mere joint occupancy of the premises." *United States v. Calhoun*, 691 F. App'x 230, 231 (5th Cir. 2017); *see also United States v. Lampley*, 781 F. App'x 282, 288 (5th Cir. 2019) (applying constructive possession concepts in review of receipt conviction).

The Fifth Circuit has held that possession of child pornography is not a lesser-included offense of distribution of child pornography. *See United States v. Woerner*, 709 F.3d 527, 539 (5th Cir. 2013).

The Fifth Circuit has recognized that knowingly receiving child pornography and knowingly possessing child pornography are separate and distinct offenses. *United States v. Ross*, 948 F.3d 243, 247 (5th Cir. 2020) (explaining, in context of § 2252A(a)(2)(B), that "a person could receive computer files without contemporaneously knowing they contained child pornography; and, if that person subsequently discovered they contained such material, he would knowingly possess child pornography, without having knowingly received it").

Downloading child pornography from a peer-to-peer computer network and storing it in a shared folder accessible to other users on the network may amount to "distribution" under § 2252A(a)(2), but the Government must prove beyond a reasonable doubt that the defendant engaged in such distribution "knowingly." *See United States v. Waguespack*, 935 F.3d 322, 330 (5th Cir. 2019); *United States v. Romero-Medrano*, 899 F.3d 356, 360 (5th Cir. 2018); *United States v. Richardson*, 713 F.3d 232, 234, 236 (5th Cir. 2013). It is not required to sustain a conviction that anyone actually accessed the files. *United States v. Barton*, 879 F.3d 595, 599 (5th Cir. 2018) ("Distribution convictions have passed muster in this circuit even without direct evidence that someone downloaded an image the defendant uploaded.").

Whether a defendant "knowingly received" computer images of child pornography is a highly fact-specific inquiry. *See United States v. Pawlak*, 935 F.3d 337, 350–51 (5th Cir. 2019); *United States v. Winkler*, 639 F.3d 692, 696–99 (5th Cir. 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. 1.41, 1.44, and 1.45, respectively.

2.85E

SEXUAL EXPLOITATION OF CHILDREN—RECEIVING OR DISTRIBUTING MATERIAL THAT CONTAINS CHILD PORNOGRAPHY (VISIBLE DEPICTION OF ACTUAL MINOR[IDENTIFIABLE MINOR]) 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;

[*Second*: That the material containing child pornography was shipped [transported] in or affecting interstate [foreign] commerce by any means, including by computer;]

[*Second*: That the defendant distributed the material containing child pornography using any means or facility of interstate or foreign commerce;] 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 transfer possession of it to someone else, with or without any financial interest in the transaction. Placing the material in a shared folder accessible to other users constitutes distribution, even in the absence of proof that anyone else accessed the files.]

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 [where such visual depiction has been created, adapted, or modified to appear that an identifiable minor is 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; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, genitals, or pubic area of any person.

["Sexually explicit conduct" means graphic intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or public area of any person is exhibited; graphic or lascivious simulated; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, 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.

Note

See Note following Instruction Nos. 2.85C, 18 U.S.C. §§ 2252A(a)(1), Sexual Exploitation of Children—Transporting or Shipping of Child Pornography (Visual Depiction of Actual Minor [Identifiable Minor]) and 2.85D, 18 U.S.C. § 2252A(a)(2)(A), Sexual Exploitation of Children—Receiving or Distributing of Child Pornography (Visual Depiction of Actual Minor [Identifiable Minor]), respectively.

The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

The list of factors describing "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. McCall*, 833 F.3d 560, 563 (5th Cir. 2016) (discussing the six *Dost* factors); *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011) (same); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (same).

The term "child pornography" involving actual minors is defined in 18 U.S.C. § 2256(8)(A); s*ee also United States v. Knowlton*, 993 F.3d 354, 357 (5th Cir. 2021). The term "child pornography" involving identifiable minors is defined in 18 U.S.C. § 2256(8)(C).

The term "computer" is defined in 18 U.S.C. § 1030(e)(1).

The term "minor" is defined in 18 U.S.C. § 2256(1).

The Fifth Circuit has recognized that knowingly receiving child pornography and knowingly possessing child pornography are separate and distinct offenses. *United States v. Ross*, 948 F.3d 243, 247 (5th Cir. 2020) (explaining that "a person could receive computer files without contemporaneously knowing they contained child pornography; and, if that person subsequently discovered they contained such material, he would knowingly possess child pornography, without having knowingly received it").

Downloading child pornography from a peer-to-peer computer network and storing it in a shared folder accessible to other users on the network may amount to "distribution" under § 2252A(a)(2), but the Government must prove beyond a reasonable doubt that the defendant engaged in such distribution "knowingly." *See United States v. Waguespack*, 935 F.3d 322, 330 (5th Cir. 2019); *United States v. Romero-Medrano*, 899 F.3d 356, 360 (5th Cir. 2018); *United States v. Richardson*, 713 F.3d 232, 234, 236 (5th Cir. 2013). It is not required to sustain a conviction that anyone actually accessed the files. *United States v. Barton*, 879 F.3d 595, 599 (5th Cir. 2018) ("Distribution convictions have passed muster in this circuit even without direct evidence that someone downloaded an image the defendant uploaded.").

"Receipt of pornographic computer files is properly chargeable as receipt of material *containing* child pornography under § 2252A(a)(2)(B)," not receipt of child pornography under § 2252A(a)(2)(A). *Knowlton*, 993 F.3d at 358 (emphasis added).

Use the definitions of "Knowingly," "Interstate Commerce," and "Foreign Commerce" in Instruction Nos. 1.41, 1.44, and 1.45, respectively.

2.85F

SEXUAL EXPLOITATION OF CHILDREN—POSSESSING OR ACCESSING CHILD PORNOGRAPHY (VISUAL DEPICTION OF AN ACTUAL MINOR [IDENTIFIABLE 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 [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[s] that contain[s] 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;

[*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 [where such visual depiction has been created, adapted, or modified to appear that an identifiable minor is 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; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, genitals, or pubic area of any person.

["Sexually explicit conduct" means graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; or lascivious simulated sexual intercourse where the genitals, breast, or public area of any person is exhibited; graphic or lascivious simulated bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, 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.

Note

See Note following Instruction No. 2.85C, 18 U.S.C. § 2252A(a)(1), Sexual Exploitation of Children—Transporting or Shipping of Child Pornography (Visual Depiction of Actual Minor [Identifiable Minor]).

The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

The list of factors describing "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 State v. McCall*, 833 F.3d 560, 563 (5th Cir. 2016) (discussing the six *Dost* factors); *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011) (same); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (same).

The term "child pornography" involving actual minors is defined in 18 U.S.C. § 2256(8)(A); s*ee also United States v. Knowlton*, 993 F.3d 354, 357 (5th Cir. 2021). The term "child pornography" involving identifiable minors is defined in 18 U.S.C. § 2256(8)(C).

The term "computer" is defined in 18 U.S.C. § 1030(e)(1).

The term "minor" is defined in 18 U.S.C. § 2256(1).

The term "producing" means producing, directing, manufacturing, issuing, publishing, or advertising. 18 U.S.C. § 2256(3).

For a discussion of "knowing possession" in relation to § 2252A(a)(5)(B), *see United States v. Lampley*, 781 F. App'x 282, 286–88 (5th Cir. 2019), *United States v. Smith*, 739 F.3d 843, 846–48 (5th Cir. 2014), *United States v. Woerner*, 709 F.3d 527, 535–37 (5th Cir. 2013), *United States v. Moreland*, 665 F.3d 137, 149–51 (5th Cir. 2011).

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).

"[P]ossession of child pornography is not the lesser-included offense of distribution of child pornography." *Woerner*, 709 F.3d at 539–40.

"Possession may be either actual or constructive." *United States v. Calhoun*, 691 F. App'x 230, 231 (5th Cir. 2017) (quoting *Moreland*, 665 F.3d at 149). But "[w]hen the government seeks to prove constructive possession of contraband found in a jointly occupied location, it must present additional evidence of the defendant's knowing dominion or control of the contraband, besides the mere joint occupancy of the premises." *Id.* (quoting *Moreland*, 665 F. 3d at 150).

"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 Fifth Circuit has recognized that knowingly receiving child pornography and knowingly possessing child pornography are separate and distinct offenses. *United States v. Ross*, 948 F.3d 243, 247 (5th Cir. 2020) (explaining that "a person could receive computer files without contemporaneously knowing they contained child pornography; and, if that person subsequently discovered they contained such material, he would knowingly possess child pornography, without having knowingly received it"). In contrast, 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).

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. 1.33, 1.41, 1.44, and 1.45, respectively.

The government need not present expert testimony to establish that the unlawful image depicts a real child. *United States v. Pawlak*, 935 F.3d 337, 349 (5th Cir. 2019); *United States v. McNealy*, 625 F.3d 858, 865 (5th Cir. 2010); *United States v. Slanina*, 359 F.3d 356, 357 (5th Cir. 2004) (per curiam). Rather, the district court is capable of determining whether the government has met its burden of showing that the images depict real children, and juries are "capable of distinguishing between real and virtual images." *Pawlak*, 935 F.3d at 349 (quoting *McNealy*, 625 F.3d at 865).

A fourth element is necessary under the *Apprendi* doctrine if there is an enhancement based on the age of the minor depicted in the child pornography. *See* 18 U.S.C. § 2252A(b)(2).

2.86A

STALKING
18 U.S.C. §§ 2261A(1), 2261(b), 2261B

Title 18, United States Code, Section 2261A(1) makes it a crime to travel in interstate or foreign commerce [to be present within the special maritime and territorial jurisdiction of the United States] [to enter or leave Indian country] with the intent to stalk another person.

For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

First: That the defendant traveled in interstate or foreign commerce [was present within the special maritime and territorial jurisdiction of the United States] [entered or left Indian country];

Second: That the defendant did so with the intent to kill [injure] [harass] [intimidate] [place under surveillance with intent to kill, injure, harass, or intimidate] another person; and

Third: That in the course of, or as a result of, such travel [presence], the defendant engaged in conduct that placed that other person in reasonable fear of the death [serious bodily injury] to that person [a member of that person's immediate family] [a spouse or intimate partner of that person] [the pet, service animal, emotional support animal, or horse of that person];

[*Third*: That in the course of, or as a result of, such travel [presence], the defendant engaged in conduct that caused, attempted to cause, or would be reasonably expected to cause substantial emotional distress to that person [a member of that person's immediate family] [a spouse or intimate partner of that person]]; and

[*Fourth*: That the defendant's conduct resulted in the death of the victim.]

[*Fourth*: That the defendant's conduct resulted in the permanent disfigurement of [life threatening bodily injury to] the victim.]

[*Fourth*: That the defendant's conduct resulted in serious bodily injury to the victim [the defendant used a dangerous weapon during the offense].]

[*Fourth*: That the defendant's conduct constituted aggravated sexual abuse [sexual abuse] [sexual abuse of a minor or ward] [abusive sexual contact].]

[*Fourth*: That the victim was under the age of 18 when the offense occurred] "Spouse or intimate partner" includes a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking. It also includes a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship [any person similarly situated to a spouse who is

protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides].

["Bodily injury" means any act, except one done in self-defense, that results in physical injury or sexual abuse.]

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

"Course of conduct" means a pattern of conduct composed of two or more acts, evidencing a continuity of purpose.

["Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.]

[The term "Indian country" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government; all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way. The term "enter or leave Indian country" includes leaving the jurisdiction of one tribal government and entering the jurisdiction of another tribal government.]

Note

Title 18 U.S.C. § 2261A includes two stalking offenses: (1) stalking through interstate travel, or in a federal jurisdiction, and (2) stalking by use of the mail or interstate communication or commerce. This instruction covers the first offense; Instruction No. 2.86B covers the second. (A separate misdemeanor stalking offense is set out in § 2261(b)(6), but is not covered by either instruction).

The Fifth Circuit has upheld this statute as constitutional in response to challenge to the vagueness of the terms "harass" and "intimidate," and ruled that the statute does not reach constitutionally protected speech because "[t]o violate the statute one must both intend to cause victims serious harm and in fact cause a reasonable fear of death or serious bodily injury." *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015). Although the Supreme Court has not squarely considered the issue, other circuits have upheld the statute against First Amendment challenges. *See United States v. Gonzalez*, 905 F.3d 165, 193 (3d Cir. 2018) (collecting cases).

The unit of prosecution for this statute is each victim, not the specific acts that constitute the "course of conduct." *Conlan*, 786 F.3d at 386–87; *see also United States v. Ackell*, 907 F.3d 67, 78–80 (1st Cir. 2018) (jury unanimity not required with respect to specific text messages making up "course of conduct"); *Gonzalez*, 905 F.3d at 185 (No specific unanimity instruction

required because "[n]either the *mens rea* requirements of § 2261A(2) nor the individual acts which constituted the statute's 'course of conduct' requirement constitute distinct elements of the offense."). The acts that constitute the "course of conduct" can include acts directed at third parties, as long as the jury is instructed that the defendant intended such acts to harass or intimidate the victim and did place that same victim in reasonable fear of death or serious bodily injury, or cause substantial emotional distress, to that same victim or the other statutorily prescribed persons or beings. *See United States v. Bartley*, 711 F. App'x 127, 129 (4th Cir. 2017).

The definition of "spouse or intimate partner" is found in 18 U.S.C. §§ 2266(7)(A)(ii) and 2266(7)(B).

The definition of "bodily injury" can be found in 18 U.S.C. § 2266(1). The definition of "serious bodily injury" is located in 18 U.S.C. §§ 2119(2) and 1365(h)(3).

The definition of "course of conduct" can be found in 18 U.S.C. § 2266(2).

For the definitions of "pet," "emotional support animal," and "service animal," *see* 18 U.S.C. §§ 2266(11)–(13).

The definitions regarding Indian country offenses can be found in 18 U.S.C. §§ 2266(3), 2266(4) and 1151.

The penalties for violations of § 2261A are set out in 18 U.S.C. §§ 2261(b) and 2261B. Those statutes establish varying minimum and maximum sentences based on specific factual predicates. In any case where the prosecution seeks such enhanced sentence, the facts must be alleged and proved to the jury, and the fourth element of the jury instruction is required. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2356–57 (2000); *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013).

In cases where the alleged factual predicate for the enhanced sentence is based on the fact that the defendant's conduct "results" in death, disfigurement or the specific degree of bodily injury required under the statute, the court must determine whether "but for" or proximate causation is the appropriate standard and so instruct the jury. *See Gonzalez*, 905 F.3d at 187–90 (finding no error where district court instructed jury based on both "but for" causation derived from *Burrage v. United States*, 134 S. Ct. 881, 889 (2014), and proximate causation derived from *Paroline v. United States*, 134 S. Ct. 1710, 1724 (2014)).

If enhancement is sought under for conduct constituting an offense under Chapter 109A of Title 18 (aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, or abusive sexual contact), the jury should be instructed as to the elements of the underlying offense, "without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison." 18 U.S.C. § 2261(b)(4).

2.86B

STALKING
18 U.S.C. §§ 2261A(2), 2261(b), 2261B

Title 18, United States Code, Section 2261A(2) makes it a crime to use the mail or any facility in interstate commerce, including interactive computer services or electronic communication services or systems, with the intent to stalk another person.

For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

First: That the defendant used the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce;

Second: That the defendant did so with the intent to kill [injure] [harass] [intimidate] [place under surveillance with intent to kill, injure, harass, or intimidate] another person; and

Third: That through the use of the mail, computer interactive service, electronic communication service or system or other facility of interstate or foreign commerce, the defendant engaged in a course of conduct that.

(1) placed that other person in reasonable fear of the death [serious bodily injury] to that person [a member of that person's immediate family] [a spouse or intimate partner of that person] [the pet, service animal, emotional support animal, or horse of that person]; or

(2) caused, attempted to cause, or would be reasonably expected to cause substantial emotional distress to that person [a member of that person's immediate family] [a spouse or intimate partner of that person]; and

[*Fourth*: That the defendant's conduct resulted in the death of the victim.]

[*Fourth*: That the defendant's conduct results in the permanent disfigurement of [life threatening bodily injury to] the victim.]

[*Fourth*: That the defendant's conduct resulted in serious bodily injury to the victim [the defendant used a dangerous weapon during the offense.]

[*Fourth*: That the defendant's conduct constituted aggravated sexual abuse] [sexual abuse] [sexual abuse of a minor or ward] [abusive sexual contact].]

[*Fourth*: That the victim was under the age of 18 at the time that the offense occurred.]

"Spouse or intimate partner" includes a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking. It also includes a person who

is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship, or any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

"Bodily injury" means any act, except one done in self-defense that results in physical injury or sexual abuse.

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

"Course of conduct" means a pattern of conduct composed of two or more acts, evidencing a continuity of purpose.

Note

Title 18 U.S.C. § 2261A includes two stalking offenses: (1) stalking through interstate travel, or in a federal jurisdiction, and (2) stalking through the mail or interstate communication. This instruction covers the second offense; Instruction No. 2.86A covers the first. (A separate misdemeanor stalking offense is set out in 18 U.S.C. § 2261(b)(6) but is not covered by either instruction).

The Fifth Circuit has upheld this statute as constitutional in response to challenge to the vagueness of the terms "harass" and "intimidate," and ruled that the statute does not reach constitutionally protected speech because "[t]o violate the statute one must both intend to cause victims serious harm and in fact cause a reasonable fear of death or serious bodily injury." *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015). Although the Supreme Court has not squarely considered the issue, other circuits have upheld the statute against First Amendment challenges. *See United States v. Gonzalez*, 905 F.3d 165, 193 (3d Cir. 2018) (collecting cases).

The unit of prosecution for this statute is each victim, not the specific acts that constitute the "course of conduct." *Conlan*, 786 F.3d at 386–87; *see also United States v. Ackell*, 907 F.3d 67, 78–80 (1st Cir. 2018) (jury unanimity not required with respect to specific text messages making up "course of conduct"); *Gonzalez*, 905 F.3d at 185 (No specific unanimity instruction required because "[n]either the *mens rea* requirements of § 2261A(2) nor the individual acts which constituted the statute's 'course of conduct' requirement constitute distinct elements of the offense."). The acts that constitute the "course of conduct" can include acts directed at third parties, as long as the jury is instructed that the defendant intended such acts to harass or intimidate the victim and did place that same victim in reasonable fear of death or serious bodily injury, or cause substantial emotional distress, to that same victim or the other statutorily prescribed persons or beings. *See United States v. Bartley*, 711 F. App'x 127, 129 (4th Cir. 2017).

The definition of "spouse or intimate partner" is found in 18 U.S.C. §§ 2266(7)(A)(ii) and 2266(7)(B).

The definition of "bodily injury" can be found in 18 U.S.C. § 2266(1). The definition of "serious bodily injury" is located in 18 U.S.C. §§ 2119(2) and 1365(h)(3).

The definition of "course of conduct" can be found in 18 U.S.C. § 2266(2).

For the definitions of "pet," "emotional support animal," and "service animal," *see* 18 U.S.C. §§ 2266(11)–(13).

The definitions regarding Indian country offenses can be found in 18 U.S.C. §§ 2266(3), 2266(4) and 1151.

The penalties for violations of § 2261A are set out in 18 U.S.C. §§ 2261(b) and 2261B. Those statutes establish varying minimum and maximum sentences based on specific factual predicates. In any case where the prosecution seeks such enhanced sentence, the facts must be alleged and proved to the jury, and the fourth element of the jury instruction is required. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2356–57 (2000); *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013).

In cases where the alleged factual predicate for the enhanced sentence is based the fact that the defendant's conduct "results" in death, disfigurement or the specific degree of bodily injury required under the statute, the court must determine whether "but for" or proximate causation is the appropriate standard and so instruct the jury. *See Gonzalez*, 905 F.3d at 187–90 (finding no error where district court instructed jury based on both "but for" causation derived from *Burrage v. United States*, 134 S. Ct. 881, 889 (2014), and proximate causation derived from *Paroline v. United States*, 134 S. Ct. 1710 (2014)).

If enhancement is sought under for conduct constituting an offense under Chapter 109A of Title 18 (aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, or abusive sexual contact), the jury should be instructed as to the elements of the underlying offense, "without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison." 18 U.S.C. § 2261(b)(4).

2.87

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 motor vehicle [vessel] [aircraft] was stolen;

Second: That, after the motor vehicle [vessel] [aircraft] was stolen, the defendant transported it in interstate [foreign] commerce; and

Third: That, at the time the defendant transported the motor vehicle [vessel] [aircraft] in interstate [foreign] commerce, he [she] knew the motor vehicle [vessel] [aircraft] was 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, 113–115 (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. 1.44, 1.45, and 1.46.

2.88

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 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 1181.

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, in a case that appears to have been abrogated by a later Supreme Court opinion, 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 (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, 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. 1.27 on Unanimity of Theory.

2.89

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. Danhach, 815 F.3d 228, 235–36 (5th Cir. 2016), and *United States v. Anderson*, 174 F.3d 515, 522 (5th Cir. 1999), set 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, 493 (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, 163 (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—it need only be shown that the defendant caused the interstate transportation by duping out-of-state investors into sending checks procured by fraud) (citing *Pereira v. United States*, 74 S. Ct. 358, 363 (1954)); *see also United States v. Vargas*, 6 F. 4th 616, 623 (5th Cir. 2021) (finding it is not required that a defendant "personally transport[]"stolen goods, but only that the defendant "caused stolen goods to travel in interstate (or foreign) commerce" in a case involving the international transportation of stolen tires.).

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; s*ee 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, at *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. Onyiego*, 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. 1.44, 1.45, and 1.46.

If the indictment charges commission of the offense in more than one manner, *see* Instruction No. 1.27 on Unanimity of Theory.

2.90

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 any one of them is a violation of the statute. The

Fifth Circuit has held, however, in a case that appears to have been abrogated by a later Supreme Court opinion, 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 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*.

2.91A

TRAFFICKING IN COUNTERFEIT GOODS OR SERVICES
18 U.S.C. § 2320(a)(1)

Title 18, United States Code, Section 2320 makes it a crime for a person to intentionally traffic [attempt to traffic] [conspire to traffic] in goods or services and knowingly use a counterfeit mark on or in connection with such goods or services.

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 trafficked in goods or services;

Second: That such trafficking was intentional;

Third: That the defendant used a counterfeit mark on or in connection with such goods and services; and

Fourth: That the defendant knew that the mark so used was counterfeit.

"Traffic" means to transport, transfer, or dispose of, to another, for purposes of commercial advantage or private financial gain, or to import, export, obtain control of, or possess with intent to do transport, transfer, or otherwise dispose of.

"Financial gain" includes the receipt, or expected receipt, of anything of value.

Note

The elements of this offense are addressed in *United States v. Xu*, 599 F.3d 452, 453 (5th Cir. 2010) (addressing the elements and requiring proof of a mark registered with the United States Patent and Trademark Office), and *United States v. Hanafy*, 302 F.3d 485 (5th Cir. 2002) (also addressing the exception for "gray market" goods).

The definition of "traffic" is found in 18 U.S.C. § 2320(f)(5).

The definition of "financial gain" is found in 18 U.S.C. § 2320(f)(2).

The definition of "counterfeit mark" is found in 18 U.S.C. § 2320(f)(1). An appropriate definition of this term, considering the particular allegations of the indictment or bill of information, should be provided. Under *United States v. Yamin*, 868 F.2d 130, 132–33 (5th Cir. 1989), the "counterfeit mark" requires the "potential to deceive or cause confusion," but does not require that the jury find actual confusion.

Enhanced penalties are provided for in 18 U.S.C. § 2320(b). If the indictment contains an enhancement for serious bodily injury or death, the trial judge should add a fifth element to the charge. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

For defenses under the Lanham Act, *see* 18 U.S.C. § 2320(d).

2.91B

TRAFFICKING IN GOODS OR SERVICES BEARING A COUNTERFEIT MARK LIKELY TO CAUSE CONFUSION, MISTAKE, OR DECEPTION 18 U.S.C. § 2320(a)(2)

Title 18, United States Code, Section 2320 makes it a crime for a person to intentionally traffic [attempt to traffic] [conspire to traffic] in certain goods knowing that a counterfeit mark has been applied thereto that is likely to cause confusion, mistake, or deception.

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 trafficked in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature to which a counterfeit mark has been applied;

Second: That the use of the counterfeit mark is likely to cause confusion [to cause mistake] [to deceive];

Third: That the defendant knows that the mark is counterfeit and that its use is likely to cause confusion [to cause mistake] [to deceive]; and

Fourth: That such trafficking was intentional.

"Traffic" means to transport, transfer, or dispose of, to another, for purposes of commercial advantage or private financial gain, or to import, export, obtain control of, or possess with intent to do transport, transfer, or otherwise dispose of.

"Financial gain" includes the receipt, or expected receipt, of anything of value.

Note

The elements of this offense are addressed in *United States v. Xu*, 599 F.3d 452, 453 (5th Cir. 2010) (addressing the elements and requiring proof of a mark registered with the United States Patent and Trademark Office), and *United States v. Hanafy*, 302 F.3d 485 (5th Cir. 2002) (also addressing the exception for "gray market" goods).

The definition of "traffic" is found in 18 U.S.C. § 2320(f)(5).

The definition of "financial gain" is found in 18 U.S.C. § 2320(f)(2).

The definition of "counterfeit mark" is found in 18 U.S.C. § 2320(f)(1). An appropriate definition of this term, considering the particular allegations of the indictment or bill of information, should be provided. Under *United States v. Yamin*, 868 F.2d 130, 132–33 (5th Cir.

1989), the "counterfeit mark" requires the "potential to deceive or cause confusion," but does not require that the jury find actual confusion.

Enhanced penalties are provided for in 18 U.S.C. § 2320(b). If the indictment contains an enhancement for serious bodily injury or death, the trial judge should add a fifth element to the charge. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

For defenses under the Lanham Act, *see* 18 U.S.C. § 2320(d).

2.91C

TRAFFICKING IN COUNTERFEIT MILITARY GOODS OR SERVICES 18 U.S.C. § 2320(a)(3)

Title 18, United States Code, Section 2320 makes it a crime for a person to intentionally traffic [attempt to traffic] [conspire to traffic] in counterfeit military goods or services for which the use, malfunction, or failure is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security.

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 trafficked in goods or services;

Second: That the defendant knew that such goods or services were counterfeit military goods or services;

Third: That the use, malfunction, or failure of such goods or services was likely to cause serious bodily injury [death] [the disclosure of classified information] [impairment of combat operations] [other significant harm to a combat operation, a member of the Armed Forces, or to national security]; and

Fourth: That such trafficking was intentional.

"Traffic" means to transport, transfer, or dispose of, to another, for purposes of commercial advantage or private financial gain, or to import, export, obtain control of, or possess with intent to do transport, transfer, or otherwise dispose of.

"Financial gain" includes the receipt, or expected receipt, of anything of value.

The term "counterfeit military good or service" means a good or service that uses a counterfeit mark on or in connection with such good or service and that (A) is falsely identified or labeled as meeting military specifications, or (B) is intended for use in a military or national security application.

Note

The definition of "traffic" is found in 18 U.S.C. § 2320(f)(5).

The definition of "financial gain" is found in 18 U.S.C. § 2320(f)(2).

The definition of "counterfeit military good or service" is found in 18 U.S.C. § 2320(f)(4).

The definition of "counterfeit mark" is found in 18 U.S.C. § 2320(f)(1). An appropriate definition of this term, considering the particular allegations of the indictment or bill of information, should be provided. Under *United States v. Yamin*, 868 F.2d 130, 132–33 (5th Cir. 1989), the "counterfeit mark" requires the "potential to deceive or cause confusion," but does not require that the jury find actual confusion.

Enhanced penalties are provided for in 18 U.S.C. § 2320(b). If the indictment contains an enhancement for serious bodily injury or death, the trial judge should add a fifth element to the charge. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

For defenses under the Lanham Act, *see* 18 U.S.C. § 2320(d).

2.91D

TRAFFICKING IN DRUGS WITH COUNTERFEIT MARK
18 U.S.C. § 2320(a)(4)

Title 18, United States Code, Section 2320 makes it a crime for a person to intentionally traffic [attempt to traffic] [conspire to traffic] in a drug and knowingly use a counterfeit mark on or in connection with such drug.

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 trafficked in a drug;

Second: That the defendant knowingly used a counterfeit mark on or in connection with such drug; and

Third: That such trafficking was intentional.

"Traffic" means to transport, transfer, or dispose of, to another, for purposes of commercial advantage or private financial gain, or to import, export, obtain control of, or possess with intent to do transport, transfer, or otherwise dispose of.

"Financial gain" includes the receipt, or expected receipt, of anything of value.

The term "drug" is defined by Section 201 of the Federal Food, Drug, and Cosmetic Act. You are instructed that _____ (*insert applicable drug name*) is a drug.

The term "counterfeit mark" means a spurious mark that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature.

A "spurious mark" is one that is identical or indistinguishable from a registered trademark and the use of which is likely to confuse, cause mistake, or deceive.

Note

The definition of "counterfeit mark" is found in 18 U.S.C. § 2320(f)(1). The definition in the instruction may need to be modified depending upon what kind of mark the defendant used.

The definition of "spurious mark" is found in *United States v. Hanafy*, 302 F.3d 485, 487 (5th Cir. 2002).

The definition of "traffic" is found in 18 U.S.C. § 2320(f)(5).

The definition of "financial gain" is found in 18 U.S.C. § 2320(f)(2).

A "drug" is defined in Section 201 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321. *See* 18 U.S.C. § 2320(f)(6).

The definition of "knowingly" is found in Instruction No. 1.41.

Enhanced penalties are provided for in 18 U.S.C. § 2320(b). If the indictment contains an enhancement for serious bodily injury or death, the trial judge should add an additional element to the charge. For example, that the defendant knowingly or recklessly caused or attempted to cause death from the trafficking conduct. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363–66 (2000).

A person acts with "reckless disregard" when he [she] is aware of, but consciously disregards, facts and circumstances indicating that that his [her] conduct created a risk of serious bodily injury or death. *See United States v. Shengyang Zhou*, 717 F.3d 1139, 1151 (10th Cir. 2013).

2.92A

PROVIDING MATERIAL SUPPORT TO TERRORISTS
18 U.S.C. § 2339A

Title 18, United States Code, Section 2339A, makes it a crime for anyone to provide material support or resources [conceal or disguise the nature, location, source, or ownership of material support or resources], knowing or intending that they are to be used in preparation for [carrying out] a violation of _____ (*include terrorist crime contained in indictment*), or in preparation for [carrying out] the concealment of an escape from the commission of any such violation, or to attempt or conspire to do so.

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 provided material support or resources to [attempted to provide material support or resources to] [conspired to provide material support or resources to] _____ (*describe person(s) or organization(s) described in the indictment*) [concealed or disguised [attempted to conceal or disguise] [conspired to conceal or disguise] the nature, location, source, or ownership of material support or resources]; and

Second: That the defendant did so knowing or intending that the material support or resources were to be used to prepare for [carry out] a violation of _____ (*describe federal terrorism offense*).

[*Second*: That the defendant did so knowing or intending that the material support or resources were to prepare for [carry out] the concealment of an escape from the commission of _____ (*describe terrorism offense*).].

The term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications, equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation. Medicine or religious materials are not included.

[The term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.]

[The term "expert advice or assistance" means advice or assistance derived from scientific technical or specialized knowledge.]

Note

The variety of terrorist offenses a defendant is prohibited from supporting include 18 §§ U.S.C. 32 (aircraft sabotage), 37, 81, 175, 229, 351, 842(m) or (n), 844(f) or (i), 930(c), 956,

1114, 1116 (crimes against internationally protected persons), 1203 (hostage taking), 1361, 1362, 1363, 1751, 1991, 2155, 2156, 2280, 2281, 2332 (terrorist acts abroad against United States nationals), 2332a, 2332b (terrorism transcending national boundaries), 2332f (bombings of places of public use, Government facilities), or 2340A; 42 U.S.C. § 2284 (sabotage of nuclear facilities or fuel; 49 U.S.C. §§ 46502 (aircraft piracy), 60123(b); or any offenses listed in 18 U.S.C. § 2332b(g)(5)(B) (except for sections 2339A and 2339B). *See* § 2339A for a precise list of offenses included.

In *Holder v. Humanitarian Law Project*, the Court briefly discussed the intent requirement of § 2339A as part of its analysis of § 2339B, discussed below in Instruction No. 2.92B. 130 S. Ct. 2705, 2717–18 (2010). The Court emphasized that the object of the intent or knowledge requirement in § 2339A is the terrorist activity itself; the defendant must specifically intend or know that the defendant's conduct will further terrorist activity. *Id.*

The Fifth Circuit encountered § 2339A in the context of a sentencing enhancement in *United States v. Fidse*, 778 F.3d 477 (5th Cir. 2015) ("*Fidse I*"), and *United States v. Fidse*, 862 F.3d 516 (5th Cir. 2017) ("*Fidse II*"). In both cases, the Fifth Circuit made clear—similar to the Court in *Humanitarian Law Project*—that § 2339A covers different ground from § 2339B by requiring the object of the defendant's action and intent to the be the terrorist activity itself, rather than a terrorist organization. *Fidse II*, 862 F.3d at 523–24; *Fidse I*, 778 F.3d at 482 n.7.

For a discussion of whether "lawful combatant immunity" is an affirmative defense, *see United States v. Harcevic*, 999 F.3d 1172, 1176–79 (8th Cir. 2021).

2.92B

PROVIDING MATERIAL SUPPORT TO A DESIGNATED FOREIGN TERRORIST ORGANIZATION
18 U.S.C. § 2339B

Title 18, United States Code, Section 2339B, makes it a crime for anyone to knowingly provide material support or resources to a designated foreign terrorist organization [to attempt to do so] [to conspire to do so].

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 provided [attempted to provide] [conspired to provide] material support or resources to an organization; and

Second: That the defendant did so knowing that the organization is a designated terrorist organization [that the organization has engaged or engages in terrorist activity] [that the organization has engaged or engages in terrorist activity] [that the organization has engaged or engages in terrorism].

[*Third*: the death of any person results.]

The term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications, equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation. Medicine or religious materials are not included.

[The term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.]

[The term "expert advice or assistance" means advice or assistance derived from scientific technical or specialized knowledge.]

[No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with one or more individuals (who may be or include himself [herself]) to work under that terrorist organization's direction or control or to organize manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.]

The term "terrorist organization" means an organization designated by the Secretary of State as a terrorist organization under section 210 of the Immigration and Nationality Act. I hereby instruct you that _____ (*list designated Foreign Terrorist Organization from indictment*) is a Foreign Terrorist Organization.

[The term "engage in terrorist activity" means _____ (*describe activity engaged in that is proscribed by 8 U.S.C. § 1182(a)(3)(B)(iv)*).]

[The term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.]

The First Amendment to the Constitution guarantees to all persons in the United States the right to freedom of speech, freedom of religion, and freedom of association. Because of these constitutional guarantees, no one can be convicted of a crime simply on the basis of his [her] beliefs, his [her] expression of those beliefs, or his [her] associations. The First Amendment, however, does not provide a defense to a criminal charge simply because a person uses his [her] associations, beliefs, or words to carry out an illegal activity. Stated another way, if a defendant's speech, expression, or associations were made with the intent to willfully provide funds, goods, or services to or for the benefit of _____ (*name foreign terrorist organization*), or to knowingly provide material support or resources to _____ (*name foreign terrorist organization*), as described in the indictment, then the First Amendment would not provide a defense to that conduct.]

Note

This broad-ranging statute has been used to prosecute an individual who volunteered to fight in a foreign army and ended up fighting against United States forces in Afghanistan, *United States v. Lindh*, 212 F. Supp. 2d 542 (E.D. Va. 2002); traveled abroad to participate in a terrorist group training camp, *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (now also covered by 18 U.S.C. § 2339D); engaged in fundraising efforts in the United States for a Foreign Terrorist Organization, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011); and organized and encouraged an online community to join ISIS and otherwise support that terrorist organization, *United States v. Rahim*, 860 F. App'x 47 (5th Cir. 2021).

The Supreme Court upheld the constitutionality of § 2339B against vagueness and First Amendment challenges in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010) (stating that Congress could "prohibit what plaintiffs want to do – provide material support to [the designated terrorist organizations] in the form of speech").

In *United States v. El-Mezain*, the Fifth Circuit upheld the convictions of five individuals and a corporation for providing material support to Hamas through promotional materials and donations to Hamas-affiliated social-service organizations in Palestine. 664 F.3d at 485, 489–90, 579. The Fifth Circuit held, *inter alia*, that constitutionally protected speech can properly be introduced as evidence of intent to further the unlawful purpose of a conspiracy to commit a § 2339B offense. *Id*. at 537. In navigating the First Amendment issue, the District Court charged the jury with the language now contained in the last bracketed instruction. *Id*. at 536. The Fifth

Circuit noted that "[b]y instructing the jury to consider the intent of the speech as alleged in the indictment, the charge merely permitted the jury to determine whether the Government's theory of the case was correct and did not permit conviction based solely on speech." *Id.* at 538. If the case raises an issue of protected speech, the district court should consider adding the bracketed material.

A defendant may be convicted for attempting to provide himself or herself as personnel in the form of making medical services available to al Qaeda. *See United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011). In addition, the Fifth Circuit has upheld the conviction of a defendant for "answering users' questions about ISIS, giving lengthy speeches, and taking various administrative actions" on a social media platform. *See United States v. Rahim*, 860 F. App'x at 53 (rejecting defendant's argument that he could not be convicted of attempting to provide personnel—himself and others—to ISIS because he was engaged in "independent advocacy" protected by the First Amendment).

8 U.S.C. § 1189 empowers the Secretary of State to designate an organization a foreign terrorist organization upon finding that: (1) the organization is a foreign organization; (2) the organization engages in terrorist activity; and (3) the terrorist activity or terrorism threatens the security of United States nationals or the national security of the United States. 8 U.S.C. § 1189(a)(1)(A)–(C); *United States v. Fidse*, 862 F.3d 516, 519 n.1 (5th Cir. 2017) (affirming that defendant's obstruction conviction supported a terrorism enhancement under the Federal Sentencing Guidelines).

"Terrorist activity" is defined in § 212(a)(3)(B) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1182(a)(3)(B).

"Terrorism" is defined in 22 U.S.C. § 2656f(d)(2).

2.93

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 prostitution or 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 _____(*insert crime*) 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 a case charging that the defendant used facilities of interstate commerce to attempt to persuade, induce, and entice a minor female to engage in illegal sexual activity the Fifth Circuit

approved instructional language similar to the two paragraphs above beginning with the phrase "[i]t is *not* necessary." *United States v. Lundy*, 676 F.3d 444, 450–51 (5th Cir. 2012) (emphasis added); s*ee 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 he is attempting to entice into illegal sexual activity 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 the elements of the offense, *see United States v. Rounds*, 749 F.3d 326, 333 (5th Cir. 2014). The statute does not require that sexual contact occur, *see United States v. Olvera*, 687 F.3d 645, 647–48 (5th Cir. 2012), or that the defendant communicate directly with the minor victim, *see United States v. Barlow*, 568 F.3d 215, 219–20 (5th Cir. 2009);s*ee also United States v. Caudill*, 709 F.3d 444, 446 (5th Cir. 2013) (holding that defendant commits a violation of § 2422(b) by communicating with an adult intermediary "to arrange direct contact so that he could persuade, induce, or entice minor children to engage in sexual intercourse, or . . . to have an adult intermediary persuade, induce, or entice minors to have sexual relations with [defendant]").

For a discussion of an attempted violation of 18 U.S.C. § 2422, *see United States v. Broussard*, 669 F.3d 537, 547 (5th Cir. 2012). For a discussion of "substantial step," *see United States v. Howard*, 766 F.3d 414, 426–27 (5th Cir. 2014).

A defendant may be found guilty of "knowingly attempt[ing] to induce or entice a minor to engage in sexual activity" where the defendant believed he or she was communicating with a minor, even though the defendant was in fact communicating with an adult law-enforcement officer posing as a minor. *United States v. Peterson*, 977 F.3d 381, 389–90 (5th Cir. 2020); *see also United States v. Farner*, 251 F.3d 510, 511–13 (5th Cir. 2001) (concluding that defendant took a substantial step toward committing a violation of § 2422(b) where he attempted to persuade an adult whom he believed was a minor to engage in criminal sexual activity).

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." *Barlow*, 568 F.3d at 220 (quoting § 2422(b); *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.").

2.94

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 [her] 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 [she] was required to appear [surrender for service of sentence] on that date and purposefully and knowingly failed to do so.

[If the defendant never received actual notice of his [her] required appearance, it may have been because the defendant purposely engaged in a course of conduct designed to prevent himself [herself] from receiving such notice. If you find the defendant did purposely engage in such evasive behavior, this evidence may indicate that the defendant was aware of his [her] required appearance.]

Note

"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." *United States v. Allison*, 953 F.2d 870, 876 (5th Cir. 1992), *modified on reh'g*, 986 F.2d 896 (5th Cir. 1993) (finding modification of fourth element necessary where, although defendant never received actual notice, he had "absconded" from his supposed residence). The fourth element should be adjusted, and the above instruction should be given in such a case.

"It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear

or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist." 18 U.S.C. § 3146(c).

2.95A

CONTROLLED SUBSTANCES—POSSESSION WITH INTENT TO DISTRIBUTE
21 U.S.C. §§ 841(a)(1), (b)

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. 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.

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*).]

[OR] [SPECIAL VERDICT FORM]

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. 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.

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 controlled substance was (place an X in the appropriate box):

(*Only the amount alleged in the indictment should be listed.*)

(a) Marijuana [Check only one box]

(i) Weighing 1000 kilograms or more [ ]

(ii) Weighing 100 kilograms or more [ ]

(iii) Weighing 50 kilograms or more [ ]

(iv) Weighing less than 50 kilograms [ ]

(b) Cocaine [Check only one box]

(i) Weighing 5 kilograms or more [ ]

(ii) Weighing 500 grams or more [ ]

(iii) Weighing less than 500 grams [ ]

(c) Cocaine base ("crack cocaine") [Check only one box]

(i) Weighing 280 grams or more [ ]

(ii) Weighing 28 grams or more [ ]

(iii) Weighing less than 28 grams [ ]

(d) Phencyclidine (PCP) [Check only one box]

(i) Weighing 100 grams or more [ ]

(ii) Weighing 10 grams or more [ ]

(iii) Weighing less than 100 grams [ ]

(e) Lysergic acid diethylamide (LSD) [Check only one box]

(i) Weighing 10 grams or more [ ]

(ii) Weighing 1 gram or more [ ]

(iii) Weighing less than 1 gram [ ]

(f) Methamphetamine [Check only one box]

(i) Weighing 50 grams or more [ ]

(ii) Weighing 5 grams or more [ ]

(iii) Weighing less than 5 gram [ ]

(g) Heroin [Check only one box]

(i) Weighing 1 kilogram or more [ ]

(ii) Weighing 100 grams or more [ ]

(iii) Weighing less than 100 grams [ ]

(h) N-phrnyl-N-[1-(2-phenylethyl)-4-piperidinyl] propenamide (fentanyl) [Check only one box]

(i) Weighing 100 grams or more [ ]

(ii) Weighing 40 grams or more [ ]

(iii) Weighing less than 40 grams [ ].]

[SPECIAL VERDICT FORM FOR INDICTMENT ALLEGING SERIOUS BODILY INJURY OR DEATH]

[Fourth [Fifth]: With respect to this Count, we further find beyond a reasonable doubt that the use of the substance distributed by the defendant caused serious bodily injury [death].]

Yes [ ]

No [ ]

Note

For a discussion of the elements of this offense and the circumstances requiring the inclusion of Instruction No. 1.33 (Possession), *see United States v. Campos-Ayala*, No. 21-50642, 2024 WL 2873463, *2, *5–*7 (5th Cir., Jun. 7, 2024) (en banc) (citing this instruction with approval). In the appropriate case, the district court should consider the inclusion of a "mere presence" instruction as follows:

> "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 in the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator."

See id., 2024 WL 2873463 at *5.

For cases listing the elements of 21 U.S.C. § 841(a)(1), *see United States v. Rodriguez-Garcia*, 657 F. App'x 252, 254 (5th Cir. 2016), *United States v. Silva-DeHoyos*, 702 F.3d 843, 848 (5th Cir. 2012), *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).

In *DePierre v. United States*, 131 S. Ct. 2225 (2011), the Court held that the term "cocaine base" refers generally to cocaine in the chemically basic form, not exclusively to what is colloquially known as "crack cocaine."

The fourth element or the Special Verdict Form is required when the indictment alleges a quantity that would trigger a mandatory minimum penalty or result in an enhanced statutory maximum penalty under 21 U.S.C. § 841(b). *See United States v. Alleyne*, 133 S. Ct. 2151 (2013); *Apprendi v. New Jersey*, 120 S. Ct. 2346 (2000); *see also United States v. McClaren*, 13 F.4th 386, 411 (5th Cir. 2021) (holding that "[d]rug quantity requiring a mandatory minimum must be proven beyond a reasonable doubt") (quoting *United States v. Gonzalez*, 481 F.3d 339, 353-54 (5th Cir. 2016)). The Fifth Circuit has held that 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. Gonzales*, 841 F.3d 339, 353–54 (5th Cir. 2016); *United States v. Arnold*, 416 F.3d 349, 356 (5th Cir. 2005) (approving use of special interrogatory). The Committee recommends the Special Verdict Form rather than the fourth element in those cases where the amount of drugs is either unknown or at issue, as drug quantity is not a formal element of the offense of possession with intent to distribute pursuant to 21 U.S.C. § 841(a). Accordingly, a jury's negative finding as to the Special Verdict Form regarding the amount of drugs affects "only the sentence that the district court [could have] impose[d]," not the jury's general guilty verdict. *United States v. Aguirre-Rivera*, 8 F.4th 405, 411 (5th Cir. 2021) (quoting *United States v. Daniels*, 723 F.3d 562, 573 (5th Cir. 2013).

If the court chooses the shorter version of the fourth question instead of the special verdict version for the amount at issue and wishes an exact delineation of the amount of the controlled substance, and there is a factual dispute 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. 1.35, Lesser Included Offense, for the lower amount.

Generally, the exact quantity of the controlled substance need not be determined so long as, in a case seeking an enhanced penalty, the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of § 841(b). The baselines for enhancements pursuant to 841(b)(1)(A), (B), (C), and (D) are provided in the Special Verdict Form. The Fifth Circuit on multiple occasions has limited the application of *Apprendi* and *Alleyne* to statutory penalties. *See, e.g., United States v. Tuma*, 738 F.3d 681, 693 (5th Cir. 2013). Consequently, unless the amount in question would expose a defendant to the possibility of an increase in the maximum penalty or the imposition of a mandatory minimum sentence, no special finding as to the amount is needed. Items that are merely sentencing factors under the United States Sentencing Guidelines do not require a beyond a reasonable doubt finding by a jury. *See Aguirre-Rivera,* 8 F.4th at 411*; United States v. Romans*, 823 F.3d 299, 316–17 (5th Cir. 2016); *United States v. Hebert*, 813 F.3d 564–65 (5th Cir. 2015); *United States v. Rodriguez*, 559 F. App'x 332, 333 (5th Cir. 2014); *United States v. Neuner*, 535 F. App'x 373, 377 n.3 (5th Cir. 2013).

Prior convictions, even those that trigger enhanced penalties, do not require jury findings. *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014); *see also Alleyne*, 133 S. Ct. at 2160 n.1.

An additional jury inquiry or special verdict form will be needed when the indictment alleges a serious bodily injury or death that would result in an enhanced penalty under 21 U.S.C. § 841(b). Subsections 841(b)(1)(A)-(C) provide enhanced penalties (maximums and mandatory minimums) in cases where "death or serious bodily injury results." *Apprendi* and *Alleyne* require that this element be found by the jury. The statute requires that the death or serious bodily injury "results from" the use of such substance. The Supreme Court has ruled that this requires a "but-for" or legal causation finding by the jury. *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (this case has an extensive discussion of death or serious bodily injury). While the *Burrage* Court also accepted certiorari on the question of "whether [the jury must find beyond a reasonable doubt that] the victim's death by drug overdose was a foreseeable result of the defendant's drug trafficking offense," it was ultimately unnecessary to reach that issue. *Id.* at 887. The Fifth Circuit has not yet determined whether a foreseeability requirement should be submitted to the jury. *But see United States v. Thompson*, 945 F.3d 340, 346 (5th Cir. 2019) (holding that failure to submit proximate cause issue to jury was not plain error, and citing to *United States v. Carbajal*, 290 F.3d 277, 284 (5th Cir. 2002), which had noted that analogous Guidelines § 2D1.1 "is a strict liability provision that applies without regard for common law principles of proximate causation or reasonable foreseeability")). However, every other federal court of appeals to address this issue has held that § 841(b) does not demand proof of proximate causation. *See, e.g., United States v. Harden*, 893 F.3d 434, 447–48 (7th Cir. 2018) (collecting cases).

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 *United States v. Garcia*, 242 F.3d 593, 599–600 (5th Cir. 2001)). 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 United States v. Clinton*, 256 F.3d 311, 315 (5th Cir. 2001); *United States v. Thomas*, 246 F.3d 438, 439 (5th Cir. 2001).

As amended in 2018, the statutory definition of "marijuana" excludes not only mature stalks, seeds incapable of germination, and other specified products, but also low potency "hemp." *See* 21 U.S.C. § 802(16)(B) (incorporating 7 U.S.C. § 1639o). A court may wish to instruct the jury as to this definition if the evidence raises an issue as to whether the substance possessed meets the definition of marijuana, or if the weight of the marijuana is reasonably in dispute.

If the evidence warrants, the following instruction may be added:

> "The government must prove beyond a reasonable doubt that the defendant knew he [she] 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. Lopez-Monzon*, 850 F.3d 202, 206–08 (5th Cir. 2017) and *United States v. Mireles*, 471 F.3d 551, 556–57 (5th Cir. 2006). "Control over a vehicle containing hidden drugs plus evidence of the defendant's general consciousness of guilt is enough to prove the 'knowledge' element of the possession with intent to distribute and importation of a controlled substance offenses." *United States v. Lara*, 23 F.4th 459, 471–72 (5th Cir. 2022).

Possession is an ongoing action. In an aiding and abetting case, advance knowledge of the drugs is not required. A defendant "can have knowledge of the possession, even without obtaining that knowledge until partway through the principal's possession." *United States v. Cabello*, 33 F.4th 281, 289 (5th Cir. 2022).

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. Lee*, 966 F.3d 310, 323–26 (5th Cir. 2020), *United States v. Araiza-Jacobo*, 917 F.3d 360, 366–68 (5th Cir. 2019), and *United States v. Oti*, 872 F.3d 696, 697–98 (5th Cir. 2017). A deliberate ignorance instruction is found at Instruction No. 1.42.

2.95B

POSSESSION WITH INTENT TO DISTRIBUTE—ANALOGUE
21 U.S.C. §§ 802(32)(A), 813(a), 841(a)(1)

Definition of Controlled Substance Analogue

Count(s) _____ of the indictment involves a substance alleged to be a "controlled substance analogue." As that term is used in Count(s) ____, the term "controlled substance analogue" means a substance that:

1. Has a chemical structure substantially similar to that of a controlled substance listed in Schedule I or II of the Controlled Substances Act, and

2. Either:

    a. Has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance listed in Schedule I or II of the Controlled Substances Act, or

    b. With respect to a particular defendant, the substance was represented by the defendant as having, or intended by the defendant as having, a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance listed in Schedule I or II of the Controlled Substances Act.

The term "substantially similar" is defined as the term is used in everyday language. "Substantially similar" does not mean "exactly the same." If two substances' chemical structures were exactly the same, the substance in question would no longer be an "analogue," but instead would be the same substance listed in Schedule I or II.

Title 21, United States Code, Section 813(a), provides that a controlled substance analogue, to the extent it is intended for human consumption, is treated as a controlled substance listed in Schedule I for the purposes of federal law.

Charge(s) in the Indictment

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.

Count _____ charges the defendant(s) _____ (*name the defendant(s)*) with possessing with intent to distribute a controlled substance analogue _____ (*name the controlled substance analogue*).

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 analogue;

Second: That the substance was in fact _____ (*name controlled substance analogue*);

Third: That _____ (*name controlled substance analogue*) was a controlled substance analogue, as I have defined that term;

Fourth: That the defendant knew that the substance was a controlled substance analogue;

Fifth: That the defendant knew that the substance was intended for human consumption; and

Sixth: That the defendant possessed the substance with the intent to distribute it.

The government can prove that a defendant knew that a substance was in fact a controlled substance analogue in one of two ways. First, the government can prove that a defendant knew that the substance was controlled under the federal drug laws—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—even if the defendant did not know the particular identity of the substance. Second, the government can prove that a defendant knew the characteristics of the substance that make it a controlled substance analogue.

As I have explained to you, the Analogue Act defines a "controlled substance analogue" by its features:

> (1) as a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or II; and
>
> (2) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the effect of a controlled substance in Schedule I or II; or which is represented or intended by the defendant to have that effect with respect to a particular person.

A defendant need not know of the existence of the Analogue Act to know that he [she] was dealing with a controlled substance.

The term "human consumption" means ingestion, injection, inhalation, absorption, or other introduction into the body of a person by whatever means, including, but not limited to swallowing, snorting, smoking, implantation, or skin contact.

You may consider the following factors in determining whether the defendant knew that a controlled substance analogue was intended for human consumption:

(1) The marketing, advertising, and labeling of the substance.

(2) The known efficacy or usefulness of the substance for the marketed, advertised, or labeled purpose.

(3) The difference between the price at which the substance is sold and the price at which the substance is purported to be or advertised as is normally sold.

(4) The diversion of the substance from legitimate channels and the clandestine importation, manufacture, or distribution of the substance.

(5) Whether the defendant knew or should have known the substance was intended to be consumed by injection, inhalation, ingestion, or any other immediate means.

(6) Any controlled substance analogue that is manufactured, formulated, sold, distributed, or marketed with the intent to avoid the provisions of existing drug laws.

Evidence that a substance was not marketed, advertised, or labeled for human consumption is not sufficient, by itself, to establish that the defendant did not know that the substance was intended for human consumption.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance analogue to another person, with or without any financial interest in the transaction.

Note

Under the Controlled Substances Act, § 841(a)(1), the Government must prove that a defendant knew he or she was dealing with "a controlled substance." *McFadden v. United States,* 135 S. Ct. 2298, 2305 (2015). As the Supreme Court has explained:

> The Analogue Act does not alter that provision, but rather instructs courts to treat controlled substance analogues "as . . . . controlled substance[s] in schedule I." § 813. Applying this statutory command, it follows that the Government must prove that a defendant knew that the substance he was dealing with was a "controlled substance," even in prosecutions involving an analogue. That knowledge requirement can be established in one of two ways. First, it can be established by evidence that a defendant knew that the substance he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. The Analogue Act defines a controlled substance analogue by its features, as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II"; "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect

> of a controlled substance in schedule I or II; or which is represented or intended to have that effect with respect to a particular person. § 802(32)(A). A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal. A defendant need not know of the existence of the Analogue Act to know that was dealing with a controlled substance.'

Id. (footnote omitted); *see also United States v. Muhammad*, 14 F.4th 352, 357 (5th Cir. 2021); *United States v. Moton*, 951 F.3d 639, 643–44 (5th Cir. 2020).

The second method of proving the third element, as described in this instruction, requires that the government prove both that the defendant knew the analogue he [she] was dealing with (1) had a chemical structure substantially similar to a controlled substance, *and* (2) had similar effects to a controlled substance or the defendant represented or intended that that it did. The word "and" is not contained in the statute between § 802(32)(A)(i) and § 802(32)(A)(ii). Although the Supreme Court did not explicitly decide that this conjunctive test was correct, given the Government's concession before the Court, *see McFadden*, 135 S. Ct. at 2305 n.2, the Fifth Circuit has applied this conjunctive test. *See Muhammad*, 14 F.4th at 357; *United States v. Stanford*, 823 F.3d 814, 835 (5th Cir. 2016); *see also United States v. Sethi*, 729 F. App'x 305, 309 (5th Cir. 2018); *United States v. Bays*, 680 F. App'x 303, 307 (5th Cir. 2017); *United States v. Nahmani*, 696 F. App'x 457, 462 n.3 (11th Cir. 2017) (collecting cases).

A 2018 amendment to 21 U.S.C. § 813(b) added the six factors that should be considered, presumably by the jury, in determining whether a controlled substance analogue was intended for human consumption under § 813(a). The limitation was added in § 813(c).

Under 21 U.S.C. § 811(a), the Attorney General by regulation may add substances, such as analogues, to the Schedules of controlled substances set out at 21 U.S.C. § 812. The Schedules are found at 21 C.F.R. Part 1308. Section 811(h) also provides the attorney general the authority to temporarily place substances on the Schedules pending a permanent rule. Any such temporary placement is published in the Federal Register.

2.95C

CONTROLLED SUBSTANCES—UNLAWFUL DISTRIBUTION BY PHYSICIAN [OTHER MEDICAL PRACTITIONER] 21 U.S.C. §§ 841(a)(1), 841(b); 21 C.F.R. § 1306.04(a)

Title 21, United States Code, Section 841(a)(1), makes it a crime for any person, except as authorized, to knowingly and intentionally distribute or dispense a controlled substance. Title 21, Code of Federal Regulation, Section 1306.04(a), authorizes registered physicians [nurse practitioners] licensed by the state to dispense controlled substances via a prescription, but only if the prescription is issued for a legitimate medical purpose by a physician [nurse practitioner] acting in the usual course of his [her] professional practice.

_____ (*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 distributed or dispensed a controlled substance;

Second: That the defendant did so knowingly or intentionally;

Third: That the defendant was unauthorized to dispense a controlled substance via a prescription, in that he [she] did so other than for a legitimate medical purpose or outside the usual course of professional practice; and

Fourth: That the defendant knew he [she] was acting in an unauthorized manner, or intended to act in an unauthorized manner.

A controlled substance is "distributed" if it is delivered or transferred.

"Dispensing" a controlled substance includes writing a prescription.

A prescription is "authorized" if it is issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice.

A controlled substance is prescribed by a physician [practitioner] for a legitimate medical purpose in the usual course of his [her] professional practice if the physician acts in accordance with the standards of medical practice generally recognized or accepted in the United States, or has a reasonable basis for deviating from this standard of care.

A physician [practitioner] "knows" he [she] is acting other than for a legitimate medical purpose or outside the usual course of professional practice when he [she] acts voluntarily and intentionally, not because of mistake or accident. In considering whether a physician [nurse

practitioner] prescribed a controlled substance knowing that it was not for a legitimate medical purpose or in the usual course of professional practice, you should consider all of the physician's [nurse practitioner's] actions and the circumstances surrounding them.

Note

This instruction, rather than Instruction No. 2.95A, applies in cases where: (1) the defendant is indicted as a licensed physician, or other practitioner as defined by 21 U.S.C. § 802(21); (2) the parties have stipulated that the defendant is a licensed physician or other practitioner as defined by 21 U.S.C. § 802(21); or (3) the defendant has produced evidence that he or she is a practitioner authorized to prescribe or dispense the particular controlled substance. *See Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022).

The Committee drafted a separate instruction for charges against pharmacists. *See* Instruction No. 2.95E.

It is well established that "registered physicians can be prosecuted under 21 U.S.C. § 841 when their activities fall outside the usual course of professional practice." *United States v. Moore*, 423 U.S. 122, 124 (1975); *see also Ruan*, 142 S. Ct. at 2381 (rejecting Government's assertion that the Court effectively endorsed its honest-effort standard in *Moore*, noting that *Moore* did not directly address the issue of the *mens rea* required to convict a physician).

The instructions contain four elements. The third element is not expressly required by the text of 21 U.S.C. § 841(a)(1), but relevant regulations provide that certain controlled substances can be dispensed by a prescription from a licensed doctor or nurse practitioner "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a); *see United States v. Armstrong*, 550 F.3d 382, 397 (5th Cir. 2008), *overruled on other grounds by United States v. Balleza*, 613 F.3d 432, 433 n.1 (5th Cir. 2010) (per curiam); *see also United States v. Evans*, 892 F.3d 692 (5th Cir. 2019) (requiring that the government prove the first three elements listed in the above instruction). The need for the fourth element was made clear by the Supreme Court in *Ruan*. Once the defendant has met his or her burden of producing evidence that his or her conduct was "authorized," the *Ruan* Court held that the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. *Ruan*, 142 S. Ct. at 2376. The *Ruan* Court rejected the government's argument that requiring it to prove that a doctor knowingly or intentionally acted not as authorized will allow bad-apple doctors to escape liability by claiming idiosyncratic views about their prescribing authority. *Id.* at 2392. It noted that the Government can prove knowledge of lack of authorization through circumstantial evidence and the more unreasonable a doctor's asserted beliefs or misunderstandings are, especially as measured against objective criteria, the more likely the jury will find that the Government has met its burden.

The Fifth Circuit endorsed almost identical instructions in *United States v. Lamartiniere*, 100 F.4th 625, 636–637, 644–645 (5th Cir. 2024). The court additionally instructed the jurors that a prescription for a controlled substance "may be issued only by an individual medical practitioner who is, one, authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession; and, two, in possession of a valid registration from the U.S.

Drug Enforcement Administration." *Id.* at 637, 643 n.55 (relying on 21 C.F.R. § 1306.03(a)). Finally, the court endorsed the following good faith instruction:

> A controlled substance is prescribed by a physician for a legitimate medical purpose in the usual course of medical practice and, therefore, authorized if the controlled substance is prescribed by him in good faith. Good faith in this context is an honest effort to prescribe for a patient's condition in accordance with the standards of medical practice generally recognized or accepted in the United States.

Id. at 637; *see also United States v. Pierre*, 88 F.4th 574, 581 (5th Cir. 2022) (instructions should ask jury to find that the defendant-doctor subjectively understood the prescriptions he wrote were unauthorized).

"[A] practitioner is unauthorized to dispense a controlled substance if the prescription *either* lacks a legitimate medical purpose *or* is outside the usual course of professional practice." *Armstrong*, 550 F.3d at 397; *see also United States v. Fuchs*, 467 F.3d 889, 899–901 (5th Cir. 2006) (rejecting requirement that the government prove that the dispensing was done both without a legitimate medical purpose and outside the usual course of professional practice).

The Fifth Circuit has acknowledged that the phrases "without a legitimate medical reason" and "beyond the course of professional practice" have been used interchangeably. *Fuchs*, 467 F.3d at 901 (citing *United States v. Outler*, 659 F.2d 1306, 1308–09 (5th Cir. 1981)).

For conspiracy cases, *see United States v. Lee*, 966 F.3d 310, 316–17 (5th Cir. 2020) ("Because Taylor was a doctor with prescribing authority, he and Lee could distribute controlled substances as long as they did so for a legitimate medical purpose and within the scope of professional practice."); *United States v. Norris*, 780 F.2d 1207, 1209 (5th Cir. 1986); *see also* 21 C.F.R. § 1306.04(a). "Thus, when a conspirator has prescribing authority, the elements of conspiracy to distribute controlled substances are: '(1) an agreement by two or more persons to unlawfully distribute or dispense a controlled substance outside the scope of professional practice and without a legitimate medical purpose; (2) the defendant's knowledge of the unlawful purpose of the agreement; and (3) the defendant's willful participation in the agreement.'" *Lee*, 966 F.3d at 317 (quoting *United States v. Oti*, 872 F.3d 678, 687 (5th Cir. 2017)).

In *United States v. Bennett*, 874 F.3d 236, 243–44 (5th Cir. 2017), the defendant requested a jury instruction on the meaning of "corruptly," in order to distinguish illegitimate distribution from distribution for legitimate medical reasons. The trial court correctly refused the instruction because "[t]he statute does not require a defendant to have acted 'corruptly.'" *Id.* at 244.

For a discussion of the distinction between dispensing and distributing, *see United States v. Craig*, 823 F. App'x 231, 239–41 (5th Cir. 2020) (per curiam).

For cases discussing when to give an instruction on deliberate ignorance, *see Lee*, 966 F.3d at 323–26, *United States v. Araiza-Jacobo*, 917 F.3d 360, 366–68 (5th Cir. 2019), and *United States v. Oti*, 872 F.3d at 697–98 (5th Cir. 2017). A deliberate ignorance instruction is found at Instruction No. 1.42.

“Distribution” is defined in 21 U.S.C. § 802(9).

“Dispensing” is defined in 21 U.S.C. § 802(10).

2.95D

ACQUISITION OF CONTROLLED SUBSTANCES BY MISREPRESENTATION 21 U.S.C. § 843(a)(3)

Title 21, United States Code, Section 843(a)(3), makes it a crime for anyone to knowingly or intentionally acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.

_____ (*list 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 or intentionally acquired or obtained possession of a controlled substance;

Second: That the defendant acquired or obtained possession of the controlled substance by misrepresentation [fraud] [forgery] [deception] [subterfuge]; and

Third: That the misrepresentation [fraud] [forgery] [deception] [subterfuge] was material.

A misrepresentation [fraud] [forgery] [deception] [subterfuge] 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 was addressed.

Note

"Knowledge" and "intent" are used in their common meaning in the 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").

If a court wishes to include a definition of "subterfuge," the Supreme Court defined the term as "a scheme, plan, stratagem, or artifice of evasion." *United Air Lines, Inc. v. McMann*, 98 S. Ct. 444, 450 (1977). This definition, however, was provided in an unrelated context as part of an analysis of the Age Discrimination in Employment Act of 1967.

The single Fifth Circuit case in which a jury instruction for 21 U.S.C. § 843(a)(3) was given is *United States v. McElwee*, No. 08-269, 2010 WL 235007, at *6 (W.D. La. Jan. 15, 2010), *aff'd*, *United States v. McElwee*, 646 F.3d 328 (5th Cir. 2011) (Doc. No. 238). Judge Maurice Hicks included a "materiality" instruction, as well as a definition of "materiality." *Id.* at 8. The Committee included these here.

The Fifth Circuit requires both materiality and causation. *See United States v. Bass*, 490 F.2d 846, 857 (5th Cir. 1974), *overruled on other grounds by United States v. Lyons*, 731 F.2d 243, 246 (5th Cir. 1984) ("But the criminal offense created by 21 U.S.C. 843(a)(3) requires more than the fact of concealment. We read this statute to require a material misrepresentation, fraud, deception, or subterfuge which is a cause in fact of the acquisition of a controlled substance. In this case, the government elicited testimony neither as to the concealment's materiality nor as to its effect on the prescribing doctors' action.").

2.95E

CONTROLLED SUBSTANCES—UNLAWFUL DISTRIBUTION BY PHARMACIST
21 U.S.C. §§ 841(a)(1), 841(b); 21 C.F.R. § 1306.04(a)

Title 21, United States Code, Section 841(a)(1), makes it a crime for any person, except as authorized, to knowingly and intentionally distribute or dispense a controlled substance. Title 21, Code of Federal Regulation, Section 1306.04(a), authorizes registered pharmacists licensed by the state to dispense controlled substances via a prescription, but only if the prescription is issued for a legitimate medical purpose by a physician [nurse practitioner] acting in the usual course of his [her] professional practice.

_____ (*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 distributed or dispensed a controlled substance;

Second: That the defendant did so knowingly or intentionally;

Third: That the defendant was not authorized to distribute or dispense the controlled substance, in that it was prescribed other than for a legitimate medical purpose or outside the usual course of professional practice; and

Fourth: That the defendant knowingly or intentionally filled a prescription the defendant knew was not issued for a legitimate medical purpose or was outside the usual course of professional practice.

A controlled substance is "distributed" if it is delivered or transferred.

"Dispensing" a controlled substance includes writing a prescription.

A prescription is "authorized" if it is issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice.

A controlled substance is prescribed by a physician [practitioner] for a legitimate medical purpose in the usual course of professional practice if the physician [practitioner] acts in accordance with the standards of medical practice generally recognized or accepted in the United States, or has a reasonable basis for deviating from this standard of care.

Note

Pharmacists can be prosecuted under 21 U.S.C. § 841. *United States v. Ferris*, 52 F.4th 235 (5th Cir. 2022).

This instruction applies in cases where: (1) the defendant is indicted as a pharmacist; (2) the parties have stipulated that the defendant is a pharmacist; or (3) the defendant has produced evidence that he or she is a pharmacist authorized to dispense the particular controlled substance pursuant to a prescription. *See Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022).

The instructions contain four elements. The third element is not expressly required by the text of 21 U.S.C. § 841(a)(1), but relevant regulations provide that certain controlled substances can be dispensed by a prescription from a licensed doctor or nurse practitioner or filled by a pharmacist when "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a); *see United States v. Armstrong*, 550 F.3d 382, 397 (5th Cir. 2008), *overruled on other grounds by United States v. Balleza*, 613 F.3d 432, 433 n.1 (5th Cir. 2010) (per curiam); *see also United States v. Evans*, 892 F.3d 692 (5th Cir. 2019) (requiring that the government prove the first three elements listed in the above instruction). The need for the fourth element was made clear by the Supreme Court in *Ruan*. Once the defendant has met his or her burden of producing evidence that his or her conduct was "authorized," the *Ruan* Court held that the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. *Ruan*, 142 S. Ct. at 2376. The *Ruan* Court rejected the government's argument that requiring it to prove that a doctor knowingly or intentionally acted not as authorized will allow bad-apple doctors to escape liability by claiming idiosyncratic views about their prescribing authority. *Id.* at 2392. It noted that the Government can prove knowledge of lack of authorization through circumstantial evidence and the more unreasonable a doctor's asserted beliefs or misunderstandings are, especially as measured against objective criteria, the more likely the jury will find that the Government has met its burden.

A pharmacist can have the requisite *mens rea* in seemingly two different situations. The first situation is well-recognized. In that factual scenario, the pharmacist has the requisite knowledge if he or she knowingly or intentionally filled a prescription that was not issued for a legitimate medical purpose or that was issued outside the usual course of professional practice. *See Ruan*, 142 S. Ct. at 2375; *see also Ferris*, 52 F.4th 235, 242–43 (5th Cir. 2022). The second situation is where the prescription is legitimately written but the pharmacist knowingly or intentionally fills the prescription for an illegitimate purpose or in a manner outside the usual course of professional practice. This situation has not to date been discussed by either the Supreme Court or the Fifth Circuit, but it flows logically from the statute.

"[A] practitioner is unauthorized to dispense a controlled substance if the prescription *either* lacks a legitimate medical purpose *or* is outside the usual course of professional practice." *Armstrong*, 550 F.3d at 397; *see also United States v. Fuchs*, 467 F.3d 889, 899–901 (5th Cir. 2006) (rejecting requirement that the government prove that the dispensing was done both without a legitimate medical purpose and outside the usual course of professional practice).

The Fifth Circuit has acknowledged that the phrases "without a legitimate medical reason" and "beyond the course of professional practice" have been used interchangeably. *Fuchs*, 467 F.3d at 901 (citing *United States v. Outler*, 659 F.2d 1306, 1308–09 (5th Cir. 1981)).

In *Ferris*, the court held that, applying *Ruan*, the government must prove that the pharmacist "knowingly or intentionally filled an unauthorized prescription." 52 F.4th at 243. In *United States v. Ajayi*, the Fifth Circuit analyzed *Ruan* to hold that a defendant "must *subjectively* understand the illegitimate nature of the distribution they facilitate to commit an offense under § 841(a)" and that filling an "objectively illegitimate prescription is not a sufficient condition to convict." 64 F.4th 243, 247 (5th Cir. 2023); *see also United States v. Capistrano*, 74 F.4th 756, 771 n.51 (5th Cir. 2023) (applying *Ruan* and *Armstrong* to find that a pharmacist defendant can be convicted "*either* for knowing prescriptions were issued for an illegitimate purpose *or* knowing they were dispensed outside the usual course of professional practice").

For conspiracy cases, *see United States v. Lee*, 966 F.3d 310, 316–17 (5th Cir. 2020) ("Because Taylor was a doctor with prescribing authority, he and Lee could distribute controlled substances as long as they did so for a legitimate medical purpose and within the scope of professional practice."), and *United States v. Norris*, 780 F.2d 1207, 1209 (5th Cir. 1986); *see also* 21 C.F.R. § 1306.04(a). "Thus, when a conspirator has prescribing authority, the elements of conspiracy to distribute controlled substances are: '(1) an agreement by two or more persons to unlawfully distribute or dispense a controlled substance outside the scope of professional practice and without a legitimate medical purpose; (2) the defendant's knowledge of the unlawful purpose of the agreement; and (3) the defendant's willful participation in the agreement.'" *Lee*, 966 F.3d at 317 (quoting *United States v. Oti*, 872 F.3d 678, 687 (5th Cir. 2017)).

In *United States v. Bennett*, 874 F.3d 236, 243–44 (5th Cir. 2017), the defendant requested a jury instruction on the meaning of "corruptly," in order to distinguish illegitimate distribution from distribution for legitimate medical reasons. The trial court correctly refused the instruction because "[t]he statute does not require a defendant to have acted 'corruptly.'" *Id.* at 244.

For a discussion of the distinction between dispensing and distributing, *see United States v. Craig*, 823 F. App'x 231, 239–41 (5th Cir. 2020) (per curiam).

For cases discussing when to give an instruction on deliberate ignorance, *see United States v. Lee*, 966 F.3d at 323–26), *United States v. Araiza-Jacobo*, 917 F.3d 360, 366–68 (5th Cir. 2019), and *United States v. Oti*, 872 F.3d at 697–98 (5th Cir. 2017). A deliberate ignorance instruction is found at Instruction No. 1.42.

"Distribution" is defined in 21 U.S.C. § 802(9).

"Dispensing" is defined in 21 U.S.C. § 802(10).

"Practitioners" authorized to dispense controlled substances include physicians and pharmacies. 21 U.S.C. § 802(21).

Instruction No. 2.95C applies to charges against physicians and other practitioners.

2.96

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] [cause 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] [cause the commission of] the felony 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" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

[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. Martinez-Vidana*, 825 F.3d 272, 274 (5th Cir. 2016), *United States v. Haines*, 803 F.3d 713, 735–36 (5th Cir. 2015), and *United States v. Mankins*, 135 F.3d 946, 949 (5th Cir. 1998).

The Fifth Circuit has held that a conviction under 21 U.S.C. § 843(b) "requires proof of the underlying [felony] drug offense that the defendant is accused of facilitating, even [if] it is not separately charged. The statute therefore requires that in the course of using a communications facility the defendant must either commit an independent drug crime, or cause or facilitate such a crime." *Mankins*, 135 F.3d at 949. It is sufficient if the defendant's use of the communication facility facilitates either the defendant's own or another person's commission of the offense. *United States v. Dixon*, 132 F.3d 192, 200 (5th Cir. 1997).

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 Court reasoned that when a drug transaction is arranged using a "communications facility" and the seller's part in the transaction is a felony, but the buyer's conduct is only a misdemeanor, the buyer does not "facilitate" the dealer's felony solely because he or she used the communications facility to make the drug purchase. A buyer, who is a necessary

party to a sale, cannot both make the transaction possible and at the same time "facilitate" it, i.e., make it easier. *Id*. at 2105. The Court said "[t]he common usage . . . limits 'facilitate' to the efforts of someone other than a primary or necessary actor in the commission of a substantive crime." *Id*. at 2106.

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).

2.96A

SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE
21 U.S.C. § 844(a)

Title 21, United States Code, Section 844(a), makes it a crime for anyone to knowingly or intentionally possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice.

_____ (*list controlled substance*) is a controlled substance within the meaning of this law.

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

First: That the defendant knowingly or intentionally possessed _____ (*identify the controlled substance*); and

Second: That the defendant knew that the substance was some kind of controlled substance. The government is not required to prove that the defendant knew the substance was _____ (*identify the controlled substance*).

Note

"Knowledge" and "intent" are used in their common meaning in the 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").

If the defendant obtained the substance directly or pursuant to a valid prescription from a practitioner acting in the course of his professional practice, the possession is not unlawful. *See Woods v. Butler*, 847 F.2d 1163, 1167 (5th Cir. 1988) (reviewing denial of habeas relief and finding that a valid prescription is a defense to a possession charge under Louisiana's version of the Uniform Controlled Dangerous Substances law, and the State could constitutionally require the defendant to prove this defense). The *Woods* court noted that in the similar provision of the federal Controlled Substances Act, the government retains the ultimate burden of persuasion on this defense. *Id*. at 1167 (citing *United States v. Forbes*, 515 F.2d 676, 680 (D.C. Cir. 1975)); *see also* 21 U.S.C. § 885(a)(1) (stating that the government is not required to negate any exemption or exception in an indictment, and the burden of going forward with evidence is on the defendant); 21 U.S.C. § 885(a)(2) (stating that in the case of a person charged under § 844(a) with simple possession, any label identifying such substance shall be prima facie evidence that such substance was obtained pursuant to a valid prescription from a practitioner while acting in the course of his professional practice).

The penalty for simple possession is ordinarily a term of imprisonment of not more than one year, though if the defendant is convicted of possession of flunitrazepam, the maximum sentence is a term of imprisonment of not more than three years. Because the identity of the controlled substance is already included in the first element, this instruction comports with *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

2.97

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.

_____ (*name controlled substance*) is a controlled substance within the meaning of federal 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 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; and

Third: That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose.

[*Fourth*: That the overall scope of the conspiracy involved at least _____ (*describe quantity*) of _____ (*name controlled substance*), and

Fifth: That the defendant knew or reasonably should have known that the 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 [her] 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 [she] 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. Lara*, 23 F.4th 459, 470-71 (5th Cir. 2022), *United States v. Aguirre-Rivera*, 8 F.4th 405, 410 (5th Cir. 2021), *United States v. Suarez*, 879 F.3d 626, 631–32 (5th Cir. 2018), *United States v. Chapman*, 851 F.3d 363, 375–78 (5th Cir. 2017), *United States v. Kiekow*, 872 F.3d 236, 245–46 (5th Cir. 2017), and *United States v. Vargas-Ocampo*, 747 F.3d 299, 303 (5th Cir. 2014) (en banc).

"Conspiracies must feature an agreement, although the agreement can be informal and unspoken. The agreement can be proven by circumstantial evidence alone, but cannot be 'lightly inferred.' 'Once the government presents evidence of a conspiracy, it only needs to produce slight evidence to connect an individual to the conspiracy.' A defendant can be convicted of conspiracy even if 'he only participated at one level . . . and only played a minor role.'" *United States v. McClaren*, 13 F.4th 386, 402 (5th Cir. 2021).

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a type and quantity of a controlled substance that would result in a mandatory minimum or enhanced statutory maximum penalty under 21 U.S.C. § 841(b). *See Alleyne v. United States*, 113 S. Ct. 2151 (2013); *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). The Fifth Circuit has described the

inclusion of this fourth element as "preferable," but not required in all situations. *United States v. Daniels*, 723 F.3d 562, 574 (5th Cir.), *modified in part on reh'g*, 729 F.3d 496 (5th Cir. 2013). Generally, the exact quantity of the controlled substance in a substantive controlled substance charge 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 factual dispute, however, as to what type of controlled substance is the object of the conspiracy, or whether the amount is above or below a particular baseline (e.g., 100 kilograms of marijuana versus 99 kilograms), the court should consider submitting the type of controlled substance and the higher amount in the fourth element, accompanied by Instruction No. 1.35, Lesser Included Offense, for the lower amount. Alternatively, the court may substitute for the fourth element special interrogatories 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).

An alternative manner of submitting maximum and minimum amounts of a controlled substance is included in the instructions concerning possession with intent to distribute (Instruction No. 2.95A) and that Special Verdict Form may be tailored for use in a conspiracy charge should the court find it more desirable. Whatever approach is used, the jury's finding as to the scope of the overall conspiracy establishes the minimum and maximum sentencing range. *See United States v. Hinojosa*, 749 F.3d 407, 412–13 (5th Cir. 2014) (holding that jury must find a fact that triggers a mandatory minimum penalty or that enhances a statutory maximum penalty, but that the *Alleyne* opinion did not imply that the traditional fact-finding on relevant conduct, to the extent it increases the discretionary sentencing range for a district judge under the guidelines, must now be made by jurors).

In a drug conspiracy, however, two separate findings are required. One is the fourth element in this instruction—the type and quantity of controlled substances involved in the entire conspiracy, and the other is the fifth element of this instruction—the type and quantity that each particular defendant knew or should have known was involved in the conspiracy. The need for these findings to be made by a jury was confirmed by the Fifth Circuit in *Turner*, 319 F.3d at 722-23 (government must prove requisite drug quantity involved in conspiracy beyond a reasonable doubt), and *United States v. Haines*, 803 F.3d 713, 741–42 (5th Cir. 2015) (*Apprendi* and *Alleyne* require the jury, rather than the court, to determine the amount each defendant knew or should have known was involved in the conspiracy). *Haines* has been reaffirmed in several published cases: *United States v. Montemayor*, 55 F.4th 1003, 1012 (5th Cir. 2022); *United States v. Aguirre-Rivera*, 8 F.4th 405, 410 (5th Cir. 2021); *United States v. Jones*, 969 F.3d 192, 198 (5th Cir. 2020); *United States v. Staggers*, 961 F.3d 745, 762 (5th Cir. 2020); *United States v. Benitez*, 800 F.3d 243, 250 (5th Cir. 2015); and *United States v. Koss*, 812 F.3d 460, 465 n.3 (5th Cir. 2016); *see also* McClaren, 13 F.4th at 411 (holding that "[t]he government need not seize the actual amount charged to meet its burden" and "[t]he jury can find the drug quantity by extrapolating from the testimony") (quoting United States v. Walker, 750 F. App'x 324, 326 (5th Cir. 2018)).

A jury's finding on the fifth element will not negate guilt. "[B]ecause the drug quantity is not a formal element of the conspiracy offense, the jury's answer to the second special interrogatory negated only the sentencing enhancement under § 841(b), not the general guilty verdict. The jury specifically found that the government had proven the existence of a conspiracy involving one kilogram or more of heroin and that Aguirre-Rivera was a participant in that conspiracy. But the jury then concluded that the government had not proven beyond a reasonable doubt that Aguirre-Rivera 'knew or reasonably should have known that the scope of the conspiracy involved at least one kilogram or more of a mixture of substance containing a detectable amount of heroin.' This finding speaks only to the amount of drugs for which Aguirre-Rivera could be held responsible—the drug quantity. Under *Daniels,* this affected only 'the sentence that the district court [could have] imposed[d].' *Daniels*, 723 F.3d at 573. Because the jury's general guilty verdict was untouched, the district court did not err in denying Aguirre-Rivera's motion for judgment of acquittal." *United States v. Aguirre-Rivera*, 8 F.4th 405, 411 (5th Cir. 2021), *cert. denied*, 142 S.Ct. 807 (2022).

Although *Haines* addresses the issue of drug quantity rather than drug type, the type of controlled substance likewise can affect the minimum penalty available. Accordingly, an individualized jury finding as to drug type is required, especially in those conspiracies involving multiple drug types. In *United States v. Hill,* 80 F.4th 595, 604–05 (5th Cir. 2023), the Fifth Circuit considered a jury charge that instructed the jury to determine whether the defendant "knew that the scope of the conspiracy involved at least a detectable amount of heroin or at least 280 grams of a mixture or substance containing cocaine base." Since the charge was drafted in the disjunctive, there was no express finding that the defendant knew that the conspiracy involved at least 280 grams of cocaine base. The Court found that "there is a reasonable probability that, but for the error, Hill would have received a significantly shorter sentence." *Id.* at 605.

"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. Daniels*, 723 F.3d 562, 575 (5th Cir. 2013); *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. 2.17, Conspirator's Liability for Substantive Count; *Pinkerton v. United States*, 66 S. Ct. 1180, 1184 (1946).

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. Hale*, 685 F.3d 522, 540–41 (5th Cir. 2012); *United States v. Smithers*, 27 F.3d 142, 146 (5th Cir. 1994). Accordingly, the elements of the "object" crime of the conspiracy, as alleged in the indictment, should be included in the instructions pertaining to the conspiracy count, unless they are given under a different count of the indictment.

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* Instruction No. 2.16, 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 *United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993)); *United States v. Delgado,* 672 F.3d 320, 341 (5th Cir. 2012); *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).

2.98A

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.

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 felony drug violations are required. *See United States v. Hicks*, 945 F.2d 107, 108 (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 sufficient. It further held that jury unanimity is

required as to the predicate violations. *Id*. at 1709, 1713 (holding that each violation in the series is a separate element of the offense and therefore, because "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element," unanimity "in respect to each individual violation is necessary"); *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 as long as each juror finds there to be five participants. *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 held that its precedent "supports the principle that 'organizer' within the meaning of § 848 requires indicia of control or authority." *Lewis*, 476 F.3d at 376 (citing *United States v. Bass*, 310 F.3d 321, 327–28 (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. 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.

The Supreme Court has held that a § 846 drug conspiracy is a lesser included offense of the CCE. *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*. *Sterling v. United States*, 116 S. Ct. 900 (1996). Except for a drug conspiracy, however, predicate drug offenses are not lesser included offenses of the CCE for the purposes of the Fifth Amendment Double Jeopardy clause and, thus, cumulative punishment for CCE and the predicate substantive offenses is permitted. *See Garrett v. United States*, 105 S.Ct. 2407, 2419 (1985); *United States v. Vasquez,* 899 F.3d 363, 382–83 (2018), *as revised* (Aug. 24, 2018).

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 or her living expenses, *Lewis*,

476 F.3d at 379 (applying the Second Circuit standard articulated in *United States v. Joyner*, 201 F.3d 61, 72 (2d Cir. 2000)).

The increase from a twenty-year mandatory minimum penalty to a thirty-year mandatory minimum penalty in § 848(a) is based on prior convictions. The Fifth Circuit has held, both before and after *Alleyne v. United States*, 133 S. Ct. 2151 (2013), that prior convictions, despite triggering a statutory mandatory minimum or increasing a statutory maximum penalty, do not require a jury finding. *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014) (citing *United States v. Akins*, 746 F.3d 590, 611 (5th Cir. 2014)). Nevertheless, it is clear to the Committee that § 848(b), which requires a minimum of life imprisonment based upon non-recidivist factual findings, will require that the jury find the elements in subsections (b)(1) and (b)(2) in order to satisfy the requirements of *Alleyne*.

The Second Circuit held that when calculating the quantity of drugs under § 848(b)(2)(A) necessary to trigger a mandatory life sentence, a jury may consider only the single violation of the Controlled Substance Act alleged in § 848(c)(1) and may not aggregate the drug amounts involved in the three predicates constituting the continuing series of violations described in § 848(c)(2). *United States v. Montague*, 67 F.4th 520, 532–35 (2d Cir. 2023). Section 848(e) is not a penalty enhancement or sentencing provision; rather, it sets forth "offense[s] separate from—and punishable in addition to—[their] predicates." *Vasquez*, 899 F.3d at 382–83; *see also United States v. Villarreal*, 963 F.2d 725, 728 (5th Cir. 1992). For an instruction on the § 848(e) offense, *see* Instruction No. 2.98B.

2.98B

KILLING WHILE ENGAGED IN DRUG TRAFFICKING OR A CONTINUING CRIMINAL ENTERPRISE 21 U.S.C. § 848(e)(1)(A)

Title 21, United States Code, Section 848(e) makes it a crime to kill or to counsel, command, induce, procure, or cause the intentional killing of a person while engaging in or working in furtherance of a continuing criminal enterprise [engaged in offenses punishable under Title 21, United States Code, sections 841(b)(1)(A) and 960(b)(1), which are drug trafficking offenses].

For you to find the defendant guilty of this charge, the government must prove the following beyond a reasonable doubt:

First: That an individual was intentionally killed;

Second: That the defendant killed the individual or that the defendant counseled [commanded] [induced] [procured] [caused] the intentional killing of the individual; and

Third: That the defendant did so while engaging in or working in furtherance of a continuing criminal enterprise [engaged in offenses punishable under Title 21, United States Code, Section 841(b)(1)(A) or Title 21, United States Code, Section 960(b)(1).]

Title 21 U.S.C. § 841(b)(1)(A) prohibits an individual from knowingly or intentionally manufacturing [distributing] [dispensing] [possessing with the intent to distribute or dispense] a controlled substance, or creating [distributing] [dispensing] [possessing with intent to distribute or dispense] a controlled substances in excess of certain amounts, including ____ (*specify substance and amount*).

Title 21 U.S.C. § 960(b)(1) prohibits any person from knowingly or intentionally importing or exporting controlled substances in excess of certain amounts, including ____ (*specify substance and amount*).

Note

This instruction was approved by the Fifth Circuit in *United States v. Vasquez*, 899 F.3d 363, 379 (5th Cir. 2018), *as revised* (Aug. 24, 2018).

Section 848(e)(1) prohibits killing while engaged either in a continuing criminal enterprise (CCE) or certain serious drug trafficking offenses. The above instruction describes the applicable predicate drug trafficking offenses; if the indictment charges a killing in conjunction with a CCE, the jury should be instructed as to the requirements of that offense. *See* Instruction No. 2.98A.

"The courts of appeals to consider the issue have all held that § 848(e)(1)(A)'s 'engaging in' element requires a 'substantive, and not merely temporal, connection' between the murder and the predicate offense." *Vasquez*, 899 F.3d at 379 (collecting cases).

2.99

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] [use] [maintain] any place for the purpose of manufacturing [distributing] [using] any controlled substance.

_____ (*list 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] [used] [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] [used] [maintained] the place.

Note

The elements of § 856(a)(1) are discussed in *United States v. Barnes*, 803 F.3d 209, 216–17 (5th Cir. 2015), and *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.

The purpose must be the defendant's; merely maintaining the premises so that others may engage in the manufacture, distribution, or use of any controlled substance is not a violation of § 856(a)(1). *See United States v. Soto-Silva*, 129 F.3d 340, 346 (5th Cir. 1997) (citing *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.

For a useful discussion of the meaning of "maintained," *see United States v. Morgan*, 117 F.3d 849, 855–58 (5th Cir. 1997). The Fifth Circuit has reiterated its holding in *Morgan* "that supervisory control over the premises was merely 'one factor' that should be considered probative of maintaining a premises" rather than the "sole determinative factor." *United States v. Chagoya*, 510 F. App'x 327, 328 (5th Cir. 2013). Nevertheless, supervisory control alone has been held to be sufficient to find that a defendant maintained a premises. *See United States v. Soto-Silva*, 129 F.3d 340, 346 (5th Cir. 1997); *United States v. Cooper*, 548 F. App'x 114, 116 (5th Cir. 2013) (citing *Soto-Silva* as holding that supervisory control over the premises may satisfy the

maintenance element of the statute). The issue of "whether a person maintained a premises is a fact-intensive issue that must be determined on a case-by-case basis." *Soto-Silva*, 129 F.3d at 346 (citing *Morgan*, 117 F.3d at 857). Depending on the evidence, the jury may be instructed on certain factors that would support a finding that a defendant maintained the premises within the scope of § 856(a)(1). In addition to the obvious factors of being the owner, leaseholder, and/or occupier, the Fifth Circuit has also looked at other factors including: access to private areas on the premises, ability to direct the occupants or activities on the premises, the duration of time during which the defendant exercised some supervisory status or connection with the premises, and the number of times the defendant used the premises for drug activities. *Sota-Silva*, 129 F.3d at 346; *Morgan*, 117 F.3d at 857.

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."); *Soto-Silva*, 129 F.3d at 344; *Chen*, 913 F.2d at 190.

2.100

CONTROLLED SUBSTANCES—UNLAWFUL IMPORTATION 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)

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 [she] 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). *Apprendi v. New Jersey*, 120 S. Ct. 2346 (2000). *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). The court should consider substituting the fourth element with the Special Verdict Form in Instruction 2.95A.

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). *Apprendi* requires a jury finding for any fact that increases the maximum statutory sentence a defendant may face. In *Alleyne v. United States*, 570 U.S. 99 (2013), the Supreme Court extended the *Apprendi* rule to any fact that triggers a statutory mandatory minimum penalty. The Fifth Circuit on multiple occasions has limited the application of *Alleyne* to statutory penalties. *See, e.g.*, *United States v. Tuma*, 738 F.3d 681, 693 (5th Cir. 2013). Consequently, unless the amount in question would expose a defendant to the possibility of an increase in the maximum penalty or the imposition of a mandatory minimum sentence, no special findings as to the amount are necessary. Items that are merely sentencing factors under the United States Sentencing Guidelines do not require a beyond a reasonable doubt finding by a jury. *See United States v. Rodriguez*, 559 F. App'x 332, 333 (5th Cir. 2014); *United States v. Neuner*, 535 F. App'x 373, 377 n.3 (5th Cir. 2013). Further, prior convictions, even those that trigger enhanced penalties, do not require jury findings *United States v. Wallace*, 759 F.3d 486, 487 (5th Cir. 2014).

That being the case, the standard charge that has been suggested by the Committee for years should suffice for most cases. Nevertheless, in light of *Apprendi* and *Alleyne*, a special verdict form for determining amounts has been included for cases in which a determination of the amount of the controlled substance is desired. 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. 1.35, 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 instead of §§ 952(a) and 960(b), *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. Lopez-Monzon*, 850 F.3d 202, 206–09 (5th Cir. 2017), *United States v. Chavez-Ibarra*, 494 F. App'x 416, 418 (5th Cir. 2012), and *United States v. Morena*, 185 F.3d 465, 471 (5th Cir. 1999).

If the evidence warrants, the following instruction may be added:

> "The government must prove beyond a reasonable doubt that the defendant knew he [she] 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); *United States v. Restrepo-Granda*, 575 F.2d 524, 527–29 (5th Cir. 1978) ("Although knowledge that the substance imported is a particular narcotic need not be proven, 21 U.S.C. § 952(a) is a 'specific intent' statute and requires knowledge that such substance is a controlled substance."). *See* Note at Instruction No. 2.95A.

The Fifth Circuit has held that a deliberate ignorance instruction is almost always inappropriate, and may constitute reversible error, if given in a §§ 952(a) and 960(a)(1) case. *See United States v. Araiza-Jacobo*, 917 F.3d 360, 366 (5th Cir. 2019) ("The [deliberate indifference] instruction is appropriate *only* when 'the evidence shows that (1) [the defendant's] subjective awareness of a high probability of the existence of illegal conduct and (2) purposeful contrivance to avoid learning of the illegal conduct.") (quoting *United States v. Nguyen*, 493 F.3d 613, 619 (5th Cir. 2007) (emphasis in original)).

For a 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 or she 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).

Should the indictment allege that death or serious bodily injury resulted from the defendant's importation of a controlled substance, the court should add an additional instruction. If seeking an enhanced penalty on this basis pursuant to 21 U.S.C. § 960, the government must prove beyond a reasonable doubt that but for the defendant's importation of a controlled substance, the victim would not have suffered serious bodily injury or died. *See Burrage v. United States,* 134 S. Ct. 881, 887 (2014). The Fifth Circuit has not yet ruled on the issue of whether the government must also prove proximate causation. *See United States v. Thompson,* 945 F.3d 340, 346 (5th Cir. 2019). *See* discussion in Instruction 2.95A.

2.101

EXPORTING ARMS WITHOUT A LICENSE
22 U.S.C. § 2778(c)

Title 22, United States Code, Section 2778(c), makes 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 United States Munitions List is found at 22 C.F.R. § 121.1.

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) (citing *United States v. Hernandez*, 662 F.2d 289, 292 (5th Cir. 1981)). Evidence that defendant knew he or she was doing something illegal is not enough to show that defendant knew he or she was unlawfully exporting weapons listed on the Munitions List. *See Hernandez*, 662 F.2d at 292. The defendant is entitled to an instruction on his or her 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* as applied to violations of the Firearm Owners' Protection Act ("FOPA"). The Committee recognizes that *United States v. Bryan*, 118 S. Ct. 1939 (1998), might not require strict scienter for offenses under the FOPA, 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); *accord Caldwell*, 295 F. App'x at 697–98.

2.102

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

The elements of this statute may be found in *United States v. Tovar*, 719 F.3d 376, 390 (5th Cir. 2013). For a discussion of whether an affirmative defense, such as justification or duress, may be asserted, *see United States v. Ortiz*, 927 F.3d 868 (5th Cir. 2019) (discussing precedent, but without deciding the issue).

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.

The element of possession can be satisfied by proof of actual or constructive possession. *See United States v. Suarez*, 879 F.3d 626, 634–35 (5th Cir. 2018) (citing *United States v. Mergerson*, 4 F.3d 337, 348 (5th Cir. 1993)).

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) (citing *Freed*, 91 S. Ct. at 1117; *United States v. Sedigh*, 658 F.2d 1010, 1012 (5th Cir. 1982)).

The government must prove that the defendant knew of the features or characteristics of the firearm that place it within the definition at 26 U.S.C. § 5845. *See Rogers v. United States*, 118 S. Ct. 673, 675–76 (1998) (citing *Staples v. United States*, 114 S. Ct. 1793, 1796–97 (1994)); *United States v. Anderson*, 885 F.2d 1248, 1256–59 (5th Cir. 1989) (en banc). *United States v. Reyna*, 130 F.3d 104, 107–09 (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.

See United States v. Hooker, 997 F.2d 67, 71–73 (5th Cir. 1993), for similar treatment of 18 U.S.C. § 922(k) (firearms with altered or obliterated serial numbers).

Each firearm that meets the criteria of § 5861(d) is a separate unit of prosecution. *See United States v. Tarrant*, 460 F.2d 701, 702 (5th Cir. 1972). It is not an element that the firearm be registerable. *See United States v. Thomas*, 15 F.3d 381, 383–84 (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, e.g.*, *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).

Whether a device falls outside the definition of "destructive device" in 26 U.S.C. § 5845(f) is not an element of possession of unregistered destructive device; rather it is an affirmative defense available to the defendant. *United States v. Brannan*, 98 F.4th 636 (5th Cir. 2024); *see also United States v. Beason*, 690 F.2d 439, 445 (5th Cir. 1982).

2.103

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 list of elements, *see United States v. Crandell*, 72 F.4th 110, 113 (5th Cir. 2023); (listing the elements as: "(1) willfulness, (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax"); *United States v. Bolton*, 908 F.3d 75, 88 (5th Cir. 2018); *United States v. Sertich*, 879 F. 3d 558, 565 (5th Cir. 2018); *United States v. Miller*, 588 F.3d 897, 907 (5th Cir. 2009); *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 reasonable 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 need not be a formal IRS assessment of a tax deficiency in order to prove this element as "a formal assessment is one piece of evidence that *may* prove the existence of a tax deficiency or a tax due and owing, but is not a requirement." *United States v. Green*, 47 F.4th 279, 292–93 (5th Cir. 2022).

The Supreme Court has recognized—but not resolved—a circuit split regarding whether the tax deficiency must be substantial. *See Boulware*, 128 S. Ct. at 1173 n.2. A recently published Fifth Circuit case restating the elements under § 7201 did not explicitly mention that the tax deficiency must be substantial. *Bolton*, 908 F.3d at 88–89. But the *Bolton* court held that the indictment in that case was sufficient, on plain error review, by alleging that the defendants attempted to defeat "a large part of the income tax due and owing by defendants to the United States[.]" *Id*. This is relevant because, for an indictment to be sufficient, each count must contain

"the essential elements of the offense charged." *Id.* at 88 (quoting *United States v. Fairley*, 880 F.3d 198, 206 (5th Cir. 2018) (internal quotations omitted)). Another case, *United States v. Biyiklioglu*, 652 F. App'x 274, 284–85 (5th Cir. 2016) (per curiam), cited to *United States v. Parr*, 509 F.2d 1381, 1385–86 (5th Cir. 1975) ("The 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.").

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); *United States v. Nolen*, 472 F.3d 357, 379–81 (5th Cir. 2011); *United States v. Masat*, 896 F.2d 88, 97–99 (5th Cir. 1990). 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, 383, 386–87 (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, 12 (1976); *Sertich*, 879 F.3d at 565; *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). For further discussion on instructions regarding "willfulness," *see Green*, 47 F.4th at 293–94; *United States v. Barnett*, 945 F.2d 1296, 1298–99 (5th Cir. 1991); Instruction No. 1.43.

Good faith is a defense to willfulness, even if that good faith belief is objectively unreasonable. *See Cheek*, 111 S. Ct. at 609–12; *United States v. Kellar*, 394 F. App'x 158, 166 (5th Cir. 2010); *United States v. Wisenbaker*, 14 F.3d 1022, 1025 (5th Cir. 1994). Consequently, if there is evidence that the defendant had a good faith belief that he or she was not violating the provisions of the tax laws, some courts include a good faith instruction. However, "a defendant's good-faith belief that the tax laws are unconstitutional or otherwise invalid" will not negate willfulness. *United States v. Simkanin*, 420 F.3d 397, 410 (5th Cir. 2005); *see Crandell*, 72 F.4th at 114–15 (discussing good faith reliance on advice of counsel); *see also Cheek*, 111 S. Ct. at 612–13; *Burton*, 737 F.2d at 440.

A supplemental instruction on the good faith defense was not required in a case where the judge charged additional language on willfulness. *See 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.

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 U.S. 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).

When the defendant has raised a statute of limitations defense, the district court errs when it refuses to instruct the jury that the government must prove that the offense charged was committed within that period of limitations, with the district court making the legal determination of any period of suspension of the running of the statute of limitations. *United States v. Pursley*, 22 F.4th 586, 591–93 (5th Cir. 2022).

2.103A

WILLFUL FAILURE TO FILE TAX RETURN
26 U.S.C. § 7203

Title 26, United States Code, Section 7203, makes it a crime for anyone to willfully fail to file a tax return if they are legally required to do so [pay any tax or estimated tax owed] [keep records or supply information as required by federal tax statute or regulation].

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 required to file a federal tax return for the year _____ (*tax year charged*) [pay any tax or estimated tax owed] [keep records or supply information as required by federal tax statute or regulation];

Second: That the defendant failed to file a federal tax return for the year _____ (*tax year charged*) [pay any tax or estimated tax owed] [keep records or supply information as required by federal tax statute or regulation]; 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

Some circuits include a supplemental instruction, in addition to the basic elements of the offense, which specifies which persons are required to file federal tax returns under which circumstances (e.g., "A single person over/under sixty-five years old is required to file a federal income tax return if s/he has gross income in excess of _____ . . . .") and explains what qualifies as gross income. *See* Seventh Circuit Criminal Pattern Jury Instructions (2020 ed.), at 941 (committee comment) (noting that the "instruction should be adapted for the particular years at issue, as filing requirements may change from year to year"); Eighth Circuit Pattern Jury Instruction No. 6.26 (2020 ed.); Eleventh Circuit Pattern Jury Instruction No. O108 (2021 ed.).

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); *United States v. Fisch*, 851 F.3d 402, 408 (5th Cir. 2017) (using this definition of willfulness when interpreting 26 U.S.C. § 7203).

Good faith is a defense to willfulness, even if that good-faith belief is objectively unreasonable. *See Cheek*, 111 S. Ct. at 609–12; *see also United States v. Boyd*, 773 F.3d 637, 645 (5th Cir. 2014) (finding an instruction defining "willfully" as "with intent to violate a known legal duty" and as acting "intentionally—not by accident or mistake—with knowledge his conduct violated the law" to be consistent with *Cheek*'s definition of willfulness); *United States v. Montgomery*, 747 F.3d 303, 308–10 (5th Cir. 2014) (holding that mentioning *Cheek*'s good-faith defense in a jury instruction requires the further explanation that the "defendant's good-faith belief

need not be objectively reasonable"). Consequently, if there is evidence that the defendant had a good-faith belief that he or she was not violating the provisions of the tax laws, some courts include a good-faith instruction. However, "a defendant's good-faith belief that the tax laws are unconstitutional 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; *United States v. Burton*, 737 F.2d 439, 440 (5th Cir. 1984).

A supplemental instruction on the good-faith defense was not required in a case where the judge charged additional language on willfulness. *See 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.

2.104A

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 made under penalties of perjury;

Second: That in this return the defendant [falsely stated] [failed to state] 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 [omitted];

Fourth: That the false [omitted] statement was material; and

Fifth: That the defendant made the statement [omission] willfully, that is, with intent to violate a known legal duty.

A statement [An omission] 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

For a list of the elements, see *United States v. Boyd*, 773 F.3d 637, 644 (5th Cir. 2014) (stating that the government must "prove that the defendant: (1) made and signed a materially false federal income tax return; (2) submitted a written declaration stating under penalties of perjury that the return was true and correct; (3) did not believe that the return was true and correct when he signed it; and (4) signed it willfully and with the specific intent to violate the law"); *see also United States v. Griggs*, No. 23-10083, 2023 WL 6548906 (5th Cir. 2023) (per curiam); *United States v. Nicholson*, 961 F.3d 328, 339 (5th Cir. 2020).

"The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him." 26 U.S.C. § 6064. If a return has an electronic signature, *see* 26 U.S.C. § 6061(b).

False statements in an amended tax return and schedules that form integral parts of tax return forms give rise to liability in the same manner as any tax return. *United States v. Adams*,

314 F. App'x 633, 638 (5th Cir. 2009); *United States v. Clayton*, 506 F.3d 405, 413 (5th Cir. 2007) (Form 1040x).

If the indictment involves a statement or document other than an income tax return, then tailor the instruction accordingly. *See* 26 U.S.C. § 7206(1) (covering "any return, statement, or other document").

Where the indictment charges the defendant with a material omission, the second element must be modified to show what the return failed to state. *See, e.g.*, *United States v. Herman*, 997 F.3d 251, 271 (5th Cir. 2021) (noting that "failing to report gross receipts is a material misrepresentation that can establish liability" for willfully filing a false tax return); *see also United States v. Cohen*, 544 F.2d 781, 783 (5th Cir. 1977) ("The omission of a material fact renders such a statement just as much not 'true and correct' within the meaning of 26 U.S.C. § 7206(1), as the inclusion of a materially false fact.").

The definition of "material" is discussed in *Neder v. United States*, 119 S. Ct. 1827, 1837 (1999) (stating that a false statement is material if it has "a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed.") (internal brackets and citation omitted); *see also Herman*, 997 F.3d at 269. 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. 119 S. Ct. at 1837. 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, is an error that is subject to the harmless error rule articulated in *Chapman v. California*, 87 S. Ct. 824 (1967). 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. *Neder,* 119 S. Ct. 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 also United States v. Charroux*, 3 F.3d 827, 831 n.6 (5th Cir. 1993); *Boyd*, 773 F.3d at 645 (finding an instruction defining "willfully" as "with intent to violate a known legal duty" and as acting "intentionally—not by accident or mistake—with knowledge his conduct violated the law" to be consistent with *Cheek*'s definition of willfulness); *United States v. Simkanin*, 420 F.3d 397, 404, 410–11 (5th Cir. 2005) (no good faith instruction required when charge adequately instructed the jury on the meaning of willfulness under *Cheek* and *Pomponio*); *United States v. Montgomery*, 747 F.3d 303, 308–10 (5th Cir. 2014) (holding that mentioning *Cheek*'s good-faith defense in a jury instruction requires further explanation that the "defendant's good-faith belief need not be objectively reasonable"); *see also* Instruction No. 1.43, "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 United States v. Loe*, 248 F.3d 449, 469 (5th Cir. 2001); *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 or she relied in good faith on a professional; and (2) made complete disclosures of all the relevant facts).

2.104B

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 [or presentation] of a document, under the internal revenue laws, which 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] [other document] arising under [in connection with any matter arising under] the internal revenue laws;

Second: That this return [affidavit] [claim] [other document] [[falsely] [fraudulently] stated] [failed to state] 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] [other document] was false [fraudulent] [omitted];

Fourth: That the false [fraudulent] [omitted] 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.

[*Fifth*: That the defendant omitted this statement willfully, that is, with intent to violate a known legal duty.]

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] [other document].

A statement [An omission] 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. 2.104A.

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. Chon*, 713 F.3d 812, 820–21 (5th Cir. 2013); *United States v. Mudekunye*, 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); *United States v. Nicholson*, 961 F.3d 328, 338 (5th Cir. 2020). A person need not actually sign, prepare, or file a tax return in order to be guilty of willfully aiding and assisting in the preparation of false returns. *See United States v. Morrison*, 833 F.3d 491, 500–02 (5th Cir. 2016) (upholding a conviction despite the defendant's "lack of direct involvement" with most of the tax returns at issue); *see also 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. *Id*. at 72–75.

Where the indictment charges the defendant with a material omission, the second element must be modified to show what the return failed to state. *See, e.g.*, *United States v. Herman*, 997 F.3d 251, 271 (5th Cir. 2021) (noting that "failing to report gross receipts is a material misrepresentation that can establish liability" for willfully filing a false tax return); *see also United States v. Cohen*, 544 F.2d 781, 783 (5th Cir. 1977) ("The omission of a material fact renders such a statement just as much not 'true and correct' within the meaning of 26 U.S.C. § 7206(1), as the inclusion of a materially false fact.").

In a willfulness instruction, it is erroneous to mention the good-faith defense but fail to instruct that a good-faith belief need not be objectively reasonable if it is sincerely held. *See United States v. Carter*, 638 F. App'x 268, 275 (5th Cir. 2015); *see also United States v. Montgomery*, 747 F.3d 303, 308–10 (5th Cir. 2014) (holding, in a case involving 26 U.S.C. § 7206(1) rather than § 7206(2), that mentioning the good-faith defense in a jury instruction requires further explanation than that the "defendant's good-faith belief need not be objectively reasonable").

For a discussion of the word "willfully," see Instruction No. 1.43 (discussing willfulness in the context of prosecutions under the Internal Revenue Code).

2.105

REPORTS ON EXPORTING AND IMPORTING MONETARY INSTRUMENTS
31 U.S.C. §§ 5316(a)(1), 5322

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 [she] 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, and acted willfully, that is, 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

"To obtain a conviction for evading the currency-reporting requirement, the Government had to prove: (1) [the defendant] knowingly transported or was about to transport more than $10,000 in currency at one time from a place in the United States to a place outside it; (2) she knew she had a legal duty to file a report of the amount of currency transported; and (3) she knowingly failed to file the report, with intent to violate the law." *United States v. Salazar*, 223 F. App'x 424, 427 (5th Cir. 2007) (citing Fifth Circuit Pattern Jury Instructions (Criminal) § 2.98 (2001); *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991) (to establish guilt under § 5316(a), "the government must show that the defendant had actual knowledge of the currency reporting requirement and voluntarily and intentionally violated that known legal duty")).

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts which would result in an enhanced penalty under 31 U.S.C. § 5322(b). *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2362–63 (2000). Section 5322 provides the criminal penalty for a § 5316 violation, so the third element requires that the defendant act willfully by acting with "intent to violate the law."

The term "monetary instruments" is defined in 31 U.S.C. § 5312(a)(3).

This offense can be committed through structuring. *See* 31 U.S.C. § 5324(a)(3) and (b). Instruction No. 2.106 ("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.

2.106

STRUCTURING TRANSACTIONS TO EVADE REPORTING REQUIREMENTS
31 U.S.C. §§ 5324(a)(3), 5324(d)(2)

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 [she] 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

Third: That the defendant so structured the transaction with the intent 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 and the purpose to evade them.

Note

"To prove a structuring offense, the government must prove the defendant (1) engaged in structuring; (2) did so with the knowledge that the financial institutions involved in the transaction were obligated to report currency transactions involving more than $10,000; and (3) intended to evade this reporting requirement." *United States v. Suarez*, 966 F.3d 376, 383 (5th Cir. 2020) (citing 31 U.S.C. § 5324(a)(3) and collecting cases).

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(d)(2). *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2362–63 (2000). To obtain an enhanced penalty under § 5324(d)(2), the government is only required to prove one of the two alternatives provided in the statute: (1) that the defendant structured transactions "while violating another law of the United States," or (2) "as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period." *United States v. Pendleton*, 761 F. App'x 339, 349, 351–52 (5th Cir. 2019). There is no express willfulness requirement. *See United States v. Threadgill*, 172 F.3d 357, 371 n.10 (5th Cir. 1999) (recognizing that Congress amended § 5324 to eliminate any requirement that the defendant acted willfully, that is, with knowledge that structuring is illegal).

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, for example, 12 U.S.C. §§ 1829b and 1953, or 31 U.S.C. §§ 5325 and 5326, and these instructions would have to be adjusted accordingly.

If the case involves monetary instruments other than currency, substitute the appropriate term. See the definition of "monetary instruments" and other pertinent definitions in 31 U.S.C. § 5312.

It is not a required element that no CTR was filed, as the crime focuses on structuring the transaction to avoid the filing of a CTR by the bank, not the lack of filing the CTR by the bank itself. *See United States v. Van Allen*, 524 F.3d 814, 824–25 (7th Cir. 2008) (affirming evidentiary ruling that it is irrelevant in § 5324(a)(3) prosecution whether a bank actually filed a CTR).

2.107

BULK CASH SMUGGLING
31 U.S.C. §§ 5332(a), 5322

Title 31, United States Code, Section 5332(a) makes it a crime for anyone, with the intent to evade a currency reporting requirement, to knowingly conceal more than $10,000 in currency [other monetary instruments] and transport [transfer] [attempt to transport] [attempt to transfer] such currency [monetary instrument] from a place within the United States to a place outside the United States [from a place outside the United States to a place within 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 knowingly concealed more than $10,000 in _____ (*specify monetary instrument*) on his [her] person [in any conveyance, article of luggage, merchandise or other container];

Second: That the defendant transported [attempted to transport] [transferred] [attempted to transfer] the _____ (*specify monetary instrument*) from a place within the United States to a place outside the United States [from a place outside the United States to a place within the United States];

Third: That the defendant knew that a report was required to be filed with the Secretary of Treasury for the transport [attempted transport] [transfer] [attempted transfer] of amounts $10,000 or greater; and

Fourth: That the defendant intended to evade filing such a report.

[*Fifth*: 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].]

The intent to evade the reporting requirement can arise at any time prior to (and including) the moment of [attempted] transportation [transfer] [attempted transfer]. It is not necessary that the defendant have such intent at the time the concealment occurred.

The currency [other monetary instrument] need not be unlawfully derived. In other words, the government does not have to prove that the defendant transported [attempted to transport] [transferred] [attempted to transfer] illicit funds.

Note

Section 5332 does not require that the defendant have the intent to evade the reporting requirement at the time the actual concealment of currency occurs. *United States v. Tatoyan*, 474 F.3d 1174, 1180 (9th Cir. 2007). Instead, the defendant can form the intent to evade reporting

requirements at any time prior to or during the moment of the transport. *Id*. "Concealment is simply one part of a continuous course of conduct, at any stage of which the requisite intent can be formed." *Id*.

For a discussion of the knowledge element of § 5332, *see United States v. Camacho-Ontiveros*, 770 F. App'x 233 (5th Cir. 2019) and *United States v. Salazar*, 223 F. App'x 424, 427–28 (5th Cir. 2007).

The term "monetary instruments" is defined in 31 U.S.C. § 5312(a)(3).

The fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts which would result in an enhanced penalty under 31 U.S.C. § 5322(b). *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2362–63 (2000). In such a case, the court may wish to consider an instruction on "willfulness." However, there are no Fifth Circuit cases interpreting the word "willfully" in the context of this statute.

Absent a finding of willfulness, the applicable penalties are found in 31 U.S.C. § 5332(b) and include imprisonment and a forfeiture provision, but not a fine. *Id*.

Section 5332 encompasses both the transportation of illicit funds and the "mere transportation of lawfully derived proceeds." *See Cuellar v. United States*, 128 S. Ct. 1994, 2001–02 (2008) (distinguishing the conduct targeted in the money laundering statute with the conduct that § 5332 targets and holding that the latter statute punishes the transportation of lawfully derived funds).

2.108A

USE OF A FALSELY OBTAINED SOCIAL SECURITY NUMBER
42 U.S.C. § 408(a)(7)(A)

Title 42 United States Code § 408(a)(7)(A) makes it a crime for anyone, with the intent to deceive, to use a falsely obtained social security account number.

For you to find the defendant guilty of this charge, the government must prove the following beyond a reasonable doubt:

First: That the defendant willfully and knowingly used, for any purpose [for the purpose of _____ (*insert specific statutory purpose listed in indictment*)] a social security account number assigned by the Commissioner of Social Security;

Second: That the social security account number was obtained based on false information provided to the Commissioner of Social Security by any person;

Third: That the defendant knew the social security account number had been obtained based on false information; and

Fourth: That the defendant used the social security account number with the intent to deceive.

To act with an "intent to deceive" means to act with a purpose to mislead. It is not necessary for the government to prove, however, that anyone was in fact misled or deceived.

Note

For the elements of this offense, *see United States v. Wilson*, 709 F.3d 84, 86 (2d Cir. 2013).

The Fifth Circuit has held that the language "for any other purpose" in the statute means any purpose, without limitation. *See United States v. Lopez-Hernandez*, 570 F. App'x 372, 373–74 (5th Cir. 2014) (citing *United States v. Silva-Chavez*, 888 F.2d 1481, 1482 (5th Cir. 1989)).

The definition of "intent to deceive" is drawn from *United States v. Sirbel*, 427 F.3d 1155, 1159–60 (8th Cir. 2005); *see also Hyder v. Keisler*, 506 F.3d 388, 391–92 (5th Cir. 2007) (discussing the "intent to deceive" element in immigration context).

For the definition of "knowingly," see Instruction No. 1.41.

2.108B

FALSE REPRESENTATION AS TO A SOCIAL SECURITY NUMBER 42 U.S.C. § 408(a)(7)(B)

Title 42 United States Code § 408(a)(7)(B) makes it a crime for anyone to represent falsely that a social security number belongs to him [her] [another person].

For you to find the defendant guilty of this crime, the government must prove each of the following beyond a reasonable doubt:

First: For the purpose of _____ (*insert specific statutory purpose listed in the indictment*) [For any purpose], the defendant knowingly represented a particular social security account number to be his [hers] [another person's];

Second: The representation was false; and

Third: The defendant acted with intent to deceive.

"Intent to deceive" means to act knowingly and intentionally to mislead someone. It is not necessary for the government to prove, however, that anyone was in fact misled or deceived.

Note

The Fifth Circuit has held that the language "for any other purpose" in the statute means any purpose, without limitation. *See United States v. Lopez-Hernandez*, 570 F. App'x 372, 373–74 (5th Cir. 2014) (citing *United States v. Silva-Chavez*, 888 F.2d 1481, 1482 (5th Cir. 1989)); *see also United States v. Herrera-Martinez*, 525 F.3d 60, 65−66 (1st Cir. 2008) (discussing § 408(a)(7)(B)). The consent of the person to whom the social security number is actually assigned is not a defense to this crime. *United States v. Soape*, 169 F.3d 257, 269 (5th Cir. 1999).

The definition of "intent to deceive" is drawn from *United States v. Sirbel*, 427 F.3d 1155, 1159–60 (8th Cir. 2005).

For the definition of "knowingly," see Instruction No. 1.41.

2.108C

SOCIAL SECURITY CARD ALTERATION
42 U.S.C. § 408(a)(7)(C)

Title 42 United States Code § 408(a)(7)(C) makes it a crime for anyone to the alter a social security card [buy a card that is or purports to be a social security card] [sell a card that is or purports to be a social security card] [counterfeit a social security card].

For you to find the defendant guilty of this crime, the government must prove the following beyond a reasonable doubt:

First: That, for the purpose of _____ (*insert specific statutory purpose listed in the indictment*) [any purpose], the defendant altered a social security card [bought a card that is; or purports to be a social security card] [sold a card that is; or purports to be a social security card] [counterfeited a social security card]; and

Second: That the defendant did so knowingly.

A "counterfeited" social security card means that the social security card bears [was made to bear] such a likeness or resemblance to something genuine that it is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation.

Note

The Fifth Circuit has held that the language "for any other purpose" in the statute means any purpose, without limitation. *See United States v. Lopez-Hernandez*, 570 F. App'x 372, 373–74 (5th Cir. 2014) (citing *United States v. Silva-Chavez*, 888 F.2d 1481, 1482 (5th Cir. 1989)); *see also United States v. Persichilli*, 608 F.3d 34, 37–40 (1st Cir. 2010) (discussing § 408(a)(7)(C)).

The definition of "counterfeit" is drawn from *United States v. Gomes*, 969 F.2d 1290, 1293–94 (1st Cir. 1992). The Fifth Circuit has adopted substantially the same definition of "counterfeit" for purposes of offenses involving currency. *See* Note, Instruction No. 2.19 (Counterfeiting).

In addition to buying, selling altering or counterfeiting a social security card, the statute prohibits possession of a real or counterfeit social security card with the intent to sell or alter it. If this offense is charged, the elements will have to be adjusted to include the relevant action and intent.

For the definition of "knowingly," see Instruction No. 1.41.

2.109A

SOLICITING OR RECEIVING KICKBACKS FOR REFERRALS TO FEDERAL HEALTH CARE PROGRAMS ("ANTI-KICKBACK STATUTE") 42 U.S.C. § 1320a-7b(b)(1)(A)

Title 42 United States Code, Section 1320a-7b(b)(1)(A), makes it a crime for anyone to knowingly and willfully solicit [receive] kickbacks [bribes] [illegal remuneration] in return for a referral for any [item or] service under a Federal [State] health care program.

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

First: That the defendant solicited [received] remuneration, including any kickback, bribe, or rebate;

Second: That the remuneration was solicited [received] in return for referring an individual to _____ (name of provider) for the furnishing [arranging for the furnishing] of an item [service];

Third: That the item [service] was one for which payment was or might be made, in whole or in part, under a Federal [State] health care program; and

Fourth: That the defendant acted knowingly and willfully when soliciting [receiving] the remuneration.

_____ (name of program) is a Federal [State] health care program.

Remuneration may be solicited [received] directly or indirectly, overtly or covertly—that is, secretly. Remuneration may be in cash or in kind.

In order to meet its burden, the government does not need to prove that the defendant's only purpose or his [her] primary purpose was to solicit [receive] remuneration in return for a referral. The government only needs to show that the solicitation was made [remuneration was received] in part for that purpose.

Note

Under § 1320a-7b(h), "a person need not have actual knowledge of [the statute] or specific intent to commit a violation" of the statute. *See United States v. St. Junius*, 739 F.3d 193, 210 (5th Cir. 2013).

The elements of this offense and the definition of "willfully" are discussed in *United States v. Ricard*, 922 F.3d 639, 647–48 (5th Cir. 2019). *See* Instruction Nos. 1.41 and 1.43 for a discussion of "knowingly" and "willfully." For purposes of this statute, the Fifth Circuit has held that the *mens rea* required is that the defendant has "the specific intent to do *something* the law forbids." *United States v. Martinez*, 921 F.3d 452, 467 (5th Cir. 2019) (holding that evidence that defendant

hid payments to patients was sufficient to prove intent to commit an unlawful act); *see also United States v. Hamilton*, 37 F.4th 246, 256–57 (5th Cir. 2022) (finding sufficient evidence of willfulness when defendant doctor testified that she knew kickbacks were illegal, a letter from regulatory agency warning of illegality of specific payments at issue was found in her office, and an employee testified that doctor told her to falsely characterize payments as patient co-pays and not kickbacks); *Ricard*, 922 F.3d at 647–49 (stating that "knowledge that the conduct is unlawful is all that is required" and finding circumstantial evidence of shuffling patients among providers, misrepresentation of income, and similar conduct was sufficient to infer that non-medical professional patient recruiter knew of illegality of conduct).

In *United States v. Shah*, 95 F.4th 328 (5th Cir. 2024), the Fifth Circuit held that the *mens rea* of knowledge did not apply to the jurisdictional element that payment for the services at issue may be made through a federal healthcare program. Accordingly, the government need not prove that the defendant knew that the patients with respect to whom a kickback is received or solicited were covered by federal healthcare program, but must prove the defendant "knowingly agreed to accept remuneration for referring patients that *could* be federally insured." *Id.* at 352.

In the context of paying or offering to pay kickbacks, the Fifth Circuit has rejected the argument that the remuneration must be "for no other purpose than inducing the referral" of patients under a Federal health care program. *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) (internal quotations omitted) (interpreting § 1320a-7b(b)(2)(A)).

A "Federal health care program" is defined as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of Title 5); or any State health care program." 42 U.S.C. § 1320a-7b(f).

Section 1320a-7b(b)(3) enumerates several "safe harbor provisions" excepting certain types of remuneration from the statute. These safe harbor provisions are affirmative defenses for which the defendant bears the burden of proof, and the district court does not abuse its discretion in refusing to provide a jury instruction on the safe-harbor provisions if the defendant fails to sufficiently prove each element of the provision invoked. *See United States v. Hagen*, 60 F.4th 932, 947–49 (5th Cir. 2023). Section 1320a–7b(b)(3)(B) contains a safe harbor provision for amounts paid by an employer to a bona fide employee. This provision "relies on 26 U.S.C. § 3121(d)(2) for the definition that an employee is 'any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.'" *Robinson*, 505 F. App'x at 387 (citing 42 C.F.R. § 1001.952(i)). For a list of factors to consider when deciding whether the bona fide employee safe harbor provision applies, *see id.* (citing *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1347–48 (1992)). But note that "[n]o one factor is determinative," and "all of the incidents of the relationship must be assessed and weighed." *Id.*

2.109B

PAYING OR OFFERING TO PAY KICKBACKS FOR REFERRALS TO FEDERAL HEALTH CARE PROGRAMS ("ANTI-KICKBACK STATUTE") 42 U.S.C. § 1320a-7b(b)(2)(A)

Title 42 United States Code, Section 1320a-7b(b)(2)(A), makes it a crime for anyone to knowingly and willfully pay or offer to pay kickbacks [bribes] [illegal remuneration] to induce another person to make a referral for [item or] service under a Federal [State] health care program.

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

First: That the defendant paid [offered to pay] _____ (*name of recipient or offeree*) any remuneration, including any kickback, bribe, or rebate;

Second: That the defendant did so to induce _____ (*name of recipient or offeree*) to refer another individual to _____ (*name of provider*) for the furnishing [arranging for the furnishing] of any item or service;

Third: That the item [service] was one for which payment was or might be made, in whole or in part, under a Federal [State] health care program; and

Fourth: That the defendant acted knowingly and willfully when paying [offering to pay] the remuneration.

_____ (*name of program*) is a Federal [State] health care program.

Note

For the elements of an offense charged under 42 U.S.C. § 1320a-7b(b)(2)(A), *see United States v. Miles*, 360 F.3d 472, 479–80 (5th Cir. 2004).

Under § 1320a-7b(h), "a person need not have actual knowledge of [the statute] or specific intent to commit a violation" of the statute. *See United States v. St. Junius*, 739 F.3d 193, 210 (5th Cir. 2013).

The elements of this offense and the definition of "willfully" are discussed in *United States v. Ricard*, 922 F.3d 639, 647–48 (5th Cir. 2019) and *United States v. Gibson*, 875 F.3d 179, 187–88 (5th Cir. 2017). However, the "defendants must have acted willfully, that is, with the specific intent to do something the law forbids." *Gibson*, 875 F.3d at 188; *see also United States v. Nora*, 988 F.3d 823, 829–34 (5th Cir. 2021) (holding evidence insufficient to support the conclusion that a patient intake and admissions coordinator acted "willfully" (i.e., with knowledge that his conduct was unlawful) when he knew of referral payments, but evidence failed to prove that he knew such payments were unlawful kickbacks). *See* Instruction Nos. 1.41 and 1.43 for a discussion of "knowingly" and "willfully"; *see also* the Notes to Instruction No. 2.109A.

The statute prohibits kickbacks to "any person." The Fifth Circuit has held that there is no requirement that the payee be a "relevant decisionmaker" or have a particular status, so long as the defendant has the requisite intent. *See Gibson*, 875 F.3d at 189 (citing *United States v. Shoemaker*, 746 F.3d 614, 628–29 (5th Cir. 2014)). However, the Fifth Circuit has held that the payments must be made for the referral of *another* individual, and not for the purpose of inducing the beneficiaries to refer themselves for covered service. *See United States v. Cooper*, 38 F.4th 428, 432–34 (5th Cir. 2022) (holding evidence insufficient to support conviction under this specific provision when the defendant paid Medicare beneficiaries to obtain a product for their own use, while noting that such self-referrals could be a violation of 42 U.S.C. § 1320a-7b(b)(2)(B)). The Fifth Circuit has rejected the argument that a defendant may be found guilty under § 1320a-7b(b)(2)(A) only if the remuneration was "for no other purpose than inducing the referral" of patients under a Federal health care program. *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) (internal quotations omitted).

A "Federal health care program" is defined as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of Title 5); or any State health care program." 42 U.S.C. § 1320a-7b(f).

Section 1320a-7b(b)(3) enumerates several "safe harbor provisions" excepting certain types of remuneration from the statute. These safe harbor provisions are affirmative defenses for which the defendant bears the burden of proof, and the district court does not abuse its discretion in refusing to provide a jury instruction on the safe-harbor provisions if the defendant fails to sufficiently prove each element of the provision invoked. *See United States v. Hagen*, 60 F.4th 932, 947–49 (5th Cir. 2023). Section 1320a–7b(b)(3)(B) contains a safe harbor provision for amounts paid by an employer to a bona fide employee. This provision "relies on 26 U.S.C. § 3121(d)(2) for the definition that an employee is 'any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.'" *Robinson*, 505 F. App'x at 387 (citing 42 C.F.R. § 1001.952(i)). For a list of factors to consider when deciding whether the bona fide employee safe harbor provision applies, *see id.* (citing *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1347–48 (1992)). But note that "[n]o one factor is determinative," and "all of the incidents of the relationship must be assessed and weighed." *Id.*

2.110

INTERFERENCE WITH SECURITY SCREENING PERSONNEL
49 U.S.C. § 46503

Title 49, United States Code, Section 46503, makes it a crime for anyone in an area within a commercial service airport in the United States, by assaulting a federal, airport, or air carrier employee who has security duties within the airport, to interfere with the performance of the duties of the employee or to lessen the ability of the employee to perform those duties.

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

First: That the defendant was in an area within a commercial service airport in the United States;

Second: That the defendant knowingly assaulted a federal, airport, or air carrier employee who had security duties within the airport; and

Third: That the assault interfered with the performance of the duties of the employee or lessened the ability of the employee to perform those duties.

[*Fourth*: That the defendant used a dangerous weapon in committing the assault].

I instruct you that _____ is a "commercial service airport."

An "assault" is any intentional and voluntary act or attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the act or attempt or threat is directed in fear of immediate bodily harm.

To do an act "knowingly" means to do it voluntarily and purposefully. In other words, the defendant must have acted with an awareness or understanding of the consequences of his [her] conduct and not because of mistake, accident, or inadvertence.

Note

A "commercial service airport" means a public airport that the Secretary of Transportation determines has at least 2,500 passenger boardings each year and is receiving scheduled passenger aircraft service. *See* 49 U.S.C. § 47102(7). The airport must be in a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or Guam. *See* 49 U.S.C. §§ 47102(7), (27). As such, the wording of the first element, which states "in the United States," may need to be changed as appropriate.

An "assault" is any intentional and voluntary act or attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the

person against whom the act or attempt or threat is directed in fear of immediate bodily harm. *See, e.g.*, *United States v. Phelps*, 168 F.3d 1048, 1056 (8th Cir. 1999); *see also United States v. Watts*, 798 F.3d 650, 653 (7th Cir. 2015) (upholding substantially similar jury instruction definition).

The definition of "dangerous weapon" has not been codified in 49 U.S.C. § 46503. *See* Instruction No. 2.112A.

2.111

INTERFERENCE WITH FLIGHT CREW MEMBERS OR ATTENDANTS 49 U.S.C. § 46504

Title 49, United States Code, Section 46504, makes it a crime for an individual on an aircraft in the special aircraft jurisdiction of the United States, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, to interfere with the performance of the duties of the member or attendant or to lessen the ability of the member or attendant to perform those duties, or to attempt or conspire to do such an act.

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 on an aircraft in the special aircraft jurisdiction of the United States, as I will define that term for you;

Second: That the defendant knowingly assaulted [intimidated] a flight crew member [flight attendant of the aircraft]; and

Third: That such assault [intimidation] interfered with the performance of the duties of the flight crew member [flight attendant of the aircraft] or lessened the ability of the member [attendant] to perform those duties.

[*Fourth*: That the defendant used a dangerous weapon in committing the assault or interference.]

To be within the special aircraft jurisdiction of the United States, an aircraft must first be "in flight," and, in addition, must also satisfy one other requirement, which I will explain to you.

The term "in flight" has a special meaning in the law. An aircraft is considered to be in flight from the time the aircraft doors are closed after boarding until the doors are opened [or, in the case of a forced landing, until authorities have recovered control of the aircraft from an offender]. The aircraft does not have to actually be in the air for the aircraft to be considered "in flight" according to the law.

To prove that the aircraft was within the special aircraft jurisdiction of the United States, the government must also prove that the aircraft was [insert appropriate alternative]:

[A] a civil aircraft of the United States.

[B] an aircraft of the armed forces of the United States.

[C] another aircraft in the United States.

[D] another aircraft outside the United States—

(i) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States;

(ii) on which an individual commits an offense if the aircraft lands in the United States with the individual still on the aircraft; or

(iii) against which an individual commits an offense if the aircraft lands in the United States with the individual still on the aircraft.

[E] any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States.

[An "assault" is any intentional and voluntary act or attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the act or attempt or threat is directed in fear of immediate bodily harm.]

[The words and conduct of the defendant amount to intimidation if they place an ordinary, reasonable person in fear.]

The government must also prove that the defendant acted knowingly. That is, he [she] must have realized what he [she] was doing and been aware of the nature of his [her] conduct, and did not act through ignorance, mistake, or accident.

Note

The term "in flight" has a special meaning in the law. An aircraft is considered to be in flight from the time the aircraft doors are closed after boarding until the doors are opened or, in the case of a forced landing, until authorities have recovered control of the aircraft from an offender. *See* 49 U.S.C. § 46501(1).

An aircraft is within the special aircraft jurisdiction of the United States if leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States. *See* 49 U.S.C. § 46501(2)(E).

49 U.S.C. § 46504 is a general intent crime. The government must prove that the defendant knowingly assaulted or intimidated a flight crew member or flight attendant. *See, e.g.*, *United States v. Grossman*, 131 F.3d 1449, 1452 (11th Cir. 1997) (per curiam). The words and conduct of the defendant amount to intimidation if they place an ordinary, reasonable person in fear. *See, e.g.*, *United States v. Hicks*, 980 F.2d 963, 968–73 (5th Cir. 1992) (confirming that words alone can constitute intimidation; further addressing a First Amendment challenge to the defendant's use of profanity towards a flight attendant and crew member); *United States v. Petras*, 879 F.3d 155, 163–66 (5th Cir. 2018) (upholding a substantially similar jury instruction).

The definition of "dangerous weapon" has not been codified in 49 U.S.C. § 46503. *See* Instruction No. 2.112A.

2.112A

CARRYING A CONCEALED WEAPON ON AN AIRCRAFT
49 U.S.C. §§ 46505(b)(1), 46505(c)

Title 49, United States Code, Section 46505(b)(1) makes it a crime for any individual, when on, or attempting to get on, an aircraft in, or intended for operation in, air transportation or intrastate air transportation, to have on or about the individual or the property of the individual a concealed dangerous weapon that is or would be accessible to the individual in flight.

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 on [attempting to get on] an aircraft that was in [was intended for] operation in air transportation or intrastate air transportation;

Second: That the defendant knowingly had on or about his [her] person or property a dangerous weapon that was or would have been accessible to him [her] in flight; and

Third: That the weapon was concealed.

[*Fourth*: That the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life;]

[*Fifth*: That death resulted to any person].

The term "air transportation" means foreign air transportation, air transportation between states, or the transportation of mail by aircraft.

The term "intrastate air transportation" means the transportation by a common carrier of passengers or property for compensation, entirely in the same state, by turbojet-powered aircraft capable of carrying at least 30 passengers.

An item is "concealed" if it is hidden from ordinary view.

The term "willfully" means that the act was done voluntarily, intentionally, and in disregard of the law. A person did not have to know the specific law or rule being violated but must have acted with the intent to do something the law forbids.

[The government bears the burden of proving each element beyond a reasonable doubt. If you find that the first three elements of the crime were proven beyond a reasonable doubt, you must then determine whether the government proved beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life. If you find that the government has proven beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life, please note this finding on the verdict form. If, on

the other hand, you find that the government failed to prove beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life, please note this finding on the verdict form.]

[The government has alleged that the defendant's actions resulted in a person's death. The government bears the burden of proving each element of the offense beyond a reasonable doubt. If you find that the first four elements of the crime were proven beyond a reasonable doubt, you must then determine whether the government proved beyond a reasonable doubt that the defendant's actions caused a person's death. If you find that the government proved beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form. If, on the other hand, you find that the government failed to prove beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form.]

Note

Section 46505(b) contains three separate offenses. This Instruction covers carrying a concealed dangerous weapon on an aircraft, in violation of subsection (b)(1); Instruction No. 2.112B covers placing a loaded firearm in an aircraft, in violation of subsection (b)(2); and Instruction No. 2.112C covers placing an explosive or incendiary device on an aircraft in violation of subsection (b)(3).

Subsection (b)(1) does not apply: (1) to a law enforcement officer authorized to carry arms in an official capacity; (2) to an individual authorized to carry a weapon by the Federal Aviation Administration or the Transportation Security Administration; or (3) when the air carrier was informed of the presence of the weapon. 49 U.S.C. § 46505(d).

The statute does not specify a *mens rea* requirement. However, in *United States v. Garrett*, 984 F.2d 1402, 1412 (5th Cir. 1993), the Fifth Circuit rejected the government's argument that 49 U.S.C. § 1472(l)—the predecessor to § 46505—was a strict liability crime. The Court adopted the "should have known" standard, requiring the government to prove that the defendant "either knew or should have known that the concealed weapon in question was on or about her person or property." *Id.* at 1413. The Court selected this "minimum level of scienter" because § 1472(l) was a misdemeanor, punishable only by up to one year in prison. *Id.* at 1412–13. The Court also distinguished its prior decision in *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (en banc), which construed a provision of the National Firearms Act to require "actual knowledge," because that provision was a "felony that carried a possible sentence of ten years imprisonment." *Garrett*, 984 F.2d at 1412.

While § 46505(b) otherwise resembles its predecessor, the current statute is a felony punishable by up to 10 years in prison, which suggests that the "actual knowledge" standard applies. *Cf. Anderson*, 885 F.2d at 1251, 1254 ("[W]e conclude that a conviction [under 26 U.S.C. § 5861] should require that the charged party knew it was a 'firearm' in the *Act* sense. . . . We think it far too severe for our community to bear—and plainly not intended by Congress—to subject to ten years' imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol . . . .") (italics in original). Several

other Circuits apply the actual knowledge requirement to § 46505(b)(1). *See United States v. Hedrick*, 207 F. Supp. 2d 710, 715 (S.D. Ohio 2002) (citing *United States v. Lee*, 539 F.2d 606, 608 (6th Cir. 1976)) (concluding, in dicta, the statute's former version required actual knowledge); *United States v. Schier*, 438 F.3d 1104 (11th Cir. 2006); *United States v. Lewis*, 67 F. App'x 435 (9th Cir. 2003). The Seventh Circuit has applied an actual knowledge requirement to § 46505(b)(2). *United States v. Chavers*, 515 F.3d 722, 724–25 (7th Cir. 2008).

There is no requirement that the defendant specifically intended to conceal the weapon, *United States v. Flum*, 518 F.2d 39, 40-41 (8th Cir. 1975), or specifically intended to use the weapon unlawfully, *United States v. Dishman*, 486 F.2d 727, 730 & n.3 (9th Cir. 1973).

While intent to conceal is not an element, the fact of concealment is an element that must be proven beyond a reasonable doubt. *Flum*, 518 F.2d at 45. The "classic definition of a concealed weapon is one which is hidden from ordinary observation." *Id.* (citing cases).

Title 49 does not define the term "dangerous weapon." When the statute was enacted in 1961, Congress determined not to provide such a definition.

> Consideration was given to attempting to define the term "deadly or dangerous weapon." However, this is not practicable. These terms have been used without definition in other provisions of title 18, United States Code, and in many State criminal laws. The courts will determine in each case, as it arises, whether the weapon in question was deadly or dangerous.

H.R. Rep. No. 87-958, at 10 (Aug. 16, 1961); *see also id.* at 15 ("For the reasons stated . . . it has not been considered feasible or necessary to define the term 'deadly or dangerous weapon' as used in [§ 46505].").

Courts have found that the absence of a statutory definition does not undermine the statute's constitutionality. *See, e.g.*, *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013) (rejecting as-applied vagueness challenge where defendant possessed pocketknife with 2.5-inch blade, and signs around terminal prohibited all knives); *Hedrick*, 207 F. Supp. 2d at 714 (same, where defendant possessed belt buckle equipped with knife with three-inch blade).

However, courts have restricted the term "dangerous weapon," as used in this statute, to weapons whose "intended or readily adaptable use is likely to produce death or serious bodily injury." *Dishman*, 486 F.2d at 730 (holding that, as a matter of law, a starter pistol incapable of firing a projectile is not a dangerous weapon); *United States v. Wallace*, 800 F.2d 1509, 1512–13 (9th Cir. 1986) (an operative stun gun is a dangerous weapon); *Hedrick*, 207 F. Supp. 2d at 714 ("a common sense definition of 'dangerous weapon' would include a knife with a three-inch blade").

The term "air transportation" is defined in 49 U.S.C. § 40102(a)(5).

The term "intrastate air transportation" is defined in 49 U.S.C. § 40102(a)(27).

The fourth and fifth elements may be required because each contains facts which increase the statutory maximum penalty a defendant may face. *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (holding that "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences to which *Burrage* was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt") (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013); *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000)). A finding that the defendant acted willfully and without regard for the safety of human life or that the defendant acted with reckless disregard for the safety of human life increases the statutory maximum penalty from 10 to 20 years, and a finding that defendant's conduct also resulted in a person's death increases the statutory maximum penalty from 20 years to life. *See* 49 U.S.C. § 46505(c).

The language animating the fifth element in this statute is almost identical to the "death results" language in 21 U.S.C. § 841(b). The Supreme Court in *Burrage*, 124 S. Ct. at 887, held that the government must prove actual causation between the defendants' distribution of a controlled substance and the victim's death. The Committee believes that the same reasoning applies to this statute, and that the Instruction correctly presents causation to the jury.

The definition of "willfully" was adopted from Instruction 6.49.46505(b), Manual of Model Jury Instructions for the District Courts of the Eighth Circuit Court of Appeals (2023 ed.).

The Fifth Circuit has not defined the terms "without regard for the safety of human life" or "reckless disregard for the safety of human life." However, those terms are defined in Instruction 6.49.46505(b), Manual of Model Jury Instructions Criminal for the District Courts of the Eighth Circuit Courts of Appeals (2023 ed.), and Instruction 0119, Eleventh Circuit Pattern Jury Instructions, Criminal Cases (2024 ed.). The Ninth Circuit also addressed the definition of the term "reckless disregard for the safety of human life" as found in 18 U.S.C. § 32(a)(5) in *United States v. Rodriguez*, 790 F.3d 951, 958 (9th Cir. 2015).

2.112B

PLACING A LOADED FIREARM ON AN AIRCRAFT
49 U.S.C. §§ 46505(b)(2), 46505(c)

Title 49, United States Code, section 46505, makes it a crime for any individual to place [attempt to place] [attempt to have placed] a loaded firearm in property not accessible to passengers in flight on an aircraft an aircraft in, or intended for operation in, air transportation or intrastate air transportation.

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 placed [attempted to place] [attempted to have placed] a loaded firearm on an aircraft in, or intended for operation in, air transportation or intrastate air transportation; and

Second: that the loaded firearm was in property not accessible to passengers in flight.

[*Third*: That the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life;]

[*Fourth*: That death resulted to any person].

The term air transportation means foreign air transportation, air transportation between states, or the transportation of mail by aircraft.

The term intrastate air transportation means the transportation by a common carrier of passengers or property for compensation, entirely in the same state, by turbojet-powered aircraft capable of carrying at least 30 passengers.

A "loaded firearm" means a starter gun or a weapon designed to expel a projectile through an explosive, that has a cartridge, a detonator, or powder in the chamber, magazine, cylinder, or clip.

The term "willfully" means that the act was done voluntarily, intentionally, and in disregard of the law. A person did not have to know the specific law or rule being violated but must have acted with the intent to do something the law forbids.

[The government bears the burden of proving each element beyond a reasonable doubt. If you find that the first two elements of the crime were proven beyond a reasonable doubt, you must then determine whether the government proved beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life. If you find that the government proved beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life, please note this finding on the verdict form. If, on the other

hand, you find that the government failed to prove beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life, please note this finding on the verdict form.]

[The government has alleged that the defendant's actions resulted in a person's death. The government bears the burden of proving each element of the offense beyond a reasonable doubt. If you find that the first three elements of the crime were proven beyond a reasonable doubt you must then determine whether the government proved beyond a reasonable doubt that the defendant's actions caused a person's death. If you find that the government proved beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form. If, on the other hand, you find that the government failed to prove beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form.]

Note

For a discussion of the statute's *mens rea* requirement, refer to the note accompanying Instruction No. 2.112A.

A "loaded firearm" in this context is defined in 49 U.S.C. § 49505(a).

The term "air transportation" is defined in 49 U.S.C. § 40102(a)(5).

The term "intrastate air transportation" is defined in 49 U.S.C. § 40102(a)(27).

"If two or more persons conspire to violate subsections (b) or (c), and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy" has violated this statute. 49 U.S.C. § 46505(e).

The third and fourth elements are required because each of these contain facts which increase the statutory maximum penalty a defendant may face. *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (holding that "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences to which *Burrage* was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt") (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013); *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000)). A finding that the defendant acted willfully and without regard for the safety of human life or that the defendant acted with reckless disregard for the safety of human life increases the statutory maximum penalty from 10 to 20 years, and a finding that defendant's conduct also resulted in a person's death increases the statutory maximum penalty from 20 years to life. *See* 49 U.S.C. § 46505(c).

The language animating the fourth element in this statute is identical to the "death results" language in 21 U.S.C. § 841(b). The Supreme Court in *Burrage*, 124 S. Ct. at 887, held that the government must prove actual causation between the defendants' distribution of a controlled substance and the victim's death. The Committee believes that the same reasoning applies to this statute and that the instruction correctly presents causation to the jury.

The definition of "willfully" was adopted from Instruction 6.49.46505(b), Manual of Model Jury Instructions for the District Courts of the Eighth Circuit Court of Appeals (2023 ed.).

The Fifth Circuit has not defined the terms "without regard for the safety of human life" or "reckless disregard for the safety of human life." However, those terms are defined in Instruction 6.49.46505(b), Manual of Model Jury Instructions Criminal for the District Courts of the Eighth Circuit Courts of Appeals (2023 ed.), and Instruction 0119, Eleventh Circuit Pattern Jury Instructions, Criminal Cases (2024 ed.). The Ninth Circuit also addressed the definition of the term "reckless disregard for the safety of human life" as found in 18 U.S.C. § 32(a)(5) in *United States v. Rodriguez*, 790 F.3d 951, 958 (9th Cir. 2015).

2.112C

PLACING AN EXPLOSIVE DEVICE ON AN AIRCRAFT
49 U.S.C. §§ 46505(b)(3), 46505(c)

Title 49, United States Code, section 46505, makes it a crime for any individual to have on or about the individual [place] [attempt to place] [attempt to have placed] on an aircraft, an explosive or incendiary 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 knowingly had on or about him [her] [placed] [attempted to place] [attempted to have placed] an explosive or incendiary device on an aircraft in, or intended for operation in, air transportation or intrastate air transportation.

[*Second*: That the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life; and]

[*Third*: That death resulted to any person].

The term air transportation means foreign air transportation, air transportation between states, or the transportation of mail by aircraft.

The term intrastate air transportation means the transportation by a common carrier of passengers or property for compensation, entirely in the same state, by turbojet-powered aircraft capable of carrying at least 30 passengers.

An "explosive or incendiary device" is (a) dynamite and all other forms of high explosives, (b) any explosive bomb, grenade, missile, or similar device, or (c) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

[The term "willfully" means that the act was done voluntarily, intentionally, and in disregard of the law. A person did not have to know the specific law or rule being violated but must have acted with the intent to do something the law forbids.]

[The government bears the burden of proving each element beyond a reasonable doubt. If you find that the first element of the crime was proven beyond a reasonable doubt, you must then determine whether the government proved beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life. If you find that the government proved beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life, please note this finding on the verdict form. If, on the other

hand, you find that the government failed to prove beyond a reasonable doubt that the crime was committed willfully and without regard for the safety of human life, or in reckless disregard for the safety of human life, please note this finding on the verdict form.]

[The government has alleged that the defendant's actions resulted in a person's death. The government bears the burden of proving each element of the offense beyond a reasonable doubt. If you find that the first two elements of the crime were proven beyond a reasonable doubt you must then determine whether the government proved beyond a reasonable doubt that the defendant's actions caused a person's death. If you find that the government proved beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form. If, on the other hand, you find that the government failed to prove beyond a reasonable doubt that the defendant's actions caused a person's death, please note this finding on the verdict form.]

Note

For a discussion of the statute's *mens rea* requirement, refer to the note accompanying Instruction No. 2.112A.

An "explosive or incendiary device" is defined in 18 U.S.C. § 232(5).

The term "air transportation" is defined in 49 U.S.C. § 40102(a)(5).

The term "intrastate air transportation" is defined in 49 U.S.C. § 40102(a)(27).

"If two or more persons conspire to violate subsections (b) or (c), and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy" has violated this statute. 49 U.S.C. § 46505(e).

The second and third elements may be required because each of these contains facts which increase the statutory maximum penalty a defendant may face. *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (holding that "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences to which *Burrage* was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt") (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013); *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000)). A finding that the defendant acted willfully and without regard for the safety of human life or that the defendant acted with reckless disregard for the safety of human life increases the statutory maximum penalty from 10 to 20 years, and a finding that defendant's conduct resulted in a person's death increases the statutory maximum penalty from 20 years to life. *See* 49 U.S.C. § 4650(c).

The language animating the third element in this statute is substantially similar to the "death results" language in 21 U.S.C. § 841(b). The Supreme Court in *Burrage*, 124 S. Ct. at 887, held that the government must prove actual causation between the defendants' distribution of a controlled substance and the victim's death. The Committee believes that the same reasoning applies to this statute, and that the instruction correctly presents causation to the jury.

The definition of "willfully" was adopted from Instruction 6.49.46505(b), Manual of Model Jury Instructions for the District Courts of the Eighth Circuit Court of Appeals (2023 ed.).

The Fifth Circuit has not defined the terms "without regard for the safety of human life" or "reckless disregard for the safety of human life." However, those terms are defined in Instruction 6.49.46505(b), Manual of Model Jury Instructions Criminal for the District Courts of the Eighth Circuit Courts of Appeals (2023 ed.), and Instruction 0119, Eleventh Circuit Pattern Jury Instructions, Criminal Cases (2024 ed.). The Ninth Circuit also addressed the definition of the term "reckless disregard for the safety of human life" as found in 18 U.S.C. § 32(a)(5) in *United States v. Rodriguez*, 790 F.3d 951, 958 (9th Cir. 2015).