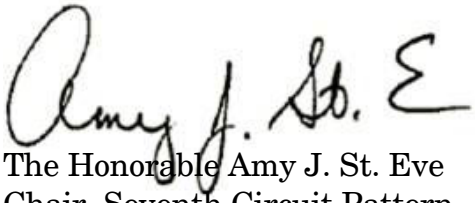
Proposed Revisions/Additions
to the Seventh Circuit Criminal Jury Instructions

The Seventh Circuit Pattern Criminal Jury Instruction Committee submits the attached proposed new and revised criminal pattern jury instructions for public comment. The proposed revised version of each instruction is redlined to reflect the proposed changes.

The Committee, which includes judges, prosecutors, defense attorneys, and law professors, welcomes comment before submission of the proposed revisions to the Seventh Circuit's Judicial Council for approval and promulgation. Please email your comments to jicomments@ca7.uscourts.gov, with a subject line of "Pattern Jury Instruction Comment." The Committee will accept comments through September 21, 2021.

Respectfully,



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

The proposed revisions/additions concern the following instructions:

- Juror Conduct (change to instruction)
- 2.01 – The Evidence (change to instruction)
- 3.11 – Evidence of Other Acts by Defendant (change to instruction)
- 3.13(a) – Dual-Capacity Witness Testimony (new instruction)
- 5.06(A) – Aiding and Abetting (new instruction)
- 5.06(B) – Acting Through Another (new instruction)
- 18 U.S.C. §§ 111(a) & 111(b) – Definition of "Assault"; Definition of "Forcibly"; Assaulting a Federal Officer – Elements; Assaulting a Federal Officer Using a Deadly or Dangerous Weapon or Inflicting Bodily Injury – Elements; Definition of "Bodily Injury"; Definition of "Deadly or Dangerous Weapon" (new instructions)
- 18 U.S.C. § 115(a)(1)(B) – Definition of "Threaten"; Threatening a United States Official, United States Judge, or Federal Law Enforcement Officer - Elements (new instruction)
- 18 U.S.C. § 115(c)(1) – Definition of "Federal Law Enforcement Officer" (new instruction)
- 18 U.S.C. § 115(c)(3) – Definition of "United States Judge" (new instruction)
- 18 U.S.C. § 115(c)(4) – Definition of "United States Official" (new instruction)
- 18 U.S.C. § 241 – Death (changes to instruction and comment)
- 18 U.S.C. § 242 – Deprivation of Rights Under Color of Law – Elements; Deprivation of Rights Under Color of Law – Definition of Intentionally – for Use in Excessive Force Cases (new instruction/changes to instruction and comment)
- 18 U.S.C. § 542 – Entry of Goods by Means of False Statements - Elements (changes to instruction and comment)
- 18 U.S.C. § 669(a) – Definition of "Health Care Benefit Program"; Health Care Theft or Embezzlement - Elements (changes to instructions and comments)
- Forfeiture – Third Party Interests (new)
- Forfeiture - Separate Consideration – Multiple Defendants (change to instruction and comment)
- 18 U.S.C. § 875(a) – Transmission of Ransom or Reward - Elements (new instruction)
- 18 U.S.C. § 875(b) – Transmission of an Extortionate Threat to Kidnap or Injure a Person - Elements (new instruction)

- 18 U.S.C. § 875(c) – Transmission of a Threat to Kidnap or Injure - Elements (new instruction)
- 18 U.S.C. § 875(d) – Transmission of an Extortionate Threat to Property or Reputation - Elements (new instruction)
- 18 U.S.C. § 876(a) – Mailing a Demand for Ransom or Reward - Elements (new instruction)
- 18 U.S.C. § 876(b) – Mailing an Extortionate Threat to Kidnap or Injure - Elements (new instruction)
- 18 U.S.C. § 876(c) – Mailing a Threat to Kidnap or Injure - Elements (new instruction)
- 18 U.S.C. § 876(d) – Mailing an Extortionate Threat to Reputation - Elements (new instruction)
- Definition of True Threat (new)
- Definition of Intent to Extort (new)
- 18 U.S.C. § 912 – Impersonation of an Officer or Employee of the United States (new instruction)
- 18 U.S.C. § 922(g)(1) – Unlawful Possession or Receipt of a Firearm or Ammunition by a Prohibited Person – Elements; Unlawful Shipment or Transportation of a Firearm or Ammunition by a Convicted Felon - Elements (changes to instructions and comments)
- 18 U.S.C. § 922(g)(3) – Definition of "Unlawful User"; Unlawful Shipment or Transportation of a Firearm or Ammunition by an Unlawful User or Addict of a Controlled Substance – Elements; Unlawful Possession or Receipt of a Firearm or Ammunition by an Unlawful User or Addict of a Controlled Substance - Elements (new instructions)
- 18 U.S.C. § 922(g)(5) – Definition of "Alien Illegally or Unlawfully in the United States"; Unlawful Possession or Receipt of a Firearm or Ammunition by an Alien Illegally or Unlawfully in the United States – Elements; Unlawful Shipment or Transportation of a Firearm or Ammunition by an Alien Illegally or Unlawfully in the United States - Elements (new instructions)
- 18 U.S.C. § 924(c) – Definition of "In Furtherance Of" (changes to instruction and comments)
- 18 U.S.C. § 1001(a)(1) – Definition of "Trick, Scheme, or Device"; Concealing a Material Fact – Elements (changes to instructions and comments)
- 18 U.S.C. § 1029(a)(2) – Trafficking or Use of Unauthorized Access Devices - Elements (changes to instruction and comment)
- 18 U.S.C. § 1029(a)(3) – Possession of Multiple Unauthorized or Counterfeit Access Devices - Elements (changes to instruction and comment)

- 18 U.S.C. § 1029(a)(10) – Fraudulent Presentation of Evidence of Credit Card Transaction to Claim Unauthorized Payment - Elements (change to instruction)
- 18 U.S.C. § 1030(e)(2) – Definition of "Protected Computer" (changes to instruction and comment)
- 18 U.S.C. § 1030(e)(13) – Definition of "Federal Election" (new instruction)
- 18 U.S.C. § 1030(e)(14) – Definition of "Voting System" (new instruction)
- 18 U.S.C. § 1035 – False Statements Related to Health Care Matters: Falsification and Concealment - Elements (changes to instruction)
- 18 U.S.C. § 1112 – Definitions of Manslaughter; Definitions (new instruction)
- 18 U.S.C. § 1201(a)(1) – Kidnapping – Definition of Interstate or Foreign Commerce; Kidnapping – Definition of Inveigle or Decoy; Kidnapping (new instructions)
- 18 U.S.C. § 1347(a) – Definition of "Health Care Benefit Program" (changes to instruction and comment)
- 18 U.S.C. § 1347(a)(1) – Health Care Fraud – Elements (changes to instruction and comment)
- 18 U.S.C. § 1347(a)(2) – Obtaining Property from a Health Care Benefit Program by False or Fraudulent Pretenses - Elements (changes to instruction and comment)
- 18 U.S.C. § 1462 – Importing or Transporting Obscene Material – Elements; Taking or Receiving Obscene Material - Elements (changes to instructions and comments)
- 18 U.S.C. § 1465 – Production with Intent to Transport/Distribute/Transmit Obscene Material for Sale or Distribution - Elements (changes to comment)
- 18 U.S.C. § 1470 – Definition of "Obscene" (changes to instruction and comment)
- 18 U.S.C. § 1503 – Obstruction of Justice – Clause 2 – Injuring Jurors or Their Property; Obstruction of Justice – Clause 3 – Injuring Court Officials; Definition of "Endeavor"; Influencing Court Officer – Elements; Influencing Juror – Elements; Influencing Witness – Elements; Obstruction of Justice Generally – Elements; Special Verdict Instructions on § 1503 Offenses Alleged to Have Involved Physical Force or the Threat of Physical Force (new instructions/changes to instructions and comments)
- 18 U.S.C. § 1512(b)(1) – Witness Tampering – Influencing or Preventing Testimony - Elements (change to instruction)

- 18 U.S.C. § 1512(b)(2)(A) – Witness Tampering – Withholding Evidence - Elements (change to instruction)
- 18 U.S.C. § 1512(b)(2)(B) – Witness Tampering – Altering or Destroying Evidence - Elements (change to instruction)
- 18 U.S.C. § 1512(b)(2)(C) – Witness Tampering – Evading Legal Process - Elements (change to instruction)
- 18 U.S.C. § 1512(b)(2)(D) – Witness Tampering – Absence from Legal Proceeding - Elements (change to instruction)
- 18 U.S.C. § 1512(b)(3) – Witness Tampering – Hinder, Delay or Prevent Communication Relating to Commission of Offense - Elements (change to instruction)
- 18 U.S.C. § 1519 – Obstruction of Justice – Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy - Elements (new instruction)
- 18 U.S.C. § 1831 – Economic Espionage (Including Federal Nexus and Knowledge) (new instruction)
- 18 U.S.C. § 1832 – Theft of Trade Secrets (Including Federal Nexus and Knowledge) (new instruction)
- 18 U.S.C. § 2113(a) – Definition of "Intimidation" (changes to instruction and comment)
- 18 U.S.C. § 2241(c) – Aggravated Sexual Abuse of a Minor Twelve to Sixteen – Elements; Aggravated Sexual Abuse of Child - Elements (changes to instructions and comments)
- 18 U.S.C. § 2252A(c) – Affirmative Defense to Charges Under 18 U.S.C. § 2252A(a)(1), (a)(2),(a)(3)(A), (a)(4) or (a)(5) (changes to instruction and comment)
- 18 U.S.C. § 2314 – Interstate Transportation of Tools Used in Making, Forging, Altering, or Counterfeiting Any Security or Tax Tamps - Elements (change to instruction)
- 18 U.S.C. § 2339A – Definition of "Material Support or Resources"; Providing Material Support to Terrorists - Elements (new instruction)
- 18 U.S.C. § 2339B – Providing Material Support or Resources to Designated Foreign Terrorist Organizations - Elements(new instruction)
- 18 U.S.C. § 2423(b) –Interstate Travel with Intent to Engage in a Sexual Act with a Minor - Elements (changes to instruction and comment)
- 18 U.S.C. § 2423(f) – Definition of "Illicit Sexual Conduct" (changes to instruction and comment)
- 18 U.S.C. § 2423(g) - Defense (changes to instruction and comment)
- 21 U.S.C. §§ 841(b)(1)(A), (B) or (C) – Definition of "Serious Bodily Injury"; Where Death or Serious Bodily Injury Results – Special Verdict Form (new instructions)

- 21 U.S.C. § 841(c)(1) – Possession of Listed Chemical with Intent to Manufacture - Elements (change to instruction and comment)
- 21 U.S.C. § 841(c)(2) – Possession/Distribution of Listed Chemical for Use in Manufacture - Elements (change to instruction and comment)
- 21 U.S.C. § 843(b) – Use of Communication Facility in Aid of Narcotics Offense - Elements (change to instruction and comment)
- 21 U.S.C. § 844 – Simple Possession - Elements (change to instruction and comment)
- Drug Quantity/Special Verdict Instructions (change to instruction and comment)
- 21 U.S.C. § 856(a)(1) – Maintaining Drug-Involved Premises Limiting Instruction (change to instruction and comment)
- 21 U.S.C. § 856(a)(2) – Maintaining Drug-Involved Premises - Elements (change to instruction and comment)
- 22 U.S.C. § 2778 – Importing/Exporting Weapons Without a License (new instruction)
- 22 U.S.C. § 2778(c) – Willfully - Definition (new instruction)
- 42 U.S.C. § 1320a-7b(b) – Criminal Penalties for Acts Involving Federal Health Care Programs – Illegal Remunerations (new instruction)

JUROR CONDUCT

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

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

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

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

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

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

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

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

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

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

2.01 THE EVIDENCE

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

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

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

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

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

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

Committee Comment

Extraneous influence. This instruction is consistent with the one approved by the Seventh Circuit in *United States v. Xiong*, 262 F.3d 672, 676 (7th Cir. 2001). The Seventh Circuit has also defined the minimum measures a trial judge must take when confronted with evidence of prejudicial publicity prior to or during trial. When apprised in a general fashion of the existence of damaging publicity, the trial judge should "strongly and repeatedly [admonish] the jury throughout the trial not to read or listen to any news coverage of the case." *Margoles v. United States*, 407 F.2d 727, 733 (7th Cir. 1969). When the publishing or broadcast of specific items of inadmissible evidence is brought to the trial court's attention, the court must investigate further to determine juror exposure:

> Thus, the procedure required by this circuit where prejudicial publicity is brought to the court's attention during a trial is

> that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity.

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

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

3.11 - EVIDENCE OF OTHER ACTS BY DEFENDANT

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

Committee Comment

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

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

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

In United States v. Miller, 673 F.3d 688 (7th Cir. 2012), the court counseled against "leaving juries to decode for themselves how they may properly consider admissible bad acts evidence" and encouraged trial judges to include "a case-specific

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

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

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

Id. at 853, 860.

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

In *United States v. Morgan*, 929 F.3d 411 (7th Cir. 2019), the jury instructions did not include the specific directives from the pattern jury instructions that were designed to inform the jury to avoid using the evidence as propensity or character evidence. The court found that omission to be an error, albeit one that the defense waived. The court

counseled that jurors should be told directly that they must not use the other-act evidence to infer that the defendant has a certain character and acted in character in the present case because it does not follow from the defendant's past acts that he committed the particular crime charged in the case.

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

3.13(a)-DUAL-CAPACITY WITNESS TESTIMONY

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

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

Committee Comment

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

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

Id. at 269-270.

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

consecutively, the court should allow cross-examination at the conclusion of each segment.

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

(proposed new, separate instruction to substitute for former 5.06(a))

5.06(A) AIDING AND ABETTING

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

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

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

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

3. The defendant did so knowingly.

Committee Comment

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

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

Instruction 7.02; Sixth Circuit Criminal Jury Instruction 4.0; Eighth Circuit Criminal Jury Instruction 5.01.

(proposed new, separate instruction
to substitute for former 5.06(b))
5.06(B) ACTING THROUGH ANOTHER

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

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

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

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

Committee Comment

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

First, in *United States v. Freed*, 921 F.3d 716 (7th Cir. 2019), the court concluded that the previous version of the instruction, which imposed responsibility if the defendant "knowingly" caused the acts of another, was "obviously problematic" because § 2(b) uses the term "willfully," not knowingly. In addressing this issue, the Committee has elected to use the statutory term "willfully" in the first sentence of the instruction. This is how the Third and Sixth Circuits handle it. *See* Third Circuit Criminal Jury Instruction 7.05; Sixth Circuit Criminal Jury Instruction 4.01(A).

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

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

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

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

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

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

2. The individual to whom the firearm was transferred was a felon;
3. The defendant knew or had reasonable cause to believe that the individual was a felon.

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

1. The defendant willfully caused [actor] to pass counterfeited United States currency;
2. The defendant knew at the time that the United States Currency was counterfeited; and
3. The defendant did so with the intent to defraud.

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

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

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

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

Committee Comment

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

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

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

Committee Comment

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

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

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

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

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

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

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

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

Committee Comment

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

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

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

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

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

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

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

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

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

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

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

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

Committee Comment

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

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

The defendant does not need to know the victim is a federal officer. *United States v. Feola*, 420 U.S. 671, 684–86 (1975); *United States v. Woody*, 55 F.3d 1257, 1265–66 (7th Cir. 1995). At the same time, if self-defense is raised, knowledge of the official capacity of the victim may be

an element necessary for conviction. *Feola*, 420 U.S. at 686 ("The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea.").

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

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

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

Committee Comment

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

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

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

Committee Comment

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

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

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

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

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

Committee Comment

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

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

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

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

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

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

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

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

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

OR

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

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a

reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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

Committee Comment

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

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

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

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

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

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

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

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

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

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

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

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

18 U.S.C. § 241 - DEATH

If you find the defendant guilty as charged in [Count[s] _ of] the indictment, you must then determine whether the government has proven that [name of victim] died as a result of the conspiracy charged [in Count[s] _].

The government must prove that [name of victim] died as a result of the defendants' conspiracy. The government satisfies this requirement by proving that the conduct of one or more of the [defendants; conspirators] contributed to or hastened [name of victim]'s death, even if that conduct by itself would not have caused his death. The government is not required to prove that the defendant[s] intended for [name of victim] to die.

To prove that [name of victim] died as a result of the defendants' conspiracy, the government must prove beyond a reasonable doubt that [name of victim] would not have died ~~but~~if not for the conduct of one or more of the [defendants; coconspirators] in furtherance of the conspiracy. It is not enough to prove that the [defendant's; coconspirator's] conduct merely contributed to [name of victim's] death. ~~It is not enough for the government to prove that the defendant's conduct was a contributing cause of [*name of victim*]'s death.~~

[The government is not required to prove that the [defendant~~/~~; coconspirators] intended to cause [name of victim]'s death.] ~~or that [his/her] death was foreseeable.~~

You will see on the verdict form a question concerning this issue. You should consider that question only if you have found that the government has proven the defendant guilty as charged in [Count[s] _ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that [name of victim] died as a result of the conspiracy charged in [Count[s] _ of] the indictment, then you should answer that question "Yes."

If you find that the government has not proven beyond a reasonable doubt that [name of victim] died as a result of the conspiracy charged in [Count[s] _ of] the indictment, then you should answer that question "No."

Committee Comment

~~See United States v. Harris, 701 F.2d 1095, 1101 (4th Cir. 1983); United States v. Hayes, 589 F.2d 811, 820-21 (5th Cir. 1979); United States v. Guillette, 547 F.2d 743, 749 (2d Cir. 1976).~~

This instruction should be used in cases in which the indictment charges that a victim died as the result of the conspiracy. If the victim dies as the result of the conspiracy, the maximum penalty is increased. For this reason, the government is required to prove the death beyond a reasonable doubt. See 18 U.S.C. §241 (increasing maximum term to life imprisonment if death results); *Apprendi v. New Jersey*, 530 U.S.

466 (2000). Because a person who engages in a conspiracy to violate civil rights violates the law even if no death results, however, the appropriate way to instruct in a case in which the victim's death is at issue is by way of a separate instruction concerning that issue, combined with a special interrogatory on the verdict form, as is done in cases in which narcotics quantity is at issue.

In *United States v. Burrage*, 571 U.S. 204 (2014), the Court held that the "death results" enhancement in drug cases ordinarily requires the government to prove that the victim would have lived but for the unlawfully distributed drugs. In adopting the "but-for" causation standard, the Court emphasized that the "language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." *Id.* at 216. Thus, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. s. 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Id.* at 218-19.

In *Perrone v. United States*, 889 F.3d 898 (7th Cir. 2018), the Seventh Circuit elaborated on the meaning of "but for" causation in the context of an overdose death:

> This dispute is about causation, so we will begin by clearly stating what "but for" causation requires. It does not require proof that the distributed drug was present in an amount sufficient to kill on its own. The Court explained in *Burrage* that death can "result[ ] from" a particular drug when it is the proverbial "straw that broke the camel's back." 134 S. Ct. at 888. As the Court put it: "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.* Here, then, the fact that other substances in [the victim's] bloodstream played a part in her death does not defeat the government's claim that her death resulted from the cocaine Perrone gave her. A jury could have found him guilty of causing her death if it concluded beyond a reasonable doubt that Perrone's cocaine pushed her over the edge.

Id. at 906.

Although the Seventh Circuit has not yet considered whether "but-for" causation is required to prove the "death results" enhancement under 18 U.S.C. § 241 or § 242, the "death results from" language in those statutes mirrors the "death results from" language in 21 U.S.C. 841(b) and warrants similar treatment.

It is an open question in this Circuit whether strict "but-for" causation is required if the government proves that the defendant's conduct was an independently sufficient cause of the victim's death. See *Perrone*, 889 F.3d at 906. In *Perrone*, the Seventh Circuit indicated that "strict 'but-for' causation might not be required when "'multiple sufficient causes independently, but concurrently, produce a result,'" but declined to decide the issue. *Id.*

The Seventh Circuit has held that the government does not have to prove proximate causation (that the death was a reasonably foreseeable result of the drug offense) to establish the "death results" enhancement for drug distribution. *United States v. Harden*, 893 F.3d 434, 447-49 (7th Cir. 2018). The other eight circuits to address this issue in the drug offense context are in agreement. See, e.g., *United States v. Jeffries*, 958 F.3d 517, 520 (6th Cir. 2020) (citing cases). *Burrage* granted certiorari on whether the jury must find that the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense, but declined to reach that issue. At least pre-*Burrage*, several circuits had adopted proximate cause as the causation standard for "death results" prosecutions under 18 U.S.C. §§ 241 and 242. See *United States v. Harris*, 701 F.2d 1095, 1101 (4th Cir. 1983) (holding that the "if death results" under § 241 requires proof that the death is foreseeable and naturally results from violating the statute); see also *United States v. Martinez*, 588 F.3d 301, 317-19 (6th Cir. 2009) (applying proximate cause in a "death results" health care fraud prosecution).

In cases where the death may have resulted from the actions of coconspirators rather than the defendant himself, the court may need to tailor the instructions to ensure that the jury makes the findings necessary to hold the defendant liable for the death. See *United States v. Walker*, 721 F.3d 828, 833–36 (7th Cir. 2013), vacated on other grounds, 572 U.S. 1111 (2014) (recognizing that "the scope of a defendant's relevant conduct for determining sentencing liability may be narrower than the scope of criminal liability"); *United States v. Hamm*, 952 F.3d 728 (6th Cir. 2020) (holding that the death-or-injury enhancement "applies only to defendants who were part of the distribution chain that placed the drugs into the hands of the overdose victim" and that "*Pinkerton* liability could only apply to the substantive offense, not the sentencing enhancement").

Section 241 likewise provides for enhanced penalties if "the acts committed in violation of this section ... include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." If the indictment includes such allegations, this instruction should be adapted accordingly.

18 U.S.C. § 242 - DEPRIVATION OF RIGHTS UNDER COLOR OF LAW—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] _ of the indictment charge[s] the defendant[s] with] deprivation of rights under color of law. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant was acting under color of law; and

2. The defendant deprived [name of victim] of his right to [name of right], which is secured or protected by the [[Constitution] [and] [laws]] of the United States; and

3. The defendant acted willfully, meaning he intentionally ~~intended to~~ deprived [name of victim] of this right. The government is not required to prove that the defendant knew this right was secured by the [[Constitution] [and] [laws]] of the United States; and

4. [Name of victim] was present in [name of State, Territory, or District of the United States].

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

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

Committee Comment

See also Pattern Instructions for 18 U.S.C. § 241 and accompanying commentary.

Prior to 1994, §242 applied only to deprivations of the rights of "inhabitants of" a state, territory, or district of the United States. In *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990), the court overturned the convictions of two customs agents for killing an alien who was briefly present in the United States. The rationale was that such a person did not qualify as an "inhabitant" for purposes of 18 U.S.C. 242. In 1994, the statute was amended to make it apply to deprivations of the rights of "persons in" a state, territory, or district of the United States, rather than just "inhabitants of" such places.

In a case in which the indictment charges that the victim died as a result of the defendant's conduct, the separate "Death" instruction provided for cases under 18 U.S.C. § 241 should be used and adapted to the case, along with a special interrogatory as discussed in the commentary to that instruction.

Section 242 also provides for an enhanced maximum penalty if the defendant's acts caused bodily injury to the victim. If that is charged, the separate instruction regarding bodily injury should be used, along with a special interrogatory on the verdict form.

18 U.S.C. § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW –
DEFINITION OF INTENTIONALLY –
FOR USE IN EXCESSIVE FORCE CASES

The defendant acted intentionally if he knew the force he used was more than what a reasonable [officer or other type of person acting under color of law] would have used under the circumstances.

Committee Comment

In *United States v. Proano*, 912 F.3d 431, 442-43 (7th Cir. 2019), which involved an alleged unreasonable or excessive use of force by a police officer, the Seventh Circuit approved including this definition of "intentionally" for alleged violations of § 242, to help guide juries on the required mens rea.

In *Proano*, the Seventh Circuit recognized that an officer's training may be relevant to help prove or disprove that an officer acted willfully. *Id*. at 438-41. If the court admits such evidence, a limiting instruction is recommended before the parties offer a department's policy or an officer's training into evidence, as well as at the close of evidence. *Id*. at 440, n. 4. The Seventh Circuit approved of the following instruction in *Proano*:

> You have heard evidence about training the defendant received relating to the use of deadly force. You should not consider this training when you decide whether the defendant's use of force was reasonable or unreasonable. But you may consider the training when you decide what the defendant intended at the time he acted.
> *Id*. at 440.

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS – ELEMENTS ~~– WHETHER OR NOT UNITED STATES SHALL OR MAY BE DEPRIVED OF ANY LAWFUL DUTIES — ELEMENTS~~

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] entering goods into commerce by means of a false statement. In order for you to find the defendant guilty of this charge, the government must prove each of the [three; four] following elements beyond a reasonable doubt:

1. [Goods named in indictment] [was; were] imported; and

2. The defendant [entered; introduced; attempted to enter; attempted to introduce] [goods named in indictment] into the commerce of the United States; and

3. The defendant did so by means of a [fraudulent; false] [invoice; declaration; affidavit; letter; paper; practice] [written; ~~or~~ verbal ~~false~~ statement], which he [[knew; had reason to believe] was [fraudulent; false;~~]~~[.]without reasonable cause to believe to be true]-~~]~~[; and~~]~~

~~OR~~

~~3. The defendant made a false statement in a declaration without reasonable cause to believe that the statement was true[.] [; and]~~

~~OR~~

~~3. The defendant caused the making of a false statement in a declaration without reasonable cause to believe the truth of the statement[.] [; and]~~

[4. The [invoice; declaration; affidavit; letter; paper; statement; practice] was material to the entry of the merchandise.]

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

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

Committee Comment

~~Section 542 provides:~~

> ~~Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; . . .~~
>
> ~~Shall be fined for each offense under this title or impris- oned not more than two years, or both.~~

Title 18 U.S.C. § 542. ~~The quoted paragraph of the statute~~ describes three types of false statements. The first does not contain any express intent requirement—it simply proscribes "fraudulent" or "false" statements—but it has been interpreted as requiring a knowing falsehood. See *United States v. Ven-Fuel, Inc.*, 602 F.2d 747, 753 (5th Cir. 1979). The second and third expressly contain what amounts to a knowledge/reckless disregard intent requirement.

The fourth element (materiality) is bracketed because the Seventh Circuit has not decided whether materiality is an element under 18 U.S.C. § 542. It appears, however, that every other circuit that has considered the issue has ruled that § 542 requires proof of materiality. See, e.g., ~~*United States v. Avelino*, 967 F.2d 815, 817 (2d Cir. 1992)~~ *United States v. An Antique Platter of Gold*, 184 F.3d 131, 135 (2d Cir. 1999); *United States v. Holmquist*, 36 F.3d 154, 158 (1st~~st~~ Cir. 1990); *United States v. Corcuera-Valor*, 910 F.2d 198, 199 (5th~~th~~ Cir. 1990); *United States v. Bagnall*, 907 F.2d 432, 435 (3d Cir. 1990); *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir. 1982). Of note is the ~~These decisions, however, predate the~~ Supreme Court's decision in *United States v. Wells*, 519 U.S. 482 (1997), to the effect that 18 U.S.C. § 1014, which like § 542 proscribes false statements, does not require proof of materiality. But see also *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality"). The Committee takes no position on whether the statute requires materiality.

18 U.S.C. § 669(a). DEFINITION OF "“HEALTH CARE BENEFIT PROGRAM AFFECTING COMMERCE"”

A “health care benefit program” is a [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 health care program affects commerce if the health care program had any degree of impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States]. The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to anysome degree. The government need not prove that [the; a] defendant engaged in interstate commerce or that the acts of [the; a] defendant affected interstate commerce.

Committee Comment

A health“Health care benefit program” is defined in 18 U.S.C. § 24 for purposes of the federal health care offenses, including §669. The first sentence of this instruction is the definition of health care benefit program in 18 U.S.C. §24. The remainder of the instruction addresses "affecting commerce" which is an element of proof in cases where 18 U.S.C. §24 is at issue. Courts have interpreted "(b). “Affecting commerce” means affecting commerce" under §24 as requiring an interstate commerce effect.under 18 U.S.C. § 24(b). See *United States v.* Klein*Natale*, 543719 F.3d 206719, 211 (732 n.5 (7th Cir. 2008); United States v. Whited, 311 F.3d 259 (3d Cir. 2002)2013). The court may also find it appropriate to adapt for health care offenses the RICO Pattern Instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce.

18 U.S.C. § 669(a). HEALTH CARE THEFT OR EMBEZZLEMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] – of the indictment charge[s] the defendant[s] with] [theft; embezzlement] from a health care benefit program. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. ~~That the~~The defendant [embezzled; stole; otherwise without authority converted to the use of any person other than the rightful owner; intentionally misapplied] any [moneys; funds; securities; premiums; credits; property; assets] of a health care benefit program; and

2. ~~That the~~The defendant did so knowingly and willfully; and

3. ~~That the~~The [moneys; funds; securities; premiums; credits; property; assets] had a value of more than $100.

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

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

Committee Comment

The court should refer to the pattern instruction defining "health care benefit program."

The statute uses both "knowingly" and "willfully" to define the mens rea element. There is no case that has definitively decided the meaning of "knowingly and willfully" in the context of this statute. See *United States v. Wheeler*, 540 F.3d 683 (7th Cir. 2008). Wheeler considered this issue under a plain error standard and concluded that "there is a plausible argument that the use of 'knowingly and willfully' in § 669 may require that a defendant know his conduct was in some way unlawful." In discussing the meaning of willfully under § 669, the Wheeler court noted that § 669 does not involve the complex statutory scheme at issue in tax or structuring crimes which require a defendant to violate a known legal duty. However, the *Wheeler* court reasoned that there is also some support for the argument that "willfully" means more than acting intentionally when it is used conjunctively with "knowingly." "

Practitioners should also consider the potential application of *United States v. Schaul*, 962 F.3d 917 (7th Cir. 2020). In *Schaul*, the Seventh Circuit held that, in the context of 18 U.S.C. § 1347, "knowingly" and "willfully" have separate meanings and must be proven in the conjunctive. The *Schaul* court also equated "willfully" under § 1347 with an "intent to defraud," which itself was already considered an element of § 1347. *Id.* at 925. The Committee notes, however, that § 669 does not contain an explicit textual reference to an intent to defraud. In the absence of controlling law, litigants might also consider reference to the definition of "willfully" under 18 U.S.C. § 1035 (false statements in healthcare matters), which similarly has no textual reference to "intent to defraud." There, "willfully" is defined as acting "voluntarily and intentionally and with the intent to do something he knows is illegal." See *United States v. Natale*, 719 F.3d 719, 741–42 (7th Cir. 2013).

The Committee advises that if the district court deems ~~the two terms~~"knowingly and willfully" to have the same meaning, then the court should define ~~"knowingly and willfully"~~the two terms in one instruction using the pattern instruction for ~~"~~"knowingly.~~"~~" If the court deems the two terms to have separate meanings, then the court should ~~define both terms in~~consider splitting them into separate ~~instructions~~elements and defining them separately.

This instruction contemplates a felony charge under the statute. If the value of the money or property is $100 or less, the offense constitutes a misdemeanor under 18 U.S.C. § 669(a).

FORFEITURE – THIRD PARTY INTERESTS

You are to determine only if a defendant's rights, title and interests, if any, in the specified property should be forfeited. You are not called upon to determine whether or not any other person has any right, title or interest in this money or property, or whether or not their interest should be forfeited. This is a matter to be determined by the court in further proceedings, if necessary. You need only determine whether or not the government has proved by a preponderance of the evidence that the defendant's interest in this property, if any, is forfeitable.

SEPARATE CONSIDERATION—MULTIPLE DEFENDANTS

The Forfeiture Allegation[s] allege[s] that the same property is subject to forfeiture as to more than one defendant. You must consider the question of forfeiture separately for each defendant. The fact that property is forfeited as to one defendant does not necessarily mean that the property should be forfeited as to another defendant.~~should give each defendant separate consideration as to [the; each] Forfeiture Allegation.~~

Committee Comment

In *Honeycutt v. United States*, ___ U.S. ___, 137 S. Ct. 1626, 1635 (2017), the Court held that "[f]orfeiture pursuant to § 853 is limited to property the defendant himself actually acquired as the result of the crime." In other words, "a defendant cannot be held jointly and severally liable for property that a co-conspirator derived from a crime, if the defendant himself did not acquire it." *United States v. Bogdanov*, 863 F.3d 630, 635 (7th Cir. 2017).

The Committee takes no position on whether this instruction is necessary where no property is involved and where the government only seeks a money judgment order of forfeiture.

18 U.S.C. § 875(a) TRANSMISSION OF A RANSOM OR REWARD – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] with transmitting a communication containing a demand or request for a ransom or reward for the release of a kidnapped person. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a [demand; request] for a [ransom; reward] for the release of any kidnapped person; and

3. The defendant transmitted the communication [for the purpose of making a [demand; request] for a [ransom; reward]]; [knowing that the communication would be viewed as a [demand; request] for a [ransom; reward]] for the release of any kidnapped person; and

4. The communication was transmitted in [interstate; foreign] commerce.

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

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

Committee Comment

In paragraph 3, the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that

the communication would be viewed as a threat is based on *Elonis v. United States*, 575 U.S. 723, 740 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.") The instruction reflects the purpose or knowledge mental state as the most common prosecution theories, but recklessness remains an open question. *Id.* ("Neither Elonis nor the government has briefed or argued that point and we accordingly decline to address it.").

18 U.S.C. § 875(b) TRANSMISSION OF AN EXTORTIONATE THREAT TO KIDNAP OR INJURE A PERSON - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] charges the defendant with transmitting a communication containing a threat to kidnap or injure a person with the intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a threat to [kidnap] [injure] any person; and

3. The defendant transmitted the communication with the intent to extort [money] [other thing of value] from any [person] [firm] [association] [corporation]; and

4. The communication was transmitted in interstate [foreign] commerce.

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

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

Committee Comment

In the third element, the requisite mental state is described as intent to extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(b)), the Supreme Court described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the

communication would be viewed as a threat. *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.")

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case). Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

18 U.S.C. §875(c) TRANSMISSION OF A THREAT TO KIDNAP OR INJURE - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] the defendant with transmitting a communication containing a threat to kidnap or injure. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a true threat to [kidnap] [injure] any person; and

3. The defendant transmitted the communication [for the purpose of making a threat] or [knowing the communication would be viewed as a threat]; and

4. The communication was transmitted in interstate [foreign] commerce.

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

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

Committee Comment

In the third element, the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.") The instruction reflects the purpose or knowledge mental state as the most common prosecution theory, but recklessness remains an open question.

Id. at 2012 ("Neither Elonis nor the Government has briefed or argued that point [whether recklessness suffices], and we accordingly decline to address it.")

The language regarding "true threats" was approved post *Elonis* in *United States v. Khan,* 937 F.3d 1042, 1051 (7th Cir. 2019). Please see the Definition of True Threat and its Committee Comment later in these instructions.

18 U.S.C. §875(d) TRANSMISSON OF AN EXTORTIONATE THREAT TO PROPERTY OR REPUTATION - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] transmitting a communication containing a threat to reputation with intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a threat [to injure the [property; reputation] of the [addressee; another]] [injure the reputation of a deceased person] [to accuse [the addressee; any other person] of a crime];

3. The defendant transmitted the communication with the intent to extort [money] [thing of value]; and

4. The communication was transmitted in interstate [foreign] commerce.

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

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

Committee Comment

In the third element, the mental state is described as intent to extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(d)), the Supreme Court described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis v. United States*, 135 S. Ct. 2001,

2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.")

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) (which similarly bars extortionate threats as § 875(d) does) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case)." Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

18 U.S.C. § 876(a) MAILING A DEMAND FOR RANSOM OR REWARD - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] mailing a communication containing a demand or request for a ransom or reward for the release of a kidnapped person. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited] [caused to be delivered] through the United States mail, a communication;

2. The communication contained a [demand; request] for a [ransom; reward] for the release of any kidnapped person; and

3. the defendant transmitted the communication for the purpose of making a [demand; request] for a [ransom; reward] for the release of any kidnapped person.

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

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

18 U.S.C.§ 876(b) MAILING AN EXTORTIONATE THREAT TO KIDNAP OR INJURE - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] mailing a communication containing a threat to kidnap or injure a person with the intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited] [caused to be delivered] through the United States mail, a communication;

2. The communication contained a threat to [kidnap any person] [injure [the person of the addressee; the person of another]]; and

3. the defendant transmitted the communication with the intent to extort [money] [other thing of value] from any person.

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

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

Committee Comment

In the third element, the requisite mental state is described as intent to extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(b)), the Supreme Court described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat. *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.")

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case). Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

18 U.S.C. §876(c) MAILING A THREAT TO KIDNAP OR INJURE - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] mailing a communication containing a threat to kidnap or injure. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited; caused to be delivered] through the United States mail, a communication; and

2. The communication contained a true threat to [kidnap any person; injure the person of [the addressee; another]]; and

3. The defendant [deposited the communication; caused the communication to be delivered] *either* [for the purpose of making a threat; knowing the communication would be viewed as a threat].

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

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

Committee Comment

In the third element, the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.") The instruction reflects the purpose or knowledge mental state as the most common prosecution theory, but recklessness remains an open question. *Id.* at 2012 ("Neither Elonis nor the Government has briefed or argued that point [whether recklessness suffices], and we accordingly decline to address it.")

The language regarding "true threats" was approved post *Elonis* in *United States v. Khan,* 937 F.3d 1042, 1051 (7th Cir. 2019). Please see the Definition of True Threat and its Committee Comment later in these instructions.

If the Government alleged that the communication was addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, that charging language should be specified in the instruction.

18 U.S.C. § 876(d) MAILING AN EXTORTIONATE THREAT TO REPUTATION - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] mailing a communication containing a threat to reputation, with intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited; caused to be delivered] through the United States mail, a communication; and

2. The communication contained a threat [to injure the [property; reputation of the [addressee; another]] [injure the reputation of a deceased person] [to accuse [the addressee; any other person] of a crime]];

3. The defendant transmitted the communication for the purpose of extorting [money; a thing of value] from any person.

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

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

Committee Comment

In the third element, the mental state is described as intent to extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(d)), the Supreme Court described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.")

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) (which similarly bars extortionate threats as § 875(d) does) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case)." Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

If the Government alleged that the communication was addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, that charging language must be specified in the instruction.

DEFINITION OF "TRUE THREAT"

A "true threat" is a serious expression of intent to commit unlawful physical violence against another person or a group of people. The communication must be one that a reasonable observer, considering the context and circumstances of the statement, including surrounding communications, would interpret as a true threat.

The government does not have to prove that the defendant actually intended to carry out the threat, or even that the defendant had the capacity to do so. At the same time lack of intent or lack of capacity to carry out the threat can be relevant circumstances in deciding whether a communication is a true threat.

A threat does not need to be communicated directly to its intended victim, or specify a particular victim, or specify when it will be carried out.

A communication is not a true threat if it is merely idle or careless talk, exaggeration, or something said in a joking manner.

[A threat may be conditional, that is, may threaten violence if some condition is not fulfilled. The fact that a communication is conditional, however, can be relevant in deciding whether a communication is a true threat.]

Committee Comment

The definition of true threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.")

The language regarding "true threats" was approved post *Elonis* in *United States v. Khan,* 937 F.3d 1042, 1051 (7th Cir. 2019). In *Khan,* the Court, reviewed instructions given when the defendant was charged under 18 U.S.C. 875(c). It held that a "true threat" is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). And "[a]true threat does not require that the speaker intend to carry it out, or even that she have the capacity to do so." *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017) (citations omitted); *Khan*, 937 F.3d at 1051.

The instruction on idle or carless talk, exaggeration, or joking is based on *Khan*, 937 F.3d at 1051 ("A communication is not a true threat if

it is merely idle or careless talk, exaggeration, or something said in a joking manner.")

The bracketed instruction on conditional threats is based on *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). *Schneider* explained that many threats are conditional (because the speaker is trying to get the victim to do something or to stop doing something), as in "Your money or your life." *Id.*

DEFINITION OF "INTENT TO EXTORT"

A person acts with an "intent to extort" when he acts with the purpose of obtaining money or something of value from someone who consents because of fear or the wrongful use of actual or threatened force or violence.

18 U.S.C. § 912 IMPERSONATION OF AN OFFICER OR EMPLOYEE OF THE UNITED STATES

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] falsely assuming or pretending to be a United States officer or employee. In order for you to find [the; a] defendant guilty of this charge, the government must prove [all of] the following elements beyond a reasonable doubt:

1. The defendant falsely impersonated or pretended to be an [officer or employee] acting under the authority of [the United States, or [name of department, agency or officer thereof]]; and

2. The defendant did so knowing that he was not actually an [officer or employee] acting under the authority of [the United States, or [name of department, agency or officer thereof]]; and

3. While doing so, the defendant committed an act, with the intent to cause [the victim] [to do something [he; she] otherwise would not have done; not to do something [he; she] otherwise would have done].

[OR]

[3. While doing so, the defendant [demanded; obtained] [money; a paper; a document; a thing of value].]

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

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

Committee Comment

The instruction regarding the first element may be modified to include the specific agency, department, or officer under which authority the defendant claimed to be acting.

As to the second element, the Seventh Circuit has read into § 912 a scienter requirement that the defendant's falsehoods as to being an officer or employee of the United States be made with "knowledge." *United States v. Wade*, 962 F.3d 1004, 1011 (7th Cir. 2020); *United States v. Bonin*, 932 F.3d 523, 538–39 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 960 (2020). For a definition of "knowingly," *see* Pattern Instruction 4.10.

As to the third element, § 912 creates two separate offenses: "1) the false impersonation of a federal official coupled with an overt act in conformity with the pretense (offense 1); and, 2) the false impersonation of a federal official coupled with the demanding or obtaining of an item of value (offense 2)." *United States v. Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985) (concluding nonetheless that charging both in the same count was duplicitous, but harmless error in that case); see also *United States v. Rippee*, 961 F.2d 677, 678 (7th Cir. 1992). If the defendant is charged with "offense 2," the above bracketed option should be substituted for the third element.

For "offense 1," the Seventh Circuit has concluded that, while it is not essential to have a separate element as to an intent to deceive or defraud, it would be helpful to the jury for the instruction to require intentional action sought to cause the deceived person to follow some course they would not have otherwise, so as to not unconstitutionally abridge protected speech. *Wade*, 962 F.3d at 1009-11, citing *Bonin*, 932 F.3d at 536. This concept has been incorporated into this instruction. Cf. *id.* at 539 (an element telling jurors that the defendant's acts must actually *have caused* someone to change their behavior is not required by the statute).

The Seventh Circuit has rejected challenges to the constitutionality of § 912's "acts-as-such clause" ("offense 1"), and opined that an instruction regarding the First Amendment "on a constitutionally

valid statute risk[ed] confusion" and was unnecessary. *Id.* at 533–37, 540.

18 U.S.C. § 922(g)(1) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY A PROHIBITED PERSON—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] unlawful [possession; receipt] of [a firearm; ammunition] by a ~~[Prohibited Person].~~person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; received] [a firearm; ammunition];

2. At the time of the charged act, the defendant ~~was~~had previously been convicted in a ~~[Prohibited Person];~~court of a crime punishable by imprisonment for a term exceeding one year;

3. At the time of the [possession; receipt], the defendant ~~[knowledge requirement for the defendant's alleged prohibited status];~~knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year; and

4. [[The [firearm; ammunition] had been shipped or transported in interstate or foreign commerce before the defendant received it.]; [The defendant's possession of the [firearm; ammunition] was in or affected commerce.]]

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

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

Committee Comment

~~The term "Prohibited Person" is used in this instruction in the same way that it is used in the elements instruction for 18 U.S.C. § 922(d). The Committee Comment associated with that instruction also applies to the use of that term in this instruction. The bracketed phrase "was a Prohibited Person" found in element 2 should be replaced with a phrase describing the nature of the prohibition. Suggested language for that description may be found below.~~

For a definition of "knowingly" see Pattern Instruction 4.10.

This instruction applies to a § 922(g)(1) offense. Instructions are also provided for §§ (g)(3)(unlawful user or addict of a controlled substance) and (g)(5)(alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191~~, 2200~~ (2019), the Supreme Court held that ~~"in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2),~~ the government must prove ~~both~~ that ~~the~~a defendant knew he or she possessed ~~a firearm~~the firearm and knew that he ~~knew he~~or she belonged to the relevant category of persons barred from ~~possessing a firearm." Although *Rehaif* specifically concerned § 922(g)(5), which prohibits an "alien" from possessing a firearm or ammunition, the Court expressed its holding as applying to § 922(g) – without specifying a subparagraph – and as applying to "the relevant category of persons" – not just an alien under § 922(g)(5). In light of *Rehaif*, it is the Committee's view, that in any prosecution under § 922(g), the trial judge must include the~~possessing a firearm. This knowledge ~~requirement as to the defendant's status in the "relevant category" of persons.~~

~~Having said that, questions may well arise as to whether the knowledge element~~requirement applies to ~~every aspect of the definitions and clauses in § 922(g)'s subparagraphs. In responding to the dissent's questions on that point, the Supreme Court stated, "We express no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here.~~a prosecution under any subsection of § 922(g). *See ~~post~~*, ~~at 2207-08 (ALITO, J., dissenting) (discussing other statuses listed in § 922(g) not at issue here)." 139 S. Ct. at 2200.~~

~~Though the full meaning of knowledge requirements following *Rehaif* is unclear, the Committee believes that *Rehaif* applies in a straightforward manner to some frequently charged subsections of the statute and makes the following suggestions for knowledge requirements:~~

~~1. Subsection (g)(1):~~

- ~~*United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had previously been convicted in a court of for a term exceeding one year; and~~

- ~~knew that he had been convicted of aof a misdemeanor crime punishable by imprisonment for more than one year.~~

~~2. Subsection (g)(5)(A):~~

- ~~was an alien;~~

of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020).

18 U.S.C. § 922(g)(1) UNLAWFUL SHIPMENT OR TRANSPORTATION OF A FIREARM OR AMMUNITION BY A ~~PROHIBITED PERSON~~CONVICTED FELON— ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] unlawful [shipment; transportation] of [a firearm; ammunition] by a ~~[Prohibited Person].~~person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. In order for you to find [the; a] defendant guilty of this charge, the government must prove ~~both~~each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [shipped; transported] [a firearm; ammunition] in interstate or foreign commerce; ~~and~~

2. At the time of the charged act, the defendant ~~was~~had previously been convicted in a ~~[Prohibited Person].~~court of a crime punishable by imprisonment for a term exceeding one year; and

3. At the time of the [shipment; transport], the defendant knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

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

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

Committee Comment

~~The term "Prohibited Person" is used in this instruction in the same way that it is used in the elements instruction for 18 U.S.C.~~

~~§ 922(d) (*i.e.* as a placeholder) and the Committee Comment associated with that instruction also applies to the use of that term in this instruction.~~

For a definition of "knowingly" see Pattern Instruction 4.10. ~~Section~~

This instruction applies to a § 922(~~d~~g)(1) ~~requires only that the defendant know that the~~offense. Instructions are also provided for §§ (g)(3)(unlawful user or addict of a controlled substance) and (g)(5)(alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

~~firearm recipient is a felon; it does not require knowledge of what crime he previously had been convicted. *United States v. Haskins*, 511 F.3d 688, 692 (7th Cir. 2007).~~

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). *See United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020).

18 U.S.C. § 922(g)(3) DEFINITION OF "UNLAWFUL USER"

The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that defendant used a controlled substance at the precise time he [shipped; transported; possessed] a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was [shipped; transported; possessed].

Committee Comment

The definition of "unlawful user" is taken from Sixth Circuit Pattern Criminal Jury Instructions 12.01, cited in *United States v. Cook*, 970 F.3d 866, 880 (7th Cir. 2020). "Past, regular use would not qualify as ongoing use if it has come to a definitive end before one possesses a gun, for example, and likewise current but isolated use (perhaps only when offered at the occasional social gathering) likewise would not count as regular use." *Id.* at 884. Use must be regular or habitual and contemporaneous with the prohibited act. *Id.* at 879.

18 U.S.C. § 922(g)(3) UNLAWFUL SHIPMENT OR TRANSPORTATION OF A FIREARM OR AMMUNITION BY AN UNLAWFUL USER OR ADDICT OF A CONTROLLED SUBSTANCE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] unlawful [shipment; transportation] of [a firearm; ammunition] by a person who is an unlawful user of or addicted to a controlled substance. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [shipped; transported] [a firearm; ammunition] in interstate or foreign commerce;

2. At the time of the charged act, the defendant was [an unlawful user of; addicted to] a controlled substance; and

3. At the time of the [shipment; transport], the defendant knew that he was [an unlawful user of; addicted to] a controlled substance.

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

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

Committee Comment

For a definition of "knowingly" see Pattern Instruction 4.10.

This instruction applies to a § 922(g)(3) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(5)(alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This

knowledge requirement applies to a prosecution under any subsection of § 922(g). *See United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020). However, the defendant must know both that he was using a controlled substance and that his use was "unlawful," inquiries which may be "tricky" or "nuanced." *United States v. Cook*, 970 F.3d 866, 882-83 (7th Cir. 2020). "That [the defendant] *ought* to have known his use was unlawful would not suffice to convict him; he had to *actually know* his use was unlawful. *Id.* at 884 (emphasis in original).

In order to convict, the shipment or transportation of the firearm (or ammunition) must be contemporaneous with an ongoing pattern of drug use. *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

18 U.S.C. § 922(g)(3) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY AN UNLAWFUL USER OR ADDICT OF A CONTROLLED SUBSTANCE— ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] unlawful [possession; receipt] of [a firearm; ammunition] by a person who is an unlawful user of or addicted to a controlled substance. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; received] [a firearm; ammunition];

2. At the time of the charged act, the defendant was [an unlawful user of; addicted to] a controlled substance;

4. At the time of the [possession; receipt], the defendant knew that he was [an unlawful user of; addicted to] a controlled substance; and

3. [[The [firearm; ammunition] had been shipped or transported in interstate or foreign commerce before the defendant received it.]; [The defendant's possession of the [firearm; ammunition] was in or affected commerce.]]

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

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

Committee Comment

For a definition of "knowingly" see Pattern Instruction 4.10.

For a definition of "unlawful user" see the pattern instruction regarding that term as used in the unlawful shipment or transportation instruction, 18 U.S.C. § 922(g)(3).

This instruction applies to a § 922(g)(3) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(5)(alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). *See United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020). However, the defendant must know both that he was using a controlled substance and that his use was "unlawful," inquiries which may be "tricky" or "nuanced." *United States v. Cook*, 970 F.3d 866, 882-83 (7th Cir. 2020). "That [the defendant] *ought* to have known his use was unlawful would not suffice to convict him; he had to *actually know* his use was unlawful. *Id.* at 884 (emphasis in original).

In order to convict, the possession of the firearm (or ammunition) must be contemporaneous with an ongoing pattern of drug use. *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

18 U.S.C. § 922(g)(5) DEFINITION OF "ALIEN ILLEGALLY OR UNLAWFULLY IN THE UNITED STATES"

An alien is any person not a citizen or national of the United States. Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant, or parole status. This term includes a person who unlawfully entered the United States without inspection and authorization by immigration; who is not an immigrant and whose authorized period of stay has expired or who has violated the terms of admission; who is under an order of deportation, exclusion or removal, or who is under an order to depart the United States voluntarily.

Committee Comment

Alien is defined at 27 CFR § 478.11.

18 U.S.C. § 922(g)(5) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY AN ALIEN ILLEGALLY OR UNLAWFULLY IN THE UNITED STATES— ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] unlawful [possession; receipt] of [a firearm; ammunition] by an alien illegally or unlawfully in the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; received] [a firearm; ammunition];

2. At the time of the charged act, the defendant was an alien illegally or unlawfully in the United States;

5. At the time of the [possession; receipt], the defendant knew he was an alien illegally or unlawfully in the United States; and

3. [[The [firearm; ammunition] had been shipped or transported in interstate or foreign commerce before the defendant received it.]; [The defendant's possession of the [firearm; ammunition] was in or affected commerce.]]

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

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

Committee Comment

For a definition of "knowingly" see Pattern Instruction 4.10.

For a definition of "alien illegally or unlawfully in the United States" see the pattern instruction regarding that term as used in the unlawful shipment or transportation instruction, 18 U.S.C. § 922(g)(5).

This instruction applies to a § 922(g)(5) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(3)(unlawful user or addict of a controlled substance). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). *See United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020).

18 U.S.C. § 922(g)(5) UNLAWFUL SHIPMENT OR TRANSPORTATION OF A FIREARM OR AMMUNITION BY AN ALIEN ILLEGALLY OR UNLAWFULLY IN THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] unlawful [shipment; transportation] of [a firearm; ammunition] by an alien illegally or unlawfully in the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [shipped; transported] [a firearm; ammunition] in interstate or foreign commerce;

2. At the time of the charged act, the defendant was an alien illegally or unlawfully in the United States; and

3. At the time of the [shipment; transport], the defendant knew he was an alien illegally or unlawfully in the United States.

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

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

Committee Comment

For a definition of "knowingly" see Pattern Instruction 4.10.

This instruction applies to a § 922(g)(5) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(3)(unlawful user or addict of a controlled substance). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the

relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). *See United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020).

18 U.S.C. § 924(c) DEFINITION OF "IN FURTHERANCE OF"

A person possesses a firearm "in furtherance of" ~~of~~ a crime if the firearm furthers, advances, moves forward, promotes or facilitates the crime. The mere presence of a firearm at the scene of a crime is insufficient to establish that the firearm was possessed "in furtherance of" the crime. There must be a ~~some additional~~ connection between the firearm and the crime.

Committee Comment

See *United States v. Huddleston*, 593 F.3d 596, 602 (7th Cir. 2010) ("in furtherance of" prong satisfied where jury could have found that defendant possessed gun to protect himself and his stash and his profits); *United States v. Castillo*, 406 F.3d 806, 814–16 (7th Cir. 2005) (holding evidence was sufficient to establish that defendant possessed shotgun "in furtherance of" underlying drug crime where he strategically placed the shotgun near his cache of drugs to protect himself, his drugs, and his drug trafficking business), *vacated on other grounds*, *Castillo v. United States*, 552 U.S. 1137 (2008).

The Seventh Circuit has acknowledged a non-exhaustive list of factors developed by the Fifth Circuit for use in the determining whether a firearm was possessed "in furtherance of" another crime. The list includes "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." *Castillo*, 406 F.3d at 815 (internal citations omitted); see also *United States v. Seymour*, 519 F.3d 700, 715 (7th Cir. 2008) (applying factors). The Seventh Circuit has advised that "given the fact- intensive nature of the 'in furtherance of' inquiry, the weight, if any, these and other factors should be accorded necessarily will vary from case to case." *Castillo*, 406 F.3d at 815. ~~Courts should craft an instruction addressing the relevant factors based on the evidence in the case on trial.~~ In *United States v. Johnson*, the Seventh Circuit emphasized that courts should strive for "simple and succinct instructions [which] invite the jury to rely on its own intuition and common sense." *United States v. Johnson*, 916 F.3d 579, 585–86 (7th Cir. 2019). Should the court decide to instruct the jury on factors based on the evidence, some of the factors the court may propose include the type of drug activity that is being conducted; accessibility of the firearm; the type of firearm; whether the firearm is loaded; the proximity of the firearm to drugs or drug profits; and the time and circumstances under which the gun is found.

18 U.S.C. § 1001(a)(1).

DEFINITION OF "~~SCHEME" AND "DEVICE~~TRICK, SCHEME, OR DEVICE"

A "trick, scheme, " ~~"~~or ~~"~~device" includes any plan or course of action intended to deceive others.

18 U.S.C. § 1001(a)(1).
CONCEALING A MATERIAL FACT—ELEMENTS

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

1. The defendant [falsified; concealed; covered up] a fact by trick, scheme or device; and

2. The fact was material; and

3. [The defendant had a legal duty to disclose the fact]; and

4~~3~~. The defendant acted knowingly and willfully; and

4~~5~~. The defendant [falsified; concealed; covered up] the material fact in a matter within the jurisdiction of the [executive; legislative; judicial] branch of the government of the United States.

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

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

Committee Comment

See comment to Pattern Instruction 18 U.S.C. § 1001, Making a False Statement or Representation.

On the third element (duty to disclose), see *United States v. Moore*, 446 F.3d 671, 677 (7th Cir. 2006).

18 U.S.C. § 1029(a)(2) TRAFFICKING OR USE OF UNAUTHORIZED ACCESS DEVICES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] —of the indictment charge[s] the defendant[s] with] the [use of; trafficking in ~~attempt to use~~] [an] unauthorized access device[s]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [used; trafficked in] one or more [~~specified~~ unauthorized access devices [as charged in the indictment]; and

2. By such conduct the defendant obtained any [money; good(s); service(s); any other thing of value] with a total value of at least $1,000 during any one year period; and

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

4. The defendant's conduct affected [interstate; foreign] commerce.

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

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

Committee Comment

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the

generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

When the indictment alleges an attempt, Pattern Instruction 4.09 for attempt should also be employed.

18 U.S.C. § 1029(a)(3) POSSESSION OF MULTIPLE UNAUTHORIZED OR COUNTERFEIT ACCESS DEVICES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] possession of multiple access devices with intent to defraud. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [~~four~~ *three*] following elements beyond a reasonable doubt:

1. The defendant knowingly possessed fifteen or more [unauthorized; counterfeit] access devices; and

~~2. Those devices were [counterfeit; unauthorized]; and~~

2~~3~~. The defendant possessed those devices with the intent to defraud; and

3~~4~~. The defendant's conduct affected [interstate; foreign] commerce.

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

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

Committee Comment

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is a dispute over whether the device at issue qualifies as an "access device."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

When the indictment alleges an attempt, Pattern Instruction 4.09 for attempt should also be employed.

18 U.S.C. § 1029(a)(10) ~~FRAUDULENT PRESENTATION OF EVIDENCE OF PAYMENT BY ACCESS DEVICE~~ FRAUDULENT PRESENTATION OF EVIDENCE OF CREDIT CARD TRANSACTION TO CLAIM UNAUTHORIZED PAYMENT ~~FRAUD~~ — ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] fraud involving [a] claim[s] for unauthorized payment[s] of [a] credit card transaction[s] ~~— fraud involving credit card payments~~. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [arranged for; caused] another person to present, for payment to a credit card system [member; agent], one or more [records; evidences] of transactions made by an access device [as described in the indictment]; and

2. The defendant was not authorized by the credit card system [member; agent] to [arrange; cause] such a claim for payment; and

3. The defendant acted with the intent to defraud; and

4. The defendant's conduct affected [interstate; foreign] commerce.

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

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

Committee Comment

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee also recommends that, if there is agreement on the issue, the court name the bank or other institution rather than using the generic term "credit card system member."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 1030(e)(2) DEFINITION OF "PROTECTED COMPUTER"

"Protected computer" means a computer that is [e~~E~~xclusively for the use of a financial institution or the United States government]~~. The term also includes computers~~ [not exclusively for ~~such use~~the use of, used by or for a financial institution or the United States government when the defendant's conduct affects the use of the computer by or for the financial institution or the government]~~. Finally, t~~[~~he term "protected computer" also includes~~[[~~computers which are~~ used in or affecting interstate or foreign commerce or communication, even if the computer is located outside of the United States~~.~~] [part of a voting system and is used for the management, support, or administration of a Federal election].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(2), (4), (5) and (7).

In 2018, 18 U.S.C. § 1030(e)(2) was amended to add § 1030(e)(2)(C), which expanded the definition of "protected computer" to include one that is part of a voting system for a Federal election. If the case involves a voting system, the definition of "voting system" and "Federal election" should be included as found in 18 U.S.C. § 1030(e)(13) and (14).

18 U.S.C. § 1030(e)(13) – DEFINITION OF "FEDERAL ELECTION"

The term "Federal election" is an election for the office of President, Vice President, Senator, or Congressional Representative, or Delegate or Resident Commissioner to Congress.

The term "election" includes:

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; or

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

Committee Comment

18 U.S.C. § 1030(e)(13) adopts this definition from section 301(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(1) and (3).

18 U.S.C. § 1030(e)(14) – DEFINITION OF "VOTING SYSTEM"

The term "voting system" means—

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used—

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

Committee Comment

18 U.S.C. § 1030(e)(14) adopts this definition from section 301(b) of the Help America Vote Act of 2002 (52 U.S.C. 21081(b)).

18 U.S.C. § 1035. FALSE STATEMENTS RELATED TO HEALTH CARE MATTERS: FALSIFICATION AND CONCEALMENT—ELEMENTS

[The indictment charges the defendant[s] with; Counts – of the indictment charge[s] the defendant[s] with] making a false statement in a matter involving a health care benefits program. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [threefour] following elements beyond a reasonable doubt:

1. The defendant [falsified; concealed; covered up by any trick, scheme or device] a material fact in a matter involving a health care benefit program;

2

2. The fact was material;

3. The defendant did so knowingly and willfully; and

34. The defendant did so in connection with the delivery of or payment for health care benefits, items or services.

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

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

Committee Comment

This instruction is modeled on the general false statements instruction under 18 U.S.C. § 1001.

18 U.S.C. § 1112 DEFINITIONS OF MANSLAUGHTER

Malice marks the boundary that separates the crimes of murder and manslaughter.

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary Manslaughter is the intentional unlawful killing of a human being without malice and upon a sudden quarrel or in the heat of passion.

Involuntary Manslaughter is the unlawful killing of a human being [in the commission of an unlawful act not amounting to a felony] [in the commission [in an unlawful manner] [without due caution and circumspection] of a lawful act which might produce death].

18 U.S.C. § 1112 DEFINITIONS

The following definitions may be relevant to a determination of whether the crime of manslaughter is voluntary manslaughter or involuntary manslaughter:

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

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

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

Committee Comment

The definition provided in the instruction is the same as the pattern instruction for "assault" as used in the bank robbery statute, 18 U.S.C. § 2113(d). See, e.g., *United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996); *United States v. Woody*, 55 F.3d 1257, 1265–66 (7th Cir. 1995); *United States v. Rizzo*, 409 F.2d 400, 402–03 (7th Cir. 1969).

The definition provided in the instruction is the same as the pattern instruction for "dangerous weapon or device" as used in the bank robbery statute, 18 U.S.C. § 2113(d).

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

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

18 U.S.C. § 1201(a)(1) KIDNAPPING—DEFINITION OF INTERSTATE OR FOREIGN COMMERCE

"Interstate commerce" means commerce between different states, territories, and possessions of the United States, including the District of Columbia.

"Foreign commerce" as used above means commerce between any state, territory, or possession of the United States and a foreign country.

"Commerce" include, among other things, travel, trade, transportation, and communication.

Committee Comment

These definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are modified here to consolidate and harmonize various definitions of those terms.

The Government need not prove that the defendant knew he was transporting the victim in interstate [foreign] commerce, only that he did. See *United States v. Hattaway*, 740 F.2d 1419, 1427 (7th Cir. 1984) (interstate transportation requirement for Mann Act violation "is an element of federal jurisdiction and not part of the knowledge requirement for a Mann Act conviction") (citing *United States v. Bankston*, 603 F.2d 528, 532 (5th Cir. 1979) (a conviction under 18 U.S.C. § 1201 "does not require that an offender know that he is crossing state lines [with victim]")).

18 U.S.C. § 1201(a)(1) KIDNAPPING—
DEFINITION OF INVEIGLE OR DECOY

To inveigle or decoy a person means to lure, or entice, or lead the person astray by false representations or promises, or other deceitful means.

Committee Comment

See *United States v. Macklin*, 671 F.2d 60, 64 (2d Cir. 1982) ("'Inveigle' means to entice, lure or lead astray, by false representations or promises, or by other deceitful means. 'Decoy' means enticement or luring by means of some fraud, trick or temptation").

18 U.S.C. § 1201(a)(1) KIDNAPPING

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

1. The defendant unlawfully [seized; confined; inveigled; decoyed; kidnapped; abducted; carried away] the victim without [his; her] consent; and

2. [The defendant intentionally transported the victim across state lines] [the defendant [traveled in [interstate; foreign] commerce] [used the mail [in committing; in furtherance of] the offense] [used any [means; facility; instrumentality] of [interstate; foreign] commerce in [committing; furtherance of committing] the offense].

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

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

Committee Comment

The government does not have to prove that the kidnapping was committed for ransom or personal financial gain. *See United States v. Healy*, 376 U.S. 75, 82 (1964) (holding a kidnapping does not have to be for pecuniary or illegal benefit). Moreover, "purpose is not an element of the offense of kidnapping and need not be charged or proven to support a conviction." *United States v. Atchison*, 524 F.2d 367, 371 (7th Cir. 1975).

The victim's lack of consent is necessary to establish the crime because it is the "involuntariness of the seizure and detention" that is "the very essence of the crime of kidnapping." *Chatwin v. United States*, 326 U.S. 455, 464 (1946). If the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement must be

against the will of the parents or legal guardian of the victim. *Id.* at 460. *See also United States v. Eason*, 854 F.3d 922 (7th Cir. 2017).

The fact that the victim may have initially voluntarily accompanied the defendant does not negate the existence of a later kidnapping. *United States v. Redmond*, 803 F.2d 438, 439 (9th Cir. 1986).

The Government need not prove that the defendant knew he was transporting the victim in interstate [foreign] commerce, only that he did. *See United States v. Hattaway*, 740 F.2d 1419, 1427 (7th Cir. 1984) (interstate transportation requirement for Mann Act violation "is an element of federal jurisdiction and not part of the knowledge requirement for a Mann Act conviction") (citing *United States v. Bankston*, 603 F.2d 528, 532 (5th Cir. 1979) (a conviction under 18 U.S.C. § 1201 "does not require that an offender know that he is crossing state lines [with victim]")).

18 U.S.C. § 1347(a)~~.~~ DEFINITION OF ~~"~~"HEALTH CARE BENEFIT PROGRAM~~"~~"

A ~~"~~"health care benefit program~~"~~" is ~~any~~a [public; private] [plan; contract], affecting commerce, under which any medical benefit, item~~,~~ or service is provided to any individual~~,~~ and includes any individual or entity who is providing a medical benefit, item~~,~~ or service for which payment may be made under the plan or contract.

A health care program affects commerce if the health care program had any ~~degree of~~ impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States]. The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to some degree. The government need not prove that [the; a] defendant engaged in interstate commerce or that the acts of [the; a] defendant affected interstate commerce.

Committee Comment

~~A health~~"Health care benefit program" is defined in 18 U.S.C. § 24~~ for purposes of the federal health care offenses, including §1347. The first sentence of this instruction is the definition of health care benefit program in 18 U.S.C. § 24. The remainder of the instruction addresses "affecting commerce" which is an element of proof in cases where 18 U.S.C. § 24 is at issue. Courts have interpreted "~~(b). "Affecting commerce" means affecting~~ ~~commerce" under § 24 as requiring an~~ interstate commerce ~~effect. United States v. Klein, 543 F.3d 206, 211 (5th Cir. 2008);~~under 18 U.S.C. § 24(b). See *United States v. ~~Lucien~~Natale*, ~~71~~719 F.~~ App'x 141 (2d. Cir. 2003); see also United States v. Whited, 311 F.3d 259~~3d 719, 732 n.5 (~~3d~~7th Cir. ~~2002) (interpreting health care benefit program under 18 U.S.C. §669~~2013). The court may also find it appropriate to adapt for health care offenses the RICO Pattern Instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce.

18 U.S.C. § ~~1347(1).~~1347(a)(1) HEALTH CARE FRAUD—ELEMENTS

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

1. There was a scheme to defraud a health care benefit program, as charged in the indictment; and

2. The defendant knowingly ~~and willfully~~ [carried out; attempted to carry out] the scheme; and

3. The defendant ~~acted~~willfully [carried out; attempted to carry out] the scheme, which means to act with the intent to defraud the health care benefit program; and

4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and

5. The scheme was in connection with the delivery of or payment for [health care benefits; health care items; health care services].

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

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

Committee Comment

In *Loughrin v. United States*, 573 U.S. 351 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. The bank fraud statute is almost identical to the health care fraud statute. Accordingly, the Committee has divided the previously unified instruction for this statute, which is structured similarly to the bank fraud statute, into two separate instructions. See the Committee Comment to the Pattern Instructions related to § 1347(a)(2) for further discussions of this issue.

Willfulness: For mens rea, § 1347(a) uses both "knowingly" and "willfully." In *United States v. Schaul*, the Seventh Circuit held that "knowingly" and "willfully"

have separate meanings and must be proven in the conjunctive. 962 F.3d 917, 924 (7th Cir. 2020). The Seventh Circuit further held that the defendant in that case acted willfully because he had an intent to defraud. *Id.* at 925. In light of *Schaul*, the Committee has listed "knowingly" and "willfully" as separate elements. Further, the Seventh Circuit in *Schaul* equated the definition of "willfully" in § 1347 with "intent to defraud," which was already considered an element of § 1347. Thus, "willfully" and "intent to defraud" have been listed as a single element. See the Committee Comment explaining Intent to Defraud for further discussions of this definition.

~~Willfulness: For the mens rea element, § 1347(a) uses both "knowingly" and "willfully." No Seventh Circuit case has definitively defined the meaning of those terms in the context of this statute, including the issue of whether "willfully" requires that the defendant know he is violating the law.~~ In *United States v. Awad*, 551 F.3d 930, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must prove that the defendant acted with knowledge that his conduct was unlawful. But in 2010, after *Awad* was decided, Congress amended § 1347 and added, in what is now § 1347(b), that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether it is strictly limited to "this section," meaning specifically § 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, § 1347 prosecutions are sometimes premised on representations that are deemed to be false due to a federal regulation, and it is also an open question whether a defendant must know that he is violating the regulation.

~~Litigants and trial courts might find it useful to refer to United States v. Wheeler, 540 F.3d 683 (7th Cir. 2008), which lays out competing considerations on the meaning of "willfully." In *Wheeler*, the Seventh Circuit considered this issue under a plain error standard in the context of another health care offense, § 669, and concluded that "there is a plausible argument that the use of 'knowingly and willfully' in § 669 may require that a defendant know his conduct was in some way unlawful." In discussing the meaning of willfully, the *Wheeler* court noted that § 669 does not involve the complex statutory scheme at issue in tax or structuring crimes which require a defendant to violate a known legal duty. However, the *Wheeler* court reasoned that there is also some support for the argument that "willfully" means more than acting intentionally when it is used conjunctively with "knowingly."~~

~~The Committee suggests that, if the District Court decides that the two terms have the same meaning, it should define "knowingly and willfully" in one instruction, using the Pattern Instruction for "knowingly." But if the Court instead concludes that the two terms have different meanings, the court should define both terms in separate instructions. It may also be useful to refer to the instructions on 18 U.S.C. § 1001, which also uses the term "knowingly and willfully."~~

Intent to Defraud: The third element requires the government to prove that there was a "specific intent to deceive or defraud." See *United States v. Natale*, 719 F.3d 719, 741-42 (7th Cir. 2013) ("intent to defraud requires a specific intent to

deceive or mislead"”), (citing *Awad*, 551 F.3d at 940 (""“intent to defraud" [is] defined as "an intent to deceive or cheat""”)); *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008) (in a § 1347 prosecution jury instructions defined intent to defraud to mean that "“the acts charged were done knowingly and with the intent to do deceive or cheat the victims"”); *United States v. White*, 492 F.3d 380, 393-94 (6th Cir. 2007) ("“the government must prove the defendant's "specific intent to deceive or defraud""”). As noted above, effective on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148, Title VI, § 10606(b), added § 1347(b), which provides that "“a person need not have actual knowledge of this section or specific intent to commit a violation of this section."”

Just as the interpretation of Section 1347(b) remains open on the issue of willfulness (see the discussion above), no Seventh Circuit decision has interpreted this section for purposes of the specific-intent element.

Materiality: With regard to the fourth element, in *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined at 18 U.S.C. § 1344. Following *Neder*, "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); see also *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). ~~Although the~~The Seventh Circuit ~~has not yet~~ addressed the application of *Neder* to § 1344(1) ~~or~~ in ~~the context of the health care fraud statute, specifically, the~~*United States v. LeBeau*, 949 F.3d 334 (7th Cir. 2020), cert. denied, 19-1424, 2020 WL 5882354 (U.S. Oct. 5, 2020). In *LeBeau*, the Seventh Circuit acknowledged its recent holding that the materiality element was required only when section 1344(2) was charged in *United States v. Ajayi*, 808 F.3d 1113, 1119 (7th Cir. 2015), and concluded that "[t]he better course, consistent with *Neder*, is to require the materiality instruction on all bank-fraud charges, whether brought under section 1344(1) or (2). The government has informed us that this is its current practice, and we encourage that practice to continue until such time as we receive greater clarity from the Supreme Court about what is required." *LeBeau*, 949 F.3d at 342. The Ninth Circuit, in *United States v. Omer*, 395 F.3d 1087 (9th Cir. 2005), has similarly held that materiality is an element of a § 1344(1) violation under *Neder*. In light of *LeBeau* and the general admonitions in *Neder* and in *Reynolds*, as well as the similarity of the bank fraud statute to the health care fraud statute, this instruction has been modified to reflect this requirement. Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporate the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information.

The jury instruction defining Health Care Benefit Program and Interstate Commerce should be given in conjunction with this instruction.

18 U.S.C. § 1347(a)(2). OBTAINING PROPERTY FROM A HEALTH CARE BENEFIT PROGRAM BY FALSE OR FRAUDULENT PRETENSES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] scheming to obtain [money; property] belonging to a health care benefit program by false or fraudulent pretenses or misrepresentations. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following five elements beyond a reasonable doubt:

1. There was a scheme to obtain the [money; property] that [was; were] [owned by; in the [care; custody; control] of] a health care benefit program by means of false or fraudulent pretenses, representations, or promises, as charged in the indictment; and

2. The defendant knowingly and willfully [carried out; attempted to carry out] the scheme; and

3. The defendant actedwillfully [carried out; attempted to carry out] the scheme, which means to act with the intent to defraud; and

4. The scheme involved a materially false or fraudulent, pretense, representation, or promise; and

5. The scheme was in connection with the delivery of or payment for [health care benefits; health care items; health care services].

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

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

Committee Comment

In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that language in the mail fraud statute, 18 U.S.C. § 1341, "sets forth just one offense, using the mail to advance a scheme to defraud." But in *Loughrin v. United States*, 573 U.S. 351 (2014), the Court held that different language in the bank fraud statute, 18 U.S.C. § 1344—language that is almost identical to that used in § 1347(a)—gives rise to two theories of liability, and that the Government need not prove that a defendant charged under § 1344(2) intended to defraud the financial institution that

owned or had custody or control over the money or property that was the object of the scheme.

This separate instruction for § 1347(a)(2) reflects that holding. (For further discussion of this issue, see the Committee Comments to the Elements and Scheme Pattern Instructions for § 1344(2).) Although the Supreme Court has not yet applied *Loughrin* to § 1347(a), that statute is constructed almost identically to § 1344. See *United States v. Hickman*, 331 F.3d 439, 445-46 (5th Cir. 2003) (language and structure of the health care fraud statute indicates that Congress patterned it after the bank fraud statute); *United States v. Awad*, 551 F.3d 930 (9th Cir. 2008) (agreeing with *Hickman*'s view that the health care fraud statute provides two theories of liability). For those reasons the Committee has concluded that, like the bank fraud statute, § 1347(a) sets forth two theories of liability. It is important to note, though, that the *Loughrin* Court supported its holding that the bank fraud statute described two theories of liability in part by noting that, at the time the bank fraud statute was enacted, the two clauses of the mail fraud statute had been construed independently by the courts. The health care fraud statute, though, was enacted after *McNally* was decided and after the Court had limited the mail fraud statute to a single theory of liability.

Willfulness: For ~~the~~ mens rea ~~element~~, § 1347(a) uses both "knowingly" and "willfully." ~~No~~ In *United States v. Schaul*, the Seventh Circuit ~~case has definitively defined the meaning of those terms in the context of this statute, including the issue of whether "willfully" requires that the defendant know he is violating the law.~~ held that "knowingly" and "willfully" have separate meanings and must be proven in the conjunctive. 962 F.3d 917, 924 (7th Cir. 2020). The Seventh Circuit further held that the defendant in that case acted willfully because he had an intent to defraud. *Id.* at 925. In light of *Schaul*, the Committee has listed "knowingly" and "willfully" as separate elements. Further, while open to some interpretation, the Seventh Circuit in *Schaul* equated the definition of "willfully" in § 1347 with "intent to defraud," which was already considered an element of § 1347. Thus, "willfully" and "intent to defraud" have been listed as a single element. See the Committee Comment explaining Intent to Defraud for further discussions of this definition.

In *United States v. Awad*, 551 F.3d ~~at~~933, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must prove that the defendant acted with knowledge that his conduct was unlawful. But in 2010, after *Awad* was decided, Congress amended § 1347 and added, in § 1347(b), that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." 18 U.S.C. 1347(b). No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether it is strictly limited to "this section," meaning specifically Section 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, § 1347 prosecutions are

sometimes premised on representations that are deemed to be false due to a federal regulation, and it is also an open question whether a defendant must know that he is violating the regulation.

~~Litigants and trial courts might find it useful to refer to United States v. Wheeler, 540 F.3d 683 (7th Cir. 2008), which lays out competing considerations on the meaning of "willfully." In *Wheeler*, the Seventh Circuit considered this issue under a plain error standard in the context of another health care offense, § 669, and concluded that "there is a plausible argument that the use of 'knowingly and willfully' in § 669 may require that a defendant know his conduct was in some way unlawful." In discussing the meaning of willfully, the *Wheeler* court noted that § 669 does not involve the complex statutory scheme at issue in tax or structuring crimes which require a defendant to violate a known legal duty. However, the Wheeler court reasoned that there is also some support for the argument that "willfully" means more than acting intentionally when it is used conjunctively with "knowingly."~~

~~The Committee suggests that, if the District Court decides that the two terms have the same meaning, it should define "knowingly and willfully" in one instruction, using the Pattern Instruction for "knowingly." But if the Court instead concludes that the two terms have different meanings, the court should define both terms in separate instructions. It may also be useful to refer to the instructions on 18 U.S.C. § 1001, which also uses the term "knowingly and willfully."~~

Intent to Defraud: Although this instruction reflects the holding in *Loughrin* that a § 1344(2) violation does not require proof of intent to defraud the financial institution that owns or holds the subject money or property, it does, like the Pattern Instruction for § 1344(2), retain "intent to defraud" as an element. It has been suggested that § 1344(2), which does not itself mention "fraud" or "defraud" or "intent to defraud"—but that still requires proof of a "scheme or artifice"—does not require proof of intent to defraud at all. While this argument may have merit, no federal appellate court has yet addressed it. The Committee also notes that the pattern instructions of other Circuits are not unanimous on the issue. For example, the Eighth and Ninth Circuits, like this Committee, continue to include a requirement of proof of intent to defraud in § 1344(2) cases, even after *Loughrin*. See Eighth Circuit Pattern Criminal Jury Instruction 6.18.1344; Ninth Circuit Pattern Criminal Jury Instruction 8.127. So do pattern instructions used in the Fourth Circuit, see E.W. Ruschky, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina 366* (2019 ed.), available at http://www.scd.uscourts.gov/pji/patternjuryinstructions.pdf. But the Third and Fifth Circuits' pattern instructions leave out "intent to defraud," citing *Loughrin*. See Third Circuit Pattern Criminal Jury Instruction 6.18.1344; Fifth Circuit Pattern Criminal Jury Instruction 2.58B. While the Committee believes the Pattern Instruction should remain as it is in the absence of guiding Seventh Circuit case law, it flags the issue for litigants.

Materiality: In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined in 18 U.S.C. § 1344. Following *Neder*, "district courts should include materiality in the jury instructions

for section 1344."" *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); *United States v. LeBeau*, 949 F.3d 334, 342 (7th Cir. 2020), cert. denied, 19-1424, 2020 WL 5882354 (U.S. Oct. 5, 2020) ("The better course, consistent with *Neder*, is to require the materiality instruction on all bank-fraud charges, whether brought under section 1344(1) or (2)."); see also *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). In keeping with the similarity between section 1344 and section 1347, the fourth element of this instruction includes materiality.

The jury instruction defining ""Health Care Benefit Program"" under 18 U.S.C. § 1347(a) should be given in conjunction with this instruction.

18 U.S.C. § 1462

IMPORTING OR TRANSPORTING OBSCENE MATERIAL— ELEMENTS

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

1. The defendant knowingly used [any express company; other common carrier; interactive computer service] to transport [name the material charged in the indictment] in interstate or foreign commerce; and

2. The defendant knew the content, character ~~or~~, and nature of [name the material charged in the indictment] at the time of such use; and

3. [Name the material charged in the indictment] was obscene.

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

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

Committee Comment

With regard to the requisite level of knowledge, the Supreme Court has held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S. 87, 122-24 (1974) (the defendant must have knowledge of the contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230-31 (4th Cir. 2011) (knowledge of content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definiton of Interstate or Foreign Commerce, below, which consolidates and harmonizes various definitons of those terms.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1462.

TAKING OR RECEIVING OBSCENE MATERIAL—ELEMENTS

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

1. The defendant knowingly took or received [name the material charged in the indictment] from [any express company; other common carrier; interactive computer service]; and

2. The defendant knew the content, character ~~or~~and nature of [the material charged in the indictment] at the time it was [taken; received]; and

3. [The material charged in the indictment] was obscene.

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

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

Committee Comment

With regard to the requisite level of knowledge, the Supreme Court has held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S. 87, 122-24 (1974) (the defendant must have knowledge of the contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230-31 (4th Cir. 2011) (knowledge of content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

"Obscene" is defined in Pattern Instruction 18 U.S.C. §~~1030(e)(1).~~1470.

18 U.S.C. § 1465.

PRODUCTION WITH INTENT TO TRANSPORT/DISTRIBUTE/TRANSMIT OBSCENE MATERIAL FOR SALE OR DISTRIBUTION—ELEMENTS

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

1. The defendant knowingly used [any express company] [other common carrier] [interactive computer service] to [transport; distribute; transmit] [name the material charged in the indictment] in interstate or foreign commerce; and

2. The defendant knowingly produced the materials with the intent to [transport; distribute; transmit] them; and

3. The defendant knew of the content, character and nature of [name the material charged in the indictment] at the time of production; and

4. [Name the material charged in the indictment] was obscene.

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

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

Committee Comment

With regard to the requisite level of knowledge, the Supreme Court has held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S. 87, 122-24 (1974) (the defendant must have knowledge of the contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230-31 (4th Cir. 2011) (knowledge of content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate

or Foreign Commerce, below, which consolidates and harmonizes various definitions of those terms.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1470.
DEFINITION OF "OBSCENE"

No evidence of what constitutes obscene material has been or needs to be presented. It is up to you to determine whether the material is obscene using the standard in this instruction.

Material is obscene when it meets all three of the following requirements:

1. The average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to the prurient interest. Material appeals to "prurient interest" when it is directed to an unhealthy or abnormally lustful or erotic interest, or to a lascivious or degrading interest, or to a shameful or morbid interest, in [sex; ~~nudity; excretion~~].

2. The average person, applying contemporary adult community standards, would find that the material depicts or describes sexual conduct in ~~a patently~~an obviously offensive way.

3. A reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Before you can find material to be obscene, you must find that it meets all three of these requirements.

You are to apply these requirements from the standpoint of an average adult in the community, namely, the counties in the __ District of __ in which you reside.

You are not to apply these standards from the standpoint of the sender, the recipient, or the intended recipient of the material.

You must also avoid applying subjective personal and privately held views regarding what is obscene. Rather, the standard is that of an average adult applying the collective view of the community as a whole.

Committee Comment

The three-part test for determining whether material is obscene is taken from *Miller v. California*, 413 U.S. 15, 24 (1973) and *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). See also *Smith v. United States*, 431 U.S. 291, 302 (1977) ("community standards ... provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness"); *United States v. Rogers*, 474 F. App'x 463, 467-68 (7th Cir. 2012) (in a prosecution under 18 U.S.C. § 1470, applying the *Miller* test and concluding that, under the facts presented, an image defendant sent to a minor of defendant holding his erect penis met the definition of obscene); see also *United States v. Little*, 365 Fed. App'x 159, 163-64 (11th Cir. 2010).

The definition of "prurient interest" comes from a number of decisions, including *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-07 (1985); *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957); and *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966); see also *Rogers*, 474 F. App'x at 468-69 (defining "prurient interest" as "shameful or morbid").

The definition of the relevant "community" is taken from *Hamling v. United States*,

418 U.S. 87, 104-05 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination ...."). Accord *Smith*, 431 U.S. at 302; see also *United States v. Langford*, 688 F.2d 1088, 1092 (7th Cir. 1982) ("the community whose standards the jury must apply need not be precisely defined").

The admonition to apply the standard of an average person and not particular persons (*e.g.* the sender and recipient, or the juror himself or herself) comes from several Supreme Court decisions. See, *e.g.*, *Miller*, 413 U.S. at 33 ("the primary concern in requiring a jury to apply the standard of the average person, applying contemporary community standards is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one") (internal quotation marks omitted). See also *Pinkus v. United States*, 436 U.S. 293, 300-01 (1978) ("Cautionary instructions to avoid substantive personal and private views in determining community standards can do no more than tell the individual juror that in evaluating the hypothetical 'average' person he is to determine the collective view of the community, as best as it can be done."); *Hamling*, 418 U.S. at 107 (material is not to be judged "on the basis of each juror's personal opinion").

18 U.S.C. § 1503 – Obstruction of Justice –
Clause 2 – Injuring jurors or their property

The defendant has been charged in [Count – of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. (Name) was a [grand][petit][prospective] juror;

2. The defendant intentionally injured (name)'s [person][property];

3. The defendant did so because [*name*] [[was; had been] a juror].

18 U.S.C. § 1503 – Obstruction of Justice –
Clause 3 – Injuring court officials

The defendant has been charged in [Count – of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. (Name) was a [court officer] [magistrate judge];

2. The defendant intentionally injured (name)'s [person][property];

3. The defendant did so because of (name)'s performance of their official duties.

18 U.S.C. § 1503 Definition of "Endeavor"

(1999 versions of 2 separate instructions)

~~The word endeavor describes any effort or act to influence, obstruct, or impede the due administration of justice. The endeavor need not be successful, but it must have at least a reasonable tendency to influence, obstruct, or impede the due administration of justice.~~

~~The word endeavor describes any effort or act to influence [a witness, a juror, an officer in or of any court of the United States]. The endeavor need not be successful, but it must have at least a reasonable tendency to impede the [witness, juror, officer] in the discharge of his duties.~~

(proposed single new version)

A defendant endeavors to influence, obstruct or impede [the due administration of a proceeding] [a [juror][witness][court officer]] if the defendant acts purposefully, with the knowledge or notice that his actions would have the natural and probable effect of wrongfully [obstructing, impeding or interfering with the due administration of the proceeding][obstructing, influencing, intimidating or impeding the [juror][witness][court officer]in the discharge of their duties]. The endeavor need not be successful.

Committee Comment

See *United States v. Aguilar*, 515 U.S. 593, 599 (1995) ("the endeavor must have the natural and probable effect of interfering with the due administration of justice") (internal quotation marks omitted); *United States v. Cueto*, 151 F.3d 620, 634 (7th Cir. 1998) ("acted in a manner that had natural and probable effect of interfering with the lawful function of . . . governmental entities"); *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999) (discussing U.S.S.G. § 3C1.1, not 18 U.S.C. § 1503).

The term "purposefully," which this instruction adopts from the 1999 version, appears to come from *United States v. Machi*, 811 F.2d 991, 998 (7th Cir. 1987), which refers to "knowingly and purposefully undertaking an act, the natural and probable consequence of which is to influence, obstruct, or impede the due administration of justice." Based on a Westlaw search, however, the term "purposefully" does not appear in the same sentence as the term "endeavor!" or the term "obstruct!" in any other Seventh Circuit criminal case. Careful consideration should be given regarding whether to include this term.

The term "reasonable tendency," which appeared in the 1999 version of this instruction, appears to have come from two Seventh Circuit cases: *United States v. Arnold*, 773 F.2d 823, 834 (7th Cir. 1985), and *United States v. Harris*, 558 F.3d 366, 369 (7th Cir. 1977), which *Arnold* quotes. It may originally come from *Nye v. United States*, 313 U.S. 33, 49 (1941), a criminal case involving an almost identically-worded phrase in a predecessor statute. This language, however, does not appear in any post-*Aguilar* obstruction case in the Seventh Circuit. *United States v. Palivos*, 486 F.3d 250, 258 (7th Cir. 2007), quotes a jury instruction using this same phrase (likely derived from the 1999 Pattern Instruction) but does not address its appropriateness. The Committee has eliminated it.

~~A couple of additional notes: the proposed Committee Comment cites the Supreme Court's decision in *Aguilar*, but *Aguilar* was not simply discussing the term "endeavor" in and of itself; it was discussing more generally the required intent under § 1503. Here's the full discussion from the case:~~

> ~~The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. *United States v. Brown,* 688 F.2d 596, 598 (CA9 1982) (citing cases). Some courts have phrased this showing as a "nexus" requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings. *United States v. Wood,* 6 F.3d 692, 696 (CA10 1993); *United States v. Walasek,* 527 F.2d 676, 679, and n. 12 (CA3 1975). In other words, the endeavor must have the "'natural and probable effect' " of interfering with the due administration of justice. *Wood, supra,* at 695; *United States v. Thomas,* 916 F.2d 647, 651 (CA11 1990); *Walasek, supra,* at 679. This is not to say that the defendant's actions need be successful; an "endeavor" suffices. *United States v. Russell,* 255 U.S. 138, 143 (1921). But as in *Pettibone,* if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.~~

~~*Aguilar*, 515 U.S. at 599. On a separate note, it is interesting that in the quoted passage, just after using the phrase "natural and probable effect," *Aguilar* uses (seemingly interchangeably) the phrase "likely to effect," which might be argued to have an at least slightly different meaning. We could have a nice debate about whether "reasonable tendency" requires more than either of these terms, less, or something in between.~~

~~Other circuits' instructions don't provide much help. By way of example, we looked at the Sixth, Eighth, and Ninth. The Sixth has no § 1503 instruction.~~

Eighth Circuit Pattern Instruction 6.18.1503A does not include a separate definition of "endeavor"; it defines the term "corruptly endeavoring" as follows:

> The phrase "corruptly endeavored" means that the defendant voluntarily and intentionally (describe obstructive act) and that in doing so, acted with the intent to [influence (judicial) (grand jury) proceedings so as to benefit himself or another] [subvert or undermine the due administration of justice]. [The endeavor need not have been successful, but it must have had at least a reasonable tendency to impede the [grand] juror in the discharge of his duties.]

Ninth Circuit Pattern Instructions 8.129 through 8.131 take a simpler approach, replacing the word "endeavored" with the word "tried." Along similar lines, *United States v. Fassnacht*, No. 01 CR 63, 2002 WL 1727388 (N.D. Ill. July 24, 2002), defines "endeavor" as "any effort or assay to obstruct justice," *id.* at *4 (quoting *United States v. Barfield*, 999 F.2d 1520, 523 (11th Cir. 1993)), and says that the term "denotes a lesser threshold of purposeful activity than 'attempt.'" *Id.*

18 U.S.C. § 1503
(Influencing ~~or Injuring~~ Court Officer-Elements)

~~To sustain the charge of obstruction of justice, the government must prove the following propositions:~~ The defendant has been charged in [Count – of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. ~~First,~~ (Name) was an officer ~~in or~~ of any court of the United States;

2. ~~Second, that t~~The defendant endeavored to [influence, intimidate, impede] (name) by (here insert act as described in the indictment) on account of ~~his/her~~ (name) being an officer in or of any court of the United States;

3. ~~Third, that t~~The defendant acted knowingly; and

4. ~~Fourth, that t~~The defendant acted ~~'s acts were done did so~~ [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] [by threats] [by force][by threatening letter or communication].

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

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

Committee Comment

~~Several cases have held that the term "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. See *United States v. Partin,* 552 F.2d 621, 641 (5th Cir. 1977) *United States v. Ryan,* 455 F.2d 728, 734 (9th Cir. 1971); *United States v. Haldeman,* 559 F.2d 31, 115 n.229 (D.C. Cir. 1976). The Seventh Circuit has not yet addressed this question.~~ In defining "corruptly," the word "wrongfully" -is used to limit the statute only to those acts where a defendant has no legal right to impede the proceeding. See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United*

States, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

18 U.S.C. § 1503
Influencing ~~or Injuring~~ Juror-Elements

~~To sustain the charge of obstruction of justice, the government must prove the following propositions:~~ The defendant has been charged in [Count – of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. ~~First, that~~ (~~n~~Name) was a [prospective] juror ~~or prospective juror~~;

2. ~~Second, that t~~The defendant endeavored to [influence, intimidate, impede] (name) by (here insert act as described in the indictment) on account of ~~his/her~~ (name) being a [prospective] juror ~~or prospective juror~~;

3. ~~Third, that t~~The defendant acted knowingly; and

4. ~~Fourth, that t~~The defendant acted ~~'s acts were done did so~~ [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] [by threats] [by force] [by threatening letter or communication].

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

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

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

~~If, on the other hand, you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.~~

Committee Comment

This statute also applies to venire members who have not been sworn or selected as jurors and are prospective jurors. *United States v. Russell*, 255 U.S. 138 (1921); *United States v. Jackson*, 607 F.2d 1219 (8th Cir. 1979), cert. denied, 444 U.S.

1080 (1980). ~~Several cases have held that the term "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. *See United States v. Partin*, 552 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir.1971); *United States v. Haldeman*, 559 F.2d 31, 115 n. 229 (D.C.Cir.1976), cert. denied, 431 U.S. 933 (1977). The Seventh Circuit has not yet addressed this question.~~

In defining "corruptly," the word "wrongfully" -is used to limit the statute only to those acts where a defendant has no legal right to impede the proceeding. *See United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

18 U.S.C. § 1503
(Influencing ~~or Injuring~~ Witness-Elements)

~~To sustain the charge of obstruction of justice, the government must prove the following propositions:~~ The defendant has been charged in [Count – of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. ~~First, that~~ (~~n~~Name) was a witness;

2. ~~Second, that t~~The defendant endeavored to [influence, intimidate, impede] (name) by (here insert act as described in the indictment) on account of ~~his/her~~ (name) being a witness;

3. ~~Third, that t~~The defendant acted knowingly; and

4. ~~Fourth, that~~ T~~t~~he defendant~~'s acts were done~~ did so acted [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] [by threats] [by force] [by threatening letter or communication].

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

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

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

~~If, on the other hand, you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.~~

Committee Comment

In 1982, as part of an amendment to § 1503, Congress eliminated any explicit reference to "witnesses" in the statute, and enacted the witness tampering statute, 18 U.S.C. § 1512. Nonetheless, the Seventh Circuit has held that the omnibus "due

administration of justice" clause of § 1503 continues to cover witness tampering. *United States v. Maloney*, 71 F.3d 645, 659 (7th Cir. 1995). ~~Several cases have held that the term "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. See *United States v. Partin,* 552 F.2d 621, 641 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977); *United States v. Ryan,* 455 F.2d 728, 734 (9th Cir.1971); *United States v. Haldeman,* 559 F.2d 31, 115 n. 229 (D.C.Cir.1976), *cert. denied,* 431 U.S. 933 (1977). The Seventh Circuit has not yet addressed this question.~~

In defining "corruptly," the word "wrongfully" -is used to limit the statute only to those acts where a defendant has no legal right to impede the proceeding. *See United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

18 U.S.C. § 1503
(Obstruction of Justice Generally-Elements)

~~To sustain the charge of obstruction of justice, the government must prove the following propositions:~~ The defendant has been charged in [Count – of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

~~First, that the defendant [influenced, obstructed, impeded] or endeavored to [influence, obstruct, impede] the due administration of justice;~~

~~Second, that the defendant acted knowingly; and~~

~~Third, that the defendant's acts were done [corruptly], that is, [by threats, by force, by threatening letter or communication] with the purpose of wrongfully impeding the due administration of justice.~~

1. There was a pending proceeding before a federal [court] [grand jury];

2. The defendant knew of that proceeding;

3. The defendant [intentionally influenced, obstructed or impeded] [endeavored to influence, obstruct or impede] the due administration of that proceeding; and

4. The defendant ~~did so~~ acted [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] [by threat] [by force] [by threatening letter or communication].

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

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

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

~~If, on the other hand, you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.~~

Committee Comment

This instruction is for use when the omnibus, or catch-all, "due administration of justice" provision of Section 1503 is used. *United States v. Macari*, 453 F.3d 926, 939 (7th Cir. 2006); *United States v. Aguilar*, 515 U.S. 593, 599 (1995); *United States v. Fassnacht*, 332 F.3d 440, 448–49 (7th Cir. 2003).

In defining "corruptly," the word "wrongfully" -is used to limit the statute only to those acts where a defendant has no legal right to impede the proceeding. *See United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

~~This provision has been widely applied to cover virtually any circumstance in which there is an effort to obstruct or interfere with the administration of justice. See *United States v. Howard,* 569 F.2d 1331 (5th Cir.), *cert. denied sub nom.*, 439 U.S. 834 (1978); *United States v. Walasek;* 527 F.2d 676 (3d Cir.1975); *United States v. Solow*, 138 F.Supp. 812 (S.D.N.Y. 1956). Several cases have held that the term "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. See *United States v. Partin,* 552 F.2d 621, 641 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977); *United States v. Ryan,* 455 F.2d 728, 734 (9th Cir.1971); *United States v. Haldeman,* 559 F.2d 31, 115 n. 229 (D.C.Cir.1976), *cert. denied,* 431 U.S. 933 (1977). The Seventh Circuit has not yet addressed this question.~~

Special Verdict Instructions on § 1503 Offenses Alleged to Have Involved Physical Force or the Threat of Physical Force

You will see on the verdict form a question concerning whether the offense charged [in Count __] involved [physical force] [the threat of physical force]. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged [in Count __ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the offense charged [in Count __] involved [physical force] [the threat of physical force] then you should answer the question "Yes."

If you find that the government has not proven beyond a reasonable doubt that the offense involved [physical force] [the threat of physical force], then you should answer the question "No."

If, but only if, you answered "Yes" to the above question, then you should consider the following question(s):

1. If the physical force is alleged to have resulted in a death and the facts support it, then the court should give the § 1111 and/or § 1112 instructions, and ask the jury to render a verdict on whether the offense involved a murder or manslaughter.

2. If the alleged physical force did not result in a death and the facts support it, then the jury should be instructed to answer the question of whether the physical force involved an attempt to kill.

In using physical force, did the defendant attempt to kill [name alleged victim]? A person "attempts" to kill if he knowingly takes a substantial step toward committing a killing, with the intent to kill. The substantial step must be an act that strongly corroborates that the defendant intended to kill the victim.

If you find that the government has proven beyond a reasonable doubt that the defendant attempted to kill [name the alleged victim], then you should answer this question "Yes." If you find that the government has not proven beyond a reasonable doubt that the defendant attempted to kill [name the alleged victim], then you should answer this question "No."

3. Finally, if the obstruction offense was alleged to have been committed against a juror in a criminal case, then the jury should be asked specifically whether that was the case, and whether the case on which the juror was sitting was a Class A or Class B felony.

Was [name of alleged victim] chosen and sitting as a juror in a criminal case involving a Class A or Class B felony? If so, you should answer this question "Yes." If not, you should answer this question "No." You are instructed that [name the felony in the case on which the victim was sitting as a juror] is a Class [A][B] felony.

Committee Comment

The italicized language is not part of the instruction but rather serves as a direction regarding usage.

18 U.S.C. § 1512(b)(1).
WITNESS TAMPERING—INFLUENCING OR PREVENTING TESTIMONY—ELEMENTS

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

1. The defendant [~~used intimidation~~intimidated; threatened ~~another person~~; corruptly persuaded ~~another person~~; engaged in misleading conduct toward ~~another person~~] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to influence, delay or prevent the testimony of any person in an official proceeding.

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

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

Committee Comment

The court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(2)(A).
WITNESS TAMPERING—WITHHOLDING EVIDENCE—ELEMENTS

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

1. The defendant [~~used intimidation~~intimidated; threatened ~~another person~~; corruptly persuaded ~~another person~~; engaged in misleading conduct toward ~~another person~~] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to withhold [testimony; a record; a document; another object] from an official proceeding.

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

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

Committee Comment

The court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(2)(B).
WITNESS TAMPERING—ALTERING OR DESTROYING EVIDENCE—ELEMENTS

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

1. The defendant [~~used intimidation~~ intimidated; threatened~~ another person~~; corruptly persuaded~~ another person~~; engaged in misleading conduct toward~~ another person~~] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to [alter; destroy; mutilate; conceal] an object with the intent to impair the object's integrity or availability for use in an official proceeding.

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

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

Committee Comment

The court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(2)(C).
WITNESS TAMPERING—EVADING LEGAL PROCESS—ELEMENTS

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

1. The defendant [~~used intimidation~~intimidated; threatened ~~another person~~; corruptly persuaded ~~another person~~; engaged in misleading conduct toward ~~another person~~] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to evade legal process summoning that person [to appear as a witness] [or] [to produce a record; document; other object]], in an official proceeding.

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

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

Committee Comment

The court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(2)(D).
WITNESS TAMPERING — ABSENCE FROM LEGAL PROCEEDING — ELEMENTS

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

1. The defendant [~~used intimidation~~intimidated; threatened ~~another person~~; corruptly persuaded ~~another person~~; engaged in misleading conduct toward ~~another person~~] another ~~r~~ person[or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to be absent from an official proceeding to which such person has been summoned by legal process.

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

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

Committee Comment

The court should define "official proceeding," "corruptly" and "misleading" when these terms are used in these instructions, using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(3).
WITNESS TAMPERING—HINDER, DELAY OR PREVENT COMMUNICATION RELATING TO COMMISSION OF OFFENSE—ELEMENTS

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

1. The defendant [~~used intimidation~~intimidated; threatened ~~another person~~; corruptly persuaded ~~another person~~; engaged in misleading conduct ~~toward another~~ person] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to hinder, delay or prevent the communication of information to [a law enforcement officer of the United States; judge of the United States]; and

4. Such information related to the commission or possible commission of a [[federal offense; violation of conditions of [probation; supervised release; release pending judicial proceedings]].

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

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

Committee Comment

The court should define "corruptly" and "misleading" when these terms are used in these instructions, using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

In United States v. Fowler, 563 U.S. 668 (2011), the Supreme Court interpreted "intent to prevent the communication ... to a law enforcement officer ... of information relating to the commission or possible commission of a Federal offense" under 18 U.S.C. §1512(a)(1)(C). Section 1512(b)(3) contains almost identical language. In *Fowler*, the Court held that a defendant need not have a particular federal law enforcement officer, nor even a "general thought about federal officers" in mind. *Fowler*, 563 U.S. at 673. The Court further held that the government was not required to prove that a communication "would have been federal." *Id.* at 678. However, the government must prove "a reasonable likelihood ... that ... at least one of the relevant communications would have been made to a federal law enforcement officer." *Id.* at 677-78. (Government need not show that such communication would have been federal "beyond a reasonable doubt, nor even that it is more likely than not . . . . But the Government must show that

the likelihood of communication to a federal office was more than remote, outlandish, or simply hypothetical.")

18 U.S.C. § 1519 – Obstruction of Justice – Destruction, Alteration, or Falsification of records in Federal investigations and bankruptcy - Elements

The defendant is charged in [Count – of] the indictment with obstructing [an investigation] [an agency of the United States]. In order for you to find the defendant guilty of this charge, the government must prove the following elements beyond a reasonable doubt:

1. The defendant knowingly [altered] [destroyed] [mutilated] [concealed] [covered up] [falsified] [made a false entry into] a [record] [document] [tangible object, in other words, an object used to record or preserve information];

2. The defendant acted with intent to impede, obstruct or influence [an investigation] [the proper administration of any [contemplated] matter]. [The government is not required to prove that the matter or investigation was pending or imminent at the time of the obstruction, only that the acts were taken in relation to or in contemplation of any such matter or investigation.]; and

3. The [investigation][matter] was within the jurisdiction of (name the federal department or agency), which is [an agency] [a department] of the United States] [any case filed under Title 11]. The government is not required to prove that the defendant specifically knew the matter or investigation was within the jurisdiction of a department or agency of the United States.

Notes on Elements of § 1519

We have not included "in relation to" or "in contemplation of" in the elements, but instead included these concepts in the second paragraph following the elements. If they were to be inserted into the elements, they should go in the first element, as connected to the acts of the defendant, rather than connected to intent in second element.

> The defendant, [in relation to a matter][in contemplation of a matter], knowingly [altered][destroyed][mutilated][concealed][covered up][falsified][made a false entry into] any [record][document][tangible object];

See *United States v. Gray*, 642 F.3d 371, 379 (2d Cir. 2011) (section 1519 does not require the existence or likelihood of a federal investigation)*; United States v. Moyer,* 674 F.3d 192 (3d Cir. 2012); *United States v. Yielding,* 657 F.3d 688 (8th Cir. 2011) (three scenarios under which § 1519 applies: (1) when a defendant acts directly with respect to a pending matter; (2) when he acts in contemplation of any

such matter; or (3) when he acts in relation to such matter. While matter doesn't have to be pending, the defendant must have an intent to obstruct for all three scenarios); *United States v. Kernell,* 667 F.3d 746 (6th Cir. 2012); *United States v. McQueen,* 727 F.3d 1144 (11th Cir. 2013) (statute requires proof that defendant knowingly altered or destroyed, but does not require knowledge of any possible investigation is federal in nature. The term "any matter within the jurisdiction…" is merely a jurisdictional element for which no mens rea is required).

On the "tangible object" element, see *Yates v. United States*, 574 U.S. 528, 536 (2015).

18 U.S.C. § 1831 ECONOMIC ESPIONAGE (INCLUDING FEDERAL NEXUS AND KNOWLEDGE)

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] economic espionage. It is against federal law to commit economic espionage. For you to find [defendant] guilty of this crime, the government must prove the following four elements beyond a reasonable doubt:

1. The [information] was a trade secret;

2. [[Defendant] knew that the [information] possessed was a trade secret;]

3. [Defendant] knowingly [stole; took without permission; obtained by fraud; copied without permission; downloaded without permission; duplicated without permission; conveyed without permission; received while knowing it was stolen or taken without permission] a trade secret; or [attempted to do so;] [conspired to do so and takes an act in furtherance to do so;]; and

4. [Defendant] intended or knew that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.

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

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

Committee Comment

The term "trade secret" means all forms and types of financial, business, scientific, technical, economic or engineering information, including program devices, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and however stored if the owner has taken reasonable measures to keep the information secret and if the information derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through proper means, by another person who can obtain economic value from the disclosure or use of such information. 18 U.S.C. § 1839(3).

The second element is bracketed because the Seventh Circuit has not yet addressed whether the government must prove that the defendant knew that the information possessed was a trade secret. Both the Supreme Court and the Seventh Circuit have interpreted similarly structured statutes but reached different results. For example, in *Flores-Figueroa v. United States*, the Supreme Court interpreted 18 U.S.C. § 1028A, which prohibits "knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person." 556 U.S. 646 (2009). The Supreme Court held that the word "knowingly" applied to all elements that followed it in the statute, such that the government must prove that the defendant knew that the "means of identification" he or she unlawfully transferred, possessed, or used did, in fact, belong to another person. *Id.* By contrast, in *United States v. Cox*, which was decided after *Flores-Figueroa*, the Seventh Circuit interpreted the prohibition in 18 U.S.C. § 2423 on "knowingly transport[ing] an individual who has not attained the age of 18 years" with intent that the individual engage in prostitution or a criminal sexual act. 577 F.3d 833, 834 (7th Cir. 2009). The Seventh Circuit held that section 2423 does not require the government to prove that the defendant knew the victim was a minor. *Id.* at 836. The Committee takes no position on whether the government needs to prove the defendant knew that the information described in the indictment was a "trade secret."

If the defendant is charged with conspiracy, the government must prove that the defendant committed an overt act to affect the object of the conspiracy. 18 U.S.C. § 1831(a)(5). For a pattern instruction regarding a conspiracy, see the Seventh Circuit's Pattern Instruction 5.08.

18 U.S.C. §1832 THEFT OF TRADE SECRETS (INCLUDING FEDERAL NEXUS AND KNOWLEDGE)

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] stealing trade secrets. It is against federal law to steal trade secrets. For you to find [defendant] guilty of this crime, the government must prove each of the six following elements beyond a reasonable doubt:

1. The [information] contained a trade secret;

2. [Defendant] intended to convert the trade secret to the economic benefit of anyone other than the trade secret's owner;

3. [[Defendant]

   OPTION 1: knew or believed that such information was a trade secret;

   OPTION 2: knew or believed that such information was proprietary information, meaning belonging to someone else who had an exclusive right to it;]

4. [Defendant] knowingly [stole; took without permission; obtained by fraud; copied without permission; downloaded without permission; duplicated without permission; conveyed without permission; received while knowing it was stolen or taken without permission] a trade secret or [attempted to do so;] [conspired to do so and committed any act to effect the object of the conspiracy;];

5. The trade secret was related to or included in a [product or service used in or intended for use in] interstate or foreign commerce; and

6. [Defendant] intended or knew that this action would injure any owner of the trade secret.

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

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

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

Committee Comment

The term "trade secret" means all forms and types of financial, business, scientific, technical, economic or engineering information, including program devices, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and however stored if the owner has taken reasonable measures to keep the information secret and if the information derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through proper means, by another person who can obtain economic value from the disclosure or use of such information. 18 U.S.C. § 1839(3).

The second element is bracketed because the Seventh Circuit has not yet addressed whether the government must prove that the defendant knew that the information possessed was a trade secret. Both the Supreme Court and the Seventh Circuit have interpreted similarly structured statutes but reached different results. For example, in *Flores-Figueroa v. United States*, the Supreme Court interpreted 18 U.S.C. § 1028A, which prohibits "knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person." 556 U.S. 646 (2009). The Supreme Court held that the word "knowingly" applied to all elements that followed it in the statute, such that the government must prove that the defendant knew that the "means of identification" he or she unlawfully transferred, possessed, or used did, in fact, belong to another person. *Id.* By contrast, in *United States v. Cox*, which was decided after *Flores-Figueroa*, the Seventh Circuit interpreted the prohibition in 18 U.S.C. § 2423 on "knowingly transport[ing] an individual who has not attained the age of 18 years" with intent that the individual engage in prostitution or a criminal sexual act. 577 F.3d 833, 834 (7th Cir. 2009). The Seventh Circuit held that section 2423 does not require the government to prove that the defendant knew the victim was a minor. *Id.* at 836. In *United States v. Nosal*, the Ninth Circuit affirmed a formulation of the jury instruction for the third element of section 1832 that required the government to prove that the defendant "knew" the information "was a trade secret." 844 F.3d 1024 (9th Cir. 2016). The Committee takes no position on whether the government needs to prove the defendant knew that the information described in the indictment was a "trade secret."

The government does not need to prove that the owner of the secret suffered an actual economic loss as a result of the theft. *United States v. Yihao Pu*, 814 F.3d 818, 828 (7th Cir. 2016). The "independent economic value" attributable to the information remaining secret, *see* 18 U.S.C. § 1839(3)(B), need only be potential value, as distinct from actual value. *United States v. Hanjuan Jin*, 733 F.3d 718, 722 (7th Cir. 2013).

The Seventh Circuit has not yet decided whether to prove attempted theft of a trade secret the government must prove that the information was, in fact, a trade secret or whether it is

sufficient that the government prove the defendant reasonably believed that the information was a trade secret. *See United States v. Lange*, 312 F.3d 263, 268–69 (7th Cir. 2002) (discussing this issue in dicta). Two circuits have decided this issue, and both held that the government need not prove that the information was actually a trade secret. *See United States v. Yang*, 281 F.3d 534 (6th Cir. 2002); *United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998).

If the defendant is charged with conspiracy, the government must prove that the defendant committed an overt act to affect the object of the conspiracy. 18 U.S.C. § 1832(a)(5). For a pattern instruction regarding a conspiracy, see the Seventh Circuit's Pattern Instruction 5.08.

18 U.S.C. § 2113(a) DEFINITION OF "INTIMIDATION"

"Intimidation" means to say or do something that would make an ordinary ~~reasonable~~ person feel threatened, by giving rise to a reasonable fear that resistance or defiance will be met with force. ~~feel threatened under the circumstances giving rise to a reasonable fear that resistance or defiance will be met with force.~~ [The government is not required to prove that the target of the intimidation actually felt threatened.]

Committee Comment

United States v. Williams, 864 F.3d 826, 827 (7th Cir. 2017) ("Intimidation means threatened force capable of causing bodily harm and therefore constitutes violent force. Intimidation exists when a bank robber's words and actions would cause an ordinary person to feel threatened by giving rise to a reasonable fear that resistance or defiance will be met with force.") (internal citations omitted).

The jury need not find that the target of intimidation was actually afraid; rather, the element is satisfied if an ordinary person would reasonably feel threatened under the circumstances. *United States v. Hill*, 187 F.3d 698, 702 (7th Cir. 1999); *see also United States v. Gordon*, 642 F.3d 596, 598 (7th Cir. 2011); *United States v. Thornton*, 539 F.3d 741, 748 (7th Cir. 2008); *United States v. Burnley*, 533 F.3d 901, 903 (7th Cir. 2008). Accordingly, the bracketed language is recommended for use only in cases in which an issue is raised regarding whether the target of the intimidation was actually put in fear.

A defendant need not brandish a weapon or make express threats of injury. See *United States v. Clark*, 227 F.3d 771, 774–75 (7th Cir. 2000); *Hill*, 187 F.3d at 701–02.

The jury need not agree unanimously as to the means employed to place such a reasonable person in fear. See *Richardson v. United States*, 526 U.S. 813, 817 (1999). For example, some jurors may conclude that the defendant intimidated by brandishing a weapon while others conclude that intimidation was established without traditional overt gestures.

18 U.S.C. § 2241(c)~~.~~ AGGRAVATED SEXUAL ABUSE OF ~~CHILD ON FEDERAL PROPERTY~~A MINOR TWELVE TO SIXTEEN— ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ~~–~~— of the indictment charge[s] the defendant[s] with] aggravated sexual abuse~~ of a child on federal property~~. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [~~three~~four] following elements beyond a reasonable doubt:

~~1.~~

1. The defendant knowingly engaged in a sexual act with [the person ~~identified~~named in the indictment]~~; and~~:

(a) by using force against [the person named in the indictment]; or

(b) by [threatening [the person named in the indictment]; placing [the person named in the indictment] in fear that any person would be subject to death, serious bodily injury, or kidnapping]; and

2. ~~2.~~ The ~~sexual act~~offense was committed ~~at~~ [location stated in indictment, e.g., in the special maritime or territorial jurisdiction of the United States]; and

3. ~~3. At the time of the sexual act, [the~~[The person identified in the indictment] ~~had not yet reached the age of~~was at least twelve years~~.~~ old but less than sixteen years old; and

4. The~~ government need not prove that the~~ defendant ~~knew that~~ was at least four years older than [the person ~~was less than twelve years old~~identified in the indictment].

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

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

Committee Comment

Acts that fall within the meaning of "“sexual act"” are listed in 18 U.S.C. § 2246(2).

~~"“~~Sexual act"” is defined in a Pattern Instruction related to 18 U.S.C. §~~2246(2).~~

18 U.S.C. § 2241(c). AGGRAVATED SEXUAL ABUSE OF CHILD—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ~~–~~— of the indictment charge[s] the defendant[s] with] aggravated sexual abuse of a child. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

~~1.~~

1. The defendant traveled across a state line; and

2. The defendant did so with intent to engage in a sexual act with ~~[the~~a person ~~named in the indictment]; and~~

~~2. At the time, [the person identified in the indictment] was less than twelve years old. The government need~~who had not ~~prove that~~attained the ~~defendant knew that the person was less than~~age of twelve years ~~old~~.

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

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

Committee Comment

Subsection 2241(d) states that "[i]n a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years." At least one court, however, has held that this limitation does not apply in cases in which the government charges the defendant with crossing state lines with the intent to engage in a sexual act with a person under the age of twelve. See Report, *United States v. Vogel*, No. 3:16-cr-00045-wmc (W.D. Wis. Nov. 14, 2016), ECF No. 47. No court of appeals, including the Seventh Circuit, has squarely addressed the issue, and the Committee takes no view. But the parties and courts should consider whether the government must prove that the defendant knew the age of the victim at the time the defendant crossed state lines and, if not, how to instruct the jury accordingly.

Acts that fall within the meaning of "~~"~~sexual act~~"~~" are listed in 18 U.S.C. § 2246(2).

~~"~~"~~"~~Sexual act~~"~~" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

18 U.S.C. § 2252A(c)~~.~~ AFFIRMATIVE DEFENSE

TO CHARGES UNDER 18 U.S.C. §§ 2252A(~~A~~a)(1),

(~~A~~a)(2), (~~A~~a)(3)(A), (~~A~~a)(4) ~~OR~~or (~~A~~a)(5)

If the defendant proves that ~~it~~either of the following is more likely true than not ~~that the~~ true, then you should find the defendant not guilty of [Count __].

1.The [alleged child pornography] was produced using [an actual person; actual persons] engaging in sexually explicit conduct and [that person; each such person] was an adult at the time the material was produced; or

2. The [alleged child pornography] was not produced using any actual ~~adults at the time the material was produced, then you should find him not guilty of possessing child pornography~~[minor; minors].

Committee Comment

_____"

"Child pornography~~"~~" is defined broadly in 18 U.S.C. § 2256(8) to include visual depictions that are "indistinguishable from" that of a minor engaging in sexually explicit conduct and visual depictions adapted or modified "to appear ~~to be~~" that ~~of~~ an "identifiable minor" is engaging in sexually explicit conduct. ~~Therefore, it is~~It may therefore be an affirmative defense that the visual depictions were produced using only actual adults~~.~~ and/or no minors. As § 2252A(c) is an affirmative defense, the instruction is intended for cases in which the defendant presents evidence that does not exclusively challenge an element of the offense—namely, whether the depictions constitute "child pornography" as defined in § 2256(8). See *United States v. Jumah*, 493 F.3d 868, 873–75 (7th Cir. 2007) (explaining that a defendant bears the burden of proving an affirmative defense when the challenge does not negate an element of the offense) (citing *Dixon v. United States*, 126 S. Ct. 2437 (2006)).

~~"Identifiable minor" is further defined at 18 U.S.C. §2256(a).~~
"

In prosecutions involving child pornography that depicts an apparent "identifiable minor," the second, alternative § 2252A(c) defense, 18 U.S.C. § 2252A(c)(2), is not available. *Id.* § 2252A(c).

Section 2252A(c) contains a pretrial notice provision for defendants who intend to put on this affirmative defense.

The alternative defenses under § 2252A(c) are somewhat "redundant," in that the "second includes the first." *United States v. Peel*, 595 F.3d 763, 770 (7th Cir. 2010). But as *Peel* explained: "[T]he second [clause] is broader because it includes the case in which no person was used in the creation of the pornographic depiction; it might be a painting of an imaginary person or a computer simulation." *Id.* See *Peel* for a discussion of the defense's history, potential applications, and the effect of *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

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

"Identifiable minor" is defined in 18 U.S.C. § 2256(9) and the related Pattern Instruction ~~18 U.S.C. §2256(1)~~.

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF TOOLS USED IN MAKING, FORGING, ALTERING, OR COUNTERFEITING ANY SECURITY OR TAX STAMPS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] transportation of any [tool; implement; item described in the indictment; ~~thing used; fitted for use~~] in [falsely making; forging; altering; counterfeiting] any security. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [transported; caused to be transported] the [tool; implement; item described in the indictment] in [interstate; foreign] commerce; and

2. At the time the defendant transported the [tool; implement; item described in the indictment], it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps, or any part thereof; and

3. At the time the defendant transported the [tool; implement; item described in the indictment], the defendant knew that it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps or any part thereof; and

4. The defendant acted with unlawful or fraudulent intent.

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

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

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the fifth paragraph of 18 U.S.C. § 2314.

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

18 U.S.C. § 2339A DEFINITION OF "MATERIAL SUPPORT OR RESOURCES"

"Material support or resources" means any property, tangible or intangible, or service, including: currency or monetary instruments or financial securities; financial services; lodging; training; expert advice or assistance; safehouses; false documentation or identification; communications equipment; facilities; weapons; lethal substances; explosives; personnel (one or more individuals who may be or include oneself); and transportation.

As used in this definition, the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.

As used in this definition, the term "expert advice or assistance" means advice or assistance derived from scientific, technical, or other specialized knowledge.

Medicine and religious materials are not "material support or resources."

Committee Comment

See 18 U.S.C. § 2339A(b)(1)–(3). This instruction applies to offenses under 18 U.S.C. §§ 2339A and 2339B.

In *Holder v. Humanitarian Law Project*, two United States citizens and six domestic non-profit organizations challenged Section 2339B as unconstitutional under the First and Fifth Amendments, arguing that they "wished to provide support for the humanitarian and political activities" of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both designated foreign terrorist organizations, "in the form of money contributions other tangible aid, legal training, and political advocacy." See 561 U.S. 1, 10 (2010). The Supreme Court upheld the constitutionality of Section 2339B and specifically the inclusion of "training," "expert advice or assistance," "service" and "personnel" in the definition of "material support or resources" against the plaintiffs' as-applied challenge based on vagueness. See *id.* at 20–21.

18 U.S.C. § 2339A PROVIDING MATERIAL SUPPORT TO TERRORISTS—ELEMENTS

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

1. The defendant [provided; attempted to provide; conspired to provide] material support or resources and/or [concealed or disguised; attempted to conceal or disguise; conspired to conceal or disguise] the nature, location, source, or ownership of material support or resources in the manner described in the indictment; and

2. The defendant knew or intended that the material support or resources were to be used to prepare for or carry out [a violation of [describe applicable federal terrorism offense listed in 18 U.S.C. § 2339A(a)]] [the concealment of an escape after violating [describe applicable federal terrorism offense listed in 18 U.S.C. § 2339A(a)]].

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

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

Committee Comment

If the indictment alleges that a death resulted, the jury must separately find this fact because the finding has the effect of raising the statutory maximum penalty to life imprisonment. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Where relevant, provide an additional instruction to this effect:

> The government has alleged that the death of a person resulted from this offense, a fact that it must prove beyond a reasonable doubt. If you conclude beyond a reasonable doubt that a death resulted, you should separately note this finding on the verdict form. If you find the elements of the crime beyond a

reasonable doubt but not the resulting death, you should also note that finding on the verdict form.

Section 2339A(a) lists the following federal terrorism offenses that a defendant is prohibited from providing material support or resources to further:

- 18 U.S.C. § 32 (sabotaging aircraft or aircraft facilities), § 37 (violence at international airports), § 1992 (attacks on mass transportation systems), § 2280 (violence against maritime navigation), § 2281 (violence against maritime fixed platforms), and 49 U.S.C. § 46502 (aircraft piracy);

- 18 U.S.C. § 81 (arson of structures, vessels, machinery or supplies), § 844(f), (i) (damage by fire or explosives to federal property or property used in interstate or foreign commerce), § 930(c) (death in the course of attack on federal facility), § 1361 (damage to government property or contracts), § 1362 (injury to communication lines), § 1363 (malicious injury to structures or property), § 1366 (destruction of energy facilities), § 2155 (destruction of national defense property), § 2156 (obstruction of national defense), and 49 U.S.C. § 60123(b) (damaging interstate pipelines);

- 18 U.S.C. § 175 (biological weapons), § 229 (chemical weapons), § 831 (unlawful transactions of nuclear material), § 842(m), (n) (unlawful transactions of plastic explosives), § 2332a (use of weapons of mass destruction), and 42 U.S.C. § 2284 (sabotaging nuclear facilities);

- 18 U.S.C. § 351 (assassination, kidnapping or assault of government officials), § 1114 (killing of federal officers and employees), § 1116 (killing of foreign officials or internationally protected persons), and § 1751 (assassination, kidnapping or assault of Presidential staff);

- 18 U.S.C. § 956 (conspiracy to kidnap or injure persons or damage property in foreign country), § 1091 (genocide), § 1203 (taking hostages), § 2332 (homicide of a national outside of the United States), § 2340A (torture), § 2332b (international acts of terrorism), § 2332f (bombings), and § 2442 (recruiting child soldiers); and

- Any offense listed in 42 U.S.C. § 2332b(g)(5)(B) (federal crimes of terrorism), except offenses under Sections 2339A and 2339B.

In *Holder v. Humanitarian Law Project*, the Supreme Court contrasted the mental state requirement in Section 2339A with Section 2339B. See 561 U.S. 1, 16–17 (2010). To be convicted under Section 2339A, a defendant must have possessed the specific intent that the material support or resources provided would be used to further unlawful terrorist activity. See *id.* at 16–17 ("Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."). Note the difference between Section 2339A and Section

2339B: in Section 2339A, the object of the intent or knowledge requirement is the terrorist activity itself; in contrast, the mental state for a conviction under Section 2339B requires only that the defendant seek to further the terrorist organization, not necessarily its specific acts.

18 U.S.C. § 2339B PROVIDING MATERIAL SUPPORT OR RESOURCES TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS—ELEMENTS

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

1. The defendant knowingly [provided; attempted to provide; conspired to provide] material support or resources to [the organization described in the indictment]; and

2. The defendant knew that [the organization described in the indictment] [is a designated terrorist organization; has engaged or engages in terrorist activity; has engaged or engages in terrorism]; and

3. One of the following additional requirements is satisfied:

(a) The defendant is a national or permanent resident alien of United States; or

(b) The defendant is a stateless person with habitual residence in the United States; or

(c) After the charged conduct occurred, the defendant was brought into or found in the United States; or

(d) The offense occurred in whole or in part in the United States; or

(e) The offense occurred in or affected interstate or foreign commerce; or

(f) The defendant aided or abetted or conspired with any person over whom jurisdiction exists.

[The term "designated terrorist organization" means an organization designated by the Secretary of State as a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. I hereby instruct you as a matter of law that [organization described in the indictment which has been listed as a Foreign Terrorist Organization] was designated as a "foreign terrorist organization" during the alleged conduct.]

[An organization is "engaged in terrorist activity" if it:

(a) Commits or incites to commit, under circumstances indicating an intent to cause death or serious bodily injury, a terrorist activity; or

(b) Prepares or plans a terrorist activity; or

(c) Gathers information on potential targets for terrorist activity; or

(d) Solicits funds or things of value for a terrorist activity or a terrorist organization; or

(e) Solicits any individual to engage in terrorist activity or for membership in a terrorist organization; or

(f) Commits an act that the actor knows, or reasonably should know, affords material support [for the commission of a terrorist activity; to any individual the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; to a terrorist organization or any member of such organization].]

[The term "terrorist activity" means any activity that is unlawful under the laws of the United States or the place it was committed, and which involves any of the following actions:

(a) Hijacking or sabotaging an aircraft, vessel, vehicle, or other conveyance; or

(b) Seizing or detaining and threatening to kill, injure, or further detain a person to compel a third party (including a government entity) to take or abstain from taking a specific action as a condition for releasing the seized or detained person; or

(c) A violent attack on an internationally protected person, including employees and officials of governments and international organizations; or

(d) An assassination; or

(e) Using biological or chemical agents, nuclear weapons or devices, explosives, firearms, or other weapons or dangerous devices with intent to

endanger the safety of one or more individuals or to cause substantial property damage; or

(f) Threatening, attempting, or conspiring to take any of the preceding actions.]

[The term "terrorism" means premeditated, politically-motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.]

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

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

Committee Comment

Section 2339B does not prohibit mere association or membership with a foreign terrorist organization; it only prohibits the provision of material support or resources. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010). Likewise, Section 2339B does not prohibit mere praise, independent advocacy, or voicing support for a foreign terrorist organization. See *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1026 (7th Cir. 2002); see also *Holder*, 561 U.S. at 25–26.

If the alleged material support or resources is the provision of personnel, provide an additional instruction:

> You may only find the defendant guilty for providing support in the form of "personnel" if the defendant knowingly [provided; attempted to provide; conspired to provide] the foreign terrorist organization [identified in Count __] with one or more individuals (who may be or include the defendant [himself; herself]) to work under the organization's direction or control, or to organize, manage, supervise or otherwise direct the operation of the organization.
>
> You may not find the defendant guilty for providing "personnel" that act entirely independently of the foreign terrorist organization to advance the organization's goals or objectives. For example, if the defendant worked to

> advance the goals and objectives of the terrorist organization but did so entirely independently, the defendant cannot be found guilty [of Count __].

See 18 U.S.C. § 2339B(h). The prohibition of support in the form of "personnel" does not include independent advocacy entirely disconnected from the foreign terrorist organization. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 23 (2010).

If the indictment alleges that a death resulted, the jury must separately find this fact because the finding has the effect of raising the statutory maximum penalty to life imprisonment. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Where relevant, provide an additional instruction to this effect:

> The government has alleged that the death of a person resulted from this offense, a fact that it must prove beyond a reasonable doubt. If you conclude beyond a reasonable doubt that a death resulted, you should separately note this finding on the verdict form. If you find the elements of the crime beyond a reasonable doubt but not the resulting death, you should also note that finding on the verdict form.

The term "material support or resource" has the same meaning in Section 2339B as the term is accorded in 18 U.S.C. § 2339A. See 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4). For a definition of "material support or resource," see the pattern instruction regarding that term as used in Section 2339A.

The terms "terrorist activity" and "engage in terrorist activity" are defined in 8 U.S.C. § 1182(a)(3)(B)(iii)–(iv).

The definition of "terrorism" comes from Section 140(d)(2) of the Foreign Relations Authorization Act, 22 U.S.C. § 2656f(d)(2).

In *Holder v. Humanitarian Law Project*, the Supreme Court clarified the mental state requirement in Section 2339B that a defendant "knowingly" provided material support. 561 U.S. 1, 16–17 (2010). A conviction under Section 2339B does not require the defendant to have the specific intent to further the organization's terrorist activities; rather, Section 2339B only requires a defendant's knowledge of the organization's connection to terrorism. See *id.*

In *Holder*, the Supreme Court also rejected an as-applied constitutional challenge to Section 2339B. See *id.* at 7–8. Two United States citizens and six domestic non-profit organizations claimed they "wished to provide support for the humanitarian and political activities" of two designated foreign terrorist organizations "in the form of monetary contributions, other tangible

aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B." *Id.* at 10. The Court ruled that Section 2339B, as applied to these plaintiffs' intended actions, did not violate their freedom of speech or association under the First Amendment. See *id.* at 39–40.

18 U.S.C. § 2423(b)~~.~~ INTERSTATE TRAVEL WITH INTENT TO ENGAGE IN A SEXUAL ACT WITH A MINOR — ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ~~–~~— of the indictment charge[s] the defendant[s] with] traveling in [interstate commerce; foreign commerce] to engage in illicit sexual conduct with a minor. In order for you to find [the; a] defendant guilty of this charge, the government must prove ~~both~~each of the following elements beyond a reasonable doubt:

~~1.~~

1. The defendant traveled in [interstate commerce; foreign commerce]; and

~~2.~~

2. The defendant~~"~~s purpose in traveling in [interstate commerce; foreign commerce] was to engage in ~~[a commercial sex act; a~~illicit sexual ~~act]~~conduct with a minor.

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

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

Committee Comment

~~"~~

"Illicit Sexual Conduct" is defined in Pattern Instruction 18 U.S.C. § 2423(f).

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

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

18 U.S.C. § 2423(f). DEFINITION OF "ILLICIT SEXUAL CONDUCT"

"Illicit sexual conduct" means:

1. ~~1.~~ a sexual act with a person under eighteen years of age; or

2. ~~2.~~ any commercial sex act with a person under eighteen years of age~~.~~; or

3. production of child pornography

Committee Comment

"Sexual act" is defined in Pattern Instruction 18 U.S.C. § 2246(2).

"Commercial sex act" is defined in Pattern Instruction 18 U.S.C. § 1591(E)(3).

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

18 U.S.C. § 2423(g)~~.~~

~~AFFIRMATIVE~~ **DEFENSE**

If the defendant establishes ~~that it is more likely than not~~with clear and convincing evidence that ~~he~~the defendant reasonably believed ~~that~~ [the person identified in the indictment~~]~~ with whom the defendant engaged in a commercial sex act] was at least eighteen years of age at the time of the charged offense, then you should find the defendant not guilty of [Count __].

Committee Comment

This defense applies to defendants accused of "engag[ing] in [a] … commercial sex act" as defined in 18 U.S.C. § 2423(f)(2). *Id.* § 2423(g). Because (b) and (c) are the subsections of § 2423 that prohibit the defendant from engaging in such acts (as opposed to transportation acts, § 2423(a), or ancillary offenses, § 2423(d)), the Committee suggests that this instruction should only be given in cases charging violations of ~~18 U.S.C. §§~~ 2423(b) ~~and~~or (c) in which the illicit sexual conduct involves a commercial sex act under § 2423(f)(2).

~~"~~"Commercial sex act~~"~~" is defined in ~~Pattern Instruction~~ 18 U.S.C. § 1591(~~E~~e)(3) and the related Pattern Instruction.

21 U.S.C. §§ 841(b)(1)(A), (B) or (C)-
Definition of "Serious Bodily Injury"

The term "serious bodily injury" means bodily injury that involves—

(a) A substantial risk of death;

(b) Extreme physical pain;

(c) Long-lasting and obvious disfigurement; or

(d) Long-lasting loss or impairment of the function of a bodily member, organ, or mental faculty.

Committee Comment

See 18 U.S.C. §§ 113(b)(2) and 1365(h)(3).

21 U.S.C. §§ 841(b)(1)(A), (B) or (C)
Where death or serious bodily injury results—Special verdict form

If you find the defendant guilty of the offense charged in [Count __of] the indictment, you must then determine whether the government has proven that the defendant's distribution of [identify the charged controlled substance] resulted in the [death of; serious bodily injury to] [name of victim].

To prove that [name of victim] died as a result of the defendant's distribution of [identify the controlled substance], the government must prove beyond a reasonable doubt that [name of victim] would not have [died; been seriously injured] if [he; she] had not used the [identify the controlled substance] distributed by defendant. It is not enough to prove that the defendant's conduct merely contributed to [name of victim's] death.

[This does not require the government to prove that the [identify the controlled substance] was present in an amount sufficient to [kill; cause serious bodily injury] on its own.]

[The government is not required to prove that the defendant intended to cause [name of victim]'s death.]

You will see on the verdict form a question concerning this issue. You should consider that question only if you have found that the government has proven the defendant guilty as charged in [Count[s] ___ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the defendant's distribution of [identify the charged controlled substance] resulted in the [death of; serious bodily injury to] [name of victim], then you should answer that question "Yes."

If you find that the government has not proven beyond a reasonable doubt that the defendant's distribution of [*identify the charged controlled substance*] resulted in the [death of; serious bodily injury to] [*name of victim*], then you should answer that question "No."

Committee Comment

See *Burrage v. United States,* 571 U.S. 204, 210-11 (2014); *Krieger v. United States*, 842 F.3d 490, 499-500 (7th Cir. 2016). In *Burrage*, the Court held that the "death results" enhancement in drug cases ordinarily requires the government to prove that the victim

would have lived but for the unlawfully distributed drugs. In adopting the "but-for" causation standard, the Court emphasized that the "language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." *Burrage*, 571 U.S. at 216. Thus, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. s. 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Id.* at 218-19.

In *Perrone v. United States*, 889 F.3d 898 (7th Cir. 2018), the Seventh Circuit elaborated on the meaning of "but for" causation in the context of an overdose death:

> This dispute is about causation, so we will begin by clearly stating what "but for" causation requires. It does not require proof that the distributed drug was present in an amount sufficient to kill on its own. The Court explained in *Burrage* that death can "result[ ] from" a particular drug when it is the proverbial "straw that broke the camel's back." 134 S. Ct. at 888. As the Court put it: "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.* Here, then, the fact that other substances in [the victim's] bloodstream played a part in her death does not defeat the government's claim that her death resulted from the cocaine Perrone gave her. A jury could have found him guilty of causing her death if it concluded beyond a reasonable doubt that Perrone's cocaine pushed her over the edge.

Id. at 906.

It is an open question in this Circuit whether strict "but-for" causation is required if the government proves that the defendant's conduct was an independently sufficient cause of the victim's death. See *Perrone*, 889 F.3d at 906. In *Perrone*, the Seventh Circuit indicated that "strict 'but-for' causation might not be required when "'multiple sufficient causes independently, but concurrently, produce a result,'" but declined to decide the issue. *Id.*

The Seventh Circuit has held that the government does not have to prove proximate causation—i.e. , that the death was a reasonably foreseeable result of the drug offense—to establish the "death results" enhancement for drug distribution. *United States v. Harden*, 893 F.3d 434, 447-49 (7th Cir. 2018). The other eight circuits to address this issue in the drug offense context are in agreement. See, e.g., *United States v. Jeffries,* 958 F.3d 517, 520 (6th Cir. 2020) (citing cases). *Burrage* granted certiorari on

whether the jury must find that the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense, but declined to reach that issue.

In cases where the death may have resulted from the actions of co-conspirators rather than the defendant himself, the court may need to tailor the instructions to ensure that the jury makes the findings necessary to hold the defendant liable for the death. See *United States v. Walker*, 721 F.3d 828, 833–36 (7th Cir. 2013), *vacated on other grounds*, 572 U.S. 1111 (2014) (recognizing that "the scope of a defendant's relevant conduct for determining sentencing liability may be narrower than the scope of criminal liability") ; *United States v. Hamm,* 952 F.3d 728 (6th Cir. 2020) (holding that the death-or-injury enhancement "applies only to defendants who were part of the distribution chain that placed the drugs into the hands of the overdose victim" and that "*Pinkerton* liability could only apply to the substantive offense, not the sentencing enhancement").

The optional sentence in the third paragraph of the instruction comes from *Perrone*, 889 F.3d at 906, which refers to situations where the drug was the "straw that broke the camel's back. " It will not be appropriate in every case.

21 U.S.C. § 841(c)(1) POSSESSION OF LISTED CHEMICAL WITH INTENT TO MANUFACTURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] possession of [identify chemical alleged in charge] with intent to manufacture a controlled substance. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly possessed [identify the chemical alleged in charge]; and

2. The defendant intended to use [identify the chemical] to manufacture a controlled substance; and

3. [Identify the chemical] is a listed chemical. ~~The government is not required to prove that the defendant knew [identify the chemical] was a listed chemical.~~

4. The defendant knew [identify the chemical] was a listed chemical.

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

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

Committee Comment

The previous version of this instruction included in the third element the following sentence: "The government is not required to prove that the defendant knew [identify the chemical] was a listed chemical." In *United States v. Estrada*, 453 F.3d 1208 (9th Cir. 2006), the Ninth Circuit held that the government is not required to prove that the defendant knew the chemical was a listed chemical. The Seventh Circuit has not yet addressed this argument in any reported case. However, in light of *McFadden v. United States*, 576 U.S. 186, 188-89 (2015), it is likely that the government must prove that the defendant knew the charged substance was a listed chemical within the meaning of 21 U.S.C. § 802(33). See Committee Comment to Distribution of a Controlled Substance, *supra* at ___. *See also* ~~However, the reasoning of~~ *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005) (requiring proof that defendant knew the substance he possessed

was a controlled substance analogue as defined by statute), *overruled on other grounds, United States v. Novak*, 841 F.3d 721, 729 (7th Cir. 2016).~~, may suggest by analogy that the government must prove that the defendant knew the substance was a listed chemical within the meaning of 21 U.S.C. 802(33) - (35). If so, the last sentence of the third element would be incorrect~~. The Committee has modified the instruction accordingly.

21 U.S.C. § 841(c)(2) POSSESSION/ DISTRIBUTION OF LISTED CHEMICAL FOR USE IN MANUFACTURE—ELEMENTS

[The indictment charges defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] possess of [identify chemical alleged in charge] for use in the manufacture of a prohibited drug. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; distributed] [identify the chemical alleged in charge]; and

2. The defendant knew or had reasonable cause to believe the [identify the chemical] would be used to manufacture a prohibited drug; and

3. [Identify the chemical] is a listed chemical. ~~The government is not required to prove that the defendant knew [identify the chemical] was a listed chemical.~~

4. The defendant knew [identify the chemical] was a listed chemical.

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

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

Committee Comment

~~The Committee notes that there is currently a circuit split as to the proper interpretation of the mens rea requirement under section 841(c)(2). As noted in United States v. Khattab, 536 F.3d 765, 769 (7th Cir. 2008), the Seventh Circuit has not yet addressed the issue. Compare United States v. Truong, 425 F.3d 1282, 1289 (10th Cir. 2005) (holding that government must prove actual knowledge or "something close to it") with United States v. Galvan, 407 F.3d 954, 957 (8th Cir. 2005), United States v. Kauer, 382 F.3d 1155, 1157–58 (9th Cir. 2004), and United States v. Prather, 205 F.3d 1265, 1270 (11th Cir. 2000). What is clear is that the defendant must be more than negligent or even reckless with respect to the risk that a listed chemical will be used to manufacture a controlled substance. United States v. Green, 779 F.2d 1313, 1318–19 (7th Cir. 1985).~~

~~The Committee notes that the Tenth Circuit's decision in Truong also holds that the defendant must know, or have reasonable cause to believe, that the listed chemical will be used to manufacture a specific controlled substance. In the absence of Seventh Circuit precedent, the Committee takes no position on this issue.~~

In *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008), the court noted a circuit split on what level of *mens rea* the government is required to prove as to the second element, with some courts concluding that "reasonable cause to believe" to be "akin to actual knowledge," *United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005), while other courts require the government only to prove objective knowledge, *See, e.g., United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004). The Seventh Circuit has not had occasion since then to revisit this issue. In light of *McFadden v. United States*, 576 U.S. 186, 188-89 (2015), it would seem more prudent to require the government to prove a defendant's subjective knowledge (which was the case in *United States v. Khattab*), but none of the courts that have approved the lower objective standard has reversed its position.

As for the third element, the Court's holding in *McFadden* indicates that the government must prove that the defendant knew the charged substance was a listed chemical within the meaning of 21 U.S.C. § 802(33). See the Committee Comment to Distribution of a Controlled Substance, *supra* at ___.

21 U.S.C. § 843(b) USE OF COMMUNICATION FACILITY IN AID OF NARCOTICS OFFENSE—ELEMENTS

[The indictment charges defendant[s] with; Count — of the indictment charges the defendant[s] with] [using; causing the use of] a [telephone; other communication facility] to facilitate a narcotics crime. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the [two] following elements beyond a reasonable doubt:

1. [The offense of [insert predicate drug offense, e.g, possession of a controlled substance with intent to distribute] was committed, as charged in Count __ of the indictment.] [***Alternatively*, insert all elements of predicate offense.]**

2. The defendant used a [telephone; other type of communication facility] to facilitate or cause the commission of, [insert predicate drug offense, e.g., possession with intent to distribute, and, if applicable, the Count number]~~; and~~.

~~2~~3. The defendant did so knowingly.

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

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

Committee Comment

~~See United States v. Campbell, 534 F.3d 599, 605 (7th Cir. 2008).~~

A defendant violates Section 843 if he knowingly and intentionally uses a communications facility, such as a telephone, to facilitate the commission of a narcotics offense. *United States v. Campbell*, 534 F.3d 599, 605 (7th Cir. 2008). Proof of ~~an underlying narcotics~~ a predicate drug offense is an element of a Section 843(b) conviction. *See United States v. Alvarez*, 860 F.2d 801, 813 (7th Cir. 1988) (cited with approval in *Campbell*, 534 F.3d at 605). A defendant cannot be convicted of using a telephone to facilitate a drug offense unless he commits the drug offense, attempts to commit the drug offense, or aids and abets another's commission of the drug offense. *Id.*

For this reason, the instruction for a charged offense under § 843(b) must require proof of the predicate drug offense. In cases in which the predicate drug offense is also one of the charges at issue during the trial, the instruction for the § 843(b) count may meet this requirement by making reference to the count in which the predicate drug offense is charged. In cases in which the predicate drug offense is not one of the charges at issue during the trial, the instruction for the § 843(b) count must itself require proof of the elements of the predicate drug offense, in order to satisfy the requirements of *Campbell*.

A sample instruction of the latter type is as follows:

1. [The defendant; *insert name of alleged offender*] knowingly distributed [identify controlled substance alleged in charge].

2. [The defendant; *insert name of alleged offender*] knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance alleged in charge.]

3. The defendant used a [telephone; other type of communication facility] to facilitate or cause the commission of the distribution of the controlled substance.

4. The defendant did so knowingly.

21 U.S.C. § 844 SIMPLE POSSESSION — ELEMENTS

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

1. The defendant knowingly possessed [at least (*specify amount*) of] [identify the controlled substance]; and

2. The defendant knew the substance was some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance in charge].

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

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

Committee Comment

In some cases a conviction for possession may require a quantity threshold. In such a case, an element incorporating that requirement should be added to the first element of the instruction.

DRUG QUANTITY/SPECIAL VERDICT INSTRUCTIONS

If you find the defendant guilty of the offense charged in [Count ——— of] the indictment, you must then determine the amount of [identify the controlled substance] the government has proven was involved in the offense.

In making this determination, you are to consider any type and amount of controlled substances for which the government has proven beyond a reasonable doubt that [: (1)] the defendant [possessed with intent to distribute; distributed; conspired to possess with intent to distribute; conspired to distribute; etc.] [while the defendant was a member of the conspiracy charged in Count —] [; plus (2) the defendant's co-conspirators [distributed; possessed with intent to distribute; conspired to possess with intent to distribute; conspired to possess with intent to distribute; etc.] in furtherance of the conspiracy during the defendant's membership in the conspiracy and ~~as a~~ reasonably foreseeable ~~consequence of that conspiracy~~to the defendant.]

You will see on the verdict form a question concerning the amount of narcotics involved in the offense charged in [Count — of] the indictment. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged in [Count ——— of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the offense involved [insert quantity as alleged in indictment; e.g., 5 kilograms or more of a substance containing cocaine; 50 grams or more of methamphetamine], then you should answer the [first] question "Yes." [If you answer "Yes," then you need not answer the remaining question[s] regarding drug quantity for that count.]

If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert quantity as alleged in indictment; e.g., 5 kilograms or more of a mixture or substance containing cocaine; 50 grams or more of methamphetamine], then you should answer the [first] question "No."

[If you answer the first question "No," then you must answer the next question. That question asks you to determine whether the government has proven beyond a reasonable doubt that the offense involved [insert lesser quantity consistent with charge in indictment; e.g., 500 grams or more of a mixture or substance containing cocaine; 5 grams or more of methamphetamine] If you find that the government has proven beyond a reasonable doubt that the offense involved [insert lesser quantity; e.g., 500 grams or more of a mixture or substance containing cocaine; 5 grams or more of methamphetamine], then you should answer the second question "Yes."]

If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert lesser quantity consistent with charge in indictment; e.g., 500 grams or more of a substance containing cocaine], then you should answer the second question "No."

Committee Comment

Based on the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this instruction should be given whenever the drug quantity may affect the statutory maximum sentence. The jury need only find the threshold quantity that triggers the increased statutory maximum penalty; it need not find the exact quantity involved. See *United States v. Kelly*, 519 F.3d 355, 363 (7th Cir. 2005); *United States v. Washington*, 558 F.3d 716, 719–20 (7th Cir. 2009).

For many controlled substances, the statutory language does not require calculation of the amount of the pure form of the controlled substance but rather references, for example, "1 kilogram or more *of a mixture or substance containing a detectable amount of heroin*." 21 U.S.C. § 841(b)(1)(A)(i) (emphasis added). For others the statutory language references either the controlled substance itself or a mixture or substance (in different quantities), for example, "50 grams or more of methamphetamine . . . or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . . ." 21 U.S.C. § 841(b)(1)(A)(viii), The instruction given to the jury should track the way in which the pertinent quantity is charged in the indictment.

~~In drafting this instruction, the Committee took account of Washington, in which the court considered a case in which the jury was given a quantity verdict form with three choices – less than 5 grams of crack; 5 grams or more but less than 50 grams; and 50 grams or more – and left the form blank because it was unable to reach a unanimous verdict on the quantity. The court noted that it was possible that the jury's failure to agree on a quantity was attributable in part to how the verdict form was worded, and it stated that "[i]t would be preferable . . . to give the jury an open-ended form, saying something like 'we find unanimously that the defendant distributed at least — grams of crack and — grams of powder cocaine." Washington, 558 F.3d at 718 n.1. Having considered this suggestion, the Committee is of the view that an "open-ended" quantity verdict form might actually be counterproductive, as a jury might find it more difficult to agree on a particular quantity than upon a range, which is what the proposed instruction directs. Though the court in Washington proposed an "at least [x]" form of verdict, the Committee believes that the instructions necessary to explain that the trial judge is, in effect, asking the jury to make a finding about the highest (or lowest) amount on which the jury can reach unanimous agreement would be quite complicated and would risk tilting the balance in favor of one side or the other.~~

The Seventh Circuit approved the methodology of this instruction in *United States v. Saunders*, 826 F.3d 363, 373-74 and 374 n.1. (7th Cir. 2016).

The part of the instruction regarding inclusion of amounts distributed by other co-conspirators is worded in accordance with *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946), as discussed in *United States v. Cruse*, 805 F.3d 795, 817 (7th Cir. 2015).

21 U.S.C. § 856(a)(1) MAINTAINING DRUG-INVOLVED PREMISES
LIMITING INSTRUCTION

A person "maintains a drug-involved premises" if he owns or rents the premises, or exercises control over them, and for a sustained period, uses those premises to manufacture, store, or sell drugs, or directs others to those premises to obtain drugs. The mere fact that the defendant lived in a [house; premises] used for [manufacturing; distributing; using] a controlled substance is insufficient to prove that he maintained the house for the purpose of [manufacturing; distributing; using] a controlled substance.

[A defendant's mere personal use of a controlled substance in a [house; premises] is insufficient to prove that he maintained the house for the purpose of [manufacturing; distributing; using] a controlled substance.]

Committee Comment

See *United States v. Flores-Olague*, 717 F.3d 526, 531-32 (7th Cir. 2013); *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008), as to the provision on merely living in a drug house.

The second sentence of this instruction is not supported by any existing case law. However, because personal possession, ordinarily a misdemeanor or a lesser felony, often occurs in a defendant's own home, the Committee believes that allowing a conviction under the "drug house" statute based only on personal use in one's own home would produce an absurd result.

21 U.S.C. § 856(a)(2) MAINTAINING DRUG-INVOLVED PREMISES—ELEMENTS

[The indictment charges defendant[s] with; Count — of the indictment charges the defendant[s] with] maintaining a drug-involved premises. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following [four] elements beyond a reasonable doubt:

1. The defendant [managed; controlled] ~~a~~ the place specified in Count __ as an [owner; lessee; agent; employee; occupant; mortgagee]; and

2. ~~The defendant was an [owner; lessee; agent; employee; occupant; mortgagee] of that place; and~~

~~3.~~ The defendant knowingly [rented this place; leased ~~the~~ this place; profited from ~~the~~ this place; made ~~the~~ this place available for use, with or without compensation] ~~; and~~

~~4. The defendant did so~~ for the purpose of unlawfully [manufacturing; storing; distributing; using] a controlled substance. The government is not required to prove that was the defendant's sole purpose.

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

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

Committee Comment

See generally *United States v. Flores-Olague*, 717 F.3d 526, 531-32 (7th Cir. 2013); *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008). The statute requires that the defendant manage or control the premises "for the purpose of" manufacturing (etc.) a controlled substance. In *United States v. Church*, 970 F.2d 401, 405–06 (7th Cir. 1992), a case under § 856(a)(1), the Seventh Circuit held that the government need not prove that drug use/ distribution was the sole purpose for which the defendant maintained the premises at issue. Beyond this, however, the Seventh Circuit has not defined or specified the degree of illegal usage of the premises that is required to violate § 856. Indeed, in *Church*, the court stated that "[r]ather than judicially modify the phrase 'for the purpose,' we agree that the meaning of that phrase lies within the common

understanding of jurors and needs no further elaboration." *Id.* at 406 n. 1. Some of the other circuits that have considered this issue have required that the illegal purpose to be "a significant purpose" or "one of the primary or principal uses" of the premises. See *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010); *United State v. Soto-Silva*, 129 F.3d 340, 346 n.4 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995). Others have rejected a "primary use" standard. That same court, however, agreed with *Church*, that the statutory phrase "for the purpose" requires no elaboration. *Id.*; see also *United States v. Payton*, 636 F.3d 1027, 1042 (8th Cir. 2011).

The Committee has followed the admonition of *Church* and has not attempted to define the "purpose" requirement beyond what *Church* itself holds, namely that the illegal purpose need not be the sole purpose for which the defendant maintains the premises.

In a case under § 856(a)(2), the limitation that *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008) suggests for offenses under § 856(a)(1) (see Comment to previous instruction) does not appear to apply, because § 856(a)(2) necessarily implies invited activities of others if it has any application beyond the scope of § 856(a)(1).

22 U.S.C. § 2778 IMPORTING/EXPORTING WEAPONS WITHOUT A LICENSE

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] willfully [[attempting to] import; export] a [defense article; service; name the specific item] which appears on the United States Munitions List without first [obtaining a license; receiving written approval]. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following beyond a reasonable doubt:

1. The defendant [[attempted to] import[ed]; export[ed]] [defense article; service; name the specific item];

2. The [name the specific item] was listed on the United States Munitions List at the time of the [[attempted] import; export];

3. The defendant did not first [obtain a license; receive written approval] for the [[attempted] import; export] of [defense article; service; name the specific item]; and,

4. The defendant acted willfully.

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

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

Committee Comment

The United States Munitions List is found at 22 CFR §1.21.1. *See also* Fifth Circuit Pattern Criminal Instruction 2.101 (2019).

Title 22 U.S.C. §2778(c) applies, in theory, to a broad range of statutory and regulatory activity. The provision broadly punishes violation of "any provision of [section 2778], section 2779 of this title, a treaty referred to in subsection (j)(1)(C)(i), or any rule or regulation issued under this section or section 2779 of this title, including any rule or regulation issued to implement or enforce a treaty referred to in subsection (j)(1)(C)(i) or an implementing arrangement pursuant to such treaty." 22 U.S.C. §2778(c). However, in practice, the statute has been used to prohibit the

import/export of "defensive articles" and, more specifically, items found on the United States Munitions List. See *United States v. Dobek*, 789 F.3d 698 (7th Cir. 2015); see also *United States v. Pulungan*, 569 F.3d 326 (7th Cir. 2009).

22 U.S.C. § 2778(c) WILLFULLY – DEFINITION

A person acts willfully if he [[attempted] imported; exported] a [defense article; service; name the specific item] knowing that the law forbade [[attempting] importing; exporting] the [defense article; service; name the specific item] into [name of jurisdiction].

Committee Comment

This instruction defines the requirement of "willful" conduct as used in the fourth element of the section 2778 instruction. The Seventh Circuit has approved the definition of "willful" conduct under section 2778 as set forth in this instruction. The Seventh Circuit has held that a finding of willfulness for purpose of section 2778 requires proof that the defendant knew the specific item at issue was being imported/exported in violation of the law. *United States v. Dobek*, 789 F.3d 698, 701 (7th Cir. 2015) ("the defendant acted willfully if he exported military aircraft parts to Venezuela knowing that the law forbade exporting those parts to that country"); see also *United States v. Pulungan*, 569 F.3d 326, 331 (7th Cir. 2009) (willfulness in the context of section 2778 requires knowledge of the specific regulation, not merely violation of some regulation).

42 U.S.C. § 1320a-7b(b) CRIMINAL PENALTIES FOR ACTS INVOLVING FEDERAL HEALTH CARE PROGRAMS—ILLEGAL REMUNERATIONS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] [solicitation; receipt; offer; payment] of remuneration in whole or in part from a federal health care program—namely _____. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the four following elements beyond a reasonable doubt:

1. The defendant knowingly [solicited; received; offered; paid] the remuneration, which took the form of a [kickback; bribe; rebate] in cash or in kind;

2. The defendant did so willfully;

3. The defendant did so [in return for [referring an individual to a person for the furnishing or arranging of any item or service; purchasing, leasing, ordering, or arranging for any good, facility, service, or item; recommending purchasing, leasing, or ordering any good, facility, service, or item]; to induce such person [to refer an individual to a person for the furnishing or arranging of any item or service; to purchase, lease, order, or arrange for any good, facility, service, or item; to recommend purchasing, leasing, or ordering any good, facility, service, or item]]; and

4. The [item; service; good; facility] was one for which payment may be made in whole or in part under a federal health care program.

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

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

Committee Comment

Section 1320a-7b(b) uses both "knowingly" and "willfully" to define the mens rea element. When interpreting this provision, practitioners should consider the potential application of *United States v. Schaul*, 962 F.3d 917 (7th Cir. 2020). In *Schaul*, the Seventh Circuit held that, in the context of 18 U.S.C. § 1347, "knowingly" and "willfully" have separate meanings and must be proven in the conjunctive. The *Schaul* court also strongly implied that, under section 1347, "willfully" means to act with an "intent to defraud," which was already considered an element of section 1347. *Id.* at 924. The Committee notes, however, that section 1320a-7b(b) does not require

an intent to defraud. In fact, section 1320a-7b(h) clarifies that "a person need not have actual knowledge of [the Anti-Kickback Statute] or specific intent to commit a violation" of it in order to be found guilty. In the absence of controlling law, litigants may also refer to the definition of "willfully" under 18 U.S.C. § 1035, which similarly has no "intent to defraud" requirement. There, "willfully" is defined as acting "voluntarily and intentionally and with the intent to do something he knows is illegal." *See United States v. Natale*, 719 F.3d 719, 741–42 (7th Cir. 2013).

"Once the government establishes the elements of a violation of the Anti-Kickback Statute, the burden shifts to a defendant to demonstrate by a preponderance of the evidence that her conduct fell within the safe harbor provision of the statute." *United States v. George*, 900 F.3d 405, 413 (7th Cir. 2018) (citing *United States v. Jumah*, 493 F.3d 868, 873 (7th Cir. 2007)). Those safe harbor provisions are laid out in section 1320a-7b(b)(3). *See also* 42 C.F.R. § 1001.952(b) (the statute's corresponding regulations).

In cases involving Medicare certifications and recertifications, practitioners should consider *U.S. v. Patel*, 778 F.3d 607, 612–18 (7th Cir. 2015). In *Patel*, the Seventh Circuit interpreted the term "referring" (which is not defined in the statute) to extend to both certifications and recertifications.

To the extent that a case involves a partial payment, *U.S. v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011) is instructive. In that case, the Seventh Circuit joined the Third, Fifth, Ninth, and Tenth Circuits in holding that "if part of the payment compensated past referrals or induced future referrals, that portion of the payment violates 42 U.S.C. § 1320a-7b(b)(1)."

In cases in which the defendant is not a physician, *U.S. v. Polin*, 194 F. 3d 863 (7th Cir. 1999) is instructive. In that case, which involved a Medicare kickback scheme perpetrated by a medical device sales representative, the Seventh Circuit recognized that "[t]he different subsections do not distinguish between physicians and lay-persons"—both can be found guilty under section 1320a-7b(b). *Id.* at 866–67.

If the success of an alleged kickback scheme requires the recommendation, certification, or permission of a third party (such as a doctor), practitioners should look to *United States v. George*, 900 F.3d 405 (7th Cir. 2018). In *George*, the Seventh Circuit rejected the argument that section 1320a-7b(b)'s application is limited to persons who could be deemed "relevant decisionmakers." *Id.* at 413. *George* involved an alleged scheme whereby the defendant (the owner of a referral agency) received payments from a home healthcare entity for each Medicare patient she referred. On appeal, the defendant argued that, because the persons she referred had to be certified by a physician before they could be admitted to the home healthcare entity, she was not the relevant decisionmaker, and therefore could not be convicted for a violation of the Anti-Kickback statute. The court rejected this argument, reiterating

that the statute's focus is on "imposing liability on operatives who 'leverage fluid, informal power and influence.'" *Id.* at 411 (quoting *United States v. Shoemaker*, 746 F.3d 614, 629–30 (5th Cir. 2014)); *see also id.* at 412 ("[P]ayments were made in this case to refer a Medicare patient to a service provider, and such conduct is prohibited under the plain language of the statute.").