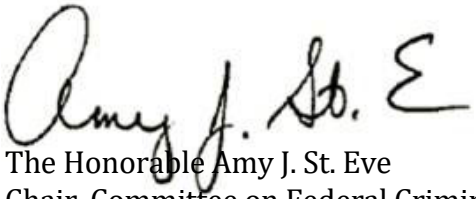
Proposed Revisions/Additions
to the Seventh Circuit Pattern Criminal Jury Instructions

The Committee on Federal Criminal Jury Instructions of the Seventh Circuit submits the attached proposed new and revised pattern criminal 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 comments 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 Criminal Jury Instruction Comment." The Committee will accept comments through October 10, 2025.

Respectfully,



The Honorable Amy J. St. Eve
Chair, Committee on Federal Criminal
Jury Instructions of the Seventh Circuit

The proposed revisions/additions concern the following instructions:

- 4.09 ATTEMPT (*Changes to comment*)
- 5.05 JOINT VENTURE (*Eliminated and committee comment added to explain elimination*)
- 5.06(A) AIDING AND ABETTING (*Change to instruction*)
- 5.08(A) CONSPIRACY—OVERT ACT REQUIRED (*Change to comment*)
- 5.09(A) – CONSPIRACY—MULTIPLE OBJECTS ALLEGED (*New*)
- 5.10(A) BUYER/SELLER RELATIONSHIP (*Changes to instruction and comment)*
- 8 U.S.C. § 1324(a)(1)(A)(iv) ENCOURAGING ILLEGAL ENTRY—ELEMENTS (*Changes to comment*)
- 18 U.S.C. § 287 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS—ELEMENTS (*Changes to comment*)
- 18 U.S.C. § 666(a)(1)(B) ACCEPTING A BRIBE—ELEMENTS (*Changes to instruction and comment*)
- 18 U.S.C. 666(a)(1)(B) ACCEPTING A BRIBE—INTENT TO BE INFLUENCED OR REWARDED (*New*)
- 18 U.S.C. § 666(a)(2) PAYING A BRIBE—ELEMENTS (*Changes to instruction and comment*)
- 18 U.S.C. 666(a)(2) PAYING A BRIBE—INTENT TO INFLUENCE OR REWARD (*New*)
- 18 U.S.C. § 844(i) ARSON – ELEMENTS (*New*)
- 18 U.S.C. § 844(i) – DEFINITION OF "MALICIOUSLY" (*New*)
- 18 U.S.C. § 844(i) – DEFINITION OF "EXPLOSIVE" (*New*)
- 18 U.S.C. § 844(i) – DEFINITION OF "INTERSTATE COMMERCE" (*New*)
- 18 U.S.C. § 875(c) TRANSMISSION OF A THREAT TO KIDNAP OR INJURE—ELEMENTS (*Changes to instruction and comment*)
- 18 U.S.C. § 876(c) MAILING A THREAT TO KIDNAP OR INJURE—ELEMENTS (*Changes to instruction and comment*)
- DEFINITION OF “TRUE THREAT” (*Changes to instruction and comment*)
- 18 U.S.C. §§ 922(g) & 924(e)ARMED CAREER CRIMINAL ACT PENALTY-ENHANCING INSTRUCTIONS (*New*)
- 18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) INTRODUCTORY INSTRUCTION (*New*)
- 18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) SPECIAL VERDICT INSTRUCTIONS (*New*)
- 18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) DEFINITION OF “OCCASIONS” (*New*)
- 18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) SPECIAL VERDICT FORM INSTRUCTION (*New*)
- 18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) SPECIAL VERDICT FORM (*New*)

- 18 U.S.C. § 924(c) DEFINITION OF "IN RELATION TO" (*Changes to comment*)
- 18 U.S.C. § 1014 FALSE STATEMENT TO FINANCIAL INSTITUTION—ELEMENTS (*Changes to comment*)
- 18 U.S.C. § 1028A DEFINITION OF "IN RELATION TO" (*Changes to instruction and comment*)
- 18 U.S.C. § 1201(a)(1) KIDNAPPING (*Changes to instruction and comment*)
- 18 U.S.C. §§ 1341 & 1343 DEFINITION OF "SCHEME TO DEFRAUD" (*Changes to comment*)
- 18 U.S.C. §§ 1341, 1343 & 1346 DEFINITION OF "HONEST SERVICES" (*Changes to comment*)
- 18 USC **§** 1347(a)(1) HEALTH CARE FRAUD—ELEMENTS (*Changes to comment)*
- 18 U.S.C. § 1347(a)(2) OBTAINING PROPERTY FROM A HEALTH CARE BENEFIT PROGRAM BY FALSE OR FRAUDULENT PRETENSES— ELEMENTS (*Changes to comment)*
- 18 U.S.C. § 1512(c)(1) DESTROY, ALTER OR CONCEAL DOCUMENT OR OBJECT— ELEMENTS (*Changes to instruction and comment*)
- 18 U.S.C. § 1512(c)(2) OTHERWISE OBSTRUCT OFFICIAL PROCEEDING—ELEMENTS (*Changes to instruction and comment*)
- 18 U.S.C. § 2251(a) SEXUAL EXPLOITATION OF CHILD—ELEMENTS (*Changes to comment*)
- 18 U.S.C. § 2256(2)(A) DEFINITION OF "SEXUALLY EXPLICIT CONDUCT" (*Changes to instruction and comment*)
- 26 U.S.C. § 5845 DEFINITIONS OF FIREARM-RELATED TERMS (*Changes to comment*)

4.09 ATTEMPT

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

Committee Comment

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

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

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

Many Seventh Circuit cases say that a "substantial step" is "something more than mere preparation, but less than the last act necessary before the actual commission of the substantive crime." *See, e.g., Sanchez*, 615 F.3d at 844 (internal quotation marks omitted); *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000). The Committee did not include this language in the pattern jury instruction because it did not appear to

provide clear guidance to jurors. As the Seventh Circuit observed in *Sanchez*, "there is no easy way to separate mere preparation from a substantial step." 615 F.3d at 844.

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

> The indictment charges defendant with **attempting to possess** cocaine with intent to distribute. In order for you to find the defendant guilty of this charge, the government must prove each of the three following elements beyond a reasonable doubt:
>
> 1. The defendant knowingly **attempted to possess** cocaine; and
>
> 2. The defendant intended to distribute the substance to another person; and
>
> 3. The defendant knew the substance was some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was cocaine.
>
> If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.
>
> **(separate instruction)**
>
> A person attempts to possess a controlled substance if he (1) knowingly takes a substantial step toward possessing the controlled substance, (2) with the intent to possess the controlled substance. The substantial step must be an act that strongly corroborates that the defendant intended to carry out the crime.

In describing the completed offense as part of an attempt instruction—whether in the bracketed "describe the offense" portion of Instruction 4.09 or in any add-on, it is important to describe the completed offense accurately and not eliminate or change elements. In *United States v. Christophel*, 92 F.4th 723 (7th Cir. 2024), a case involving attempted enticement of a minor under 18 U.S.C. § 2422(b), the trial judge instructed

consistently with this comment but also added to the pattern instruction two sentences stating that:

> In order to meet its burden in this case, the Government must prove the defendant took a substantial step toward causing a person he believed to be a minor to [assent] or agree to engage in the criminal offense of aggravated criminal sexual abuse under Illinois law. The Government is not required to prove that the defendant actually intended to engage in illegal sexual activity [with] that person.

Though the Seventh Circuit concluded that the instructions as a whole accurately stated the law, it commented that the first sentence of the add-on, which the defendant argued modified the statute's element requiring "persuading, inducing, enticing, [or] coercing" the minor to the arguably broader "causing," was "potentially confusing and may be erroneous in the context of another case." *Id.* at 728. In light of *Christophel*, the Committee recommends adhering closely to the statutory elements in any description of the completed offense.

5.05 JOINT VENTURE (eliminated)

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

Committee Comment

The previous "joint venture" instruction has been eliminated. The instruction, in its entirety, read as follows:

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

With the revision of the more detailed aiding-and-abetting instructions, any need for this instruction as a stand-alone instruction no longer exists. Setting it out as a stand-alone instruction suggests that it should be given that way, and doing so could risk misleading a jury to believe that a defendant may be convicted even if not all elements of the charged crime are proven.

The concept of this instruction, to the extent it interrelates with aiding-and-abetting responsibility, has been incorporated as an optional element of Instruction 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.

[The second element may be established without proof that the defendant personally participated in every act of the crime of _____.]

Committee Comment

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

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

5.08(A) CONSPIRACY—OVERT ACT REQUIRED

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

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

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

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

(Remainder of instruction omitted here, as no change to the instruction is proposed.)

Committee Comment

(No change to Comments (a) through (d) proposed, so those comments are omitted here.)

(e)

Unanimity regarding object of multiple-object conspiracy. When the indictment charges a multiple-object conspiracy, ~~an instruction may be required regarding the need for jury unanimity~~ the jury must be instructed that it has to be unanimous regarding the particular object(s) proven. See *United States v. Clark*, 140 F.4th 395, 414-16 (7th Cir. 2025); see also Instruction 4.04 and its commentary. ~~, as well as *Griggs*, 569 F.3d at 344, which uses a multiple-object conspiracy as an example of a situation in which the jury must be unanimous as to particulars of an indictment. See also *United States v. Hughes*, 310 F.3d 557, 560–61 (7th Cir. 2002).~~ In such a case, this instruction should be supplemented accordingly, and this will typically require (as in *Clark*) spelling out the conspiracy's alleged objects. This is covered in proposed new instruction 5.09(A).

5.09(A) – CONSPIRACY—MULTIPLE OBJECTS ALLEGED

In this case, the indictment alleges that the defendant[s] conspired to: (a) [*fill in with description of first alleged object of conspiracy*] and/or (b) [*fill in with description of second alleged object of conspiracy*] [*etc., if more than two objects are alleged*[. I will refer to these as the alleged "objects" of the conspiracy. The government is not required to prove that the defendants agreed upon [both; all] of these objects of the conspiracy. However, the government is required to prove that the defendants agreed upon at least one of these objects of the conspiracy. To find that the government has proven this, you must agree unanimously on which particular object[s] the defendants agreed upon.

Committee Comment

See United States v. Clark, 140 F.4th 395, 414-16 (7th Cir. 2025). *Clark* also approved the trial court's submission of a special interrogatory to the jury to identify the particular object(s) it had agreed upon:

> To the extent the jurors did not understand the law from the instructions alone, the special verdict form would have alleviated any confusion. *See Downing v. Abbott Lab'ys*, 48 F.4th 793, 811 (7th Cir. 2022) (the district court did not abuse its discretion in denying the defendant's proposed jury instruction where the verdict form clarified the law); *cf. United States v. Matthews*, 505 F.3d 698, 710 (7th Cir. 2007) (special verdict forms can alleviate juror confusion)

Clark, 140 F.4th at 414.

5.10(A) BUYER/SELLER RELATIONSHIP

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

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. Instead, the government must prove that the defendant knowingly agreed with another person, expressly or impliedly, to distribute [*name of drug*] to others. In deciding this, you should consider all of the evidence.

Committee Comment

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

The pattern instruction has undergone several revisions over the years. At one point the instruction included a list of factors to be considered in deciding whether the government had proven a conspiracy or instead only a simple buyer-seller relationship. In *United States v. Colon*, 549 F.3d 565 (7th Cir. 2008), however, the Court criticized the instruction. As a result, the Committee

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

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

the evidence. That version of the instruction read as follows:

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

In *United States v. Page*, 124 F.4th 851 (7th Cir. 2024), however, the Seventh Circuit, sitting *en banc*, overruled prior caselaw that supported, in part, the second sentence of the instruction. In particular, the court concluded that "evidence of repeated, distribution-quantity transactions of illegal drugs between two parties, on its own, can sufficiently sustain a drug conspiracy conviction . . . ." *Id.* at 862. Though *Page* was a sufficiency-of-the-evidence decision that did not specifically address the pattern instruction, the Committee concluded that another look at the instruction was warranted.

The Committee considered and rejected whether to return to the pre-*Colon* approach of listing factors to be considered on this issue. Even though *Colon*'s holding regarding repeated transactions is no longer good law after *Page*, its criticism of the list-of-factors approach remains valid.

The Committee instead elected to eliminate the second sentence of the prior version—the sentence effectively overruled by *Page*—and to otherwise simplify the language of the instruction. How particular evidence should be considered is left for argument by counsel rather than direction by the court. Judges should proceed with caution before adopting a jury instruction that identifies particular factors as pointing in one direction or another. *Cf. United States v. Brown*, 726 F.3d 993, 1002 (7th Cir. 2013).

There was some sentiment on the Committee for including an optional sentence adopting the aforementioned discussion in *Page* about repeated wholesale-level transactions as supporting an inference of conspiracy. This would be consistent with *Page*, but there is a concern that if the trial judge provides an imprimatur for a particular type of evidence, it might be understood by the jury as effectively directing a verdict and unduly highlighting one consideration over others. In addition, *Page* does not describe any precise contours of when "repeat transactions" suffices—for example, how much repletion over what period of time would suffice (*Page* itself concerned "hundreds of transactions over the course of a year," *see Page*, 123 F.4th at 863). The Committee elected to leave this for discussion on a case-by-case basis. The optional language proposed if a trial judge elects to give an instruction along these lines is:

> [Among other things, you may consider whether there were repeated transactions between the buyer and seller involving distribution quantities of [*name of drug*]].

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

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

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

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

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

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

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

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

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

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

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

Committee Comment

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

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

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

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

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

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

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

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

In *United States v. Hansen*, 599 U.S. 762 (2023), the Supreme Court held that 8 U.S.C. § 1324(a)(1)(A)(iv) was constitutional, rejecting an overbreadth challenge centered on the language

prohibiting "encourag[ing]" or "induc[ing]" an alien to come to, enter, or reside in the United States. In finding that clause (iv) was not overbroad, the Court stated: "'encourage' and 'induce,' as terms of art, carry the usual attributes of solicitation and facilitation—including, once again, the traditional *mens rea*." *Id.* at 780.

18 U.S.C. § 287 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS—ELEMENTS

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

1. The defendant [made; presented] a claim against [the United States; a department or agency of the United States]; and

2. The claim was [false; fictitious; fraudulent]; and

3. The defendant knew the claim was [false; fictitious; fraudulent] [.] [; and]

4. [The defendant acted with the intent to defraud.]

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

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

Committee Comment

The government is required to prove that the defendant knew the claim was false. *United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996).

~~The weight of appellate authority is that proof of materiality~~

~~is not required under section 287, at least when the claim is alleged to be "false" or "fictitious" rather than "fraudulent." See, *e.g.*, *United States v. Saybolt*, 577 F.3d 195, 199–201 (3d Cir. 2009);*United States v. Logan*, 250 F.3d 350, 358 (6th Cir. 2001); *United States v. Upton*, 91 F.3d 677, 684–85 (5th Cir. 1996). If the claim is alleged to be "fraudulent," then materiality is required. *Saybolt*, 577 F.3d at 199–01 (citing *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality")). The Seventh Circuit has not yet addressed this issue.~~

In *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023), the Supreme Court held unequivocally that the scienter element for the civil False Claims Act is the defendant's knowledge and subjective beliefs, not what an objectively reasonable person may have known or believed. The Supreme Court rejected all arguments that the possibility of an "objectively reasonable" misinterpretation of a law, regulation, or rule could result in an honest mistake by another would make irrelevant the defendant's subjective belief or actual knowledge that the claim was false. Although a civil False Claims Act case, the attorneys and judge should consider this holding and its application to the knowledge requirement for 18 U.S.C. § 287.

The fourth element (intent to defraud) is bracketed because it is unsettled in this Circuit whether proof of intent to defraud is required under section 287. In *United States v. Nazon*, 940 F.2d 255 (7th Cir. 1991), the jury was instructed that it must find that the defendant submitted his claim with an intent to defraud. On appeal, the defendant objected to the district court's failure to define the phrase intent to defraud for the jury. Although the Seventh Circuit held that the failure to define intent to defraud was not plain error, it assumed that the jury was required to find intent to defraud. *Id*. at 260. In *United States v. Haddon*, 927 F.2d 942 (7th Cir. 1991), the court said that a jury instruction that required the government to prove intent to defraud on a section 287 charge "accurately presented the jury with the fundamental questions bearing upon the defendant's guilt or innocence" and concluded that "the requisite intent to defraud was present." *Id*. at 951.

In *Catton*, the court considered whether a trial judge had erred in failing to instruct a jury that the government had to prove willfulness to convict under section 287. The court equated willfulness with intent to defraud. *Catton*, 89 F.3d at 392. It noted that *Nazon* and *Haddon* assumed that intent to defraud is required. *Id*. The court concluded, however, that "It is implicit in the filing of a knowingly false claim that the claimant intends to defraud the government, and hence unnecessary to charge willfulness separately." *Id*. ~~In an unpublished decision, *United States v. Strong*, 114 F.3d 1192, 1997 WL 269359, at *2 (7th Cir. May 20,~~

~~1997) (unpublished), the court concluded that intent to defraud is not required under section 287 and read its decision in Catton as so concluding.~~

A separate unresolved question exists as to whether the government must prove that the defendant knew the false claim would be presented to the United States or whether that point is a jurisdictional fact which need not be presented to the jury. The case law is silent. The issue turns on whether the requirement is more like the requirement in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (charge of knowingly transporting visual depictions of minors engaging in sexually explicit conduct in viola- tion of 18 U.S.C. § 2252 requires proof that defendant knew depic- tion was of a minor) or more like *United States v. Feola*, 420 U.S. 671 (1975) (charge of conspiracy to assault a federal officer in violation of 18 U.S.C. § 111 does not require proof that defendant knew person was federal officer.).

The weight of appellate authority is that proof of materiality is not required under section 287, at least when the claim is al- leged to be "false" or "fictitious" rather than "fraudulent." See, *e.g.*, *United States v. Saybolt*, 577 F.3d 195, 199–201 (3d Cir. 2009);*United States v. Logan*, 250 F.3d 350, 358 (6th Cir. 2001); *United States v. Upton*, 91 F.3d 677, 684–85 (5th Cir. 1996). If the claim is alleged to be "fraudulent," then materiality is required. *Saybolt*, 577 F.3d at 199–01 (citing *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality")). The Seventh Circuit has not yet addressed this issue.

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

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

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

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

3. The defendant did so corruptly, that is, with the understanding that something of value is to be offered or given to ~~reward or~~ influence or reward [him/her] in connection with [his/her] [organizational; official] duties; and

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

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

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

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

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

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

Committee Comment

Federal Funds. The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised. The federal-funds element is not a requirement of subject matter jurisdiction. *United States v. Bowling*, 952 F.3d 861, 867 (7th Cir. 2020). Instead, it is an element that goes to the merits. *Id.*

Intent to Be Influenced or Rewarded. In *Snyder v. United States*, 603 U.S. 1, 19–20 (2024), the Supreme Court held that § 666 is a bribery statute and does not bar gratuities. A separate instruction defines "intent to be influenced or rewarded."

Corruptly. The definition of "corruptly" set forth above is derived from *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015) (An agent "act[s] corruptly if they *know* that the payor is trying to get them to do the acts forbidden by the statute, and take the money anyway.") (emphasis in original); see also *United States v. Mullins*, 800 F.3d 866, 870 (7th Cir. 2015) ("An agent acts corruptly when he *understands* that the payment given is a bribe~~,~~ [or] reward~~, or gratuity.")~~ …") (emphasis added).

Although the parties and the court should consider whether *Snyder*, 603 U.S. at 11–12, 19–20, alters this pre-existing Seventh Circuit law on the definition of "corruptly," the Seventh Circuit has not yet decided the issue. So the Committee takes no position. The Supreme Court did rely on the statute's use of "corruptly" to categorize § 666 as a bribery statute rather than a gratuities law. *Id.* at 11–12. But *Snyder* did not otherwise define corruptly, nor equate corruptly with willfulness or any other mental state. *Snyder* pointed out that "American law generally treats bribes as *inherently* corrupt and unlawful." 603 U.S. at 5 (emphasis added). This may be consistent with the pre-existing Seventh Circuit case law holding that so long as the bribe recipient understands (or in undercover/informant cases, believes) that value is being offered in exchange for an official act, then the recipient has acted with a corrupt state of mind. Again, the Committee takes no position given the absence of a controlling post-*Snyder* decision defining "corruptly."

With regard to the definition of "corruptly," in cases involving an undercover agent or a cooperator, jurors might be confused if they are asked to determine whether a defendant understood the intent to influence or to reward when the undercover or cooperator of course did not *in fact* have the intent to influence or to reward. In those cases, some courts might prefer "with the belief" as a more appropriate term than "with the understanding." The term "believes" is used in explaining attempt offenses for which "the defendant's conduct should be measured according to the circumstances as he *believes* them to be, rather than the circumstances as they may have existed in fact." See *United States v. Williams*, 553 U.S. 285, 300 (2008) (quoting ALI, Model Penal Code § 5.01, Comment at 307, governing attempts) (emphasis added).

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

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

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

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in *McDonnell v. United States*, ~~136~~ 579 U.S. ~~Ct. 2355, 2371-72~~550, 572–74 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and

judges should consider the potential impact of *McDonnell* on § 666 cases. Also, as explained in the Committee Comment for the Definition of Intent to Be Influenced or Rewarded, *Snyder* repeatedly refers to "official act" in explaining that a defendant must act with the intent to be influenced or rewarded in exchange for an "official act." 603 U.S. at 11–12, 19–20.

~~Lawyers and judges should consider whether intent to "influence"and intent to "reward" are two separate theories of liability, that is, bribery ("influence") versus gratuity ("reward"). Although Seventh Circuit opinions have stated, in broad terms, that a specific *quid pro quo* is not required under § 666(a), see *United States v. Mullins*, 800 F.3d 866, 871 (7th Cir. 2015); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir.1997), those cases involved the government's pursuit of a "reward" theory as well. It is not clear that the Seventh Circuit has directly answered whether a case presenting only an intent to "influence" theory requires a *quid pro quo*.~~

~~The reasoning of *United States v. Boender* arguably suggests that there is a difference between "influence" and "reward." *Boender* reaffirmed that § 666(a)(2) does not require a *quid pro quo*, but the opinion examined the federal employee bribery counterpart, 18 U.S.C. § 201(b), and relied on the distinction between bribes and gratuities:~~

> ~~Whereas § 201(b) makes it a crime to "corruptly give[], offer[] or promise[] anything of value to any public official . . . with intent to influence any official act," § 666(a)(2) criminalizes corrupt giving "with intent to influence *or reward*" a state or local official. Further, § 201(b) is complemented by § 201(c), which trades a broader reach—criminalizing any gift given "for or because of any official act performed or to be performed," § 201(c)(1)(A)—for a less severe statutory maximum of two, rather than fifteen, years' imprisonment. Section 666(a)(2) has and needs no such parallel: by its plain text, it already covers both *bribes and rewards*.~~

~~*Boender*, 649 F.3d at 655 (first emphasis in original). In that explanation, the Seventh Circuit appears to emphasize that the intent to "reward" is the add-on that distinguishes § 666(a)(2) from § 201(b) bribery~~**Campaign Contributions.** ~~. *Id.* The passage's concluding sentence says that § 666(a)(2) "covers both bribes and rewards." *Id.* Arguably, then, under § 666(a)(2), "intent to influence" covers bribes whereas "intent to reward" covers gratuities. Also, *Boender* relied on the bribery-versus-~~

~~gratuity distinction drawn by the Supreme Court in interpreting § 201(b) versus § 201(c), 649 F.3d at 655 (citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404, 406 (1999)), and § 201(b) uses the same intent to "influence" statutory language as § 666(a).~~

~~In dictum, one Circuit arguably has treated the two theories of liability independently, noting that where a defendant is charged with bribery only, the jury instructions should not include the "reward" language. See *United States v. Munchak*, 527 F. App'x 191, 194 (3d Cir. May 31, 2013) ("As [the defendant] was charged with bribery under § 666, the Court's instructions should not have included the 'reward' language."). It is worth noting too that the Statutory Appendix of the Sentencing Guidelines directs § 666 corruption offenses to both Guideline § 2C1.1, which covers bribery, and § 2C1.2, which covers gratuities.~~

~~In light of the uncertainty in the case law, the Committee does not take a position on this issue. If the district court decides that there is a distinction between the two forms of intent, then the court should provide separate instructions for them.~~

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes ~~or illegal gratuities~~. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. 666(a)(1)(B) ACCEPTING A BRIBE— INTENT TO BE INFLUENCED OR REWARDED

A defendant acts with the "intent to be influenced or rewarded" if [he she] [solicited], [demanded], [accepted] [or] [agreed to accept] a thing of value in exchange for an official act before taking the official act, and did so in connection with some business, transaction or series of transactions of the [organization; government; government agency]. If the defendant has taken the official act before [he she] [solicited], [demanded], [accepted] [or] [agreed to accept] the thing of value, then the defendant has not acted with the "intent to be influenced or rewarded."

[Even if payment of the thing of value is provided after the official act, or is to be provided after the official act, the defendant acts with the "intent to be influenced or rewarded" so long as the [he she] [solicited], [demanded], [accepted] [or] [agreed to accept] the thing of value in exchange for the official act before taking the official act.]

[The defendant acts with the "intent to be influenced or rewarded" even if [he she] would have taken the same official act anyway, so long as the defendant [solicited], [demanded], [accepted] [or] [agreed to accept] the thing of value in exchange for the official act before taking the official act.]

Committee Comment

In *Snyder v. United States*, 603 U.S. 1, 19–20 (2024), the Supreme Court held that § 666(a)(1)(B) forbids bribes and does not bar gratuities. *Snyder* recognized that, in the abstract and in isolation, the word "rewarded in the phrase "intending to be influenced or rewarded" could be interpreted to cover gratuities, that is "a reward given after the act with no agreement beforehand," *id.* at 18. But after applying the tools of statutory construction, the Supreme Court held that § 666(a)(1)(B) only bans bribes, that is, "payments made or agreed to *before* an official act in order to influence the official with respect to that future official act." *Id.* at 5 (emphasis in original). The definition thus instructs the jury, in the definition's first paragraph, that the "intent to be influenced or rewarded" requires an agreement of an exchange for an official act *before* the official act is taken.

Snyder further explained that the word "rewarded" does play a role in § 666(a)(1)(B) because "the term 'rewarded' closes off certain defenses that otherwise might be raised in bribery cases." 603 U.S. at 18. First, "rewarded" makes clear that "where the agreement was made *before* the act but the payment was made *after* the

act," the statue is still violated. *Id.* (emphases added). In cases in which this might be an issue, the bracketed second paragraph explains this concept. Second, the term "rewarded" also prevents an official from "assert[ing] as a defense that he would have taken the same act anyway and therefore was not 'influenced' by the payment." *Id.* at 19. The bracketed third paragraph explains this point to the jury, and at the same time instructs the jury that "intent to be rewarded" is not established if the defendant has already taken the official act before the bribe is agreed on.

The instructions refer to an "official act" in requiring that a defendant act with the intent to be influenced or rewarded in exchange for an "official act." Although § 666(a)(1)(B) does not explicitly use that term, *Snyder* repeatedly refers to "official act" in explaining that a defendant must act with the intent to be influenced or rewarded in exchange for an "official act." 603 U.S. at 11–12, 19–20. For example, the Supreme Court emphasized that bribery requires that the defendant have the intent "to be influenced in the official act." *Id.* at 11, 12; *see also id.* at 19 (explaining that a "state or local official can violate § 666 when he accepts an up-front payment for a future *official act* or agrees to a future reward for a future *official act*.") (emphases added).

For a definition of "official act," in *McDonnell v. United States*, 579 U.S. 550, 572–74 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). The Committee recommends using the Pattern Instruction for the same term in 18 U.S.C. § 201, the bribery statute that applies to federal officials. *Snyder* explained that Congress modeled the text of § 666(a)(1)(B) on § 201(b). 603 U.S. at 10–11.

A defendant need only be partially motivated by the expectation of or desire for reward. *United States v. Coyne*, 4 F.3d 100, 113 (2nd Cir. 1993).

18 U.S.C. § 666(a)(2) PAYING A BRIBE—ELEMENTS

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

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

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

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

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

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

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

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

Committee Comment

Federal Funds. The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised. The federal-funds element is not a requirement of subject matter jurisdiction. *United States v. Bowling*, 952 F.3d 861, 867 (7th Cir. 2020). Instead, it is an element that goes to the merits. *Id.*

Intent to Influence or Reward. In *Snyder v. United States*, 603 U.S. 1, 19–20 (2024), the Supreme Court held that § 666 is a bribery statute and does not bar gratuities. A separate instruction defines "intent to influence or reward."

Corruptly. The bracketed definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995) ("person acts corruptly, for example, when he gives or offers to give something of value intending to influence or reward a government agent in connection with his official duties"). Although the Seventh Circuit has defined "corruptly" in cases in which the defendant was a bribe *recipient* (not the bribe payer), *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015); *United States v. Mullins*, 800 F.3d 866, 870 (7th Cir. 2015), there is no definitive holding from the Seventh Circuit on the definition as to bribe *payers*. The Committee notes that the definition does not appear to add any requirement beyond the intent requirement in the second element of the Pattern Instruction, but absent a Seventh Circuit holding on the issue, the Committee takes no further position.

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

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

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in *McDonnell v. United States*, ~~136 S. Ct. 2355, 2371-72~~579 U.S. ~~Ct.~~ 550, 572–74 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and judges should consider the potential impact of *McDonnell* on § 666 cases. Also, as explained in the Committee Comment for the Definition of Intent to Be Influenced or Rewarded, *Snyder* repeatedly refers to "official act" in explaining that a defendant must act with the intent to be influenced or rewarded in exchange for an "official act." 603 U.S. at 11–12, 19–20.

~~Lawyers and judges should consider whether intent to "influence"and intent to "reward" are two separate theories of liability, that is, bribery ("influence") versus gratuity ("reward"). Although Seventh Circuit opinions have stated, in broad terms, that a specific *quid pro quo* is not required under § 666(a), see *United States v. Mullins*, 800 F.3d 866, 871 (7th Cir. 2015); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir.1997), those cases involved the government's pursuit of a "reward" theory as well. It is not clear that the Seventh Circuit has directly answered whether a case presenting only an intent to "influence" theory requires a *quid pro quo*.~~

~~The reasoning of *United States v. Boender* arguably suggests that there is a difference between "influence" and "reward." *Boender* reaffirmed that § 666(a)(2) does not require a *quid pro quo*, but the opinion examined the federal employee bribery counterpart, 18 U.S.C. § 201(b), and relied on the distinction between bribes and gratuities:~~

> ~~Whereas § 201(b) makes it a crime to "corruptly give[], offer[] or promise[] anything of value to any public official . . . with intent to influence any official act," § 666(a)(2) criminalizes corrupt giving "with intent to influence *or reward*" a state or local official. Further, § 201(b) is complemented by § 201(c), which trades a broader reach—criminalizing any gift given "for or~~

~~because of any official act performed or to be performed," § 201(c)(1)(A) for a less severe statutory maximum of two, rather than fifteen, years' imprisonment. Section 666(a)(2) has and needs no such parallel: by its plain text, it already covers both *bribes and rewards*.~~

~~*Boender*, 649 F.3d at 655 (first emphasis in original). In that explanation, the Seventh Circuit appears to emphasize that the intent to "reward" is the add-on that distinguishes § 666(a)(2) from § 201(b) bribery~~**Campaign Contributions.** ~~*Id.* The passage's concluding sentence says that § 666(a)(2) "covers both bribes and rewards." *Id.* Arguably, then, under § 666(a)(2), "intent to influence" covers bribes whereas "intent to reward" covers gratuities. Also, *Boender* relied on the bribery versus gratuity distinction drawn by the Supreme Court in interpreting § 201(b) versus § 201(c), 649 F.3d at 655 (citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404, 406 (1999)), and § 201(b) uses the same intent to "influence" statutory language as § 666(a).~~

~~In dictum, one Circuit arguably has treated the two theories of liability independently, noting that where a defendant is charged with bribery only, the jury instructions should not include the "reward" language. See *United States v. Munchak*, 527 F. App'x 191, 194 (3d Cir. May 31, 2013) ("As [the defendant] was charged with bribery under § 666, the Court's instructions should not have included the 'reward' language."). It is worth noting too that the Statutory Appendix of the Sentencing Guidelines directs § 666 corruption offenses to both Guideline § 2C1.1, which covers bribery, and § 2C1.2, which covers gratuities.~~

~~In light of the uncertainty in the case law, the Committee does not take a position on this issue. If the district court decides that there is a distinction between the two forms of intent, then the court should provide separate instructions for them.~~

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes ~~or illegal gratuities~~. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. 666(a)(2) PAYING A BRIBE— INTENT TO INFLUENCE OR REWARD

A defendant acts with the "intent to influence or reward" if [he she] [gave] [offered] [or] [agreed to give] a thing of value in exchange for an official act in connection with some business, transaction or series of transactions of the [organization; government; government agency].

[Even if payment of the thing of value is provided after the official act, or is to be provided after the official act, the defendant acts with the "intent to influence or reward" so long as the [he she] [gave] [offered] [or] [agreed to give] the thing of value in exchange for the official act.]

[The defendant acts with the "intent to reward" even if the agent would have taken the same official act anyway, so long as the defendant [gave] [offered] [or] [agreed to give] the thing of value in exchange for the official act before the agent took the official act. If the agent has taken the official act before the defendant [gave] [offered] [or] [agreed to give] the thing of value, then the defendant did not act with the "intent to reward."]

Committee Comment

Section 666(a)(1)(B) applies to bribe *recipients*, whereas § 666(a)(2) applies to bribe *payers*. In *Snyder v. United States*, 603 U.S. 1, 19–20 (2024), the Supreme Court held that § 666(a)(1)(B) forbids bribes and does not bar gratuities. *Snyder* recognized that, in the abstract and in isolation, the word "rewarded in the phrase "intending to be influenced or rewarded" could be interpreted to cover gratuities, that is "a reward given after the act with no agreement beforehand," *id.* at 18. But after applying the tools of statutory construction, the Supreme Court held that § 666(a)(1)(B) only bans bribes, that is, "payments made or agreed to *before* an official act in order to influence the official with respect to that future official act." *Id.* at 5 (emphasis in original).

Although *Snyder* involved the bribe-recipient version of § 666, 18 U.S.C. § 666(a)(1)(B), the opinion makes clear that the reasoning applies to the bribe-payer subsection, § 666(a)(2). 603 U.S. at 16 n.5 (noting that interpreting § 666(a)(2) to bar gratuities poses even more problems as to "gift-givers" than recipients). This Pattern Instruction thus instructs the jury, in the definition's first paragraph, that the "intent to influence or reward" requires the giving, offering, or agreement to give a thing of value in exchange for an official act.

Snyder further explained that the word "rewarded" does play a role in § 666 because "the term 'rewarded' closes off certain defenses that otherwise might be raised in bribery cases." 603 U.S. at 18. First, "rewarded" makes clear that "where the agreement was made *before* the act but the payment was made *after* the act," the statue is still violated. *Id.* (emphases added). In cases in which this might be an issue, the bracketed second paragraph explains this concept. Second, the term "rewarded" also prevents an official from "assert[ing] as a defense that he would have taken the same act anyway and therefore was not 'influenced' by the payment." *Id.* at 19. The bracketed third paragraph explains this point to the jury as applied to bribe payers. At the same time, the paragraph instructs the jury that "intent to be rewarded" is not established if the agent has already taken the official act before the bribe is offered.

The instructions refer to an "official act" in requiring that a defendant act with the intent to be influenced or rewarded in exchange for an "official act." Although § 666(a)(2) does not explicitly use that term, *Snyder* repeatedly refers to "official act" in explaining that a defendant must act with the intent to be influenced or rewarded in exchange for an "official act." 603 U.S. at 11–12, 19–20. For example, the Supreme Court emphasized that bribery requires that the defendant have the intent "to be influenced in the official act." *Id.* at 11, 12; *see also id.* at 19 (explaining that a "state or local official can violate § 666 when he accepts an up-front payment for a future *official act* or agrees to a future reward for a future *official act*.") (emphases added).

For a definition of "official act," in *McDonnell v. United States*, 579 U.S. 550, 572–74 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). The Committee recommends using the Pattern Instruction for the same term in 18 U.S.C. § 201, the bribery statute that applies to federal officials. *Snyder* explained that Congress modeled the text of § 666(a)(1)(B) on § 201(b), 603 U.S. at 10–11, and that the interpretation of the bribe-recipient provision also applies to the bribe-payer provision of § 666(a)(2), *id.* at 16 n.5.

18 U.S.C. § 844(i) – ARSON – ELEMENTS

Count One

[The indictment; Count ___ of the indictment] charges the defendant[s] with [damaging; destroying] [or] [attempting to [damage] [or] [destroy]] by [fire; explosive] [*insert description of building, vehicle, or other real or personal property charged in indictment*]. In order for you to find the defendant guilty of this charge, the government must prove each of the following three elements beyond a reasonable doubt:

1. The defendant maliciously [[damaged] [destroyed] [attempted to [damage] [or] [destroy]] a [[building] [vehicle] [or] [other real or personal property]], namely [*insert description of property charged in indictment*].

2. The defendant did so by using [fire] [an explosive].

3. The [building; vehicle; property] that the defendant [[damaged] [destroyed] [or] [attempted to [damage] [or] [destroy]] was used in interstate commerce or in an activity affecting interstate commerce.

I will define several of these terms in the following instructions.

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

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

Comment

See Jones v. United States, 529 U.S. 848, 859 (2000) (property itself must be used in interstate commerce; insufficient that damage or destruction might affect

interstate commerce). The remaining elements are taken directly from the statute.

In a case involving an allegedly unsuccessful attempt to damage or destroy property, refer to the Committee Comment to Instruction 4.09 (attempt) regarding how this instruction should be modified. In a case in which it is disputed whether there was damage or only attempted damage to property, thus requiring an instruction on both possibilities, use this instruction and provide a separate definition of attempt taken from Instruction 4.09, for example:

> A person attempts to commit the crime of damaging a [building; vehicle; property] by means of an explosive if he: (a) knowingly takes a substantial step toward damaging a [building; vehicle; property] by means of an explosive, (b) with the intent to damage the [building; vehicle; property] by means of an explosive. The substantial step must be an act that strongly supports the conclusion that the defendant intended to cause damage to the [building; vehicle; property] by means of an explosive.

18 U.S.C. § 844(i) – DEFINITION OF "MALICIOUSLY"

A person acts "maliciously" if he uses [fire; an explosive] with the intent to cause harm to property or a person or acts with deliberate disregard of the likelihood that harm to property or a person will result.

Comment

See United States v. Grady, 746 F.3d 846, 848-49 (7th Cir. 2014); *United States v. McBride*, 724 F.3d 754, 759-60 (7th Cir. 2013).

18 U.S.C. § 844(i) – DEFINITION OF "EXPLOSIVE"

The term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical compound, mechanical mixture, or device that contains any oxidizing or combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

Comment

This definition quotes the entire list of items described in statute. 18 U.S.C. § 844(j). In some cases, it will not be necessary to provide the entire list of items that are considered explosives.

18 U.S.C. § 844(i) – DEFINITION OF "INTERSTATE COMMERCE"

The term "interstate commerce" means business, trade, travel, transportation, or communicating between a place in a state and any place outside that state. Activity affects interstate commerce if the natural consequences of the activity have some effect on interstate commerce. The government must prove that the [building; vehicle; property] was actually used for a function that involved or affected interstate or foreign commerce. [The government is not required to prove that the defendant knew the property was used for a function that involved or affected interstate or foreign commerce.]

Comment

See, e.g., Jones v. United States, 529 U.S. 848, 859 (2000) (property itself must be used in interstate commerce; insufficient that damage or destruction might affect interstate commerce); *United States v. Johnson*, 42 F.4th 743, 749-55 (7th Cir. 2022) (discussion of interstate commerce element); *United States v. Soy*, 454 F.3d 766, 769 (7th Cir. 2006) (knowledge of effect on commerce not required).

Properties "actively used for a commercial purpose, such as restaurants, bars, rental properties, and home offices, possess the requisite nexus with interstate commerce under § 844(i)." *United States v. Aljabari*, 626 F.3d 940, 948 (7th Cir. 2010) (internal quotation marks omitted). In particular, evidence that the property was used as rental property is sufficient to establish an effect on interstate commerce. *See United States v. Adame*, 827 F.3d 637, 644 (7th Cir. 2016). A sentence to this effect may be included in an appropriate case.

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] ~~or~~ [knowing the communication would be viewed as ~~a threat~~] [or] [consciously disregarding a substantial risk that his communication would be viewed as] a true 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 true threat or knowing that the communication would be viewed as a true threat is based on *Elonis v. United States*, ~~135 S. Ct. 2001, 2012~~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~~is~~ portion of the instruction reflects that the purpose or knowledge mental state is sufficient to sustain a conviction. ~~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.").~~

In the third element, the language requiring the defendant to consciously disregard a substantial risk that his communication would be viewed as a true threat reflects that a mental state of recklessness is sufficient to sustain a conviction. *Elonis* "decline[d] to address" whether a mental state of recklessness was sufficient, *id.* at 740, but *Counterman v. Colorado*, 600 U.S. 66 (2023), answered that question affirmatively. "[T]he First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements," but "a mental state of recklessness is sufficient." *Counterman*, 600 U.S. at 69. The evidence must establish "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* "In the threats context, [recklessness] means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id.* at 79, citing *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part).

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. § 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~~] [or] [knowing the communication would be viewed as] [or] [consciously disregarding a substantial risk that the communication would be viewed as] a true 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 true threat or knowing that the communication would be viewed as a true threat is based on *Elonis v. United States*, ~~135 S. Ct. 2001, 2012~~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."). This~~e~~

portion of the instruction reflects that the purpose or knowledge mental state is sufficient to sustain a conviction.~~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.").~~

In the third element, the language requiring the defendant to consciously disregard a substantial risk that his communication would be viewed as a true threat reflects that a mental state of recklessness is sufficient to sustain a conviction. *Elonis* "decline[d] to address" whether a mental state of recklessness was sufficient, *id.* at 740, but *Counterman v. Colorado*, 600 U.S. 66 (2023), answered that question affirmatively. "[T]he First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements," but "a mental state of recklessness is sufficient." *Counterman*, 600 U.S. at 69. The evidence must establish "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* "In the threats context, [recklessness] means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id.* at 79, citing *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part).

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.

DEFINITION OF "TRUE THREAT"

A "true threat" is a communication that a reasonable observer, considering the surrounding circumstances and communications, would interpret as 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~~However, you may consider 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~~ 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."). In *Counterman v. Colorado*, 600 U.S. 66 (2023), the Supreme Court further clarified that the minimum mental state required is one of recklessness. "In the threats context, it means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id.* at 79

(citing *Elonis*, 575 U.S. at 746) (Alito, J., concurring in part and dissenting in part). See Instructions, 18 U.S.C. § 875(c) Transmission of a Threat to Kidnap or Injure-Elements and 18 U.S.C. § 876(c) Mailing a Threat to Kidnap or Injure-Elements.

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

The instruction on idle or careless talk, exaggeration, or joking is based on *Khan*, 937 F.3d at 1051 ("A communication is not a true threat if it is merely idle or careless talk, exaggeration, or something said in a joking manner.").

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

18 U.S.C. §§ 922(g) & 924(e)
ARMED CAREER CRIMINAL ACT
PENALTY-ENHANCING INSTRUCTIONS

Committee Comment

The default maximum penalty for offenses under 18 U.S.C. § 922(g) is fifteen years' imprisonment. The Armed Career Criminal Act provides for an enhanced penalty range of fifteen years to life imprisonment if a defendant is convicted of an 18 U.S.C. § 922(g) offense and "has three previous convictions" for "a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The Fifth and Sixth Amendments require a jury, rather than a judge, to find beyond a reasonable doubt that at least three of the defendant's previous convictions were "committed on occasions different from one another." *Erlinger v. United States*, 602 U.S. 821, 835 (2024).

Therefore, if the Government seeks an enhanced sentence under the Armed Career Criminal Act, then the jury must be instructed on the different occasions inquiry. These instructions should be given in a bifurcated trial only after the jury has returned a guilty verdict for an 18 U.S.C. § 922(g) offense. The parties can then present evidence and make arguments solely on the "different occasions" question. Whether a prior conviction qualifies as an ACCA "violent felony" or "serious drug offense" is a question of law for the court. See, *e.g., Descamps v. United States*, 570 U.S. 254, 257 (2013) (discussing the information a district court can consider when determining whether a prior conviction "qualifies as an ACCA predicate"); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); see also *Erlinger*, 602 U.S. at 843.

The introductory instruction and special verdict instruction begin on the next page.

18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) INTRODUCTORY INSTRUCTION

You have found the defendant guilty of the offense charged in [Count __] of the indictment. That finding remains in place. You must now determine a special verdict concerning the defendant's prior convictions.

The indictment alleges that the defendant has [at least] three prior convictions for offenses committed on occasions different from one another, namely:

- [List name of violent felony or serious drug offense, listed date offense committed from charging instrument, jurisdiction, and date convicted]

- [List name of violent felony or serious drug offense, listed date offense committed from charging instrument, jurisdiction, and date convicted]

- [List name of violent felony or serious drug offense, listed date offense committed from charging instrument, jurisdiction, and date convicted]

You will now hear evidence regarding these prior offenses so that you can determine whether they were committed on occasions different from one another. This phase of the trial will proceed in the same way as the first.

First, each side's attorneys may make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

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

After that, you will go to the jury room to deliberate on the special verdict. All of the instructions previously given to you still apply.

18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) SPECIAL VERDICT INSTRUCTIONS

The instructions previously given to you concerning your consideration of the evidence, the credibility of the witnesses, your duty to deliberate together, the burden of proof, and the necessity of a unanimous verdict still apply.

You should not reconsider whether the defendant is guilty or not guilty. Your previous verdict is final and conclusive.

Because you found the defendant guilty of the offense charged in [Count __] of the indictment, you have one more task. The indictment alleges that the defendant has [at least] three prior convictions for offenses committed on occasions different from one another. Here, the government has presented evidence that the defendant was convicted of the following offenses:

- [List name of violent felony or serious drug offense, listed date offense committed from charging instrument, jurisdiction, and date convicted]

- [List name of violent felony or serious drug offense, listed date offense committed from charging instrument, jurisdiction, and date convicted]

- [List name of violent felony or serious drug offense, listed date offense committed from charging instrument, jurisdiction, and date convicted]

The government bears the burden of proving beyond a reasonable doubt that the defendant's prior offenses were committed on occasions different from one another.

If you find from your consideration of all the evidence that the government has proved beyond a reasonable doubt that [at least] three of the defendant's prior offenses were committed on occasions different from one another, you may say so on the special verdict form.

If, on the other hand, you find from your consideration of all the evidence that the government has not proved beyond a reasonable doubt that [at least] three of the defendant's prior offenses were committed on occasions different from one another, you must say so on the special verdict form.

18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) DEFINITION OF "OCCASIONS"

Crimes occur on different occasions when each crime was a distinct event, occurrence, or episode, rather than part of a single, uninterrupted course of conduct. A single occasion may encompass multiple activities that happen at different times. No particular lapse of time or distance separates a single occasion from distinct ones. In determining whether [at least] three of the defendant's prior offenses were committed on occasions different from one another, you may consider all relevant circumstances, including whether the offenses were committed close in time, the closeness of their location, and the character and relationship of the offenses to one another, including whether they are similar or intertwined and whether they shared a common scheme or purpose, comprising a single criminal episode.

Committee Comment

In *Wooden v. United States*, 595 U.S. 360 (2022), the Supreme Court rejected a rule that offenses committed sequentially necessarily occurred on different occasions. *Id*. at 370. Instead, the Court adopted a "straightforward and intuitive approach," giving the term "occasion" within the Armed Career Criminal Act its ordinary meaning, defined as an "event, occurrence, happening, or episode." *Id*. at 367-369. Under this approach, a single occasion "may itself encompass multiple, temporally distinct activities." *Id* at 367. "No particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones." *Erlinger v. United States*, 602 U.S. 821, 841 (2024)(citing *Wooden*, 595 U.S. at 369-370).

In determining whether crimes occurred on separate occasions, a "range of circumstances" are relevant factors, including "timing" (offenses "close in time" and in an "uninterrupted course of conduct" will likely be one occasion); "proximity of location" ("the further away crimes take place, the less likely they are components of the same criminal event); and "the character and relationship of the offenses" ("[t]he more similar or intertwined the conduct giving rise to the offenses- the more for example, they share a common scheme or purpose" the more likely they will be one occasion). *Wooden,* 595 U.S. at 384-385. In *Erlinger*, the Court reaffirmed the factors set forth in *Wooden*, noting that the jury may consider timing, proximity of location, and how similar or

intertwined the crimes were in purpose or character. 602 U.S. at 834 (citing *Wooden*, 595 U.S. at 369).

18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) SPECIAL VERDICT FORM INSTRUCTION

A special verdict form has been prepared for you. You will take this form with you to the jury room.

[Read the special verdict form.]

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

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

Committee Comment

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

18 U.S.C. § 922(g) PENALTY ENHANCING PROVISION UNDER § 924(e) SPECIAL VERDICT FORM

You have found the defendant guilty of the offense charged in [Count __] of the indictment. You must now unanimously determine whether the defendant has [at least] three prior offenses committed on occasions different from one another.

We, the jury, unanimously find beyond a reasonable doubt that the defendant has [at least] three prior offenses committed on occasions different from one another.

Yes _____ No _____

Committee Comment

There may be cases in which there are more than three prior convictions and if so, the instruction should be modified to fit the circumstances of the case.

It is well established that a jury in a federal criminal case may not convict unless it unanimously finds the government has proved each element of the offense beyond a reasonable doubt. *Richardson v. United States*, 526 U.S. 813, 817 (1999). Enhancing a defendant's sentence under 18 U.S.C. § 924(e) requires a unanimous jury to determine whether the defendant's prior offenses were committed on separate occasions. *Erlinger v. United States*, 602 U.S. 821 (2024). However, a federal jury need not always decide unanimously the means the defendant used to commit an element of the crime. *Richardson*, 526 U.S. at 817. In cases alleging more than three prior offenses, the Seventh Circuit has not yet decided whether unanimity regarding which convictions occurred on separate occasions is required, and the Committee takes no position.

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

A person [uses; carries] a firearm "in relation to" a crime if there is a connection between the use or carrying of the firearm and the crime of violence or drug trafficking crime. The firearm must have some purpose or effect with respect to the crime; its presence or involvement cannot be the result of accident or coincidence. The firearm must at least facilitate, or have the potential of facilitating, the crime.

Committee Comment

See *Smith v. United States*, 508 U.S. 223, 238 (1993); *United States v. Rivers*, 108 F.4th 973, 980 (7th Cir. 2024); *United States v. Mancillas*, 183 F.3d 682, 707 (7th Cir. 1999).

The Seventh Circuit has stated that the terms "during" and "in relation to" have separate meanings under § 924(c)(1)(A). *United States v. Young*, 316 F.3d 649, 662 (7th Cir. 2002).

18 U.S.C. § 1014 FALSE STATEMENT TO FINANCIAL INSTITUTION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] making a false statement to a [bank] [financial institution]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant made a false statement to a [bank; financial institution], [orally; in writing]; and

2. At the time the defendant made the statement, he knew it was false; and

3. The defendant made the statement with the intent to influence the action of the [bank; financial institution] concerning a[n] [describe type of action: application, loan, etc.]; and

4. The accounts of the [bank; financial institution] were insured by the Federal Deposit Insurance Corporation.

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

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

Committee Comment

There are several types of institutions listed in the statute for which this instruction should be modified, but the vast majority of section 1014 cases are based on statements to banks.

See *United States v. Lane*, 323 F.3d 568, 583 (7th Cir. 2003) (elements of offense under 18 U.S.C. § 1014 include "knowledge of falsity, and the intent to influence action by the financial institution concerning a loan or one of the other

transactions listed in the statute"). Proof of materiality is not required under section 1014. *United States v. Wells*, 519 U.S. 482 (1997); *Lane*, 323 F.3d at 583.

The term "knowingly" is defined in Pattern Instruction 4.10.

In *Thompson v. United States*, ___ U.S. ___ (2025), the Supreme Court held that § 1014 only prohibits "false" statements, not merely misleading ones. Statements that are true but misleading—instead of false—do not violate § 1014. The first element of the pattern instruction requires proving that the statement is "false," so the instruction does not cover merely misleading statements,. but judges and lawyers should be aware of the issue. Some additional clarification of the distinction between "false" and "misleading" statement ~~may~~would be warranted in a case in which a defendant argues that his statement was misleading but was not false.

18 U.S.C. § 1028A DEFINITION OF "IN RELATION TO"

A person [transfers; possesses; uses] a [means of identification; false identification document] "in relation to" a crime if he ~~it had a purpose, role or effect is~~ [transfer~~r~~s~~ed~~; possesses~~ed~~; uses~~d~~] [in a manner that is fraudulent or deceptive] with respect to the [felony; terrorism] offense. ~~It also~~This means that the [transfer; possession; use] of the [means of identification; false identification document] ~~had a connection to or relationship with~~ must be central to ~~at the crux of~~ the [felony; terrorism] offense.

Committee Comment

Section 1028A of Title 18 does not provide a specific definition for "in relation to." This definition borrows from ~~the meaning of that phrase in the firearms context, see Pattern Instruction 18 U.S.C. § 924(c)(1);~~ *Dubin v. United States*, ~~143~~599 U.S. 110 ~~S. Ct. 1557~~ (2023), which held that "§1028A(a)(1) is violated when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal." The Court explained:

> "[B]eing at the crux of the criminality requires more than a causal relationship, such as 'facilitation' of the offense or being a but-for cause of its 'success.' … Instead, with fraud or deceit crimes like the one in this case, the means of identification specifically must be used in a manner that is fraudulent or deceptive. Such fraud or deceit going to identity can often be succinctly summarized as going to 'who' is involved."

Id. at 131–32. The Committee considered the use of the word "crux" and determined that the word "central" was a more common term that reflected the same concept as "crux." *Id*. at 123 (defining "in relation to" as playing a "central role" in the underlying offense).

The Court further noted "[w]hen the underlying crime involves fraud or deceit, as many of § 1028A's predicates do, this entails using a means of identification specifically in a fraudulent or deceitful manner." Id. at 117. ~~see also Pattern Crim. Jury Instr. 5th Cir. 2.44 (2020); Mod. Crim. Jury Instr. 3rd Cir. 6.18.924B (2018); Pattern Crim. J. Instr. 11th Cir. OI 35.2 (2020)~~ See also Pattern Crim. Jury Instr. 5th Cir. 2.48C (2024); 9th Cir. Pattern Crim. Jury Instr. 15.9 (2024). The definition should be tailored to the particular facts of the case on trial and the government's theory of how the defendant's transfer, possession, or use was ~~related to~~at the crux of the felony or terrorism offense.

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~~without lawful authority [seized; confined; inveigled; decoyed; kidnapped; abducted; carried away] the victim without [his; her] consent; and

~~2.~~2. The defendant held the victim for some purpose; and

3. [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).~~ However, the government must prove that the defendant held the victim for some purpose. *United States v. Larsen*, 615 F.3d 780, 787 (7th Cir. 2010). Moreover, the Seventh Circuit has

interpreted the phrase "for ransom, reward, or otherwise" in the statute as encompassing any purpose at all. *United States v. Jones*, 808 F.2d 561, 565-66 (7th Cir. 1986).

It is well established that a jury in a federal criminal case may not convict unless it unanimously finds the government has proved each element of the offense beyond a reasonable doubt. *Richardson v. United States*, 526 U.S. 813, 817 (1999). However, a federal jury need not always unanimously determine the means a defendant used to commit an element of the crime. The Seventh Circuit has not yet decided whether unanimity is required as to the purpose for which the defendant held the victim. The Committee takes no position on whether unanimity as to the purpose for holding the victim is required, but notes that the two circuits to squarely examine the issue have found it is not. *United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000); *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998). If unanimity is not required, the Committee suggests inserting the following bracketed language:

> [Though you must unanimously agree that the defendant held the victim for some purpose, you need not agree on what that purpose was.]

The act of holding a kidnapped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent to so confine the victim. *Chatwin v. United States*, 326 U.S. 455, 460 (1946). 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." *Id.* at 464.~~*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. §§ 1341 & 1343 DEFINITION OF "SCHEME TO DEFRAUD"

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

[A "scheme to defraud" is a scheme that is intended to deceive or cheat another and [to obtain money or property or cause the [potential] loss of money or property to another by means of materially false or fraudulent pretenses, representations or promises]; [to deprive another of the intangible right to honest services through [bribery; kickbacks].]]

[A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] or the concealment of material information.]

Committee Comment

The "scheme to defraud" and "intent to defraud" elements are distinct, and subject to definition in separate instructions. See *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992).

As the Supreme Court held in *Skilling v. United States*, 561 U.S. 358, 409 (2010) the honest services statue only covers bribery and kickback schemes.

In cases in which the indictment alleges multiple schemes, the jury should be instructed that it must be unanimous on at least one of the schemes. See *United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) ("Jury Instruction 13 informed the jury that the government need not prove every scheme that it had alleged, but that it must prove one of them beyond a reasonable doubt."); see also *United States v. Sababu*, 891 F.2d 1308, 1326 (7th Cir. 1989). A unanimity instruction can be found at Pattern Instruction 4.04.

A jury need not be given a specific unanimity instruction regarding the means by which an offense is committed. See *Richardson v. United States*, 526 U.S. 813, 817 (1999) (citing *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality)); see also *United States v. Griggs*, 569 F.3d 341 (7th Cir. 2009) (jury is not required to unanimously agree on overt act in a conspiracy prosecution). In the absence of definitive precedent on the subject, the Committee takes no position on whether a specific unanimity instruction as to

money/property and honest services fraud should be given when the indictment charges both money/property and honest services fraud. If money/property and honest services fraud are viewed as establishing separate scheme objects, a specific unanimity instruction may be appropriate. On the other hand, if money/property and honest services fraud are viewed as different means by which to commit the "scheme to defraud" essential element, cf. *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006) (honest services is a definition of scheme to defraud), or as something akin to an overt act, the general unanimity instruction applicable to essential elements may be sufficient. See *United States v. Blumeyer*, 114 F.3d 758, 769 (8th Cir. 1997) (*dicta*) ("we have serious doubts whether the jury was required to agree on the precise manner in which the scheme violated the law"); *United States v. Zeidman*, 540 F.2d 314, 317–18 (7th Cir. 1976) ("[T]he indictment cannot be attacked because it would permit a conviction by less than a unanimous jury. The trial judge clearly instructed the jury that they must not return a guilty verdict unless they all agreed that the defendants had devised a scheme to defraud at least the creditor or the debtor.").

The mail/wire fraud statutes do not include the words "omission" or "concealment," but cases interpreting the statutes hold that omissions or concealment of material information may consti- tute money/property fraud, without proof of a duty to disclose the information pursuant to a specific statute or regulation. See *United States v. Powell*, 576 F.3d 482, 490, 492 (7th Cir. 2009); *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998); *United States v. Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991); *United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985); see also *United States v. Colton*, 231 F.3d 890, 891–901 (4th Cir. 2000).

Nevertheless, it is not clear that an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited in the preceding paragraph involved more than just an omission; their facts also included other misrepresentations or affirmative acts of concealment. Some cases state the proposition in a way that suggests that an omission-based fraud scheme must include an act of concealment. *Powell*, 576 F.3d at 491 ("a failure to dis- close information may constitute fraud if the 'omission [is] ac- companied by acts of concealment' ") (quoting *Stephens*, 421 F.3d at 507)). It is also worth noting that in *Skilling*, 561 U.S. at 409– 11, the Supreme Court refused to hold that an undisclosed conflict of interest by itself constituted honest services fraud. The Court cautioned that an attempt to criminalize undisclosed conflicts of interest would require answering specific questions. *Id.* at 411, n.44 ("How direct or significant does the conflicting financial inter-

est have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context."). In cases where the indictment charges that the scheme to defraud was to obtain "property," the property cannot include State licenses. In *Cleveland v. United States*, 531 U.S. 12, 23–24 (2000), the Supreme Court explained that a State gambling license was not, for purposes of § 1341, "property" in the hands of the State. *Id*. at 23–24, 26–27. The same reasoning would apply to § 1343 (wire fraud), and was so applied in a wire (and mail) fraud case to reverse convictions premised on the obtaining of vehicle title papers issued by the State. *United States v. Borrero*, 771 F.3d 973, 976 (7th Cir. 2014) (citing *Cleveland*, 531 U.S. at 23–24, and *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989)). If the evidence at trial raises the risk that a jury would rely on State licenses to be a form of "property," then it might be appropriate to include an ex- plicit instruction in a way that prevents that reliance. *See also Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (applying *Cleveland* to a traffic-regulation decision and holding that the employee-labor costs was not the object of the fraud).

Furthermore, in *Ciminelli v. United States*, 598 U.S. 306 (2023), the Supreme Court reiterated that (setting aside the right to honest services) the mail and wire fraud statutes "criminalize only schemes to deprive people of traditional property interests." *Id.* at 309. In *Ciminelli*, the defendants were accused of bribing a prominent lobbyist with ties to the governor's office and then rigging the bidding process for a large, multiyear public infrastructure project so the defendant's construction company would secure a lucrative government contract associated with the project. *Id.* at 309-10. The defendants were charged under the Second Circuit's right-to-control theory, whereby fraud can be established by showing that a defendant "schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions." *Id.* at 310. In rejecting the right-to-control theory as a valid basis for liability under the wire fraud statute, the Court explained that the "right to valuable economic information needed to make discretionary economic decisions is *not* a traditional property interest." *Id.* at 316 (emphasis added). However, schemes to defraud the government of loan guarantees are subject to prosecution under the fraud statutes. *See United States v. Griffin*, 76 F.4th 724, 739 (7th Cir. 2023) (applying *Ciminelli* and holding that falsely obtained loan guarantees that committed government agency "to stand behind a significant portion of the loan amount in case of default[] are most certainly 'property' as required by the wire

fraud statute"). Likewise, schemes to defraud a government in order to secure valuable contracts or jobs also qualify as a deprivation of property under the fraud statutes. *See Kousisis v. United States*, 145 S. Ct. 1382, 1391–92, 1398 (2025) (endorsing fraudulent-inducement theory and holding that a defendant who fraudulently induces a victim to enter into a contract may be convicted of wire fraud even if the defendant did not seek to cause a ~~net~~ economic loss to the victim); *United States v. Leahy*, 464 F.3d 773, 787 (7th Cir. 2006) (distinguishing *Cleveland* and holding that object of fraud committed against municipality acting as both regulator and property holder was "money, plain and simple," where defendants falsely represented that their services were being provided by minority or woman-owned businesses); *United States v. Sorich*, 523 F.3d 702, 711–13 (7th Cir. 2008) (holding that "jobs are property for purposes of mail fraud" and that defendants cheated municipality out of "qualified civil servants" due to a "massive scheme to defraud" based on "patronage and cronyism"). At the same time, certain "schemes to defraud a party into entering a contract it would not enter if it had been told the truth, but where the fraudsters deliver the agreed money, goods, or services are close to the edge of the reach of the wire and mail fraud statutes." *United States v. Kelerchian*, 937 F.3d 895, 913 (7th Cir. 2019).

18 U.S.C. §§ 1341, 1343 & 1346 DEFINITION OF "HONEST SERVICES"

A scheme to defraud another of the intangible right to "honest services" consists of a scheme to violate a fiduciary duty by bribery or kickbacks. A fiduciary duty is a duty to act only for the benefit of the [public; employer; shareholder; union].

[A public official owes a fiduciary duty to the public.]

[An employee owes a fiduciary duty to his employer.]

[An officer of a corporation owes a fiduciary duty to the corporation's shareholders.]

[A union official owes a fiduciary duty to the union.]

[The defendant need not owe the fiduciary duty personally, so long as he devises or participates in a bribery or kickback scheme intended to deprive the [public; employer; union] of its right to a fiduciary's honest services.]

Committee Comment

As the Supreme Court held in *Skilling v. United States*, 561 U.S. 358 (2010), the honest services statute covers only bribery and kickback schemes. See the bribery and kickback instructions for further definition.

Skilling noted certain examples of fiduciary relationships covered by § 1346. See 561 U.S. at 408, n.42. The list of fiduciary duties in this instruction is not exhaustive and courts may need to use other fiduciary duties than those identified above. See, *e.g.*, *United States v. Hausmann*, 345 F.3d 952, 955–56 (7th Cir. 2003).

In most cases, public official status will not be in dispute. If public official status is a disputed issue, the court may consider giving an instruction tailored for the case.

In *Percoco v. United States*, 598 U.S. 319 (2023), the Supreme Court rejected jury instructions that allowed it to find that the defendant, who had been on a break from government service, could have a fiduciary duty to provide honest services if "he dominated and controlled any governmental business" and "people working in

government actually relied on him because of a special relationship he had with the government." *Id.* at 330–31. Although the Court rejected the defense position that a private citizen can never have a fiduciary duty to the public, the Court held that the particular instruction was "too vague." *Id.* at 330.

The final bracketed instruction may be given in cases in which one or more of the trial defendants is not the individual who personally owed the fiduciary duty. See, *e.g.*, *United States v. Alexander*, 741 F.2d 962, 964 (7th Cir. 1984) ("[t]here can be no doubt that a non-fiduciary who schemes with a fiduciary to deprive the victim of intangible rights is subject to prosecution under the mail fraud statute"), overruled on other grounds, *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (*en banc*); *United States v. Lovett*, 811 F.2d 979, 984 (7th Cir. 1987) (lawyer guilty of mail fraud for bribing mayor, and thereby depriving the citizens of their right to the mayor's honest services). The public official/fiduciary, in fact, need not even be a party to the scheme. See *United States v. Potter*, 463 F.3d 9, 17 (1st Cir. 2006) (businessmen guilty of honest services fraud for scheming to bribe state speaker of the house; no requirement that public official agree to the scheme; "that [official] might prove unwilling or unable to perform, or that the scheme never achieved its intended end, would not preclude conviction").

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

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

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

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

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

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

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

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

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

Committee Comment

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

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

In *United States v. Awad*, 551 F.3d 930, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must prove that the defendant acted with knowledge that his conduct was unlawful. But in 2010, after *Awad* was decided, Congress amended § 1347 and added, in what is now § 1347(b), that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether it is strictly limited to "this section," meaning specifically § 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, § 1347 prosecutions are sometimes premised on

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

Other circuits define "willfully" under § 1347 to mean that the defendant knows that his conduct is unlawful. *United States v. Nora*, 988 F.3d 823, 930 (5th Cir. 2021) (willfulness requires the government to prove that "the defendant acted with knowledge that his conduct was unlawful") (citation omitted); *United States v. Clay*, 832 F.3d 1259, 1301 (11th Cir. 2016) ("A defendant acts willfully when he acts with 'knowledge that his conduct was unlawful ….'"); *United States v. Shvets*, 631 Fed. Appx. 91, 95–96 (3d Cir. 2015) (non-precedential disposition) (willfulness is defined as "act[ing] with the knowledge that [one's] conduct was unlawful") (citation omitted).

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' "defraud"'). As noted above, effective on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148, Title VI, § 10606(b), added § 1347(b), which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." Just as the interpretation of Section 1347(b) remains open on the issue of willfulness (see the discussion above), no Seventh Circuit decision has interpreted this section for purposes of the specific-intent element.

Materiality: With regard to the fourth element, in *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined

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

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

18 U.S.C. § 1347(a)(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~~beyond a reasonable doubt:

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

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

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

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

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

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

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

Committee Comment

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

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

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

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

Other circuits define "willfully" under § 1347 to mean that the defendant knows that his conduct is unlawful. *United States v. Nora*, 988 F.3d 823, 930 (5th Cir. 2021) (willfulness requires the government to prove that "the defendant acted with knowledge that his conduct was unlawful") (citation omitted); *United States v. Clay*, 832 F.3d 1259, 1301 (11th Cir. 2016) ("A defendant acts willfully when he acts with 'knowledge that his conduct was unlawful ….'"); *United States v. Shvets*, 631 Fed. Appx. 91, 95–96 (3d Cir. 2015) (non-precedential disposition) (willfulness is defined as "act[ing] with the

knowledge that [one's] conduct was unlawful") (citation omitted).

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/p ji/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~~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 ~~in~~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). ~~1999);~~The Seventh Circuit addressed the application of *Neder* to § 1344(1) in *United States v.* ~~*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~~). 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 ~~sec- tion~~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 ~~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 instruc- tion includes materiality.~~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" under 18 U.S.C. § 1347(a) should be given in conjunction with this instruction.

18 U.S.C. § 1512(c)(1) DESTROY, ALTER OR CONCEAL DOCUMENT OR OBJECT—ELEMENTS

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

1. The defendant [attempted to] [alter[ed]; destroy[ed]; mutilate[d]; conceal[ed]] ~~a~~ [[a] record[s]; document[s]; other object[s]]; and

~~2. The defendant acted knowingly; and~~

~~3.~~2. The defendant acted corruptly; and

~~4.~~3. The defendant acted with the intent to impair the [record's; document's; other object's] integrity or availability for use in an official proceeding.

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

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

Committee Comment

See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007). The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below.

Section 1512(b) requires that the defendant act "knowingly"

with regard to each offense listed in § 1512(b). The § 1512(c) offenses require that the defendant act "corruptly." Thus, the Committee has not included "knowingly" as an element for the two § 1512(c) offenses. The Committee notes, though, that § 1503 requires the defendant act "corruptly" and does not include "knowingly" in the statute. Nonetheless, the 1999 Committee included both "corruptly" and "knowingly" in Pattern Instruction § 1503. In *Matthews*, although in a different context, the Court of Appeals analogized § 1503 and § 1512 conduct. *Matthews*, 505 F.3d at 706 ("because both sections prohibit similar types of conduct, it was proper for the district court to refer to § 1503 in arriving at a definition for 'corruptly' under § 1512").

In *United States v. Johnson*, 655 F.3d 594 (7th Cir. 2011), the court confirmed that "other object" in the first element is not limited to items in the nature of records or documents of the sort that are characteristic of white-collar criminal investigations, but rather "criminalizes the alteration, destruction, mutilation, or concealment of any object, including contraband." *Id*. at 605. The defendant in that case flushed cocaine down the toilet while law enforcement officers were executing a search warrant; see also *Yates v. United States*, 574 U.S. 528, 544–45 (2015) (interpreting "tangible object" in 18 U.S.C. § 1519 as narrower in scope than "other object" in 18 U.S.C. § 1512(c)(1)).

18 U.S.C. § 1512(c)(2) OTHERWISE OBSTRUCT OFFICIAL PROCEEDING—ELEMENTS

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

1. The defendant [attempted to] [obstruct[ed]; influence[d]; impede[d]] any official proceeding by [describe conduct or evidence at issue]; and

2. The defendant acted corruptly.

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

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

Committee Comment

See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007). The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below.

Section 1512(b) requires that the defendant act "knowingly" with regard to each offense listed in § 1512(b). The § 1512(c) offenses require that the defendant act "corruptly." Thus, the Committee has not included "knowingly" as an element for the two § 1512(c) offenses. The Committee notes, though, that § 1503 requires that the defendant act "corruptly" and does not include "knowingly" in the statute. Nonetheless, the 1999 Committee included both "corruptly" and "knowingly" in Pattern Instruction § 1503. In

Matthews, although in a different context, the Court of Appeals analogized § 1503 and § 1512 conduct. *Matthews*, 505 F.3d at 706 ("because both sections prohibit similar types of conduct, it was proper for the district court to refer to § 1503 in arriving at a definition for 'corruptly' under § 1512").

In *United States v. Fischer,* 603 U.S. 480, 486 (2024), the Supreme Court held that §1512(c)(2) covers some set of "matters not specifically contemplated" by §1512(c)(1). In *Fischer*, the Supreme Court then sought to define what exactly Congress left for (c)(2) beyond (c)(1). The Court concluded that, "subsection (c)(2) makes it a crime to impair the availability or integrity of records, documents, or objects used in an official proceeding *in ways other than* those specified in (c)(1)." *Id*. at 491 (emphasis added). In other words, the act at issue still must be with respect to some form of *evidence*, as opposed to *any* type of obstructive conduct. *Id*. at 492. Therefore, the instruction has been crafted to allow for inclusion of conduct in one of two ways beyond conduct violative of (c)(1): (a) an act with respect to some form of evidence other than those acts specified in (c)(1): altering, destroying, mutilating, or concealing; or (b) an act with respect to some form of evidence other than the forms of evidence listed in (c)(1): a record, document, or other object. The bracketed choice in the first element is to be replaced with a description of the way in which the obstruction is alleged to have occurred.

Finally, the Committee notes that an intent element is included in the jury instruction for §1512(c)(1), as it comes from the text of that subsection. *Id*. ("(1) . . . with the intent to impair the object's integrity or availability for use in an official proceeding.") A similar intent element is not included in the text of the (c)(2) subsection, however. On the one hand, the text of (c)(2) does not explicitly refer to "intent," and *Fischer* did not explicitly address whether the same intent element from subsection (c)(1) should be imputed into (c)(2). On the other hand, *Fischer* defined subsection (c)(2) as a "residual clause," 603 U.S. at 490, and (c)(2) starts with "otherwise," which suggests that (c)(2) incorporates the intent element in (c)(1). Given these competing considerations, the Committee opted not to include an intent element in the jury instruction for (c)(2). If the trial court decides to include an intent element in (c)(2), then the element could read: "3. The defendant acted with the intent to [describe conduct or evidence at issue] [in order to affect its] integrity or availability for use in any official proceeding."

18 U.S.C. § 2251(a) SEXUAL EXPLOITATION OF CHILD—ELEMENTS

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

1. At the time, [the person identified in the indictment] was under the age of eighteen years; and

2. The defendant, for the purpose of [producing a visual depiction; transmitting a live visual depiction] of sexually explicit conduct:

(a) [employed; used; persuaded; induced; enticed; coerced] [the person identified in the indictment] to cause [the person identified in the indictment] to engage in sexually explicit conduct; or

(b) had [the person identified in the indictment] assist any other person to engage in sexually explicit conduct; or

(c) transported [the person identified in the indictment] [across state lines; in foreign commerce; in any Territory or Possession of the United States] with the intent that [the person identified in the indictment] engage in sexually explicit conduct; and

3.

(a) The defendant knew or had reason to know that such visual depiction would be mailed or transported across state lines or in foreign commerce; or

(b) The visual depiction was [produced; transmitted] using materials that had been mailed, shipped, transported across state lines or in foreign commerce by any means, including by computer; or

(c) The visual depiction was mailed or actually transported across state lines or in foreign commerce.

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

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

Committee Comment

It is not intended that this entire instruction would be given to the jury. The options set forth as subparts (a), (b) and (c) in each of the second and third elements are alternative means of setting forth the elements of the offense.

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2)(B).

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

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

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

Knowledge of the age of the minor victim is not an element of

the offense. *United States v. Fletcher*, 634 F.3d 395 (7th Cir. 2011); *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) ("[P]roducers may be convicted under 2251(a) without proof they had knowledge of age. . .") (*dicta*).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See *United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

In *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), the Seventh Circuit held that the word "use" in § 2251(a) does not cover productions in which the minor is the "object of sexual inter- est" of—but not engaged in—the sexually explicit conduct. As the court wrote: "The most natural and contextual reading of the statu- tory language requires the government to prove that the offender took one of the listed actions to cause the minor to engage in sexu- ally explicit conduct for the purpose of creating a visual image of that conduct." *Id.* at 721. Cases involving Part 2(a) of this instruc- tion therefore require that the government prove that the employ- ment, use, persuasion, inducement or coercion was done "to cause" the minor to "engage in" the sexually explicit conduct.

The Seventh Circuit has noted "[t]he plain meaning of the verbs 'uses' and 'employs' in § 2251(a) do[es] not require a defendant to communicate directly with a child." *United States v. Hartleroad*, 73 F.4th 493, 497 (7th Cir. 2023). Should the parties confront such a case where the defendant is alleged to have operated through another adult in communicating with a minor, the parties should consider instructing the jury that to "use" or "employ" a minor does not require direct communication with the minor.

18 U.S.C. § 2256(2)(A) DEFINITION OF "SEXUALLY EXPLICIT CONDUCT"

"Sexually explicit conduct" includes actual or simulated –

1. sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral anal, whether between persons of the same or opposite sex;

2. bestiality;

3. masturbation;

4. sadistic or masochistic abuse; or

5. lascivious exhibition of the anus, genitals, or pubic area of any person.

Committee Comment

Only the applicable terms within this definition should be used.

In some cases charging violations of 18 U.S.C. § 2252A involving allegations of the use of computer-generated images that are, or are indistinguishable from, that of a minor engaging in sexually explicit conduct, this definition should be modified as set forth in 18 U.S.C. § 2256(2)(B).

In 2018, Congress passed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, which added the term "anus," to 18 U.S.C. § 2256(2)(A)(v).

As to "lascivious exhibition," the Seventh Circuit, in *United States v. Donoho*, 76 F.4th 588 (7th Cir. 2023), approved the following description of lasciviousness:

> In order to determine whether a visual depiction is a *lascivious exhibition of the anus, genitals, or pubic area*, you must consider the overall content of the visual depiction, while taking into account the age of the child depicted. Mere nudity does not make an image lascivious; instead, the image must tend to arouse sexual desire by the viewer. Accordingly, the focus of the image must be on the anus, genitals, or pubic area or the image of the anus, genitals, or pubic area must be

otherwise sexually suggestive. Ultimately, whether the government has proven an image is lascivious beyond a reasonable doubt is left to you to decide on the facts before you applying common sense.

See also United States v. Miller, 829 F.3d 519, 524–25 (7th Cir. 2016) ("[L]ascivious means 'tending to arouse sexual desire,' … [and] more than nudity is required to make an image lascivious.… [W]e require that 'the focus of the image must be on the genitals or the image must be otherwise sexually suggestive.'") (citations omitted); *but see also Donoho*, 76 F.4th at 601 (Easterbrook, J., concurring) ("*Miller* defines 'lascivious exhibition of the genitals' in a way that is hopelessly vague, leaving judges, prosecutors, jurors, and, most important, photographers, unable to determine what is and what is not lawful.").

26 U.S.C. § 5845 DEFINITIONS OF FIREARM-RELATED TERMS

Committee Comment

The terms "firearm," "machinegun," "rifle," "shotgun," "any other weapon," "destructive device," "antique firearm," "unserviceable firearm," "make," "transfer," "dealer," "importer," and "manufacturer" are defined in 26 U.S.C. § 5845. The definitions of those terms for the jury should, if necessary, be taken from the statute.

In a 2024 opinion, the ~~United States~~ Supreme Court held that the Bureau of Alcohol, Tobacco, Firearms, and Explosives exceeded its statutory authority by issuing a rule that classified "bump stocks" as "machineguns." ATF's interpretation was held to be contrary to the plain language of the statute. *Garland v. Cargill*, 602 U.S. 406, 415 (2024).