Pattern Jury Instructions for Federal Criminal Cases

District of South Carolina

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About the Author

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Mr. Ruschky served as an Assistant United States Attorney for the District of South Carolina from 1974 to 2004. During his career, he served as Deputy Chief of the Criminal Division and Senior Litigation Counsel and litigated approximately 200 jury trials, ranging from routine gun and drug cases to first degree murder and complicated white collar cases.

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PREFACE

Many federal circuits have pattern jury instructions formulated by committees of judges and practitioners and approved by the circuit for use in criminal cases. The Fourth Circuit does not. Thus, the purpose of this work, *Pattern Criminal Instructions for Criminal Cases District of South Carolina*, is to fill that void by publishing pattern instructions annotated primarily by reference to Fourth Circuit and Supreme Court cases. Authority from other circuits is referenced only when there is no Fourth Circuit or Supreme Court authority on point.

The instructions are organized in six sections, reflecting the order in which jury instructions are generally given.

1. **Preliminary Matters** addresses burden of proof, presumption of innocence, direct and circumstantial evidence, note-taking by jurors, and similar general topics. Most judges have standard preliminary charges and do not require counsel to submit proposed instructions on preliminary matters.

2. **Specific Criminal Statutes** provides pattern charges for most federal crimes, separated into crimes under Title 18 and Other Titles. Elements of the offense are included for each crime. Where appropriate, definitions of the key words or phrases used in the elements are also provided. Potential affirmative defenses are explained, and pertinent case law is cited in footnotes.

3. **Definitions** provides explanations of terms commonly used throughout the criminal code. These are terms whose meaning does not vary depending on the crime charged.

4. **Defenses** provides jury instructions for various defenses to crimes. In addition, it provides defense-specific definitions for common terms and explains to which crimes each defense is applicable.

5. **Final Instructions** advise the jury as to rules they must follow in evaluating evidence admitted during the trial and in reaching a verdict. These non-offense-specific instructions also include rules for deliberations.

6. **Practice Notes** addresses a number of lesser known legal principles which may influence the preparation of jury instructions. For example, this section covers special verdicts, lesser-included offenses, as well as jury nullification.

Pattern Jury Instructions for Federal Criminal Cases

Eric Wm. Ruschky

I. INTRODUCTION

Jury instructions should be based on the particular facts of the case on trial and should not be merely "boilerplate abstractions. Because abstract instructions that are not adjusted to the facts of a particular case may confuse the jury, it is plain error for a district judge to fail to relate the evidence to the law." *United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974) (quotations and citations omitted).

The charge must outline to the jury the elements of the crime. Mere reading of the statute to the jury will not suffice. An exposition of the constituents of the offense is mandatory and indispensable. *See United States v. Head*, 641 F.2d 174, 180 (4th Cir. 1981); *United States v. Polowichak*, 783 F.2d 410, 415 (4th Cir. 1986).

"The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985).

In *Griffin v. United States*, 502 U.S. 46 (1991), the Supreme Court reiterated settled law that a "general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds ...." 502 U.S. at 49. The Supreme Court admonished that "if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration." *Id*. at 60.

"The fact that a party did not pursue a particular theory does not preclude the trial judge from giving an instruction on that theory where it deems such an instruction to be appropriate." *United States v. Horton*, 921 F.2d 540, 544 (4th Cir. 1990).

II. PRELIMINARY

A. Admonishing Attorneys

Sometimes the court must admonish or warn an attorney who out of zeal for his or her client does something which is not in keeping with the rules of evidence or procedure. If this happens, "do not permit this to have any effect on your evaluation of the merits of any evidence that comes before you .... You are to draw absolutely no inference against the side to whom an admonition of the court may have been addressed during the trial of this case."[1]

B. Burden of Proof

The government must prove each element of the crime charged to each and every one of you beyond a reasonable doubt. If the government fails to prove an element beyond a reasonable doubt, then you must find that that element has not been proven and find the defendant not guilty. While the government's burden of proof is a strict and heavy burden, it is not necessary that it be proved beyond all possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning that element. The defendant never has the burden of disproving the existence of anything which the government must prove beyond a reasonable doubt. The burden is wholly upon the government. The law does not require the defendant to produce any evidence.[2]

C. Discussing the Case

"You are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about the case."[3]

You are not even to discuss the case among yourselves until you have heard all of the evidence and you have received final instructions from me.

You are not to read any newspaper or internet accounts of this case or listen to any radio or television accounts of this case. You are not to allow any member of your family, or a friend, acquaintance, or other person to tell you what was contained in such accounts.

D. Evidence

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[1] *United States v. Smith*, 441 F.3d 254, 269 (4th Cir. 2006) (approvingly quoting district court's instructions).

[2] *See United States v. Moss*, 756 F.2d 329 (4th Cir. 1985).

[3] *United States v. Nelson*, 102 F.3d 1344, 1348 (4th Cir. 1996).

Evidence can come in many forms. It can be testimony about what the witness saw, heard, tasted, touched, or smelled, something that came to the witness's knowledge through his senses.

Evidence can be an exhibit admitted into evidence.

Evidence can be a person's opinion.

Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as circumstantial evidence. In either instance, the witness's testimony is evidence that a jet plane flew across the sky.[4]

"Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of another fact or other facts which have a logical tendency to lead the mind to the conclusion that the disputed fact has been established."[5]

"[C]ircumstantial evidence is treated no differently than direct evidence, and may be sufficient to support a verdict of guilty, even though it does not exclude every reasonable hypothesis consistent with innocence."[6]

The following are not evidence: arguments and statements by the lawyers, questions and objections by the lawyers, testimony that was stricken or that you have been instructed to disregard, comments or questions by me, and anything that you may have seen or heard when the court was not in session.

E. Indictment

☞ **Giving the indictment to the jury is within the trial judge's discretion.**

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[4] Peter J. Tiersma, *Communicating with Juries: How to Draft More Understandable Instructions*, 10 Scribes J. Legal Writing 37 (2005-2006).

[5] *United States v. Yousef*, 327 F.3d 56, 133 (2d Cir. 2003) (approvingly quoting instruction given by district court).

[6] *United States v. Gray*, 137 F.3d 765, 772 (4th Cir. 1998) (quoting *United States v. Jackson*, 863 F.2d 1168, 1173 (4th Cir.1989)).

The indictment is not evidence. It is given to you solely as an aid in following the court's instructions and the arguments of counsel.[7]

_____NOTE_____

If the indictment contains irrelevant allegations, ordinarily they should be redacted, or the court can instruct the jury that certain counts or allegations should be disregarded as irrelevant to the defendant(s) on trial. *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986).

F. Note-Taking

☞ **Allowing jurors to take notes is within the trial judge's discretion. If allowed, use the following instruction:**

You are permitted to take notes during the trial. You, of course, are not obliged to take any notes, and some feel that the taking of notes is not helpful because it may distract you so that you do not hear and evaluate all of the evidence. If you do take notes, do not allow note taking to distract you from the ongoing proceedings.

Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you do not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.[8]

Notes are not official transcripts and may not cover points that are significant to another juror. The contents of notes must not be disclosed except to other jurors.[9]

G. Presumption of Innocence

The law presumes a defendant to be innocent, and the presumption of innocence alone is sufficient to acquit a defendant, unless the jury is satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of the evidence introduced at trial.

A defendant has no obligation to establish his innocence. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt, and this burden never shifts to the defendant. If the jury, after careful and impartial consideration of all the evidence, has a

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[7] *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986).

[8] *See id*. at 413 (citing *United States v. Rhodes*, 631 F.2d 43, 46 n.3 (5th Cir. 1980)).

[9] *Id*. (citing *United States v. MacLean*, 578 F.2d 64, 66 (3d Cir. 1978)).

reasonable doubt that a defendant was guilty of the charge under consideration, you must find that defendant not guilty of that charge.

If, on the other hand, the jury finds that the evidence is sufficient to overcome the presumption of innocence and to convince you beyond a reasonable doubt of the guilt of the defendant of the charge under consideration, it must find the defendant guilty of that charge.[10]

H. Questioning by Jurors

If any juror would like to have a particular question asked of a witness during his testimony, the juror should write the question out and have it passed to the judge. If the question is not legally improper, I will ask the witness the question.

I am not encouraging you to ask a large number of questions, but you should not hesitate to ask a question if you feel that there is something that you need to know from a witness and the lawyers or the court did not bring it out.

_____NOTE_____

The proper handling of juror questions is a matter within the discretion of the trial judge. *United States v. Callahan*, 588 F.2d 1078, 1086 n.2 (5th Cir. 1979). There is nothing improper about the practice of allowing occasional questions from jurors, but the *Callahan* opinion should not be read as an endorsement of any particular procedure.

I. Voir Dire [LAST UPDATED: 7/18/14]

"The Supreme Court has not required specific voir dire questions except in very limited circumstances—capital cases, ... and cases where racial or ethnic issues are 'inextricably bound up with the conduct of the trial' such that inquiry into racial or ethnic prejudice of the jurors is constitutionally mandated ....." *United States v. Jeffery*, 631 F.3d 669, 673 (4th Cir. 2011) (quoting *Rosales-Lopez v. United States*, 451 U.S.182, 189 (1981)). In most non-capital cases, a district court "need not pursue a specific line of questioning on voir dire, provided the voir dire as a whole is reasonably sufficient to uncover bias or partiality in the venire." *Id*. at 674 (quotations and citation omitted).

In *Jeffery*, the defendant wanted the district court to inquire about a juror's ability to apply the reasonable-doubt standard and burden of proof. The Fourth Circuit reiterated that it has rejected this approach. *Id.* (citing *United States v. Robinson*, 804 F.2d 280, 281 (4th Cir. 1986)).

[10] *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987).

III. TITLE 18

18 U.S.C. § 2 AIDING AND ABETTING

Title 18, United States Code, Section 2 makes it a crime to aid and abet another person to commit a crime.

The guilt of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of another person or persons in a joint effort or enterprise.[1]

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

- First, that the crime charged was in fact committed by someone other than the defendant [the court should instruct on the elements of that crime];
- Second, that the defendant participated in the criminal venture as in something that he wished to bring about;
- Third, that the defendant associated himself with the criminal venture knowingly and voluntarily; and
- Fourth, that the defendant sought by his actions to make the criminal venture succeed.[2]

Simply put, aiding and abetting means to assist the perpetrator of the crime.[3]

One who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly.

To prove association, the government must show that the defendant shared in the criminal intent of the person(s) committing the crime. This requires evidence that the defendant was aware of (his) (their) criminal intent and the unlawful nature of the criminal acts.[4]

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[1] *United States v. Chorman*, 910 F.2d 102, 108, 113 (4th Cir. 1990) (instruction not error).

[2] *United States v. Moye*, 454 F.3d 390, 400-01 (4th Cir. 2006) (*en banc*).

[3] *United States v. Horton*, 921 F.2d 540, 543 (4th Cir. 1990).

[4] *United States v. Moye*, 422 F.3d 207, 213 (4th Cir. 2005), *rev'd on other grounds*, 454 F.3d 390 (4th Cir. 2006) (*en banc*).

Evidence that the defendant merely brought about the arrangement that made the criminal act possible does not alone support a conclusion that the defendant was aware of the criminal nature of the act.[5]

The government is not required to prove that the defendant participated in every stage of an illegal venture, but the government is required to prove beyond a reasonable doubt that the defendant participated at some stage and that the participation was accompanied by knowledge of the result and intent to bring about that result.[6]

There must be evidence to establish that the defendant engaged in some affirmative conduct, that is, that the defendant committed an act designed to aid in the success of the venture, and there must be evidence to establish that the defendant shared in the criminal intent of the person the defendant was aiding and abetting.[7]

It is not necessary that the person who was aided and assisted be tried and convicted of the offense.[8]

It is not necessary that the government prove the actual identity of the perpetrator of the crime. The government must prove that the underlying crime was committed [or attempted, if attempt is included] by some person and that the defendant aided and abetted that person.[9]

If two persons act in concert with a common purpose or design to commit an unlawful act, then the act of one of them in furtherance of the unlawful act is in law considered the act of the other.[10]

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[5] *United States v. Winstead*, 708 F.2d 925, 927 (4th Cir. 1983).

[6] *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*); *United States v. Wilson*, 135 F.3d 291, 305 (4th Cir. 1998).

[7] *United States v. Beck*, 615 F.2d 441, 449 (7th Cir. 1980). However, the defendant need not have the exact intent as the principal.

[8] *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982).

[9] *United States v. Horton*, 921 F.2d 540, 543-44 (4th Cir. 1990).

[10] "We can discern no Congressional intent to eliminate an instruction on a common law confederation by its promulgation of 18 U.S.C. § 2." *United States v. Sims*, 543 F.2d 1089, 1090 (4th Cir. 1976).

The government must prove that the defendant counseled and advised the commission of the crime, and that the counsel and advice influenced the perpetration of the crime. There is no requirement that fixes a time limit within which the crime must be committed.[11]

If the person who was assisted or induced commits the crime he was assisted or induced to commit, then the person who assisted or induced him is guilty of aiding and abetting.[12]

The government must prove that the defendant participated in the crime charged.

The mere presence of a defendant where a crime is being committed even coupled with knowledge by the defendant that a crime is being committed or the mere acquiescence by a defendant in the criminal conduct of others even with guilty knowledge is not sufficient to establish guilt.[13]

However, the jury may find knowledge and voluntary participation from evidence of presence when the presence is such that it would be unreasonable for anyone other then a knowledgeable participant to be present.[14]

_____NOTE_____

See generally United States v. Winstead, 708 F.2d 925, 927 (4th Cir. 1983).

It is of no consequence that in the indictment the defendant was charged only as the principal and not as an aider or abettor. "[O]ne may be convicted of aiding and abetting under an indictment which charges only the principal offense." *United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969).

"A defendant who merely aided and abetted in the [mail and securities] fraud and performed all of his acts in relation thereto prior to the mailing and outside the limitations period nonetheless may be prosecuted for his role where the fraud was completed inside the limitations period." *United States v. United Med. and Surgical Supply Corp.*, 989 F.2d 1390, 1398 (4th Cir. 1993).

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[11] *Barnett*, 667 F.2d at 841.

[12] *Id*. at 841-42.

[13] *See United States v. Moye*, 422 F.3d 207, 217 (4th Cir. 2005) (citing instruction given by the district court), *rev'd on other grounds*, 454 F.3d 390 (4th Cir. 2006) (*en banc*).

[14] *See United States v. Gallardo-Trapero*, 185 F.3d 307, 322 (5th Cir. 1999).

An aider and abettor may be prosecuted in the district in which the principal acted in furtherance of the substantive crime. *United States v. Kibler*, 667 F.2d 452, 455 (4th Cir. 1982). In other words, it does not matter where the aider and abettor acted, venue depends on where the principal acted. However, venue might be improper if the defendant is not charged as an aider and abettor. *See United States v. Cabrales*, 524 U.S. 1, 7 (1998).

In *United States v. Moye*, 454 F.3d 390 (4th Cir. 2006) (*en banc*), the defendant was charged with 18 U.S.C. § 922(g)(1), felon in possession of firearms, and § 922(j), possession of stolen firearms, and aiding and abetting. Moye and two co-defendants were caught burglarizing a gun dealer. The district court gave a general aiding and abetting charge, set forth above. However, there was no evidence that either of the co-defendants were felons, so the aiding and abetting charge did not apply to the § 922(g) charge. The Fourth Circuit said the "preferable approach would have been for the court to give an instruction that tailored the aiding and abetting theory exclusively to the § 922(j) count." 454 F.3d at 398.

Conspiracy requires proof of agreement, aiding and abetting does not. *United States v. Beck*, 615 F.2d 441, 449 n.9 (7th Cir. 1980).

Aiding and abetting is not a lesser included offense of conspiracy. *United States v. Price*, 763 F.2d 640, 642 (4th Cir. 1985).

A person cannot be found guilty of aiding and abetting a crime that already has been committed. *United States v. Daly*, 842 F.2d 1380, 1389 (2d Cir. 1988).

18 U.S.C. § 2(b) CAUSING ANOTHER TO COMMIT A CRIME

Title 18, United States Code, Section 2(b) makes it a crime to cause another person to commit a crime.

The guilt of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.[15]

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

- First, that another person committed an act that is prohibited by law [the court should instruct on the elements of that crime]; and
- Second, that the defendant caused that person to do so.

[15] *United States v. Chorman*, 910 F.2d 102, 108 n.9 (4th Cir. 1990) (quoting instruction).

_____NOTE_____

In *United States v. Sahadi*, 292 F.2d 565 (2d Cir. 1961), the indictment alleged that the defendant unlawfully issued postal money orders to be presented by another. The trial judge instructed the jury on § 2. The Second Circuit held that it was not a fatal defect that the indictment did not expressly charge the defendant under § 2. "There is no rule of pleading which requires that a federal indictment state whether the offense charged was as to one or more of its various elements committed by the defendant directly or indirectly through another." 292 F.2d at 569.

It is not necessary that the government prove that the person who committed the prohibited act had any criminal intent. In *United States v. West Indies Transport, Inc.*, 127 F.3d 299 (3d Cir. 1997), the defendants contended that they could not be convicted because the government conceded that immigrant workers who presented false information to the INS at the instigation of West Indies Transport lacked criminal intent. The Third Circuit said that "a defendant is liable if he willfully causes an act to be done by another which would be illegal if he did it himself. For this reason, whether the immigrant workers lacked criminal intent is irrelevant so long as West Indies Transport intentionally caused them to submit false information." 127 F.3d at 307 (citation omitted).

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

Title 18, United States Code, Section 3 makes it a crime to give assistance to a person who has committed a federal crime. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that a crime against the United States had been committed [the court should instruct on the elements of that crime];
- Second, that the defendant knew that the crime had been committed;
- Third, that the defendant received, relieved, comforted, or assisted the person who committed the crime; and
- Fourth, that the defendant did so in order to hinder or prevent the apprehension, trial, or punishment of the person who committed the crime.

_____NOTE_____

For one to be convicted as an accessory after the fact, the substantive crime must be complete. *United States v. McCoy*, 721 F.2d 473 (4th Cir. 1983).

See United States v. Osborn, 120 F.3d 59, 63 (7th Cir. 1997). In *Osborn*, the defendant argued that a lie to authorities is insufficient, standing alone, to violate 18 U.S.C. § 3. The Seventh Circuit acknowledged the issue, but did not need to provide a definitive answer.

See also Gov't of Virgin Islands v. Aquino, 378 F.2d 540, 553 (3d Cir. 1967).

18 U.S.C. § 4 MISPRISION

Title 18, United States Code, Section 4 makes it a crime to conceal information about a felony offense. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that a felony crime was committed;
- Second, that the defendant knew the felony had been committed;
- Third, that the defendant failed to notify authorities; and
- Fourth, that the defendant took an affirmative step to conceal the crime.[16]

NOTE

Pre-arrest silence may satisfy the "failure to disclose" element, but silence alone is not concealment. *United States v. Wilkes*, No. 92-5037, 1992 WL 188133 (4th Cir. Aug. 7, 1992). However, harboring a fugitive and assisting in the disposal of evidence would constitute concealment. *Id.* at *2.

In *United States v. Pittman*, 527 F.2d 444 (4th Cir. 1975), the Fourth Circuit affirmed the defendant's conviction because her untruthful statement was intended to conceal her husband's participation in a bank robbery.

18 U.S.C. § 13 ASSIMILATIVE CRIMES ACT

Title 18, United States Code, Section 13 makes it a crime to commit certain offenses within the special territorial jurisdiction of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, [all of the elements for the state crime alleged];[17] and

[16] *United States v. Wilkes*, No. 92-5037, 1992 WL 188133 at *2 (4th Cir. Aug. 7, 1992) (citing *United States v. Baez*, 732 F.2d 780, 782 (10th Cir. 1984)).

[17] See Ralph King Anderson Jr., *South Carolina Requests to Charge - Criminal* (2007), and Miller W. Shealy Jr. & Margaret M. Lawton, *South Carolina Crimes: Elements and Defenses* (2009), for elements of various state offenses.

- Second, that the offense occurred within the special maritime and territorial jurisdiction of the United States.[18]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[19]

NOTE

The Assimilative Crimes Act assimilates the elements and punishment of state offenses when committed on or within a federal jurisdiction, unless the offense has been preempted by a federal statute that proscribes the same conduct.

The Assimilative Crimes Act does not assimilate state procedures or state rules of evidence. *Kay v. United States*, 255 F.2d 476, 479 (4th Cir. 1958), *abrogated on other grounds by Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

See also Williams v. United States, 327 U.S. 711, 724-25 (1946) (United States may invoke Assimilative Crimes Act to prosecute offense under state law only when there is no enactment of Congress that punishes the offender); *United States v. Wright*, No. 92-5527, 1993

[18] *See United States v. Sturgis*, 48 F.3d 784, 786 (4th Cir. 1995).

[19] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include the following: the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

WL 18321 (4th Cir. Jan. 29, 1993); *United States v. Eades*, 633 F.2d 1075 (4th Cir. 1980) (*en banc*).

This statute applies to members of the armed services if they have not been prosecuted under the Uniform Code of Military Justice for the same offense. *United States v. Walker*, 552 F.2d 566, 567 (4th Cir. 1977).

Special territorial jurisdictions in the District of South Carolina include Fort Jackson, parts of Shaw Air Force Base, parts of McEntire Air National Guard Base, Parris Island, and the Marine Corps Air Station.

Special territorial jurisdiction does not include proprietary jurisdiction. Most federal buildings, such as courthouses and office buildings, are proprietary jurisdictions, and are usually covered only by regulations of the General Services Administration published in the Code of Federal Regulations.

18 U.S.C. § 17 INSANITY DEFENSE REFORM ACT[LAST UPDATED: 7/2/14]

The defendant has the burden of proving, by clear and convincing evidence, that at the time of the offense, he was unable to appreciate the nature and quality of the wrongfulness of his acts because of a severe mental disease or defect.[20]

NOTE

"The language of the statute leaves no room for a defense that raises any form of legal excuse based upon one's lack of volitional control including a diminished ability or failure to reflect adequately upon the consequences or nature of one's actions." *United States v. Worrell*, 313 F.3d 867, 872 (4th Cir. 2002) (quotation and citation omitted). However, the Fourth Circuit is "inclined to agree with those [circuit] courts holding that [the] Insanity Defense Reform Act does not prohibit psychiatric evidence of a mental condition short of insanity when such evidence is offered purely to rebut the government's evidence of specific intent, although such cases will be rare." *Id*. at 874. In *Worrell*, because the psychiatrist's opinion did not address the defendant's intent to mail the threatening letters (18 U.S.C. § 876), it was properly excluded. The IDRA "bars a defendant who is not pursuing an insanity defense from offering evidence of his lack of volitional control as an alternative defense." *Id*. at 875.

In *United States v. Flanery*, No. 88-5605, 1989 WL 79731 (4th Cir. July 13, 1989), the Fourth Circuit stated the following:

[20] *United States v. Cristobal*, 293 F.3d 134, 144 (4th Cir. 2002).

> We note that the Eighth Circuit recognizes "that a defendant's delusional belief that his criminal conduct is morally justified may establish an insanity defense under federal law, even where the defendant knows that the conduct is illegal." *United States v. Dubray*, 854 F.2d 1099, 1101 (8th Cir. 1988). *See also United States v. Seqna*, 555 F.2d 226, 232-33 (9th Cir. 1977). We are, however, unwilling to adopt this rule under the facts of this case. A review of the record indicates that there was no evidence of defendant's moral justification of the bank robbery — merely evidence that voices compelled Flanery to rob the bank. As the *Dubray* court stated, "[t]he jury should be instructed on the distinction between moral and legal wrongfulness, however, only where evidence at trial suggests that this is a meaningful distinction in the circumstances of the case." We hold that the trial court did not err in refusing Flanery's proffered jury instruction regarding moral wrongfulness.

Id. at *6 (citations omitted).

The Fourth Circuit has never required a jury instruction regarding the consequences of a verdict of not guilty only by reason of insanity. *United States v. McDonald*, 444 F. App'x 710 (4th Cir. 2011). *See also Shannon v. United States*, 512 U.S. 573, 580 (1994) ("The text of the Act gives no indication that jurors are to be instructed regarding the consequences of an NGI verdict.")

18 U.S.C. § 32 DESTRUCTION OF AIRCRAFT

Title 18, United States Code, Section 32 makes it a crime to damage aircraft or communicate false information concerning aircraft. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 32(a)(1)

- First, that the defendant set fire to, damaged, destroyed, disabled, or wrecked;
- Second, an aircraft in the special aircraft jurisdiction of the United States, or a civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce; and
- Third, that the defendant acted willfully.

§ 32(a)(2)

- First, that the defendant placed, or caused to be placed, a destructive device or substance in, upon, or in proximity to, or otherwise made or caused to be made unworkable or unusable or hazardous to work or use;
- Second, an aircraft in the special aircraft jurisdiction of the United States, or a civil aircraft used, operated, or employed in interstate, overseas, or foreign air

commerce, or any part or other materials used or intended to be used in connection with the operation of such aircraft;

- Third, that the conduct was likely to endanger the safety of the aircraft; and
- Fourth, that the defendant acted willfully.

§ 32(a)(3)

- First, that the defendant set fire to, damaged, destroyed, or disabled, or interfered by force or violence with the operation of;
- Second, an air navigation facility;
- Third, that the conduct was likely to endanger the safety of an aircraft in flight; and
- Fourth, that the defendant acted willfully.

§ 32(a)(4)

- First, that the defendant set fire to, damaged, destroyed, disabled, or placed a destructive device or substance in, on, or in proximity to;
- Second, any appliance or structure, ramp, landing area, property, machine, or apparatus or any facility or other material used, or intended to be used in connection with the operation, maintenance, loading, unloading, or storage of an aircraft or cargo carried or intended to be carried on an aircraft;
- Third, that the aircraft was in the special aircraft jurisdiction of the United States, or was a civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce; and
- Fourth, that the defendant acted willfully and with intent to damage, destroy, or disable the aircraft.

§ 32(a)(5)

- First, that the defendant interfered with or disabled a person;
- Second, that the person was engaged in the authorized operation of an aircraft in the special aircraft jurisdiction of the United States, or a civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce, or any air navigation facility aiding in the navigation of such an aircraft; and
- Third, that the defendant acted willfully and with intent to endanger the safety of any person or with reckless disregard for the safety of human life.

§ 32(a)(6)

- First, that the defendant committed an act of violence against or incapacitated an individual;

- Second, that the individual was on an aircraft in the special aircraft jurisdiction of the United States, or a civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;
- Third, that the act was likely to endanger the safety of the aircraft; and
- Fourth, that the defendant acted willfully.

§ 32(a)(7)

- First, that the defendant communicated false information concerning an aircraft in the special aircraft jurisdiction of the United States or a civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;
- Second, that the defendant knew the information was false and under circumstances in which the information may reasonably be believed;
- Third, that the defendant acted willfully; and
- Fourth, that, as a result of the false information being communicated, the safety of an aircraft in flight was endangered.

"Endanger" means to bring into danger or peril of probable harm or loss; imperil or threaten to danger; to create a dangerous situation.[21]

§ 32(a)(8)

Prohibits attempting or conspiring to violate §§ 32(a)(1) through (7).

§ 32(b)(1)

- First, that the defendant performed an act of violence against an individual;
- Second, that the individual was on board a civil aircraft registered in a country other than the United States and the aircraft was in flight;
- Third, that the act of violence was likely to endanger the safety of the aircraft;
- Fourth, that the defendant acted willfully; and
- Fifth, that a national of the United States was, or would have been, on board the aircraft; the defendant is a national of the United States; or the defendant was found in the United States.

§ 32(b)(2)

- First, that the defendant destroyed an aircraft while that aircraft was in service, or caused damage to an aircraft which rendered the aircraft incapable of flight or was likely to endanger the aircraft's safety in flight;

[21] *United States v. Mendoza*, 244 F.3d 1037, 1042 (9th Cir. 2001).

- Second, that the aircraft was a civil aircraft registered in a country other than the United States;
- Third, that the defendant acted willfully; and
- Fourth, that a national of the United States was, or would have been, on board the aircraft; the defendant is a national of the United States; or the defendant was found in the United States.

§ 32(b)(3)

- First, that the defendant placed or caused to be placed a device or substance on an aircraft;
- Second, that the device or substance was likely to destroy the aircraft or cause damage to it that rendered it incapable of flight or which was likely to endanger the aircraft's safety in flight;
- Third, that the aircraft was a civil aircraft registered in a country other than the United States;
- Fourth, that the defendant acted willfully; and
- Fifth, that a national of the United States was, or would have been, on board the aircraft; the defendant is a national of the United States; or the defendant was found in the United States.

§ 32(b)(4)

Prohibits attempting or conspiring to violate §§ 32(b)(1) through (3).

§ 32(c)

- First, that the defendant imparted or conveyed a threat that [would violate any of §§ 32(a)(1) through (6) or §§ 32(b)(1) through (3), and the court should reiterate the elements of the appropriate subsection];
- Second, that the defendant acted willfully; and
- Third, that the defendant had the apparent determination and will to carry the threat into execution.

"Aircraft" means a civil, military, or public contrivance invented, used, or designed to navigate, fly, or travel in the air. [§ 31(a)(1)]

"Aviation quality," with respect to a part of an aircraft or space vehicle, means the quality of having been manufactured, constructed, produced, maintained, repaired, overhauled, rebuilt, reconditioned, or restored in conformity with applicable standards specified by law (including applicable regulations). [§ 31(a)(2)]

"In flight" means

(A) any time from the moment at which all the external doors of an aircraft are closed following embarkation until the moment when any such door is opened for disembarkation; and

(B) in the case of a forced landing, until competent authorities take over the responsibility for the aircraft and the persons and property on board. [§ 31(a)(4)]

"In service" means

(A) anytime from the beginning of preflight preparation of an aircraft by ground personnel or by the crew for a specific flight until 24 hours after any landing; and

(B) in any event includes the entire period during which the aircraft is in flight. [§ 31(a)(5)]

"Special aircraft jurisdiction of the United States" includes any of the following aircraft in flight:

(a) a civil aircraft of the United States;

(b) an aircraft of the armed forces of the United States;

(c) another aircraft in the United States;

(d) another aircraft outside the United States

(1) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States;

(2) on which an individual unlawfully seizes, exercises control of, or attempts to seize or exercise control of an aircraft in flight by any form of intimidation (or assists such an individual); or

(3) against which an individual unlawfully seizes, exercises control of, or attempts to seize or exercise control of an aircraft in flight by any form of intimidation (or assists such an individual), if the aircraft lands in the United States with the individual still on the aircraft;

(e) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States. [49 U.S.C. § 46501(2)]

"National of the United States" means a citizen of the United States, or a person, who though not a citizen of the United States, owes permanent allegiance to the United States. [8 U.S.C. § 1101(a)(22)]

_____NOTE_____

In *United States v. Mendoza*, 244 F.3d 1037, 1045 n.4 (9th Cir. 2001), the Ninth Circuit assumed, without deciding, that this section contains a causation element.

18 U.S.C. § 33 DESTRUCTION OF MOTOR VEHICLES

Title 18, United States Code, Section 33(a) makes it a crime to damage motor vehicles. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant damaged, disabled, destroyed, tampered with, or placed or caused to be placed any explosive or other destructive substance in, upon, or in proximity to, any motor vehicle;
- Second, that the motor vehicle was used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation;
- Third, that the defendant did so with intent to endanger the safety of any person on board or anyone who the defendant believed would board the motor vehicle, or with a reckless disregard for the safety of human life; and
- Fourth, that the defendant did so willfully.[22]

¶ 2

- First, that the defendant damaged, disabled, destroyed, set fire to, tampered with, or placed or caused to be placed any explosive or other destructive substance in, upon, or in proximity to, any garage, terminal, structure, supply, or facility used in the operation or, or in support of the operation of, motor vehicles or otherwise made or caused such property to be made unworkable, unusable, or hazardous to work or use;
- Second, that the motor vehicles were engaged in interstate or foreign commerce;
- Third, that the defendant did so with intent to endanger the safety of any person on board or anyone who the defendant believed would board the motor vehicle, or with a reckless disregard for the safety of human life; and
- Fourth, that the defendant did so willfully.[23]

¶ 3

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[22] *United States v. Kurka*, 818 F.2d 1427, 1430 (9th Cir. 1987).

[23] *Id*.

- First, that the defendant disabled or incapacitated any driver or person employed in connection with the operation or maintenance of a motor vehicle, or in any way lessened the ability of such person to perform his duties as such;
- Second, that the motor vehicle was used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation;
- Third, that the defendant did so with intent to endanger the safety of any person on board or anyone who the defendant believed would board the motor vehicle, or with a reckless disregard for the safety of human life; and
- Fourth, that the defendant did so willfully.[24]

AGGRAVATED PENALTY

1. Was the motor vehicle, at the time the violation occurred, carrying high-level radioactive waste or spent nuclear fuel [as defined in 42 U.S.C. §§ 10101(12) and (23)]?

_____NOTE_____

The statute has its own attempt and conspiracy provision in paragraph 4.

18 U.S.C. § 35(b) CONVEYING FALSE INFORMATION (BOMB HOAX ACT)

Title 18, United States Code, Section 35(b) makes it a crime to convey false information concerning the destruction of aircraft, trains, or vessels. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant imparted, conveyed, or caused to be imparted or conveyed false information;
- Second, that the defendant knew the information was false;
- Third, that the information concerned an attempt being made or to be made to do an act which would violate [18 U.S.C. §§ 32-40 (concerning aircraft)] [18 U.S.C. §§ 1991-1992 (concerning railroads)] or [18 U.S.C. §§ 2271-2285 (concerning vessels and shipping)];[25] and

[24] *Id*.

[25] The court should instruct on the elements of the appropriate predicate offense.

- Fourth, that the defendant did so willfully and maliciously, or with reckless disregard for the safety of human life.[26]

☞ **The court should instruct on the elements of the appropriate predicate offense.**

Willfully means deliberately and intentionally, as contrasted with being made accidentally, carelessly or unintentionally.[27]

To act maliciously means to do something with an evil purpose or motive.[28]

18 U.S.C. § 36 DRIVE-BY SHOOTING

Title 18, United States Code, Section 36 makes it a crime to shoot into a group of people in furtherance of a major drug offense. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 36(b)(1)

- First, that the defendant fired a weapon into a group of two or more persons;
- Second, that the defendant fired the weapon in furtherance of, or to escape detection of, a major drug offense;
- Third, that the defendant fired the weapon with intent to intimidate, harass, injure, or maim; and
- Fourth, that, in the course of firing the weapon, the defendant caused grave risk to human life.[29]

§ 36(b)(2)(A)

- First, that the defendant fired a weapon into a group of two or more persons;
- Second, that the defendant fired the weapon in furtherance of, or to escape detection of, a major drug offense;

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[26] *See United States v. White*, 475 F.2d 1228, 1230 (4th Cir. 1973).

[27] *United States v. Hassouneh*, 199 F.3d 175, 183 (4th Cir. 2000).

[28] "We note that Hassouneh's proposed instruction, which incorporated an 'evil purpose or motive' component, more accurately reflects the proper legal standard necessary to convict a person of acting 'maliciously' under § 35(b). We also note that other instructions may be equally capable of properly directing the jury on the meaning of 'maliciously' under the Act." *Id.* at 182.

[29] *See United States v. Wallace*, 447 F.3d 184, 187 (2d Cir. 2006).

- Third, that the defendant fired the weapon with intent to intimidate, harass, injure, or maim;
- Fourth, that, in the course of firing the weapon, the defendant unlawfully killed another human being with malice aforethought; and
- Fifth, that the killing was willful, deliberate, malicious, and premeditated.[30]

§ 36(b)(2)(B)

- First, that the defendant fired a weapon into a group of two or more persons;
- Second, that the defendant fired the weapon in furtherance of, or to escape detection of, a major drug offense;
- Third, that the defendant fired the weapon with intent to intimidate, harass, injure, or maim; and
- Fourth, that, in the course of firing the weapon, the defendant unlawfully killed another human being with malice aforethought.[31]

A "major drug offense" means one of the following: [§ 36(a)]

1. a continuing criminal enterprise, [the court should instruct on the elements of 21 U.S.C. § 848];
2. a conspiracy to distribute controlled substances [the court should instruct on the elements of 21 U.S.C. § 846]; or
3. distribution of major quantities of drugs, or possession of major quantities of drugs with intent to distribute [the court should instruct on the elements of 21 U.S.C. § 841].

18 U.S.C. § 81 ARSON

Title 18, United States Code, Section 81 makes it a crime to set fire to or burn any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, within the special territorial jurisdiction of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant set fire to or burned (or attempted to or conspired to set fire to or burn) a building, structure, vessel, machinery, building materials or

[30] See jury instruction for 18 U.S.C. § 1111.

[31] See jury instruction for 18 U.S.C. § 1111.

supplies, military or naval stores, munitions of war, structural aids or appliances for navigation or shipping;[32]

- Second, that the building, structure, vessel, machinery, building materials or supplies, military or naval stores, munitions of war, structural aids or appliances for navigation or shipping, was/were within the special maritime and territorial jurisdiction of the United States; and
- Third, that the defendant did so willfully and maliciously.[33]

AGGRAVATED PENALTY

1. Was the building a dwelling?

2. Was the life of any person placed in jeopardy?

"Maliciously" means acting intentionally or with willful disregard of the likelihood that damage or injury will result.[34]

In other words, willfully and maliciously can be proved by evidence that the defendant set the fire intentionally and without justification or lawful excuse.[35]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[36]

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[32] *See United States v. Auginash*, 266 F.3d 781, 785 (8th Cir. 2001) (concluding that "the ordinary meaning of § 81 includes the burning of an automobile.").

[33] *United States v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir. 2001).

[34] *See United States v. Gullett*, 75 F.3d 941, 947 (4th Cir. 1996) (§ 844(i) prosecution).

[35] *United States v. Doe*, 136 F.3d 631, 635 (9th Cir. 1998) ("At common law ... arson did not require proof of an intent to burn down a building, or of knowledge this would be the probable consequence of the defendant's act."). See discussion of *Gullet* under NOTE.

[36] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the

(continued...)

NOTE

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

In *United States v. Gullett*, 75 F.3d 941 (4th Cir. 1996), an explosion occurred in the parking lot of a machine shop, but damaged nearby rental property. The appellant stipulated that the rental property was used in activity affecting interstate commerce, but argued that he did not maliciously intend to damage the rental property. The Fourth Circuit approved the following charge:

> A defendant may not be excused from responsibility for the harmful consequences of his actions simply because that harm was not precisely the harm in which he intended. That is, if the only difference between what a defendant intended to flow from his action and what actually occurred as a result of his action is that some property was damaged other than that which the defendant intended, the defendant, under the law, may still be held responsible to the same extent that he would have been responsible had the intended harm resulted, so long as the actual result is similar to and not remote from the intended result. Of course, the defendant must have acted maliciously and with specific intent, and the government must prove all of the essential elements of the offense beyond a reasonable doubt in order for you to find the defendant guilty.

75 F.3d at 948. The court stated this was "a correct statement of the law" as Gullett "'may' be legally responsible for his actions even though 'some property was damaged other than that which the defendant intended.'" *Id.*

18 U.S.C. § 111 ASSAULTING FEDERAL OFFICER[37] [LAST UPDATED: 12/29/14]

[36] (...continued)
occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[37] *See United States v. Briley*, 770 F.3d 267, 273 (4th Cir. 2014) ("In essence, § 111 (continued...)

Title 18, United States Code, Section 111 makes it a crime to assault certain federal officers or employees. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 111(a)(1) or (2) [misdemeanor]

- First, that the defendant [assaulted, resisted, opposed, impeded, intimidated, or interfered with an officer or employee of the United States as designated in § 1114] [assaulted or intimidated a person who formerly served as an officer or employee of the United States as designated in § 1114];
- Second, that the defendant did so forcibly;[38]
- Third, that the defendant did so [while the employee was engaged in or on account of the performance of official duties] [on account of the performance of official duties during that person's term of service]; and
- Fourth, that the defendant acted intentionally.[39]

To be guilty under this section, the government must prove that the defendant committed a simple assault, or an assault not involving physical contact.[40] "Simple assault" is an assault involving an attempt to put another in fear of imminent serious bodily injury by physical menace.[41]

An assault is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.[42]

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[37] (...continued)
proscribes five types of offenses: a misdemeanor (constituting only simple assault), two less serious felonies (involving either physical contact or felonious intent), and two more serious felonies (involving either a weapon or bodily injury). Notably, in defining the penalties for the various offenses, each statutory provision refers back to the original list of violative acts against current or former officials. 18 U.S.C. § 111(a) ('the acts in violation of this section'); *id.* ('such acts'); *id.* § 111(b) ('any acts described in subsection (a)').").

[38] The verb "forcibly" modifies each of the verbs it precedes, not only "assault." *Long v. United States*, 199 F.2d 717, 719 (4th Cir. 1952). The D.C. Circuit approved the following two-sentence pattern instruction in *United States v. Arrington*, 309 F.3d 40, 47 n.13 (D.C. Cir. 2002): "All of the acts — assault, resist, oppose, impede, intimidate and interfere with — are modified by the word 'forcibly.' Thus, before you can find the defendant guilty you must find, beyond a reasonable doubt, that he acted forcibly."

[39] *See United States v. Cooper*, 289 F. App'x 627, 629 (4th Cir. 2008) (citing *Arrington*, 309 F.3d at 44).

[40] *United States v. Campbell*, 259 F.3d 293, 296 (4th Cir. 2001).

[41] *Id*. (citing *United States v. Duran*, 96 F.3d 1495, 1511 (D.C. Cir. 1996)).

[42] *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (citation omitted).

However, the government must prove some use of force.[43]

The government need not prove that the defendant knew that the victim was a federal employee.[44]

§ 111(a)(1) or (2) [felony]

- First, that the defendant [assaulted, resisted, opposed, impeded, intimidated, or interfered with an officer or employee of the United States as designated in § 1114] [assaulted or intimidated a person who formerly served as an officer or employee of the United States as designated in § 1114];
- Second, that the defendant did so forcibly;[45]
- Third, that the defendant did so [while the employee was engaged in or on account of the performance of official duties] [on account of the performance of official duties during that person's term of service];
- Fourth, that the act involved physical contact with the victim of the assault or the intent to commit another felony [here, the court must identify the elements of this other felony][46]; and
- Fifth, that the defendant acted intentionally.[47]

The government must prove some use of force.[48]

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[43] Congress "has prescribed the use of force as an essential element of the crime." *Long*, 199 F.2d at 717.

[44] *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) (finding "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute."). *See also United States v. Wallace*, 368 F.2d 537 (4th Cir. 1966) (same).

[45] The verb "forcibly" modifies each of the verbs it precedes, not only "assault." *United States v. Long*, 199 F.2d 717, 719 (4th Cir. 1952). The D.C. Circuit approved the following two-sentence pattern instruction in *United States v. Arrington*, 309 F.3d 40, 47 n.13 (D.C. Cir. 2002): "All of the acts — assault, resist, oppose, impede, intimidate and interfere with — are modified by the word 'forcibly.' Thus, before you can find the defendant guilty you must find, beyond a reasonable doubt, that he acted forcibly."

[46] *United States v. Thomas*, 669 F.3d 421, 425 (4th Cir. 2012) (government conceded plain error in indictment's failure to allege intent to commit another felony).

[47] *See United States v. Cooper*,289 F. App'x 627, 629 (4th Cir. 2008) (citing *Arrington*, 309 F.3d at 44).

[48] Congress "has prescribed the use of force as an essential element of the crime." *Long*, 199 F.2d at 719.

§ 111(b)[49] [aggravated felony]

- First, that the defendant [assaulted, resisted, opposed, impeded, intimidated, or interfered with an officer or employee of the United States as designated in § 1114] [assaulted or intimidated a person who formerly served as an officer or employee of the United States];
- Second, that the defendant did so forcibly;[50]
- Third, that the defendant did so while the employee was engaged in or on account of the performance of official duties, and
- Fourth, that the defendant [used a deadly or dangerous weapon] [inflicted bodily injury][51]; and
- Fifth, that the defendant did so intentionally.[52]

The government must prove some use of force.[53]

The government need not prove that the defendant knew that the victim was a federal employee.[54]

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict serious physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. Thus, an object need not be inherently dangerous to be a dangerous weapon.

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[49] Section 111(b) is a separate offense from § 111(a) and use of a dangerous or deadly weapon or inflicting bodily injury are offense elements. *United States v. Campbell*, 259 F.3d 293, 298 (4th Cir. 2001).

[50] The verb "forcibly" modifies each of the verbs it precedes, not only "assault." *United States v. Long*, 199 F.2d 717, 719 (4th Cir. 1952). The D.C. Circuit approved the following two-sentence pattern instruction in *Arrington*, 309 F.3d at 47 n.13: "All of the acts — assault, resist, oppose, impede, intimidate and interfere with are — modified by the word 'forcibly.' Thus, before you can find the defendant guilty you must find, beyond a reasonable doubt, that he acted forcibly."

[51] *See Thomas*, 669 F.3d at 425 (Government conceded plain error in indictment's failure to allege infliction of bodily injury).

[52] *See Cooper*, 289 F. App'x at 629 (citing *United States v. Feola*, 420 U.S. 671, 686 (1975)).

[53] Congress "has prescribed the use of force as an essential element of the crime." *Long*, 199 F.2d at 719.

[54] *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) (finding "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute."). *See also United States v. Wallace*, 368 F.2d 537 (4th Cir. 1966) (same).

Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use.[55]

"Deadly or dangerous weapon" includes a weapon intended to cause death or danger but that fails to do so by reason of a defective component. [§ 111(b)]

"Bodily injury" means a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.[56]

NOTE

In *United States v. Briley*, 770 F.3d 267, 274 (4th Cir. 2014), the Fourth Circuit held that "§ 111 prohibits the six different kinds of enumerated acts ["forcibly assaults, resists, opposes, impedes, intimidates, or interferes with ...."] and [ ] specifically, the misdemeanor provision is not limited to assault." *But see United States v. Davis*, 690 F.3d 127, 135 (2d Cir. 2012) ("[F]or a defendant to be guilty of the misdemeanor of resisting arrest under Section 111(a), he necessarily must have committed common law simple assault.").

One episode of interference with federal officers is a single offense, regardless of the number of injuries. In *Ladner v. United States*, 358 U.S. 169 (1958), the defendant injured two federal officers with the single discharge of a shotgun, and the Supreme Court held it constituted a single assault. 358 U.S. at 178. *See also United States v. Thomas*, 669 F.3d 421 (4th Cir. 2012) (defendant committed multiple acts, both verbally threatening and later punching the officer following significant intervening acts); *United States v. Alverez*, 445 F. App'x 715 (4th Cir. 2011) (defendant could only be convicted of one instance of assault under § 111(b) when he ran his vehicle into one car containing two DEA agents).

However, an indictment may allege "separate assaults [ ] when the Government demonstrates that 'the actions and intent of [the] defendant constitute distinct successive criminal episodes, rather than two phases of a single assault.'" *Thomas*, 669 F.3d at 426 (citation omitted). *See also Briley*, 770 F.3d at 270 (defendant charged with three counts of assault where three officers involved in attempt to arrest defendant).

The "dangerous weapon" language of § 111(b) is the same language used in 18 U.S.C. § 2113(d). Accordingly, cases interpreting armed bank robbery apply to this statute. *United States v. Hamrick*, 43 F.3d 877, 881 (4th Cir. 1995) (*en banc*). Hamrick was prosecuted for mailing a bomb which did not detonate to the United States Attorney for the Northern

[55] In *United States v. Sturgis*, 48 F.3d 784, 787 (4th Cir. 1995), an inmate who was HIV positive bit two correctional officers. The Fourth Circuit surveyed "dangerous weapon" cases, and concluded that the "test of whether a particular object was used as a dangerous weapon ... must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury." *Id.* at 788 (citations omitted).

[56] See 18 U.S.C. §§ 831(f)(5), 1365(g)(4), 1515(a)(5), 1864(d)(2) (statutory definitions). *See also United States v. Perkins*, 470 F.3d 150, 161 (4th Cir. 2006) ("physical pain alone or any injury to the body, no matter how fleeting, suffices" to establish bodily injury.) (18 U.S.C. § 242 prosecution).

District of West Virginia. The Fourth Circuit held that a dysfunctional or inoperable bomb "could be considered by the jury to constitute a 'dangerous weapon'" under this section. *Id*. at 884.

In *United States v. Arrington*, 309 F.3d 40, 45 (D.C. Cir. 2002), the government conceded that when an object is not inherently deadly, the following additional elements are required: "the object must be capable of causing serious bodily injury or death to another person *and* the defendant must use it in that manner."

In *United States v. Gore*, 592 F.3d 489 (4th Cir. 2010), the Fourth Circuit held that "a prisoner charged with a violation of 18 U.S.C. § 111 must, to succeed on the affirmative defense of self-defense, demonstrate that he responded to an unlawful and present threat of death or serious bodily injury." 592 F.3d st 495. In that case, the district court instructed the jury that the defendant "could rely on justification based on self-defense only when he was under an unlawful present or imminent threat of serious bodily injury or death." *Id.* at 490 (quotation omitted). The district court elaborated as follows:

> A present or imminent threat of serious bodily injury or death must be based on a reasonable fear that a real and specific threat existed at the time of the defendant's assault, resistance, opposition, or impediment. This is an objective test that does not depend on the defendant's perception. If the defendant unlawfully assaulted, resisted, or impeded a correctional officer when no reasonable fear of a present or imminent threat of serious bodily injury or death actually existed, his self-defense justification must fail.

Id. at 490.

In *United States v. Stotts*, 113 F.3d 493 (4th Cir. 1997), the defendant was prosecuted under D.C. Code § 22-505, which punishes assaults on correctional officers "without justifiable and excusable cause." The Fourth Circuit held that a defendant generally cannot invoke self-defense to justify an assault on a police or correctional officer, and therefore a standard self-defense instruction would not apply. However, a defendant has a limited right of self-defense if the defendant presents evidence that the officer used excessive force in carrying out his official duties. "A defendant who responds to an officer's use of excessive force with force reasonably necessary for self-protection under the circumstances has acted with 'justifiable and excusable cause' and therefore does not violate § 22-505." 113 F.3d at 496. The court added that the jury must be instructed that "the government bears the burden of disproving the defendant's limited claim of self-defense or justification beyond a reasonable doubt." *Id.*

18 U.S.C. § 113 ASSAULTS WITHIN SPECIAL TERRITORIAL JURISDICTION [LAST UPDATED: 7/3/14]

Title 18, United States Code, Section 113 makes it a crime to commit certain assaults within the special territorial jurisdiction of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 113(a)(1)

- First, that the defendant assaulted the victim;

- Second, that the defendant did so with intent to commit murder[57] or sexual abuse [in violation of either Section 2241 or 2242]; and
- Third, that the assault occurred within the special maritime and territorial jurisdiction of the United States.

§ 113(a)(2)

- First, that the defendant assaulted the victim;
- Second, that the defendant did so with intent to commit [a felony other than murder or criminal sexual conduct — specify elements of felony charged in indictment]; and
- Third, that the assault occurred within the special maritime and territorial jurisdiction of the United States.

§ 113(a)(3)

- First, that the defendant assaulted the victim;
- Second, that the defendant did so with a dangerous weapon;
- Third, that the defendant did so with intent to do bodily harm;[58] and
- Fourth, that the assault occurred within the special maritime and territorial jurisdiction of the United States.

☞ **Assault by striking and simple assault are lesser included offenses of assault with a dangerous weapon, and the jury should be charged if that is an issue.**

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict serious physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. Thus, an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use.[59]

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[57] In *United States v. Perez*, 43 F.3d 1131, 1138 (7th Cir. 1994), the Seventh Circuit held that § 113(a) requires a specific intent to commit murder, and the usual "malice aforethought" instruction which includes "conduct which is reckless and wanton" without intending to kill is not sufficient. *See Braxton v. United States*, 500 U.S. 344, 351 n.1 (1991); *United States v. Bird*, 409 F. App'x 681 (4th Cir. 2011) (citing *Perez*, 43 F.3d at 1137). In *Bird*, the defendant argued unsuccessfully that attempted murder is a lesser-included offense of assault with intent to commit murder.

[58] *United States v. Jackson*, No. 99-4388, 2000 WL 194284 (4th Cir. Feb. 18, 2000) (quoting *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982)) ("The existence of 'just cause or excuse' for the assault is an affirmative defense, and the government does not have the burden of pleading or proving its absence.").

[59] In *United States v. Sturgis*, 48 F.3d 784 (4th Cir. 1995), an inmate who was HIV positive bit two correctional officers. The Fourth Circuit surveyed "dangerous weapon" cases, and concluded that "test of whether a particular object was used as a dangerous weapon ... must be left to the jury to

(continued...)

The intent of the defendant is not to be measured by his secret motive, or some undisclosed purpose merely to frighten, not to hurt, but rather it is to be judged objectively from the visible conduct of the defendant and what a person in the position of the victim might reasonably conclude.[60]

§ 113(a)(4)[61]

- First, that the defendant assaulted the victim by striking, beating, or wounding the victim; and
- Second, that the assault occurred within the special maritime and territorial jurisdiction of the United States.

§ 113(a)(5)("simple assault")[62]

- First, that the defendant assaulted the victim; and
- Second, that the assault occurred within the special maritime and territorial jurisdiction of the United States.

AGGRAVATED PENALTY for § 113(a)(5):

1. Was the victim of the assault an individual who had not attained the age of 16 years?

§ 113(a)(6)[63]

- First, that the defendant assaulted the victim;
- Second, that the assault resulted in serious bodily injury;[64] and
- Third, that the assault occurred within the special maritime and territorial jurisdiction of the United States.

§ 113(a)(7)

- First, that the defendant assaulted the victim, who had not attained the age of 16 years;

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[59] (...continued)
determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury." *Id.* at 788 (citations omitted).

[60] *United States v. Guilbert*, 692 F.2d at 1344.

[61] This section is simple battery since it contemplates some form of contact. *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991). Intent to cause injury is not an element of § 113(a)(4). *United States v. Martin*, 536 F.2d 535, 535 (2d Cir. 1976).

[62] "[A] specific kind of intent is not inherent in the statutory definition of [§ 113(a)(5)] ...." *United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000).

[63] Section 113(a)(6) is a general intent crime. *United States v. Lewis*, 780 F.2d 1140, 1143 (4th Cir. 1986).

[64] *United States v. Campbell*, 259 F.3d 293, 300 (4th Cir. 2001).

- Second, that the assault resulted in substantial bodily injury;[65] and
- Third, that the assault occurred within the special maritime and territorial jurisdiction of the United States.

An assault is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.[66]

Battery is defined as inflicting injury upon the person of another.[67]

Battery may also be defined as the slightest willful offensive touching of another, regardless of whether the defendant had an intent to do physical harm.[68]

In the case of an attempted battery, the victim need not have experienced reasonable apprehension of immediate bodily harm.[69]

Attempt requires two elements:

- First, that the defendant intended to commit a battery; and
- Second, that the defendant committed an act which constituted a substantial step toward the commission of the battery.[70]

A substantial step is more than mere preparation, yet may be less than the last act necessary before the actual commission of the battery.[71]

The government need not prove that the defendant intended to injure the victim. The government need only prove that the defendant was criminally negligent or reckless.[72]

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[65] *See id.*

[66] *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (citation omitted).

[67] See *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991), for a full definition of common law assault.

[68] *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999) ("Intention to do bodily harm is not a necessary element of battery.").

[69] *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982).

[70] *See United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003).

[71] *United States v. Sutton*, 961 F.2d 476, 478 (4th Cir. 1992). "But if preparation comes so near to the accomplishment of the crime that it becomes *probable* that the crime will be committed absent an outside intervening circumstance, the preparation may become an attempt." *Pratt*, 351 F.3d at 136.

[72] *United States v. Juvenile Male*, 930 F.2d 727, 728-29 (9th Cir. 1991) ("a battery need not be intentional to constitute a violation of [§ 113(a)(6)].").

If the defendant intended to assault another person with intent to do bodily harm, but he harms a third person whom he did not intend to harm, the law considers the defendant just as guilty as if he had actually harmed the intended victim.[73]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[74]

"Substantial bodily injury" means bodily injury which involves a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty. [§ 113(b)(1)]

"Serious bodily injury" means bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [§ 113(b)(2) which adopts the definition in 18 U.S.C. § 1365(h)(3)]

NOTE

See United States v. Sturgis, 48 F.3d 784, 786 (4th Cir. 1995).

"Force and violence is the traditional language of assault." *Simpson v. United States*, 435 U.S. 6, 13 (1978).

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

Section § 113(a)(6), is a general intent crime; therefore, voluntary intoxication is not a defense. *United States v. Lewis*, 780 F.2d 1140, 1143 (4th Cir. 1986).

See also *United States v. Fay*, 668 F.2d 375 (8th Cir. 1981), where the Eighth Circuit said that intoxication would be a defense to assault with a deadly weapon which includes the element of specific intent to do bodily harm. However, assault resulting in serious bodily

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[73] Instruction on transferred intent approved in *United States v. Montoya*, 739 F.2d 1437 (9th Cir. 1984).

[74] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

injury and assault by striking do not require more than general intent, and therefore "the trial court's failure to give an intoxication instruction [did] not affect defendant's convictions on these counts." 668 F.2d at 377.

"Assault had two meanings at common law, the first being an attempt to commit a battery and the second [being] an act putting another in reasonable apprehension of bodily harm. A battery, in turn, did not require proof that the defendant intended to injure another or to threaten [the person] with harm. The slightest willful offensive touching of another constitute[d] a battery ... regardless of whether the defendant harbor[ed] an intent to do physical harm." *United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000) (internal citation and quotation marks omitted).

Unit of Prosecution

In *United States v. Chipps*, 410 F.3d 438 (8th Cir. 2005), the Eighth Circuit concluded that Congress had not specified the unit of prosecution for simple assault with clarity. Applying the rule of lenity, the Eighth Circuit interpreted assault to be a course-of-conduct offense. To determine how many courses of conduct the defendant undertook, the Eighth Circuit applied the so-called "impulse test." Under that test, all violations that arise from "that singleness of thought, purpose of action, which may be deemed a single impulse are treated as one offense." 410 F.3d at 449. The defendant was charged with two counts of assault with dangerous weapons, shod feet and a baseball bat. The jury convicted Chipps of the lesser included offense of simple assault, § 113(a)(5), on each count. The Eighth Circuit directed the district court to vacate the second conviction, "[g]iven the uninterrupted nature of the attack ...." *Id.*

Lesser-Included Offenses

Assault by striking and simple assault are lesser-included offenses of assault with a dangerous weapon, and the jury should be charged if that is an issue. *See United States v. Agofsky*, 411 F.2d 1013 (4th Cir. 1969) (noting that assault by striking, beating, or wounding under 18 U.S.C. 113(d) [now § 113(a)(4)] and simple assault under § 113(e) [now § 113(a)(5)] are lesser included offenses of assault with a dangerous weapon under § 113(c) [now § 113(a)(3)]. Simple assault is defined as the form of assault involving an attempt to put another in fear of imminent serious bodily injury by physical menace. *See United States v. Campbell*, 259 F.3d 293, 296 n.3 (4th Cir. 2001) (citing *United States v. Duran*, 96 F.3d 1495, 1511 (D.C. Cir. 1996)). *But see United States v. Duran*, 127 F.3d 911, 915 (10th Cir. 1997) ("the offense of striking, beating or wounding is simply not a lesser included offense of assault with a dangerous weapon"). Assault by striking requires physical touching whereas assault with a weapon does not. *Id*.

Offensive Touching

At common law, battery included the slightest willful offensive touching of another, regardless of whether the defendant had an intent to do physical harm. *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999). However, because § 113(a)(4) speaks in terms of "striking, beating, or wounding," offensive touching cases are usually resolved as violations of § 113(a)(5), simple assault. In *United States v. Bayes*, 210 F.3d 64, 69 (1st Cir. 2000), the First Circuit found that "in a prosecution for simple assault under § 113(a)(5), it is sufficient to show that the defendant deliberately touched another in a patently offensive manner without justification or excuse[ ]" where the defendant had rubbed and grabbed the

buttocks of a flight attendant. *See also United States v. Whitefeather*, 275 F.3d 741 (8th Cir. 2002) (defendant urinated on victim).

18 U.S.C. § 115 RETALIATING AGAINST A FEDERAL OFFICIAL

§ 115(a)(1)(A)

Title 18, United States Code, Section 115(a)(1)(A) makes it a crime to assault, kidnap, or murder, or threaten to assault, kidnap, or murder a United States official, judge, law enforcement officer [or other official designated in § 1114]. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant assaulted, kidnapped, or murdered, or attempted or conspired to kidnap or murder, or threatened to assault, kidnap, or murder a member of the immediate family of [the victim designated]; and
- Second, that the defendant did so with intent to impede, intimidate, or interfere with such official while the official was engaged in the performance of official duties, or with intent to retaliate against such official on account of the performance of official duties.

§ 115(a)(1)(B)

Title 18, United States Code, Section 115(a)(1)(B) makes it a crime to threaten to assault, kidnap, or murder a United States official, judge, law enforcement officer [or other official designated in § 1114]. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant threatened to assault, kidnap or murder [the victim designated]; and
- Second, that the defendant did so with intent to impede, intimidate, or interfere with such official while the official was engaged in the performance of official duties, or with intent to retaliate against such official on account of the performance of official duties.

§ 115(a)(2)

Title 18, United States Code, Section 115(a)(2) makes it a crime to threaten to assault, kidnap, or murder a former United States official, judge, law enforcement officer [or other official designated in § 1114], or a member of the immediate family of such person. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant assaulted, kidnapped or murdered, or attempted or conspired to kidnap or murder, or threatened to assault, kidnap, or murder [the victim designated]; and
- Second, that the defendant did so with intent to retaliate against such official on account of the performance of official duties during the term of service of such person.

The threat must be a "true threat" and not merely uttered as a part of a political protest or an idle gesture.[75]

The test is whether an ordinary reasonable recipient who is familiar with the context of the threat would interpret it as a threat of injury. There is no requirement that the actual recipient testify.[76]

The government is not required to prove that the person who made the threat was capable of carrying out the threat.[77]

NOTE

A threatening statement must amount to a "true threat" rather than mere political hyperbole or idle chatter. *Watts v. United States*, 394 U.S. 705, 708 (1969). In *Watts*, the Supreme Court identified four factors in determining that the statement was not a true threat. The Court noted that the communication was: (1) made in jest; (2) to a public audience; (3) in political opposition to the President; and (4) conditioned upon an event the speaker himself vowed would never happen. *Id.* at 707-08.

In *United States v. Armel*, 585 F.3d 182 (4th Cir. 2009), the Fourth Circuit refused to add a "particularized victim" element to § 115. "The Supreme Court has explained that true threats encompass statements directed at a particular individual or group of individuals." 585 F.3d at 185 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

18 U.S.C. § 152 BANKRUPTCY FRAUD

Title 18, United States Code, Section 152 makes it a crime to commit certain offenses in bankruptcy proceedings. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 152(1) Concealing Property Belonging to a Debtor

- First, that there existed a proceeding in bankruptcy on or about the date alleged in the indictment;
- Second, that the defendant concealed[78] property belonging to the estate of a debtor;

[75] *United States v. Roberts*, 915 F.2d 889, 890 (4th Cir. 1990).

[76] *Id.* at 891.

[77] *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009).

[78] See *United States v. Atkins*, No. 97-4864, 1999 WL 397711 (4th Cir. June 17, 1999), where the Fourth Circuit found substantial evidence that Atkins attempted to conceal his misappropriation of funds from the bankruptcy court. Atkins secretly took funds out of an escrow account, then created false documents to conceal the transfer. The court approvingly cited *United States v. Weinstein*, 834 F.2d 1454 (9th Cir. 1987) (sufficient if one withholds knowledge of assets about which trustee should be told), and *United States v. Turner*, 725 F.2d 1154 (8th Cir. 1984) (sale not recorded in corporation's books constituted concealment).

- Third, that the defendant concealed the property from a custodian, trustee, marshal, or other officer of the bankruptcy court charged with the control or custody of the property, or from creditors or the United States Trustee; and
- Fourth, that the defendant did so knowingly and fraudulently.[79]

The property need not be physically concealed. Concealment can be accomplished by withholding knowledge or preventing disclosure about the property.[80]

§ 152(3) False Statement under Penalty of Perjury

- First, that a proceeding in bankruptcy existed on or about the date alleged in the indictment;
- Second, that the defendant made or caused to be made a false declaration, certificate, verification, or statement in that bankruptcy proceeding or in relation to it;
- Third, that the statement or declaration related to a material matter;
- Fourth, that the declaration or statement was made under penalty of perjury; and
- Fifth, the defendant did so knowingly and fraudulently, that is, the defendant knew the statement was false and acted with intent to defraud.[81]

A statement is fraudulent if known to be untrue and made with intent to deceive.[82]

A statement (or claim) is material if it has a natural tendency to influence, or is capable of influencing, the decision of the body to which it was addressed. It is irrelevant whether the false statement (or claim) actually influenced or affected the decision-making process. The capacity to influence must be measured at the point in time that the statement (or claim) was made.[83]

Materiality does not require harm to or adverse reliance by a creditor, nor does it require a realization of a gain by the defendant. Rather, it requires that the false oath or account relate to some significant aspect of the bankruptcy case or proceeding in which it was given, or that it pertain to the discovery of assets or to the debtor's financial

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[79] *See United States v. Guiliano*, 644 F.2d 85, 87 (2d Cir. 1981).

[80] *United States v. Porter*, 842 F.2d 1021, 1024 (8th Cir. 1988).

[81] *Compare United States v. Pritt*, No. 99-4581, 2000 WL 1699833 (4th Cir. Nov. 14, 2000), *with United States v. Gellene*, 182 F.3d 578, 586 n.12 (7th Cir. 1999). *See also United States v. O'Connor*, 158 F. Supp. 2d 697, 727 (E.D. Va. 2001).

[82] *Gellene*, 182 F.3d at 586, 587. Prosecutable false statements are not limited to those that deprive the debtor of his property or the bankruptcy estate of its assets. Section 152 is designed to protect the integrity of the administration of a bankruptcy case.

[83] *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998).

transactions. Materiality does not require proof of the potential impact on the disposition of assets.[84]

The government does not have to prove that a loss was suffered as a result of a false statement made in the course of the bankruptcy proceeding.[85]

§ 152(4) Presenting a False Claim

- First, that a proceeding in bankruptcy existed on or about the date alleged in the indictment;
- Second, that the defendant presented a proof of claim against the estate of a debtor;
- Third, that the claim was false as to a material matter; and
- Fourth, that the defendant knew the claim was false and acted knowingly and fraudulently.[86]

A proof of claim filed in a bankruptcy proceeding is a legal document submitted to the court by a creditor of the person or corporation who filed bankruptcy. In this document the creditor is required to notify the court, the debtor, and all other creditors that he is asserting some claim or right to payment from the estate of the debtor in bankruptcy. This claim or right to payment can be asserted by a creditor whether or not this right or claim is reduced to judgment, is liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. In other words, the creditor can submit a claim whether or not he knows the exact amount, whether it is right, or even if the claim is in dispute, as long as he submits the claim in good faith.

A proof of claim is false if it is untrue when it is made and is known to be untrue by the person making it. A proof of claim is false if the statements in it are intentionally inaccurate and submitted without any good faith basis for the claim and are not the result of some mistake or clerical error or inadvertent omission.[87]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[88]

AFFIRMATIVE DEFENSE

Good faith is an absolute defense. A claim, even if false, made with a good faith belief in its accuracy, does not amount to presenting a false claim in violation of this statute. You

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[84] *Gellene*,182 F.3d at 588.

[85] *O'Connor*, 158 F. Supp. 2d at 727.

[86] *United States v. Overmyer*, 867 F.2d 937, 949 (6th Cir. 1989).

[87] *Id*. at 950.

[88] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

must consider whether the claim was intentionally false and made with fraudulent intent, or whether it was the result of an honest mistake or omission.[89]

§ 152(8) Concealing or Making False Entries Concerning the Property of a Debtor

- First, that the defendant concealed, destroyed, mutilated, falsified, or made a false entry in any recorded information relating to the property or financial affairs of a debtor;
- Second, that the defendant did so after the filing of a case under Title 11 or in contemplation of filing; and
- Third, that the defendant did so knowingly and fraudulently.

NOTE

Statutory definitions relevant to bankruptcy proceedings may be found in 11 U.S.C. § 101.

18 U.S.C. § 201 BRIBERY OF OFFICIALS and ILLEGAL GRATUITIES[90] [LAST UPDATED: 8/15/2016]

Title 18, United States Code, Section 201 makes it a crime to give a bribe or an illegal gratuity to a public official, or for a public official to accept a bribe or illegal gratuity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 201(b)(1) [defendant gave the bribe]

- First, that the defendant, directly or indirectly, gave, offered, or promised anything of value to any public official [or offered or promised the public official to give anything of value to any other person or entity]; and
- Second, that the defendant did so corruptly with the intent to influence any official act or to induce a public official to do or omit to do any act in violation of his official duty [or to influence the public official to commit, aid, collude in or allow any fraud, or make an opportunity for the commission of any fraud on the United States].[91]

§ 201(b)(2) [defendant received the bribe]

- First, that the defendant was, at the time alleged in the indictment, a public official;

[89] *Overmyer*, at 950-51.

[90] This statute also covers persons selected to be public officials, witnesses, and jurors. Separate wording for these categories of individuals is not included. Additionally, § 201(c)(1) covers former public officials.

[91] *See United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) (noting elements of §§ 201(b)(1) and (b)(2)).

- Second, that the defendant, directly or indirectly, demanded, sought, received, accepted, or agreed to receive or accept anything of value personally or for any other person or entity; and
- Third, that the defendant did so corruptly in return for being influenced in the performance of any official act or being induced to do or omit to do any act in violation of the official's duty [or being influenced to commit, aid, collude in or allow any fraud, or make an opportunity for the commission of any fraud on the United States].[92]

§ 201(c)(1)(A) [defendant gave the gratuity][93]

- First, that the defendant, directly or indirectly, gave, offered, or promised to any public official anything of value to which the public official was not lawfully entitled; and
- Second, that the thing of value was for or because of any official act performed or to be performed by the public official.

§ 201(c)(1)(B) [defendant received the gratuity]

- First, that the defendant was, at the time alleged in the indictment, a public official;
- Second, that the defendant, directly or indirectly, demanded, sought, received, accepted, or agreed to receive or accept anything of value personally to which the defendant was not lawfully entitled; and
- Third, that the thing of value was for or because of any official act performed or to be performed by the defendant.[94]

☞ **The following instructions apply to illegal gratuities, § 201(c):**

The government must establish a link between the gratuity and a specific official act — some particular official act must be identified and proved.[95]

An illegal gratuity can take one of three forms: (1) for past action, that is, for an official act already performed; (2) to entice a public official who has already staked out a position favorable to the giver to maintain that position; or (3) to induce a public official to propose, take, or shy away from some future act.[96]

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[92] *See United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2003) (listing elements).

[93] "[A]n illegal gratuity does not require an intent to influence or be influenced." *United States v. Jefferson*, 674 F.3d 332, 358 (4th Cir. 2012).

[94] 18 U.S.C. § 201(c)(1)(B). *See Sun-Diamond Growers*, 526 U.S. at 404 (noting elements of § 201(c)(1)(B)).

[95] *Sun-Diamond Growers of Cal.*, 526 U.S. at 406, 414.

[96] *See United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999) (noting that an illegal gratuity "may constitute merely a reward for some future act that the public official will take (or may already have determined to take), or for a past act that he already has taken.").

The government does not have to prove the intent of the giver or the receiver of the illegal gratuity. What the government must prove is that the public official received something to which he was not lawfully entitled for performance of an official act.[97]

The government does not need to prove the existence of a *quid pro quo* in order to prove the payment or receipt of an illegal gratuity.[98]

Payments, sometimes referred to as goodwill gifts, made with no more than some generalized hope or expectation of ultimate benefit on the part of the donor are neither bribes nor gratuities, since they are made neither with the intent to engage in a relatively specific *quid pro quo* with an official nor for or because of a specific official act (or omission).[99]

Also, token gifts given to a public official based upon that official's position and not linked to any identifiable act are not illegal gratuities.[100]

"Public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror. [§ 201(a)(1)]

"To be a public official under section 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy."[101]

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[97] *See United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (noting that for conviction regarding an illegal gratuity, "[n]o corrupt intent to influence official behavior is required. The payor simply must make the payment 'for or because of' some official act.").

[98] *Id.* at 1013.

[99] *Id.* at 1020 n.5.

[100] *See United States v. Jefferson*, 674 F.3d 332, 353 (4th Cir. 2012).

[101] *Dixson v. United States*, 465 U.S. 482, 499 (1984). *See also id.* at 496 (Section 201(a) is "applicable to all persons performing activities for or on behalf of the United States, whatever the form of delegation of authority."); *United States v. Jennings*, 160 F.3d 1006, 1013 n.2 (4th Cir. 1998) (citing *Dixson*); *United States v. Velazquez*, 847 F.2d 140, 142 (4th Cir. 1988) (person bribed was a county deputy in a county jail who "supervised the federal prisoners as a federal jailer would.").

In *Hurley v. United States*, 192 F.2d 297 (4th Cir. 1951), the Fourth Circuit read § 201 to cover three categories of persons:

> (1) officers of the United States; (2) employees of the United States; and (3) persons acting for the United States in any official function. The phrase "in any official function," therefore, modifies only the word "person" and not "officer or employee." When the bribee is an officer of the United States, there is no necessity to show that he was acting in an official capacity .... We hold, therefore, that since [the defendant] was an officer of the United States, it was not necessary to allege or prove that he was acting in an official function.*** It is sufficient if it be shown

(continued...)

To determine whether a person is acting for or on behalf of the United States, "the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities."[102]

A bribe under § 201(b) need not be given directly to the public official; it may be given indirectly to the public official. Additionally, the bribe can be an offer or promise given to the public official to give anything of value to or for "any other person or entity." 18 U.S.C. §§ 201(b)(1), (b)(2). (Note that § 201(c) does not contain this "any other person or entity" language.)

"Official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit. [§ 201(a)(3)][103]

The Government must show that the public official undertook an official act. To prove an "official act" the Government must prove two things.[104] First, the Government must identify a question, matter, cause, suit, proceeding, or controversy that may at any time be pending or may by law be brought before a public official.[105] This requires a showing of a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.[106] It must also be something specific and focused that is pending or may by law be brought before a public official.[107]

Second, the Government must prove that the public official made a decision or took an action on that question, matter, cause, suit, proceeding, or controversy, or that

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[101] (...continued)

> that the bribee was an officer of the United States and that the bribe was given "with intent to influence him to commit or aid in committing *** any fraud, on the United States" or with intent "to induce him to do or omit to do any act in violation of his lawful duty."

192 F.2d at 299-300.

[102] *Dixson*, 465 U.S. at 496.

[103] See *United States v. Valdes*, 475 F.3d 1319 (D.C. Cir. 2007) (*en banc*), which held that a police officer disclosing information from databases does not constitute an "official act." The D.C. Circuit held that "the six-term series ["question, matter, cause, suit, proceeding or controversy"] [in § 201(a)(3)] refers to a class of questions or matters whose answer or disposition is determined by the government." 475 F.3d at 1324.

[104] *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016).

[105] *Id.*

[106] *Id.* at 2369, 2372.

[107] *Id.* at 2372.

he agreed to do so.[108] That decision or action may include using his official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. Setting up a meeting, talking to another official, or organizing an event or agreeing to do so—without more—does not count as a decision or action on that matter.[109]

The government does not have to prove that the official receiving the bribe took any affirmative action to perform his part of the corrupt bargain.[110]

The official act offered in exchange for the bribe need not "be harmful to the government or inconsistent with the official's legal obligations. The critical question is whether the government official solicited something of value with a corrupt intent, *i.e.*, in exchange for an official act."[111] "It is not a defense that the official act sought to be influenced would have been done anyway regardless of the fact that the bribe was received or accepted. That is to say, even if the defendant acted as he or she normally would if the bribe had not been requested, the crime of bribery has still been committed."[112]

"[I]t is not necessary to find that the action or result sought by whoever hypothetically gives the bribe is something that was in fact within the power of the official in question. It would not be possible, on the other hand, for you to find a case of bribery [or illegal gratuity] if the action sought was so far outside the purview of the official's duties or possible power or possible authority that it would be unreasonable for any reasonable man to have supposed the official could have done anything about that particular subject."[113]

The following instructions apply to bribery, § 201(b):

A bribe requires that the payment be made or received corruptly, that is with the intent either to induce a specific act or be influenced in performance of a specific act.[114]

An act is done "corruptly" if is done with the intent to receive a specific benefit in return for the payment.[115]

"[F]or bribery there must be a *quid pro quo* -a specific intent to give or receive something of value in exchange for an official act."[116]

Not every payment made to influence or reward an official is intended to corrupt him. A payor has the intent to corrupt an official only if he makes a payment or promise with the intent to engage in some fairly specific *quid pro quo* with that official. The defendant must

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[108] *Id.* at 2368.

[109] *Id.* at 2372, 2375.

[110] *Wilson v. United States*, 230 F.2d 521, 526 (4th Cir. 1983) (prosecution under former § 202, a companion statute, which contained language quite similar to § 201).

[111] *United States v. Quinn*, 359 F.3d 666, 675 (4th Cir. 2004) (internal citations omitted).

[112] *Id.*

[113] *United States v. Carson*, 464 F.2d 424, 431-32 (2d Cir. 1972).

[114] *United States v. Jennings*, 160 F.3d 1006, 1021 (4th Cir. 1998) (prosecution under 18 U.S.C. § 666).

[115] *Id.* at 1013.

[116] *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999).

have intended for the official to engage in some specific act or omission or course of action or inaction in return for the payment charged in the indictment.[117]

To prove bribery, "the government is not required to prove an expressed intention (or agreement) to engage in a *quid pro quo*. Such an intent may be established by circumstantial evidence." [118]

Also, the government need not show that the defendant intended for his payments to be tied to specific official acts (or omissions). But the government must show that the payor intended for each payment to induce the official to adopt a specific course of action. "Bribery requires the intent to effect an exchange of money (or gifts) for specific official action (or inaction), but each payment need not be correlated with a specific official act."[119] It is not necessary for the government to prove "that the payor intended to induce the official to perform a set number of official acts in return for the payments. The *quid pro quo* requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor."[120] Therefore, the government only has to show that payments were made with the intent of obtaining a specific type of official action or favor in return.[121]

The *quid pro quo* requirement is satisfied if you find that the government has established beyond a reasonable doubt that the defendant agreed to accept things of value in exchange for performing [or declining to perform] official acts on an as-needed basis, so that whenever the opportunity presents itself, the defendant would take [or fail to take] specific action on the payor's behalf.[122]

NOTE

Section 201 prohibits two types of payments to federal officials: bribes and illegal gratuities. Bribes are corruptly given with intent to influence any official act. Illegal gratuities are given for or because of any official act. "Whether a payment is a bribe or an illegal gratuity depends on the intent of the payor." *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998). Corrupt intent is the intent to receive a specific benefit in return for the payment. The payor of a bribe must intend to engage in some more or less specific *quid pro quo* with the official who receives the payment. "Accordingly, a goodwill gift to an official to foster a favorable business climate, given simply with the generalized hope or expectation of ultimate benefit on the part of the donor does not constitute a bribe." *Id.* (quotation marks and citation omitted). "Vague expectations of some future benefit should not be sufficient to make a payment a bribe." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

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[117] *Jennings*, 160 F.3d at 1018-19. In *Jennings*, the defendant was the payor. If the defendant is the public official/bribee, the wording should be changed appropriately.

[118] *Id.* at 1014.

[119] *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (quotation and citation omitted).

[120] *Id.*

[121] *Id.*

[122] *See United States v. Jefferson*, 674 F.3d 332, 358 (4th Cir. 2012).

On the other hand, an illegal gratuity "is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event. No corrupt intent to influence official behavior is required. The payor simply must make the payment or gift for or because of some official act." *Jennings*, 160 F.3d at 1013 (quotations marks and citation omitted). "The gratuity and the [relevant] official act need not motivate each other." *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 966 (D.C. Cir. 1998), *cert. granted in part*, *aff'd*, 526 U.S. 398 (1999). The timing of the payment in relation to the official act for which it is made is irrelevant. *Jennings*, 160 F.3d at 1014.

In *Sun-Diamond Growers*, the Supreme Court affirmed the reversal of a conviction for giving a gratuity to the Secretary of Agriculture because the government did not prove a link between the gift and a specific official act for or because of which it was given.

> The distinguishing feature of each crime [in § 201] is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*–a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999).

Bribery and illegal gratuities are subsections of the same statutory scheme and are therefore subject to the same definitions. *United States v. Jefferson*, 674 F.3d 332, 353 (4th Cir. 2012).

Payment of an illegal gratuity is a lesser included offense of bribery. *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991).

"[F]ederal bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's specific authority (or lack of same) to make a binding decision." *United States v. Carson*, 464 F.2d 424, 433 (2d Cir. 1972).

In *United States v. Hare*, 618 F.2d 1085, 1087 (4th Cir. 1980), the court held that a loan with favorable interest and payment provisions constituted "anything of value." However, the statute of limitations started running with the making of the loan, not the making of payments subject to the favorable interest rate or the missing of payments without suffering late payment penalties.

18 U.S.C. § 208 CONFLICT OF INTEREST [LAST UPDATED: 7/3/14]

Title 18, United States Code, Section 208 makes it a crime for a federal employee to benefit personally from an official action. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was an officer or employee of the executive branch or of an independent agency of the federal government;

- Second, that the defendant participated personally and substantially in his official, governmental capacity through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise;
- Third, that the defendant did so in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter;
- Fourth, that the defendant knew that he, his spouse, or [other statutorily-listed person or entity] had a financial interest in that particular matter; and
- Fifth, that the defendant did so willfully.[123]

The government does not have to prove actual corruption, or that an actual loss was suffered by the government.[124]

Negotiation is a communication between two parties with a view to reaching an agreement. Negotiation connotes discussion and active interest on both sides. Preliminary or exploratory talks do not constitute negotiation. Rather, to find a negotiation, you must find that there was a process of submission and consideration of offers.[125]

NOTE

See United States v. Lund, 853 F.2d 242 (4th Cir. 1988).

Section 208 establishes an objective standard of conduct. *United States v. Hedges*, 912 F.2d 1397, 1402 (11th Cir. 1990).

The Eleventh Circuit held that § 208 is a strict liability offense statute, requiring knowledge only as to the fourth element, that a statutorily-listed person had a financial interest in the defendant's official work. *Id.* at 1402.

Under the sentencing scheme in § 216(a), a felony conviction requires willfulness. Otherwise, the conduct is punishable as a misdemeanor.

"[L]iability for conflict of interest may be founded on a variety of acts leading up to the formation of a contract even if those acts are not specifically mentioned in the text of section 208(a)." *United States v. Selby*, 557 F.3d 968, 972-73 (9th Cir. 2009).

Section 208(b) sets forth a number of exceptions, which might be construed as affirmative defenses. *See United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) (the existence of "just cause or excuse" for an assault in violation of 18 U.S.C. § 113(a)(3) is an affirmative defense, and the government does not have the burden of pleading or proving its absence).

[123] *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993).

[124] *United States v. Hedges*, 912 F.2d 1397, 1402 (11th Cir. 1990) (citing *United States v. Miss. Valley Generating Co.*, 364 U.S. 520 (1961)) (predecessor statute).

[125] *Id.* at 1403 n.2 (quoting instruction given by district court).

18 U.S.C. § 211 ACCEPTING OR ASKING FOR ANYTHING OF VALUE TO OBTAIN APPOINTIVE PUBLIC OFFICE

Title 18, United States Code, Section 211 makes it a crime to ask for or receive any thing of value in return for supporting any person for any appointive office under the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant asked for or received any money or thing of value; and
- Second, that the thing of value was in return for the promise of support or the use of influence in obtaining for any person any appointive office or place under the United States.

¶ 2

- First, that the defendant asked for or received any thing of value; and
- Second, that the thing of value was asked for or received in return for helping a person to obtain employment under the United States either by referring his name to an executive department or agency of the United States, or by requiring the payment of a fee because the person obtained employment.

NOTE

The statute covers the sale of non-existent offices. "This Act penalized corruption. It is no less corrupt to sell an office one may never be able to deliver than to sell one he can." *United States v. Hood*, 343 U.S. 148, 151 (1952).

18 U.S.C. § 215 RECEIVING GIFTS FOR PROCURING LOANS

Title 18, United States Code, Section 215 makes it a crime to receive a gift for procuring a loan from a financial institution. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 215(a)(1)

- First, that the defendant gave, offered, or promised anything which exceeded $1,000.00 in value to any person;
- Second, that the thing was given in connection with any business or transaction of a financial institution; and
- Third, that the defendant did so corruptly and with intent to influence or reward an officer, director, employee, agent, or attorney of the financial institution.

§ 215(a)(2)

- First, that the defendant was an officer, director, employee, agent, or attorney of a financial institution;
- Second, that the defendant asked for or demanded for the benefit of any person, or accepted or agreed to accept, anything which exceeded $1,000.00 in value; and
- Third, that the defendant did so corruptly and intending to be influenced or rewarded in connection with any business or transaction of the financial institution.

An act is done "corruptly" if is done with the intent to receive a specific benefit in return for the payment.[126]

"Financial institution" means

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act);

(7) a Federal Reserve bank or a member bank of the Federal Reserve System.

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974. [18 U.S.C. § 20]

NOTE

See United States v. Etheridge, 414 F. Supp. 609, 611 (E.D. Va. 1976) ("It is of no consequence that the money was not paid until after the loan had been made, or that [the] borrower did not know the bank officer was sharing in the fee.").

18 U.S.C. § 228 FAILURE TO PAY CHILD SUPPORT [LAST UPDATED: 7/3/14]

Title 18, United States Code, Section 228 makes it a crime to fail to pay a past due child support obligation, or to travel in interstate commerce with intent to evade a support obligation. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 228(a)(1)[127]

- First, that the defendant failed to pay;
- Second, a past due support obligation, which is defined as "any amount ... determined under a court order or an order of an administrative process pursuant to the law of a state to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living." The past due

[126] *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (18 U.S.C. § 666 prosecution).

[127] A second conviction is a felony. 18 U.S.C. § 228(c).

support obligation must have remained unpaid for more than one year or be greater than $5,000.00;

- Third, with respect to a child who resides in another state; and
- Fourth, that the defendant did so willfully.[128]
- [Fifth, that the defendant has a prior conviction for the same offense.][129]

§ 228(a)(2)

- First, that the defendant traveled in interstate or foreign commerce;
- Second, that the defendant owed a past due support obligation, which is defined as "any amount ... determined under a court order or an order of an administrative process pursuant to the law of a state to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living." The past due support obligation must have remained unpaid for more than one year or be greater than $5,000.00; and
- Third, that the defendant traveled with the intent to evade the support obligation.

§ 228(a)(3)

- First, that the defendant failed to pay;
- Second, a past due support obligation, which is defined as "any amount ... determined under a court order or an order of an administrative process pursuant to the law of a state to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living." The past due support obligation must have remained unpaid for more than two years or be greater than $10,000.00;
- Third, with respect to a child who resides in another state; and
- Fourth, that the defendant did so willfully.

☞ **If a disputed issue is whether the past due support obligation is unpaid for more than one year or two years, or is greater than $5,000 or $10,000, the court should consider giving a lesser included offense instruction.**

Willfulness is defined as the voluntary, intentional violation of a known legal duty.[130]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Reside" means the act or fact of living in a given place permanently or for an extended period of time.[131]

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[128] *United States v. Johnson*, 114 F.3d 476, 482 (4th Cir. 1997).

[129] Prior convictions used as a basis for a sentencing enhancement need not be pled in the indictment or submitted to the jury for proof beyond a reasonable doubt. *United States v. Cheek*, 415 F.3d 349 (4th Cir. 2005).

[130] *See Cheek v. United States*, 498 U.S. 192, 201 (1991). *See also United States v. Fields*, 500 F.3d 1327, 1332 (11th Cir. 2007) (finding that to prove willfulness, the government must prove that the defendant knew his child resided in another state and that he refused to pay.).

[131] *United States v. Novak*, 607 F.3d 968 (4th Cir. 2010).

The government must prove the existence of a state judicial or administrative order creating the support obligation. The government does not need to prove the facts which were the basis for the support order, including the fact of parentage.[132]

NOTE

In *United States v. Mattice*, 186 F.3d 219 (2d Cir. 1999), the defendant argued that to establish willfulness, the government had to prove that he had sufficient disposable income to pay his entire past due support obligation during the period charged in the indictment. Writing for the court, then-Circuit Judge Sotomayor disagreed. "Congress's choice of 'any amount,' rather than 'the amount,' is significant. This language suggests that Congress intended to make partial failures to pay actionable ..., and that defendants who can pay some of their past due support obligations but fail to do so can be held liable." 186 F.3d at 227. The Second Circuit nevertheless found that "if a defendant is unable to pay even some of his past due child support obligations, his failure to pay cannot be either voluntary or intentional and thus cannot be willful ...." *Id.* at 228. As a defense to the charge, the court found that a "defendant is free to present evidence that during the period charged in the indictment, his income was not sufficient, after meeting his basic subsistence needs, to enable him to pay any portion of the support obligation." *Id.* at 229.

In *United States v. Ballek*, 170 F.3d 871 (9th Cir. 1999), the court found that willfully "can be read one of two ways: having the money and refusing to use it for child support; or, not having the money because one has failed to avail oneself of the available means of obtaining it." *Id.* at 873.

In *United States v. Johnson*, 114 F.3d 476, 483 (4th Cir. 1997), the defendant relied on *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), to relitigate the parentage issue. The Fourth Circuit assumed the principle applied, but found that Johnson could not meet the critical requirement that he had no means within the state court system to challenge the support order.

Section 228(b) states "[t]he existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period." One court has held this provision unconstitutional, but severable from the rest of the statute. *United States v. Grigsby*, 85 F. Supp. 2d 100 (D.R.I. 2000).

In *United States v. Kerley*, 544 F.3d 172 (2d Cir. 2008), the defendant was charged in a two-count indictment, because there were two children, although only one order. The Second Circuit found that Congress failed to specify that the unit of prosecution was the child involved, and therefore, applying the rule of lenity in favor of the defendant, the court ruled the indictment multiplicitous.

In *United States v. Novak*, 607 F.3d 968 (4th Cir. 2010), the Fourth Circuit pointed out that § 228 contains a specific venue provision, which provides that the prosecution may be brought in the district in which the obliger resided.

18 U.S.C. § 229 CHEMICAL WEAPONS [LAST UPDATED: 12/10/14]

Title 18, United States Code, Section 229 makes it a crime to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, use, or threaten to use, any chemical weapon. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

[132] *Johnson*, 114 F.3d at 482.

§ 229(a)(1)

- First, that the defendant developed, produced, otherwise acquired, transferred directly or indirectly, received, stockpiled, retained, owned, possessed, used, or threatened to use; chemical weapon; and
- Second, that the defendant did so knowingly.[133]

§ 229(a)(2)

- First, that the defendant [assisted or induced, in any way, any person] or [attempted] or [conspired]
- Second, that the defendant [assisted or induced, in any way, any person] or [attempted] or [conspired] to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, use, or threaten to use, any chemical weapon; and
- That the defendant did so knowingly.

AGGRAVATED PENALTY [§ 229A(a)(2)]

1. Did the defendant's conduct result in the death of another person?

"Chemical weapon" means the following, together or separately:

(a) a toxic chemical and its precursors, except where intended for a purpose not prohibited under Chapter 11B as long as the type and quantity is consistent with such a purpose;

(b) a munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in (a) above, which would be released as a result of the employment of such munition or device;

(c) any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in (b) above. [§ 229F(1)]

"Precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system. [§ 229F(6)(A)]

"Key component of a binary or multicomponent chemical system" means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system. [§ 229F(3)]

"Person" means "means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States." [§229F(5)]

NOTE

Section 229(b) identifies certain exemptions.

Section 229(c) provides the bases for jurisdiction.

Section 229C excludes individual self-defense devices, including those using pepper spray or chemical mace.

[133] *United States v. Johnson*, 114 F.3d 476, 482 (4th Cir. 1997).

The Supreme Court has determined that § 229 does not "reach a purely local crime [of] an amateur attempt by a jilted wife to injury her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water." *United States v. Bond*, 572 U.S. __, 134 S. Ct. 2077, 2083 (2014).

18 U.S.C. § 241 CONSPIRING AGAINST CIVIL RIGHTS

Title 18, United States Code, Section 241 makes it a crime to conspire with someone else to injure or intimidate another person in the exercise of his civil rights. A conspiracy is an agreement between two or more persons to join together to accomplish the unlawful purpose. It is a kind of partnership in crime in which each member becomes the agent of every other member. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that two or more persons agreed to injure, oppress, threaten, or intimidate any person;
- Second, in that person's free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised his right or privilege [the right or privilege should be identified and explained to the jury]; and
- Third, that the defendant knew of the agreement and willfully participated in the agreement.

AGGRAVATED PENALTY

1. Did death result from the act committed in violation of this law, or did the act include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill?

_____NOTE_____

See jury instructions for 18 U.S.C. § 371.

See United States v. Falcone, 311 U.S. 205, 210 (1940); *United States v. Hedgepeth*, 418 F.3d 411, 420 (4th Cir. 2005); *United States v. Tucker*, 376 F.3d 236, 238 (4th Cir. 2004).

"The right to choose is the right of qualified voters to cast their ballots and have them counted at Congressional elections. [T]his is a right secured by the Constitution [and] is secured against the action of individuals as well as of states." *United States v. Classic*, 313 U.S. 299, 315 (1941). *See id.* at 320 ("[A] primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision ....").

Section 241 "embraces a conspiracy to stuff the ballot box at an election for federal officers, and thereby to dilute the value of votes of qualified voters." *Anderson v. United States*, 417 U.S. 211, 226 (1974). The government does not have to prove an intent to change the outcome of the federal election. The intent required is the intent "to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots." *Id.* However, the Court found the case was an inappropriate vehicle to decide whether a conspiracy to cast false votes for candidates for state or local office was unlawful under § 241. *Id.* at 228.

In *United States v. Olinger*, 759 F.2d 1293 (7th Cir. 1985), the Seventh Circuit held that § 241 covered the right of suffrage in state or local elections, under the equal protection clause of the Fourteenth Amendment, if there is involvement of the state or of one acting under the color of its authority. "'Under color' of law has been construed as identical with and as representing state action. It may be represented by action taken directly under a state statute or by a state official acting 'under color' of his office." 759 F.2d at 1304.

"Misuses of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Classic*, 313 U.S. at 326.

The government is permitted to present evidence of acts committed in furtherance of the conspiracy even though they are not specified in the indictment. *United States v. Janati*, 374 F.3d 263, 270 (4th Cir. 2004).

In *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), a § 242 prosecution, the defendant was a law enforcement officer, and the victim was a pretrial detainee subjected to excessive force. The district court instructed the jury concerning the element of deprivation of a right, as follows:

> In considering whether or not a defendant deprived [the victim] of his constitutional right not to be subjected to unreasonable and excessive force, you should determine whether the force used by that defendant was necessary in the first place or was greater than the force that would appear reasonably necessary to an ordinary, reasonable, and prudent person.
>
> A law enforcement officer is justified in the use of any force which he reasonably believes to be necessary to effect an arrest or hold someone in custody and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm.
>
> Provocation by mere insulting or threatening words will not excuse a physical assault by a law enforcement officer. Mere words, without more, do not constitute provocation or aggression on the part of the person saying those words. No law enforcement officer is entitled to use force against someone based on that person's verbal statements alone.
>
> In determining whether the force used in this case was excessive or unwarranted, you should consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

905 F.2d at 787-88.

Regarding the element of willfulness, the district court instructed as follows:

> [The government] must show that a defendant had the specific intent to deprive [the victim] of his right not to be subjected to unreasonable and excessive force. If you find that a defendant knew what he was doing and that he intended to do what he was doing, and if you find that he did violate a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victim of that constitutional right.

Id. at 788.

In *Cobb*, the victim's constitutional right was a Fourteenth Amendment right to be free from the use of excessive force that amounted to punishment. *Id*. at 788. Therefore, it would have

been appropriate for the trial court to have instructed the jury that to have been excessive, the use of force must have been intended as punishment. Although the instruction was far from perfect, it fairly stated the controlling law.

Other protected rights include the following:

- The right to vote. *United States v. Classic*, 313 U.S. 299, 323 (1941). Voter bribery and honest elections fall under 42 U.S.C. § 1973i. *United States v. McLean*, 808 F.2d 1044, 1046 (4th Cir. 1987).
- The right to report a crime. *In re Quarles*, 158 U.S. 532, 535 (1895).
- The right to testify at trial. *United States v. Thevis*, 665 F.2d 616, 626-27 (5th Cir. Unit B 1982), *superseded on other grounds by rule*, Fed. R. Evid. 804(b)(6).
- The right not to be subject to cruel and unusual punishment. *United States v. LaVallee*, 439 F.3d 670, 686 (10th Cir. 2006).
- The right not to be deprived of liberty without due process of law. This right includes the right to be kept free from harm while in official custody. "No person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state." *United States v. Bigham*, 812 F.2d 943, 949 (5th Cir. 1987).
- The right to enjoy public accommodations. 42 U.S.C. § 2000a. The presence of electronic video games turns a convenience store into a supplier of entertainment and therefore a place of public accommodation. *United States v. Baird*, 85 F.3d 450, 454 (9th Cir. 1996). In *United States v. Piche*, 981 F.2d 706 (4th Cir. 1992), *superseded on other grounds by statute*, 18 U.S.C. § 3664, the defendant was prosecuted for interfering with Asian-American men because they were enjoying the goods and services of a public facility. The district court charged the jury that "[a] place of public accommodation is any establishment that is used by members of the general public for entertainment, that is, recreation, fun, or pleasure, and in which the sources of entertainment move in interstate commerce." 981 F.2d at 716.

A pretrial detainee has a Fourteenth Amendment right to be from the use of excessive force, an arrestee has a Fourth Amendment right to be free from unreasonable seizures, and a convict has an Eighth Amendment right to be free from cruel and unusual punishment. *United States v. Cobb*, 905 F.2d 784, 788 and 788 n.7 (4th Cir. 1990).

18 U.S.C. § 242 CIVIL RIGHTS – COLOR OF LAW

Title 18, United States Code, Section 242 makes it a crime to deprive any person of his civil rights under color of law. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that [name of victim] was present in South Carolina;
- Second, that the defendant deprived [name of victim] of a right secured or protected by the Constitution or laws of the United States [the right infringed must be identified], or to different punishments, pains, or penalties on account of such person being an alien, or by reason of his color or race;
- Third, that the defendant acted under color of law; and
- Fourth, that the defendant acted willfully.[134]

[134] *See United States v. Perkins*, 470 F.3d 150, 153 n.3 (4th Cir. 2006); *United States v.*
(continued...)

AGGRAVATED PENALTIES

1. Did bodily injury result from the act committed in violation of this law, or did the act include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire?
2. Did death result from the act committed in violation of this law, or did the act include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill?

"Under color of law" means the real or purported use of authority provided by law. A person acts "under color of law" when that person acts in his or her official capacity or claims to act in his or her official capacity. Acts committed "under color of law" include not only the actions of officials within the limits of their lawful authority, but also the actions of officials who exceed the limits of their lawful authority while purporting or claiming to act in performance of their official duties.[135]

"Bodily injury" means a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.[136]

Physical abuse or violence is not necessarily required to prove a violation of this statute.[137]

NOTE

In *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), the defendant was a law enforcement officer, and the victim was a pretrial detainee subjected to excessive force. The district court instructed the jury concerning the element of deprivation of a right, as follows:

> In considering whether or not a defendant deprived [the victim] of his constitutional right not to be subjected to unreasonable and excessive force, you should determine whether the force used by that defendant was necessary in the first place or was greater than the force that would appear reasonably necessary to an ordinary, reasonable, and prudent person.
>
> A law enforcement officer is justified in the use of any force which he reasonably believes to be necessary to effect an arrest or hold someone in custody and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm.
>
> Provocation by mere insulting or threatening words will not excuse a physical assault by a law enforcement officer. Mere words, without more, do not constitute provocation or aggression on the part of the person saying those words. No law

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[134] (...continued)
Cobb, 905 F.2d 784, 789 (4th Cir. 1990).

[135] O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* § 29.04 (5th ed. 2000). *See United States v. Ramey*, 336 F.2d 512, 515-16 (4th Cir. 1964) ("under color of law" means under pretense of law, and includes misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law); *Screws v. United States*, 325 U.S. 91, 111 (1945) (acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it).

[136] 18 U.S.C. §§ 831(f)(5), 1365(g)(4), 1515(a)(5), and 1864(d)(2). *See also Perkins*, 470 at 161 ("physical pain alone or any injury to the body, no matter how fleeting, suffices" to establish bodily injury).

[137] *United States v. Ramey*, 336 F.2d 512, 514 (4th Cir. 1964).

> enforcement officer is entitled to use force against someone based on that person's verbal statements alone.
>
> In determining whether the force used in this case was excessive or unwarranted, you should consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

905 F.2d at 787-88.

Regarding the element of willfulness, the district court instructed as follows:

> [The government] must show that a defendant had the specific intent to deprive [the victim] of his right not to be subjected to unreasonable and excessive force. If you find that a defendant knew what he was doing and that he intended to do what he was doing, and if you find that he did violate a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victim of that constitutional right.

Id. at 788.

In *Cobb*, the victim's constitutional right was a Fourteenth Amendment right to be free from the use of excessive force that amounted to punishment. *Id*. at 788. Therefore, it would have been appropriate for the trial court to have instructed the jury that to have been excessive, the use of force must have been intended as punishment. Although the instruction was far from perfect, it fairly stated the controlling law.

Other protected rights include the following:

- The right to vote. *United States v. Classic*, 313 U.S. 299, 323 (1941). Voter bribery and honest elections fall under 42 U.S.C. § 1973i. *United States v. McLean*, 808 F.2d 1044, 1046 (4th Cir. 1987).
- The right to report a crime. *In re Quarles*, 158 U.S. 532, 535 (1895).
- The right to testify at trial. *United States v. Thevis*, 665 F.2d 616, 626-27 (5th Cir. Unit B 1982), *superseded on other grounds by rule*, Fed. R. Evid. 804(b)(6).
- The right not to be subject to cruel and unusual punishment. *United States v. LaVallee*, 439 F.3d 670, 686 (10th Cir. 2006).
- The right not to be deprived of liberty without due process of law. This right includes the right to be kept free from harm while in official custody. "No person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state." *United States v. Bigham*, 812 F.2d 943, 949 (5th Cir. 1987).
- The right to enjoy public accommodations. 42 U.S.C. § 2000a. The presence of electronic video games turns a convenience store into a supplier of entertainment and therefore a place of public accommodation. *United States v. Baird*, 85 F.3d 450, 454 (9th Cir. 1996). In *United States v. Piche*, 981 F.2d 706 (4th Cir. 1992), *superseded on other grounds by statute*, 18 U.S.C. § 3664, the defendant was prosecuted for interfering with Asian-American men because they were enjoying the goods and services of a public facility. The district court charged the jury that "[a] place of public accommodation is any establishment that is used by members of the general public for entertainment, that is, recreation, fun, or pleasure, and in which the sources of entertainment move in interstate commerce." 981 F.2d at 716.

A pretrial detainee has a Fourteenth Amendment right to be from the use of excessive force, an arrestee has a Fourth Amendment right to be free from unreasonable seizures, and a convict has an Eighth Amendment right to be free from cruel and unusual punishment. *United States v. Cobb*, 905 F.2d 784, 788 and 788 n.7 (4th Cir. 1990).

18 U.S.C. § 287 FALSE, FICTITIOUS OR FRAUDULENT CLAIMS[LAST UPDATED: 7/3/14]

Title 18, United States Code, Section 287 makes it a crime to present a false claim for money to an agency of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made or presented a false, fictitious, or fraudulent claim to an agency of the United States;
- Second, that the defendant knew at the time that the claim was false, fictitious, or fraudulent;[138] and
- [Third, that the claim was material.][139]

The word "claim" relates solely to the payment or approval of a claim for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant.[140]

A statement (or claim) is material if it has a natural tendency to influence, or is capable of influencing, the decision of the body to which it was addressed. It is irrelevant whether the false statement (or claim) actually influenced or affected the decision-making process. The capacity to influence must be measured at the point in time that the statement (or claim) was made.[141]

It is no defense to a prosecution under this section that the government received its money's worth.[142]

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[138] A defendant must also proceed "with a consciousness that he was doing something which was wrong or which violated the law." *United States v. Maher*, 582 F.2d 842, 847 (4th Cir. 1978).

[139] In *United States v. Greenberg*, No. 87-5089, 1988 WL 21229 at *4 n.2 (4th Cir. Mar. 8, 1988), the court indicated that "[w]e do not here decide whether materiality is an element of § 287 and note that some courts have recently concluded that it is not." The Second, Fifth, Sixth, Ninth and Tenth Circuits have all concluded materiality is not an element. However, in *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), the court reversed the conviction of a Quaker tax protester for violating 26 U.S.C. § 7205. In *dicta*, the court stated that materiality has been required as an element of § 287 in the same manner as under § 1001 and cited *Johnson v. United States*, 410 F.2d 38, 46 (8th Cir. 1969), where the Eighth Circuit approved an instruction that included materiality. *Snider*, 502 F.2d at 652 n.12. *But see United States v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008) (materiality an element under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq*.).

[140] *United States v. Duncan*, 816 F.2d 153, 155 (4th Cir. 1987) (citing *United States v. Cohn*, 270 U.S. 339, 345-46 (1926)). "Regardless of whether a false voucher is submitted for a credit or for reimbursement, the government potentially suffers a monetary loss. Therefore, we hold that a voucher for reduction of liability for advanced funds is a 'claim' under § 287." *Id.* at 155. *Duncan* dealt with a free airline ticket. During deliberations, the trial court instructed the jury that ownership of the ticket was irrelevant. The Fourth Circuit reversed, holding that the government was required to prove ownership of the free ticket.

[141] *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998).

[142] *United States v. Blecker*, 657 F.2d 629, 634 (4th Cir. 1981) (§ 287 does not require a showing of specific intent to defraud the government).

NOTE

United States v. Ewing, 957 F.2d 115, 119 (4th Cir. 1992) (noting two elements of offense).

In *United States v. Maher*, 582 F.2d 842 (4th Cir. 1978), the Fourth Circuit held the district court had properly instructed the jury that § 287 may be violated by the "submission of a false claim, a fictitious claim or a fraudulent claim, if, in each instance, the defendant acted with knowledge that the claim was false or fictitious or fraudulent and with a consciousness that he was either doing something which was wrong or which violated the law." 582 F.2d at 847.

Section 287 does not specify an intent to defraud as an element. *Id.*

"[T]he submission of a false claim to a state agency to obtain federal funds that were provided to the state falls within the parameters of § 287." *United States v. Bolden*, 325 F.3d 471, 494 n.28 (4th Cir. 2003).

In *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981), the defendant argued that the government got its money's worth. The court found that

> [t]his quantum meruit argument is simply a restatement of the contention that conviction for violating § 287 requires a showing of specific intent to defraud the government a contention that we [have previously rejected] .... [Section] 287 is phrased in the disjunctive, and a conviction under that statute may therefore be based on proof that a claim submitted to the government is either false, fictitious or fraudulent. [E]vidence that the government got its money's worth was no defense to this proof.

657 F.2d at 634.

Venue lies either where the claim was prepared, or where it was presented to the government, or where "the false claim was submitted to an intermediary in one district who paid the claim and then transmitted a claim for reimbursement based on that payment, as a matter of course, to a government agency in another district." *Id.* at 633. Computer Sciences Corporation (CSC) contracted with the General Services Administration (GSA) to provide computer and data processing services. CSC subcontracted with Blecker for consulting services, and his claims were submitted to CSC. The Fourth Circuit rejected Blecker's defense, relying on the "cause" language in 18 U.S.C. § 2(b), although apparently § 2 was not charged in the indictment. In *Blecker*, there was substantial evidence that Blecker submitted the invoices for hourly rates based on falsified resumes with knowledge that CSC would seek reimbursement for the payment of the invoices from the GSA.

Venue also may be proper in a district into which the victimized government agency had passed the subject claim after its initial presentation to that agency, either by the defendant or an intermediary. *United States v. Ebersole*, 411 F.3d 517, 530 (4th Cir. 2005).

18 U.S.C. § 371 CONSPIRACY

Title 18, United States Code, Section 371 makes it a crime to conspire with someone else to commit an offense made illegal by federal law [or to defraud the United States].[143] A conspiracy is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of partnership in crime in which each member becomes

[143] *United States v. Ellis*, 121 F.3d 908, 913 (4th Cir. 1997) (noting § 371 "criminalizes two types of conspiracies ....").

the agent of every other member. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

Conspiracy to Commit Offense Against the United States

- First, that two or more persons agreed to do something which federal law prohibits, that is, [here, set forth the elements of the object of the conspiracy, as charged in the indictment, or by reference to a substantive count, if that is the object of the conspiracy];[144]
- Second, that the defendant knew of the conspiracy and willfully joined the conspiracy; and
- Third, that at some time during the existence of the conspiracy or agreement [and within the limitations period[145]], one of the members of the conspiracy knowingly performed, in the District of South Carolina, one of the overt acts charged in the indictment in order to accomplish the object or purpose of the agreement.[146]

Conspiracy to Defraud the United States[147]

- First, that two or more persons agreed to defraud the United States;
- Second, that at some time during the existence of the conspiracy or agreement [and within the limitations period[148]], one of the members of the conspiracy knowingly performed one of the overt acts charged in the indictment in order to accomplish the object or purpose of the agreement; and
- Third, that the defendant had the intent to agree to defraud the United States.[149]

To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also includes any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.[150]

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[144] "In a conspiracy, two different types of intent are generally required–the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 n.20 (1978). *See also United States v. Kingrea*, 573 F.3d 186, 191 (4th Cir. 2009) (conspiracy indictments must allege all elements of offense which defendant is accused of conspiring to commit); *United States v. Atkinson*, 966 F.2d 1270, 1275 (9th Cir. 1992) ("and (3) the requisite intent to commit the underlying substantive offense.").

[145] In *United States v. Head*, 641 F.2d 174 (4th Cir. 1981), the defendant was convicted of a single conspiracy to commit three separate offenses, one of which was a tax violation with a different statute of limitations. The Fourth Circuit found error when the district court instructed the jury that "it could convict defendant if it found that he conspired to violate any one or more of the three criminal statutes but declined and failed to instruct the jury that it had to find an overt act in furtherance of that conspiracy committed within the applicable period of limitations." 641 F.2d at 176.

[146] *See United States v. Singh*, 518 F.3d 236, 252 (4th Cir. 2008).

[147] An indictment drawn under this portion of the statute need refer to no statute other than § 371. *United States v. Vogt*, 910 F.2d 1184, 1200 (4th Cir. 1990).

[148] *See Head*, 641 F.2d at 176 (reversed district court that failed to failed to instruct that jury had to find overt act in furtherance of that conspiracy committed within applicable period of limitations).

[149] *United States v. Winfield*, 997 F.2d 1076, 1082 (4th Cir. 1993) (noting three elements). *See also United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986) (same).

[150] *Tedder*, 801 F.2d at 1446; *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091-92 (4th Cir. 1993) (citation omitted).

The government must prove that the conspiracy came into existence during or reasonably near the period of time charged in the indictment and the defendant knowingly joined in the conspiracy within or reasonably near the same time period.[151]

A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in a criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other.[152]

You may find that a defendant was a member of the conspiracy only from evidence of his own acts and statements.[153]

The essence of the crime of conspiracy is an agreement to commit a criminal act. But there does not have to be evidence that the agreement was specific or explicit. By its very nature, a conspiracy is clandestine and covert, thereby frequently resulting in little direct evidence of such an agreement. Therefore, the government may prove a conspiracy by circumstantial evidence. Circumstantial evidence tending to prove a conspiracy may consist of a defendant's relationship with other members of the conspiracy, the length of this association, the defendant's attitude and conduct, and the nature of the conspiracy.

One may be a member of a conspiracy without knowing the full scope of the conspiracy, or all of its members, and without taking part in the full range of its activities or over the whole period of its existence. The conspiracy does not need a discrete, identifiable organizational structure. The fact that a conspiracy is loosely-knit, haphazard, or ill-conceived does not render it any less a conspiracy. The government need not prove that the defendant knew the particulars of the conspiracy or all of his co-conspirators. It is sufficient if the defendant played only a minor part in the conspiracy. Thus, a variety of conduct can constitute participation in a conspiracy. Moreover, a defendant may change his role in the conspiracy.

Once it has been shown that a conspiracy exists, the evidence need only establish a slight connection between the defendant and the conspiracy. The government must produce evidence to prove the defendant's connection beyond a reasonable doubt, but the connection itself may be slight, because the defendant does not need to know all of his co-conspirators, understand the reach of the conspiracy, participate in all the enterprises of the conspiracy, or have joined the conspiracy from its inception.

Presence at the scene of criminal activity is material and probative in the totality of the circumstances in determining the defendant's participation in the conspiracy. Mere presence alone is not sufficient to prove participation in the conspiracy, but proof beyond a

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[151] In *United States v. Queen*, 132 F.3d 991 (4th Cir. 1997), the defendant was charged with conspiring to tamper with a witness during the period from February 1994 to March 1995. The district court charged that the first two elements of conspiracy are proved

> if you find beyond a reasonable doubt that a conspiracy as charged in the indictment came into existence at any point in time within or reasonably near to the window from February 1994 to March 1995, and that [the defendant] knowingly joined in the conspiracy at some point within or reasonably near to that same window ....

Id. at 999 n.5. The Fourth Circuit concluded that the jury "may find that the starting date of a conspiracy begins anytime in the time window alleged, so long as the time frame alleged places the defendant sufficiently on notice of the acts with which he is charged." *Id*. at 999.

[152] *Salinas v. United States*, 522 U.S. 52, 63-64 (1997).

[153] *See United States v. Lanese*, 890 F.2d 1284, 1290 (2d Cir. 1989) (approving citing jury instructions).

reasonable doubt of presence coupled with an act that advances the conspiracy is sufficient to establish participation in the conspiracy.[154]

A conspirator must intend to further an endeavor which, if completed, would [be a federal crime], but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the [criminal objective].[155]

Mere presence at the scene of an alleged transaction or event, mere association with persons conducting the alleged activity, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.[156]

The statements and actions of an alleged co-conspirator may be considered in determining the existence of the conspiracy.[157]

The jury may find knowledge and voluntary participation from evidence of presence when the presence is such that it would be unreasonable for anyone other than a knowledgeable participant in the conspiracy to be present.[158]

An overt act is any act, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.[159] Each conspirator is liable for overt acts of every other conspirator done in furtherance of the conspiracy, whether the acts occurred before or after he joined the conspiracy.[160]

Pinkerton **Liability** [161]

A member of a conspiracy who commits another crime during the existence or life of a conspiracy and commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy. Under certain conditions, therefore, a defendant may be found guilty of this other crime even though he or she did not participate directly in the acts constituting the offense. If you find

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[154] *See United States v. Burgos*, 94 F.3d 849, 857-61, 869 (4th Cir. 1996) (*en banc*).

[155] *Salinas*, 522 U.S. at 65.

[156] *United States v. Heater*, 63 F.3d 311, 326 (4th Cir. 1995) (approvingly quoting jury instruction). *See also United States v. Fleschner*, 98 F.3d 155, 160 (4th Cir. 1996) (same).

[157] *United States v. Neal*, 78 F.3d 901, 905 (4th Cir. 1996). See *Bourjaily v. United States*, 483 U.S. 171 (1987): 1. it is for the trial court, not the jury, to determine the existence of the defendant's involvement in the alleged conspiracy before admitting co-conspirator hearsay, Fed. R. Evid. 801(d)(2)(E); 2. burden of proof is by a preponderance of the evidence; and 3. the statements themselves might be considered in making the ruling.

[158] *United States v. Gallardo-Trapero*, 185 F.3d 307, 322 (5th Cir. 1999).

[159] *Fleschner*, 98 F.3d at 159.

[160] *United States v. Read*, 658 F.2d 1225, 1230 (7th Cir. 1980).

[161] *Pinkerton v. United States*, 328 U.S. 640 (1946). "Proper application of the *Pinkerton* theory depends on appropriate instructions to the jury." *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990).

that the government has proven a defendant guilty of conspiracy as charged in the indictment, you may also find him guilty of the crimes alleged in any other counts of the indictment in which he is charged provided you find that the essential elements of these counts as defined in these instructions have been established beyond a reasonable doubt. And further that you also find beyond a reasonable doubt that the substantive offense was committed by a member of the conspiracy, that the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy, and that at the time this offense was committed the defendant was a member of the conspiracy.[162]

In order to hold a co-conspirator criminally liable for acts of other members of the conspiracy, the act must be done in furtherance of the conspiracy and be reasonably foreseeable as a necessary or natural consequence of the conspiracy. In order to be reasonably foreseeable to another member of the criminal organization, and thus to hold a co-conspirator criminally liable, acts of a co-conspirator must fall within the scope of the agreement between the specific individual and the co-conspirator.[163]

The government need not prove that the alleged conspirators entered into any formal agreement, or that they directly stated between/among themselves all the details of the agreement. The government need not prove that all of the details of the agreement alleged in the indictment were actually agreed upon or carried out. The government need not prove that all of the persons alleged to have been members of the conspiracy were in fact members of the conspiracy, only that the defendant and at least one other person were members. Finally, the government need not prove that the alleged conspirators actually accomplished the unlawful objective of their agreement.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that the defendant was one of the members, then you may consider as evidence against the defendant the statements knowingly made and acts knowingly done by another person likewise found to be a member of the conspiracy, even though the statements and the acts may have occurred in the absence of and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.[164]

"A statement by a co-conspirator is made in furtherance of a conspiracy if it was intended to promote the conspiracy's objectives, whether or not it actually has that effect. For example, statements made by a conspirator to a non-member of the conspiracy are considered to be in furtherance of the conspiracy if they are designed to induce that party either to join the conspiracy or to act in a way that will assist the conspiracy in accomplishing its objectives."[165]

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[162] *United States v. Irvin*, 2 F.3d 72, 75 (4th Cir. 1993). In *United States v. Aramony*, 88 F.3d 1369, 1380 (4th Cir. 1996), the court held that the district court did not abuse its discretion in omitting the "reasonably foreseeable" language from the instruction. However, in light of *Irvin*, the district court would be better advised to include language regarding reasonably foreseeable.

[163] *Irvin*, 2 F.3d 72.

[164] See *Chorman*, 910 F.2d at 111, where a similarly worded instruction "fairly expressed the *Pinkerton* principle." The Fourth Circuit has specifically approved this instruction holding the defendant responsible for statements and acts of co-conspirators without referring to substantive crimes. The substantive offense need not be a charged object of the conspiracy. *Id.* at 110-12.

See Aramony, 88 F.3d at 1381 (district court did not abuse discretion in omitting "reasonably foreseeable" language from *Pinkerton* instruction).

[165] *United States v. Smith*, 441 F.3d 254, 262 (4th Cir. 2006) (quotations and citations

(continued...)

Multiple versus Single Conspiracy[166]

The government has charged a particular conspiracy, and the government has to prove that the defendant was a member of the conspiracy charged in the indictment. If the government does not prove that, then you must find the defendant not guilty, even if you find that he was a member of some other conspiracy not charged in the indictment. Proof that a defendant was a member of some other conspiracy is not enough to convict unless the government also proves beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment.[167]

Whether the evidence proves a single conspiracy or, instead, multiple conspiracies, is an issue for you, the jury.[168]

A single conspiracy exists where there is one overall agreement, or one general business venture. Whether there is a single conspiracy or multiple conspiracies depends upon the overlap of key actors, methods, and goals.[169]

A single conspiracy exists when the conspiracy has the same objective, the same goal, the same nature, the same geographic spread, the same results, and the same product.[170]

A single overall agreement need not be manifested by continuous activity. A conspiracy may suspend active operations for a period: for logistical reasons, to escape detection, or even to afford its members an opportunity to spend their ill-gotten gains. The question is not the timing of the conspiracy's operations but whether it functioned as an ongoing unit.[171]

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[165] (...continued)
omitted).

[166] "A court need only instruct on multiple conspiracies if such an instruction is supported by the facts." *United States v. Bowens*, 224 F.3d 302, 307 (4th Cir. 2000) (quoting *United States v. Mills*, 995 F.2d 480, 485 (4th Cir. 1993)). "A multiple conspiracy instruction is not required unless the proof demonstrates that the defendant was involved *only* in a separate conspiracy *unrelated* to the overall conspiracy charged in the indictment." *United States v. Squillacote*, 221 F.3d 542, 574 (4th Cir. 2000) (quotation and citation omitted). The Double Jeopardy Clause prevents the government from splitting a single conspiracy into multiple offenses. The Fourth Circuit employs a totality of the circumstances test to decide whether two conspiracies are distinct. Five factors guide this determination:

1. the time periods covered by the alleged conspiracies;
2. the places where the conspiracies are alleged to have occurred;
3. the persons charged as co-conspirators;
4. the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offense charged which indicate the nature and scope of the activities being prosecuted; and
5. the substantive statutes alleged to have been violated.

United States v. Ragins, 840 F.2d 1184, 1189 (4th Cir. 1988). The test is a flexible one; some factors may be more important than others depending on the circumstances of the case. *United States v. Alvarado*, 440 F.3d 191, 198 (4th Cir. 2006).

[167] This instruction was approved as correct and fair in *United States v. Sullivan*, 455 F.3d 248, 259 (4th Cir. 2006).

[168] *United States v. Banks*, 10 F.3d 1044, 1051 (4th Cir. 1993); *United States v. Harris*, 39 F.3d 1262, 1267 (4th Cir. 1994).

[169] *Squillacote*, 221 F.3d at 574 (quotation and citation omitted).

[170] *United States v. Johnson*, 54 F.3d 1150, 1154 (4th Cir. 1995).

[171] *United States v. Leavis*, 853 F.2d 215, 218-19 (4th Cir. 1988).

You may find a single conspiracy, despite looseness of organization structure, changing membership, shifting roles of participants, limited roles and knowledge of some members.[172]

A conspiracy is an ongoing crime, and if a criminal conspiracy is established, it is presumed to continue until its termination is affirmatively shown.[173]

Withdrawal[174]

If the government proves that a conspiracy existed, and that the defendant willfully joined the conspiracy, you may conclude that the conspiracy continued unless or until the defendant shows that the conspiracy was terminated or the defendant withdrew from it. The defendant must show affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach his co-conspirators.[175]

A member of a conspiracy remains in the conspiracy unless he can show that at some point he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient. The defense of withdrawal requires the defendant to make a substantial showing that he took some affirmative step to terminate or abandon his participation in the conspiracy. In other words, the defendant must demonstrate some type of affirmative action which disavowed or defeated the purpose of the conspiracy. This would include, for example, voluntarily going to the police and telling them about the conspiracy; telling the other conspirators that he did not want to have anything more to do with the agreement; or any other affirmative act that was inconsistent with the object of the conspiracy which was communicated to other members of the conspiracy.[176] Merely doing nothing or avoiding contact with other members of the conspiracy is not enough.

The defendant has the burden of proving that he withdrew from the conspiracy, by a preponderance of the evidence. To prove something by a preponderance of the evidence means that when all the relevant evidence is considered, the fact alleged is more likely so than not so.[177] The government may refute evidence from the defendant that he withdrew from the conspiracy by showing beyond a reasonable doubt that the defendant did not withdraw from the conspiracy as claimed.[178]

_____NOTE_____

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[172] *Banks*, 10 F.3d at 1051.

[173] *United States v. Barsanti*, 943 F.2d 428, 437 (4th Cir. 1991). A conspiracy is presumed to continue until there is affirmative evidence of abandonment or defeat of its purposes. *Leavis*, 853 F.2d at 218.

[174] Withdrawal is a complete defense to the crime of conspiracy only when it is coupled with the defense of the statute of limitations. A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981). Otherwise, by definition, the defendant is criminally responsible for acts committed by the conspiracy prior to his withdrawal.

Withdrawal would limit the defendant's responsibility for substantive offenses committed after his withdrawal, and would impact the defendant's culpability for drug amounts under *United States v. Collins*, 415 F.3d 304 (4th Cir. 2005).

[175] *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986).

[176] "These acts or statements need not be known or communicated to all other co-conspirators as long as they are communicated in a manner reasonably calculated to reach some of them." *Read*, 658 F.2d at 1231.

[177] *Hyde v. United States*, 225 U.S. 347, 369 (1912). *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978); *United States v. Cardwell*, 433 F.3d 378 (4th Cir. 2005); *Walker*, 796 F.2d at 49.

[178] *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989).

See United States v. Hedgepeth, 418 F.3d 411, 420 (4th Cir. 2005) (noting elements of § 371 conspiracy); *United States v. Tucker*, 376 F.3d 236, 238 (4th Cir. 2004) (same).

There are two objects of the conspiracy statute: to commit any offense against the United States, or to defraud the United States. If the object is, for example, to thwart the efforts of the IRS to determine and collect income taxes (often termed a "Klein conspiracy"), *see United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957), a conviction will not stand where impeding the government agency was only a collateral effect of the conspiracy. *United States v. Hairston*, 46 F.3d 361, 374 (4th Cir. 1995).

The two prongs of § 371, to commit an offense and to defraud, "are not mutually exclusive." *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993).

The jury must be instructed on the elements of the object of the conspiracy. If the object of the conspiracy is charged in a separate substantive count of the indictment, the instruction can be by reference to that portion of the charge. *United States v. Kingrea*, 573 F.3d 186 (4th Cir. 2009).

Violation of an executive order can constitute an offense as that term is used in § 371. For example, 50 U.S.C. § 1705(b) makes it a crime to disobey an order issued under the International Emergency Economic Powers Act (IEEPA). *Arch Trading Co.*, 987 F.2d at 1091.

Because of accomplice liability, a defendant can be found guilty of a substantive offense committed by a co-conspirator in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640 (1946).

Section 371 does not require a greater *mens rea* than does the substantive offense which is the object of the conspiracy. "[W]here a substantive offense embodies only a requirement of *mens rea* as to each of its elements, [§ 371] requires no more." *United States v. Feola*, 420 U.S. 671, 692 (1975).

The government may present evidence of acts committed in furtherance of the conspiracy even though they are not specified in the indictment. *United States v. Janati*, 374 F.3d 263, 270 (4th Cir. 2004).

"A prosecution for conspiracy is timely if, during some portion of the limitations period, (1) the agreement between the conspirators was in existence; and (2) at least one overt act in furtherance of that conspiratorial agreement occurred." *United States v. United Med. and Surgical Supply Corp.*, 989 F.2d 1390, 1398 (4th Cir. 1993).

"A person ... may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas v. United States*, 522 U.S. 52, 64 (1997).

A defendant may be convicted of conspiracy even if his co-conspirator is acquitted. *United States v. Collins*, 412 F.3d 515, 520 (4th Cir. 2005).

Known as "Wharton's Rule," an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. *Iannelli v. United States*, 420 U.S. 770, 773 n.5 (1975). The classic examples are adultery, incest, bigamy, and dueling. However, "Wharton's Rule is inapplicable when the conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense." *United States v. Walker*, 796 F.2d 43, 47 (4th Cir. 1986).

In *United States v. Lechuga*, 994 F.2d 346 (7th Cir. 1993), the Seventh Circuit explained that

> when a crime requires the joint action of two people to commit (prostitution, [for example]), a charge of conspiracy involves no additional element unless someone

> else is involved besides the two persons whose agreement is the *sine qua non* of the substantive crime.… What is required for conspiracy in such a case is an agreement to commit some other crime beyond the crime constituted by the agreement itself.… A person who sells a gun knowing that the buyer intends to murder someone may or may not be an aider or abettor of the murder, but he is not a conspirator, because he and his buyer do not have an agreement to murder anyone.

994 F.2d at 349.

A defendant may be convicted of a § 924(c) charge on the basis of a co-conspirator's use of a gun if the use was in furtherance of the conspiracy and was reasonably foreseeable to the defendant. *United States v. Wilson*, 135 F.3d 291, 305 (4th Cir. 1998).

Buyer-Seller

"District judges should inform juries that repeated transactions do not constitute a conspiracy .... Furthermore, because the line between a conspiracy and a mere buyer-seller relationship is difficult to discern, district judges should instruct juries in appropriate situations on the distinction." *United States v. Gee*, 226 F.3d 885, 895 (7th Cir. 2000).

"The buy-sell transaction is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction." *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991).

"[O]ne does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally." *Direct Sales Co., Inc. v. United States*, 319 U.S. 703, 709 (1943).

One who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator. *United States v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967).

Termination

A conspiracy continues until the "spoils are divided among the miscreants," and the payments made constitute overt acts made in furtherance of the conspiracy. *United States v. Automated Sciences Grp., Inc.*, No. 91-5063, 1992 WL 103647 (4th Cir. May 18, 1992) (collecting cases). In *Automated Sciences*, one of the objects of the conspiracy involved sharing money.

The scope of the conspiratorial agreement determines both the duration of the conspiracy and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy. In *Grunewald v. United States*, 353 U.S. 391 (1957), the Supreme Court rejected the government's theory that an agreement to conceal a conspiracy can be deemed part of the conspiracy and can extend the duration of the conspiracy for purposes of the statute of limitations. A "distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." 353 U.S. at 405.

Actions taken to conceal a conspiracy after its accomplishment do not postpone the running of the statute of limitations, where concealing the crime was not an objective of the conspiracy. *Id*. at 399.

However, in *United States v. Neal*, 78 F.3d 901, 905 (4th Cir. 1996), the Fourth Circuit stated that "[e]scaping detection and apprehension by police officers furthered the continued viability of the conspiracy." (Citation omitted).

A conspiracy ends as to a particular co-conspirator upon his arrest. *United States v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967).

A conspiracy ends when its central purpose has been accomplished. *United States v. United Med. and Surgical Supply Corp.*, 989 F.2d 1390, 1399 (4th Cir. 1993).

"As the overt acts give jurisdiction for trial, it is not essential where the conspiracy is formed, so far as the jurisdiction of the court in which the indictment is found and tried is concerned." *Hyde v. United States*, 225 U.S. 347, 367 (1912).

In *United States v. Stewart*, 256 F.3d 231, 241 n.3 (4th Cir. 2001), the court noted that "venue in the Eastern District of Virginia arguably would have been improper on the conspiracy count ... unless ... the Government was able to [demonstrate that the defendant] knowingly and voluntarily entered into a conspiracy involving the Eastern District of Virginia."

Aiding and abetting is not a lesser included offense of conspiracy. *United States v. Price*, 763 F.2d 640, 642 (4th Cir. 1985).

After a conspiracy has ended, acts of a conspirator occurring thereafter are admissible against former co-conspirators only where they are relevant to show the previous existence of the conspiracy or the attainment of its illegal ends; and subsequent declarations, if otherwise relevant, are admissible only against the declarant. *Chase*, 372 F.2d at 460.

"Factual impossibility exists where the objective is proscribed by the criminal law but a factual circumstance unknown to the actor prevents him from bringing it about." *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) (*en banc*). However, factual impossibility is not a defense to an attempt crime or conspiracy.

As long as the evidence establishes a conspiracy, the indictment need not specifically name anyone other than the defendant. *United States v. Anderson*, 611 F.2d 504, 511 (4th Cir. 1979).

18 U.S.C. § 372 CONSPIRACY TO IMPEDE OFFICER

Title 18, United States Code, Section 372 makes it a crime for two or more persons to conspire to interfere with any officer of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant agreed with at least one other person to do one of the following:
  1. to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties of such office;
  2. to induce, by force, intimidation, or threat, any officer of the United States to leave the place where his duties as an officer are required to be performed;
  3. to injure an officer of the United States, or his property, on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge of his duties; or
  4. to injure the property of an officer of the United States so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; and
- Second, that the defendant knew of the agreement and willfully participated in the agreement.

_____NOTE_____

See jury instructions for 18 U.S.C. § 371.

There is authority for the proposition that an agreement to interfere with a government officer's performance of his official duties by causing him to be arrested unlawfully is a violation of § 372. *United States v. Hall*, 342 F.2d 849, 852 (4th Cir. 1965).

In *United States v. Joiner*, 418 F.3d 863 (8th Cir. 2005), the Eighth Circuit affirmed the convictions of two defendants for violating § 372. They were confined in federal prison in Arkansas, where they caused to be filed false Uniform Commercial Code (UCC) Financing Statements against Alabama real property owned by the federal judge, United States Attorney, and Assistant United States Attorney from their drug conviction trial. The Eighth Circuit held that real estate is property within the meaning of the statute. The defendants argued that the UCC does not apply to real property, and even if it did, the Arkansas filings would have no effect on the Alabama property. The Eighth Circuit rejected the argument because the success of the endeavor is irrelevant to a charge of conspiracy. The crime is conspiring to injure, not causing an injury. "[C]onspiring to file unfounded liens against prosecutors and judges in retaliation for a criminal conviction is nonetheless an illegal purpose." *Id*. at 867.

18 U.S.C. § 373 SOLICITATION TO COMMIT A CRIME OF VIOLENCE [LAST UPDATED: 8/13/14]

Title 18, United States Code, Section 373 makes it a crime to solicit another person to commit a crime of violence. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had the intent that another person commit a federal felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another; and
- Second, that under circumstances strongly corroborative of that intent, the defendant solicited, commanded, induced, or otherwise endeavored to persuade such other person to engage in such conduct.[179]

☞ **The court should identify the federal felony involved, and instruct the jury on the elements of that offense.**

AFFIRMATIVE DEFENSE

The defendant has the burden of proving, by a preponderance of the evidence, that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, he prevented the commission of the crime solicited. A renunciation is not voluntary and complete if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. [§ 373(b)]

_____NOTE_____

[179] The Fourth Circuit has recently described the essential elements of § 373(a) as: "(1) a solicitation, command, or similar entreaty; (2) to commit a federal felony; (3) involving the actual or inchoate use of force against person or property; (4) made under such conditions or within such context that the overture may reasonably be regarded as sincere." *United States v. Barefoot*, 754 F.3d 226, 237 (4th Cir. 2014) (quoting *United States v. Buckalew*, 859 F.2d 1052, 1054 (1st Cir. 1988)) (quoted for proposition that § 373(a) "is designed to cover any situation where a person seriously seeks to persuade another person to engage in criminal conduct."). *But see United States v. Cardwell*, 433 F.3d 378, 390 (4th Cir. 2005) (listing only two elements of offense).

"Congress has provided examples of 'strongly corroborative circumstances' that are highly probative of intent:

> (i) the fact that the defendant offered or promised payment or some other benefit to the person solicited if he would commit the offense;
>
> (ii) the fact that the defendant threatened harm or some other detriment to the person solicited if he would not commit the offense;
>
> (iii) the fact that the defendant repeatedly solicited the commission of the offense, held forth at length in soliciting the commission of the offense, or made express protestation of seriousness in soliciting the commission of the offense;
>
> (iv) the fact that the defendant believed or was aware that the person solicited had previously committed similar offenses; and
>
> (v) the fact that the defendant acquired weapons, tools or information suited for use by the person solicited in the commission of the offense, or made other apparent preparations for the commission of the offense by the person solicited."

United States v. Gabriel, 810 F.2d 627, 635 (7th Cir. 1987) (citation omitted). "The above factors are not exclusive or conclusive indicators of intent to solicit." *Id*.

It is not a defense that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution. [§ 373(c)]

Because the penalty for § 373 depends on the punishment for the crime solicited, if the government charges more than one qualifying federal felony which a defendant is alleged to have solicited, the court should submit special interrogatories to the jury. *See United States v. Udeozor*, 515 F.3d 260, 271 (4th Cir. 2008) ("whether to use a special verdict form is a matter of the district court's discretion.") (citation omitted).

18 U.S.C. § 401 CONTEMPT OF COURT [LAST UPDATED: 3/14/14]

Title 18, United States Code, Section 401 makes it a crime to obstruct the administration of justice or disobey a lawful court order. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 401(1)

- First, that the defendant misbehaved;
- Second, that the misbehavior was in or near to the presence of the court;
- Third, that the misbehavior obstructed the administration of justice; and
- Fourth, that the misbehavior was committed with criminal intent.[180]

§ 401(2)

- First, that the defendant was an officer of a court of the United States;
- Second, that the defendant misbehaved;
- Third, that the misbehavior was in the defendant's official transactions; and
- Fourth, that the misbehavior was committed with criminal intent.

§ 401(3)

[180] *United States v. Warlick*, 742 F.2d 113, 115 (4th Cir. 1984).

- First, that there was a lawful writ, process, order, rule, decree, or command of a court of the United States which was definite, clear, and specific;
- Second, that the defendant violated the writ, process, order, rule, decree, or command; and
- Third, that the defendant did so willfully, contumaciously, intentionally, and with a wrongful state of mind.[181]

"Contempt of court" includes any act which is calculated to embarrass, hinder, or obstruct a court in administration of justice, or which is calculated to lessen its authority or dignity.[182]

Obstruction of the administration of justice requires some act that will interrupt the orderly process of the administration of justice, or thwart the judicial process.[183]

"Near" means conduct taking place near actual court proceedings, in time or location.[184]

"Criminal intent" is defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. Of course, an actual design to subvert the administration of justice is a more grievous and perhaps more culpable state of mind, but proof of such an evil motive is unnecessary to establish the intent.[185]

Willfulness does not exist where there is a good faith pursuit of a plausible though mistaken alternative.[186]

A good faith effort to comply with the court's order is a defense to a charge of contempt, but delaying tactics or indifference to the court's order are not.[187]

The government is required to prove that the defendant had the ability to comply with the court's order. If you find that the defendant lacked the ability to comply with the court's order, you cannot find that the defendant willfully violated the court's order.[188]

NOTE

See generally United States v. United Mine Workers, 330 U.S. 258 (1946).

In *In re: Gates*, 600 F.3d 333 (4th Cir. 2010), the Fourth Circuit reversed the summary contempt citation of an attorney who was late to court. "[T]he mere failure to appear in court at a scheduled proceeding is not an act committed in the actual presence of the court and is therefore not punishable summarily under Fed.R.Crim.P. 42(b)." 600 F.3d at 339 (quotation marks and citation omitted). Criminal Rule of Procedure 42(a), by contrast, applies to indirect contempts, giving the alleged contemnor

[181] *See In re: Gates*, 600 F.3d 333, 338-39 (4th Cir. 2010) (citation omitted); *United States v. McMahon*, 104 F.3d 638, 642 (4th Cir. 1997) (citation omitted).

[182] *United States v. Tigney*, 367 F.3d 200, 202 (4th Cir. 2004).

[183] *Warlick*, 742 F.2d at 115-16. "To satisfy the obstruction element it suffices if the defendant's conduct 'interrupt[ed] the orderly process of the administration of justice' by distracting court personnel from, and delaying them in, completing their duties." *United States v. Peoples*, 698 F.3d 185, 191 (4th Cir. 2012).

[184] *Peoples*, 698 F.3d at 192.

[185] *United States v. Marx*, 553 F.2d 874, 876 (4th Cir. 1977).

[186] *United States v. McMahon*, 104 F.3d 638, 645 (4th Cir. 1997).

[187] *United States v. Rylander*, 714 F.2d 996, 1003 (9th Cir. 1983).

[188] *Id*. at 1002.

> three essential procedural safeguards: notice of contempt charges against him, the appointment of an independent prosecutor, and disposition after a trial .... The requisite notice must (1) state the essential facts constituting the charged criminal contempt and describe it as such, (2) permit the alleged contemnor a reasonable time to prepare a defense, and (3) include the trial date.

Id. at 338 (citations and internal quotes omitted). Addressing the merits, the court wrote that because contempt requires criminal intent, "absence or tardiness alone is not contemptuous; the reasons for the failure to appear at the appointment are of central importance." *Id*. at 339. The court found the record lacked any evidence from which the district court could find that Gates had the requisite criminal intent to support a conviction under § 403(3).

Criminal contempt proceedings require such protections as the Sixth Amendment right to counsel, the Fifth Amendment right not to take the witness stand, the "beyond a reasonable doubt" burden of proof, and, in some instances, the right to a jury trial, if the penalty will exceed six months. *See United States v. Rylander*, 714 F.2d 996, 998 (9th Cir. 1983).

In *United States v. Warlick*, 742 F.2d 113, 117 (4th Cir. 1984), the Fourth Circuit acknowledged the split of authority on whether § 401(3) applied to Rules to Show Cause and similar orders, or to standing rules or local rules, and ruled it was not necessary to face that issue as Warlick was convicted under both § 401(1) and § 401(3).

A lawyer's willful absence from his client's trial without a legitimate reason is contemptuous. His disobedience to the order of the court setting the trial date violates § 401(3). *United States v. Marx*, 553 F.2d 874, 876 (4th Cir. 1977).

Criminal contempt requires more than just the vehemence of language. However, courts repeatedly have found that offensive words directed at the court may form the basis for a contempt charge. *United States v. Peoples*, 698 F.3d 185, 190 (4th Cir. 2012).

In *United States v. Snider*, 502 F.2d 645, 646 (4th Cir. 1974), the Fourth Circuit held that refusal to rise is not misbehavior which obstructs the administration of justice within the meaning of § 401.

Lying to a judge is misbehavior in the court's presence and punishable under § 401. *United States v. Temple*, 349 F.2d 116, 117 (4th Cir. 1965).

Unit of Prosecution

In *United States v. Murphy*, 326 F.3d 501 (4th Cir. 2003), the defendant was cited by the district court three times for insulting outbursts during his sentencing hearing. On appeal, the defendant did not dispute that his conduct rose to the level of criminal contempt, but argued that the district court erred in convicting him of three separate contempt offenses. The Fourth Circuit vacated two of the three contempt convictions, concluding that § 401 was ambiguous with regard to the allowable unit of prosecution, and the rule of lenity dictated that the ambiguity be resolved in Murphy's favor.

18 U.S.C. § 471 COUNTERFEITING OBLIGATIONS OF THE UNITED STATES

Title 18, United States Code, Section 471 makes it a crime to make counterfeit obligations of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant falsely made, forged, counterfeited, or altered;
- Second, any obligation or other security of the United States; and

- Third, that the defendant did so with the intent to defraud.

The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps. [18 U.S.C. § 8]

An obligation is "counterfeit" if it bears such a likeness or a resemblance to a genuine obligation or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright.[189]

Forge means to fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine.[190]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[191]

NOTE

Each act of counterfeiting is a separate offense. *United States v. LeMon*, 622 F.2d 1022, 1024 (10th Cir. 1980).

18 U.S.C. § 472 PASSING OR POSSESSING COUNTERFEIT OBLIGATIONS OF THE UNITED STATES

Title 18, United States Code, Section 472 makes it a crime to pass or possess counterfeit obligations of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant passed, uttered, published, or sold, or attempted to pass, utter, publish, or sell, or brought into the United States, or kept in his possession or concealed;
- Second, an obligation or other security of the United States that was falsely made, forged, counterfeited or altered;
- Third, that at the time, the defendant knew the obligation or security was a falsely made, forged, counterfeited, or altered obligation or other security of the United States; and

[189] *United States v. Ross*, 844 F.2d 187, 190 (4th Cir. 1988). In *Ross*, the Fourth Circuit reversed a conviction because the so-called counterfeit money (a black and white photocopy of the face of a U.S. one dollar bill inserted into a coin change machine) was not "of such falsity in purport as to fool an 'honest, sensible and unsuspecting person of ordinary observation and care.'" *Id.* at 189.

[190] *United States v. Cowan*, 116 F.3d 1360, 1362 (10th Cir. 1997) (18 U.S.C. § 505 prosecution).

[191] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

- Fourth, that the defendant did so with the intent to defraud.[192]

The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps. [18 U.S.C. § 8]

An obligation is "counterfeit" if it bears such a likeness or a resemblance to a genuine obligation or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright.[193]

"To pass or utter" means to offer the obligation or security, such as, to another person or to a bank, with intent to defraud. It is not necessary to prove that anything of value was actually received in exchange. In other words, it is not necessary that the instrument be accepted.[194]

Forge means to fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine.[195]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[196]

18 U.S.C. § 473 DEALING IN COUNTERFEIT OBLIGATIONS OF THE UNITED STATES

Title 18, United States Code, Section 473 makes it a crime to buy, sell, or receive counterfeit obligations of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant bought, sold, exchanged, transferred, received, or delivered;
- Second, any false, forged, counterfeited, or altered obligation or other security of the United States; and
- Third, that the defendant did so with the intent that it be passed, published, or used as true and genuine.

The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve

[192] *United States v. Leftenant*, 341 F.3d 338, 347 (4th Cir. 2003). Both knowledge and intent are necessary elements of § 472.

[193] *Ross*, 844 F.2d at 190. In *Ross*, the Fourth Circuit reversed a conviction because the counterfeit money (a black and white photocopy of the face of a U.S. one dollar bill inserted into a coin change machine) was not "of such falsity in purport as to fool an 'honest, sensible and unsuspecting person of ordinary observation and care.'" *Id.* at 189.

[194] *See United States v. Jenkins*, 347 F.2d 345, 347 (4th Cir. 1965) (citation omitted).

[195] *Cowan*, 116 F.3d at 1362 (18 U.S.C. § 505 prosecution).

[196] *Ellis*, 326 F.3d at 556.

bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps. [18 U.S.C. § 8]

An obligation is "counterfeit" if it bears such a likeness or a resemblance to a genuine obligation or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright.[197]

NOTE

Section 473 requires the involvement of an obligation or security of the United States. In *United States v. Scott*, 159 F.3d 916, 921 (5th Cir. 1998), the Fifth Circuit reversed a § 473 conviction where the credit enhancement scheme involved fraudulently reflecting that the defendants owned millions of dollars in treasury notes, which were leased to victims to enhance their creditworthiness. What were transferred were the alleged certificates of ownership, not the treasury notes themselves.

18 U.S.C. § 484 CONNECTING PARTS OF DIFFERENT NOTES

Title 18, United States Code, Section 484 makes it a crime to connect parts of different Federal Reserve Notes. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant placed or connected together different parts of two or more notes, bills, or other genuine instruments issued under the authority of the United States [or by any foreign government or corporation] to produce one instrument; and
- Second, that the defendant did so with intent to defraud.

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[198]

18 U.S.C. § 498 FORGING MILITARY DISCHARGE CERTIFICATES

Title 18, United States Code, Section 498 makes it a crime to forge or use a forged military discharge certificate. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant forged, counterfeited, or falsely altered; and
- Second, a certificate of discharge from the military or naval service of the United States.

OR

[197] *United States v. Ross*, 844 F.2d 187, 190 (4th Cir. 1988). In *Ross*, the Fourth Circuit reversed a conviction because the counterfeit money (a black and white photocopy of the face of a U.S. one dollar bill inserted into a coin change machine) was not "of such falsity in purport as to fool an 'honest, sensible and unsuspecting person of ordinary observation and care.'" *Id.* at 189.

[198] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

- First, that the defendant used, unlawfully possessed, or exhibited;
- Second, a forged, counterfeited, or falsely altered certificate of discharge from the military or naval service of the United States; and
- Third, the defendant knew the certificate of discharge was forged, counterfeited, or falsely altered.

Forge means to fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine.[199]

_____NOTE_____

See *United States v. Ross*, 844 F.2d 187, 190 (4th Cir. 1988), where the Fourth Circuit stated that currency is "counterfeit" if it bears such a likeness or a resemblance to a genuine obligation or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright.

Intent to defraud is not an element of § 498. *See United States v. Cowan*, 116 F.3d 1360, 1363 (10th Cir. 1997) (18 U.S.C. § 505 prosecution).

18 U.S.C. § 500 POSTAL MONEY ORDERS

Title 18, United States Code, Section 500 makes criminal certain acts relating to postal money orders. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant falsely made, forged, counterfeited, engraved, or printed;
- Second, any order in imitation of or purporting to be a blank money order or a money order issued by or under the direction of the Postal Service; and
- Third, the defendant did so with intent to defraud.

¶ 2

- First, that the defendant forged or counterfeited the signature or initials of any person authorized to issue money orders;
- Second, that the forged or counterfeited signature or initials were upon or to any money order, postal note, or blank money order or postal note provided or issued by or under the direction of the Postal Service [or post office department or corporation of any foreign country and payable in the United States]; and
- Third, that the defendant did so knowingly.

OR

- First, that the defendant forged or counterfeited any material signature or indorsement;
- Second, on any money order, postal note, or blank money order or postal note provided or issued by or under the direction of the Postal Service [or post office department or corporation of any foreign country and payable in the United States]; and

[199] *United States v. Cowan*, 116 F.3d 1360, 1362 (10th Cir. 1997) (18 U.S.C. § 505 prosecution).

- Third, that the defendant did so knowingly.

OR

- First, that the defendant forged or counterfeited any material signature;
- Second, to any receipt or certificate of identification of any money order, postal note, or blank money order or postal note provided or issued by or under the direction of the Postal Service [or post office department or corporation of any foreign country and payable in the United States]; and
- Third, that the defendant did so knowingly.

¶ 3

- First, that the defendant falsely altered;
- Second, any money order, postal note, or blank money order or postal note provided or issued by or under the direction of the Postal Service [or post office department or corporation of any foreign country and payable in the United States];[200]
- Third, that the alteration was material; and
- Fourth, that the defendant did so with intent to defraud.[201]

Fraudulently filling out blank money orders can be considered "altering" money orders.[202]

¶ 4

- First, that the defendant passed, uttered, published, or attempted to pass, utter, or publish a postal money order;
- Second, that the money order had material initials, signature, stamp impression or indorsement which was/were false, forged, or counterfeited, or had a material alteration which had been falsely made;
- Third, that the defendant knew that the postal money order contained a material alteration which was falsely made; and
- Fourth, that the defendant did so with intent to defraud.[203]

The government does not have to prove how the defendant came into possession of the postal money order.[204]

A signature may consist of initials only, when the initials are contemplated to be representative of the person making the initials.[205]

A signature is forged if the signature is false in any material part and calculated to induce another to give credit to it as genuine.[206]

¶ 5

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[200] "[A]ny such money order" in ¶ 3 refers to ¶ 2 and therefore includes a blank postal money order. *United States v. Turner*, 28 F.3d 981, 984 (9th Cir. 1994).

[201] *United States v. Walls*, 134 F. App'x 825 (6th Cir. 2005).

[202] *Turner*, 28 F.3d at 984.

[203] *See United States v. Prewitt*, 553 F.2d 1082, 1087 (7th Cir. 1977).

[204] *United States v. Tasher*, 453 F.2d 244, 246 (10th Cir. 1972).

[205] *Id*.

[206] *Id*.

- First, that the defendant issued a money order or postal note without having previously received or paid the full amount of money payable for the money order or postal note;
- Second, that the defendant did so with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States or the Postal Service, or any officer, employee, or agent of the United States or the Postal Service, any sum of money.

¶ 6

- First, that the defendant embezzled, stole, or knowingly converted to his own use or to the use of another, or without authority converted or disposed of;
- Second, any blank money order form provided by or under the authority of the Post Service; and
- Third, that the defendant did so knowingly and willfully.

¶ 7

- First, that the defendant received or possessed a stolen blank postal money order;
- Second, that the defendant did so with intent to convert it to his own use or gain or the use or gain of another; and
- Third, that the defendant did so knowing the money order had been embezzled, stolen, or converted.[207]

¶ 8

- First, that the defendant transmitted, presented, or caused to be transmitted or presented;
- Second, any money order or postal note that
  (1) contained any forged or counterfeited signature, initials, or any stamped impression, or
  (2) contained any material alteration unlawfully made, or
  (3) had been unlawfully issued without previous payment of the amount required to be paid upon the issue of such money order or postal note, or
  (4) had been stamped without lawful authorization;
- Third, that the defendant knew the money order or postal note [fit one of the four categories listed above];[208] and
- Fourth, that the defendant did so with intent to defraud the United States, the Postal Service, or any person.

¶ 9

Title 18, United States Code, Section 500 makes it a crime to steal or receive a stolen postal money order machine. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

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[207] *United States v. Bryant*, 612 F.2d 806, 812 (4th Cir. 1979). *See also United States v. Smith*, 527 F.2d 692, 696 (10th Cir. 1975); *United States v. Broadus*, 664 F. Supp. 592, 599 (D.D.C. 1987). "Any such money order" in ¶ 7 refers to the phrase "any blank money order form" in ¶ 6." *Bryant*, 612 F.2d at 803.

[208] *United States v. Sahadi*, 292 F.2d 565, 566 (2d Cir. 1961).

- First, that the defendant stole a postal money order machine [or any stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms]; and
- Second, that the defendant did so with intent to deprive the United States Postal Service, temporarily or permanently, of the rights and benefits of ownership.[209]

OR

- First, that the defendant did receive, possess, or dispose of or attempt to dispose of any postal money order machine [or any stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms]; and
- Second, that the defendant did so with intent to defraud or without being lawfully authorized by the Postal Service.

An obligation is "counterfeit" if it bears such a likeness or a resemblance to a genuine obligation or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright.[210]

Forge means to fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine.[211]

"To pass or utter" means to offer the obligation or security, such as, to another person or to a bank, with intent to defraud. It is not necessary to prove that anything of value was actually received in exchange. In other words, it is not necessary that the instrument be accepted.[212]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[213]

A statement (or claim) is material if it has a natural tendency to influence, or is capable of influencing, the decision of the body to which it was addressed. It is irrelevant whether the false statement (or claim) actually influenced or affected the decision-making process. The capacity to influence must be measured at the point in time that the statement (or claim) was made.[214]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in

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[209] *See United States v. Merchant*, 731 F.2d 186, 190 (4th Cir. 1984).

[210] *United States v. Ross*, 844 F.2d 187, 190 (4th Cir. 1988). In *Ross*, the Fourth Circuit reversed a conviction because the so-called counterfeit money (a black and white photocopy of the face of a U.S. one dollar bill inserted into a coin change machine) was not "of such falsity in purport as to fool an 'honest, sensible and unsuspecting person of ordinary observation and care.'" 844 F.2d at 189.

[211] *United States v. Cowan*, 116 F.3d 1360, 1362 (10th Cir. 1997) (18 U.S.C. § 505 prosecution).

[212] *See United States v. Jenkins*, 347 F.2d 345, 347 (4th Cir. 1965) (citation omitted).

[213] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[214] *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998).

possession participated in some way in the theft of the property[215] or knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.[216] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[217]

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[218] You are reminded that the Constitution never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[219]

NOTE

Concerning ¶ 4, the Ninth Circuit has held that "a false representation is not a necessary element for passing a forged money order." *United States v. Nuanez*, No. 96-10357, 1997 WL 133252 (9th Cir. Mar. 21, 1997) (citation omitted).

See United States v. Di Pietroantonio, 289 F.2d 122 (2d Cir. 1961) (defendant counterfeited material signatures on money orders charged with falsely altering money orders).

18 U.S.C. § 505 FORGING A JUDGE'S SIGNATURE

Title 18, United States Code, Section 505 makes it a crime to forge the signature of a federal judge. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant forged the signature of any judge, register, or other officer of any court of the United States, [or forged or counterfeited the seal of any such court][or knowingly concurred in using a forged or counterfeited signature or seal]; and
- Second, that the defendant did so for the purpose of authenticating any proceeding or document.

[215] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[216] *Id.*

[217] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[218] *See Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[219] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

OR

- First, that the defendant tendered in evidence any proceeding [sic]or document with a false or counterfeit signature of any judge, register, or other officer of any court of the United States, or a false or counterfeit seal of the court, subscribed or attached to it; and
- Second, that the defendant knew the signature or seal to be false or counterfeit.

Forge means to fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine.[220]

The government need not prove any financial gain or loss.[221]

_____NOTE_____

Intent to defraud is not an element of § 505. *United States v. Cowan*, 116 F.3d 1360, 1361 (10th Cir. 1997).

In *Cowan*, the Tenth Circuit found that this section's purpose is to "protect the reputation and integrity of the federal courts, their official documents and proceedings, rather than simply to outlaw a narrow category of fraud." *Id.* at 1362. The court found that the statute applies when an individual forges a federal judge's signature "in order to make that document appear authentic. A forged signature on a document which the forger intends to appear authentic is the only intent requirement of § 505." *Id.* at 1363.

18 U.S.C. § 510 FORGING TREASURY CHECKS

Title 18, United States Code, Section 510 makes it a crime to forge the endorsements on Treasury checks, or buy, sell, or receive forged Treasury checks. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 510(a)(1)

- First, that the defendant falsely made or forged any endorsement or signature on a Treasury check or bond or security of the United States; and
- Second, that the face value of the Treasury check or bond or security of the United States, or the aggregate face value, if more than one Treasury check or bond or security of the United States, exceeded $1,000; and
- Third, that the defendant did so with intent to defraud.

§ 510(a)(2)

- First, that the defendant passed, uttered, or published, or attempted to pass, utter, or publish a Treasury check or bond or security of the United States;
- Second, that the check, bond, or security bore a falsely made or forged endorsement or signature;
- Third, that the defendant knew that the check, bond, or security bore a falsely made or forged endorsement or signature;
- Fourth, that the face value of the Treasury check or bond or security of the United States, or the aggregate face value, if more than one Treasury check or bond or security of the United States, exceeded $1,000; and

[220] *United States v. Cowan*, 116 F.3d 1360, 1362 (10th Cir. 1997).
[221] *Id.*

- Fifth, that the defendant did so with intent to defraud.[222]

§ 510(b)

- First, that the defendant bought, sold, exchanged, received, delivered, retained, or concealed a Treasury check or bond or security of the United States that was stolen, or which bore a falsely made or forged endorsement or signature;
- Second, that the face value of the Treasury check or bond or security of the United States, or the aggregate face value, if more than one Treasury check or bond or security of the United States, exceeded $1,000; and
- Third, that the defendant knew that the Treasury check or bond or security of the United States was stolen or bore a falsely made or forged endorsement or signature.

☞ **If there is an issue about whether the face value of the Treasury check or bond or security, or the aggregate face value, if more than one, does not exceed $1,000, the court should consider giving a lesser included offense instruction.**

Forge means to fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine.[223]

"To pass or utter" means to offer the obligation or security, such as, to another person or to a bank, with intent to defraud. It is not necessary to prove that anything of value was actually received in exchange. In other words, it is not necessary that the instrument be accepted.[224]

NOTE

There is a lesser included offense if the face value of the Treasury check or bond or security, or the aggregate face value, if more than one, does not exceed $1,000. 18 U.S.C. § 510(c).

18 U.S.C. § 511 ALTERING VEHICLE IDENTIFICATION NUMBERS

§ 511(a)(1)

Title 18, United States Code, Section 511 makes it a crime to remove or alter a vehicle identification number. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant removed, obliterated, tampered with, or altered;
- Second, an identification number for a motor vehicle; and
- Third, that the defendant did so knowingly.

§ 511(a)(2)

Title 18, United States Code, Section 511 makes it a crime to remove or alter a motor vehicle decal or device. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant removed, obliterated, tampered with, or altered;
- Second, a decal or device affixed to a motor vehicle pursuant to the Motor Vehicle Theft Prevention Act; and

[222] *See United States v. Rosario*, 118 F.3d 160, 163 (3d Cir. 1997); *United States v. Hill*, 40 F.3d 164, 167 (7th Cir. 1994).

[223] *Cowan*, 116 F.3d at 1362 (18 U.S.C. § 505 prosecution).

[224] *See United States v. Jenkins*, 347 F.2d 345, 347 (4th Cir. 1965) (citation omitted).

- Third, that the defendant did so knowingly and with intent to further the theft of a motor vehicle.

"Tampered with" includes covering a program decal or device affixed to a motor vehicle pursuant to the Motor Vehicle Theft Prevention Act for the purpose of obstructing its visibility. [§ 511(d)]

"Motor vehicle" means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line. [49 U.S.C. § 32101(7)]

"Identification number" means a number or symbol that is inscribed or affixed for purposes of identification [under chapter 301 and part C of subtitle VI of Title 49]. [§ 511(c)(1)]

NOTE

United States v. Chorman, 910 F.2d 102 (4th Cir. 1990).

Section 511(a) does not require specific intent, but only that the defendant act knowingly. Knowingly in this context means only knowing action by the defendant. *See United States v. Enochs*, 857 F.2d 491, 492-94 (8th Cir. 1989).

18 U.S.C. § 513 UTTERING FORGED SECURITIES

§ 513(a)

Title 18, United States Code, Section 513(a) makes it a crime to make, utter, or possess a forged security of an organization with intent to deceive another. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made, uttered, or possessed;
- Second, a forged or counterfeited security;
- Third, of an organization which operates in or the activities of which affect interstate commerce;[225] and
- Fourth, that the defendant did so with intent to deceive another person, organization, or government.[226]

§ 513(b)

Title 18, United States Code, Section 513(b) makes it a crime to make, receive, possess, or otherwise transfer an implement designed for making a forged security, with the intent that the implement be so used. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made, received, possessed, or otherwise transferred;

[225] An interstate commerce nexus is an essential element of this section, but it is incorporated in "organization," which is a term of art defined in the statute. *United States v. Wicks*, 187 F.3d 426, 428 (4th Cir. 1999). The organization may be the account holder, or the bank at which the organization has its account. *United States v. Chappell*, 6 F.3d 1095, 1099 (5th Cir. 1993) (finding that "section 513 does not expressly or impliedly state that a document may be the security of only one organization.").

[226] *United States v. Lessington*, 372 F. App'x 379 (4th Cir. 2010). If the victim is an organization, ordinarily the government is required to prove the organization's connection to interstate commerce. Not so if the victim is a person. *Chappell*, 6 F.3d at 1099.

- Second, an implement designed for or particularly suited for making a forged security; and
- Third, that the defendant did so with the intent that the implement be used to make a counterfeit or forged security.

"To pass or utter" means to offer the obligation or security, such as, to another person or to a bank, with intent to defraud. It is not necessary to prove that anything of value was actually received in exchange. In other words, it is not necessary that the instrument be accepted.[227]

"Counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. [§ 513 (c)(1)]

"Forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents. [§ 513 (c)(2)]

"Security" means

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

(B) an instrument evidencing ownership of goods, wares, or merchandise;

(C) any other written instrument commonly known as a security;

(D) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or

(E) a blank form of any of the foregoing. [§ 513(c)(3)]

"Organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce. [§ 513 (c)(4)]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

NOTE

In *United States v. Chappell*, 6 F.3d 1095 (5th Cir. 1993), the defendants were convicted of cashing counterfeit Mississippi Power and Light (MP&L) payroll checks drawn on Trustmark National Bank. The government failed to prove that MP&L was an organization operating in interstate commerce. The Fifth Circuit affirmed the conviction, holding that "section 513 does not expressly or impliedly state that a document may be the

[227] *See Jenkins*, 347 F.2d at 347 (citation omitted).

security of only one organization," which included the bank on which the counterfeit checks were drawn. 6 F.3d at 1099.

In *United States v. Barone*, 71 F.3d 1442 (9th Cir. 1995), the defendant was convicted of uttering checks drawn on a non-existent shell company. The Ninth Circuit reversed, holding that issuance of false checks by a company not otherwise engaged in interstate commerce did not satisfy the jurisdictional element. In a footnote, the Ninth Circuit observed that the government might have been able to prove the interstate jurisdictional element by showing that the banks which issued the check operated in interstate commerce, citing *Chappell*, but the government failed to present any evidence on that theory either.

The Fourth Circuit has not addressed this issue.

Congress "did not require in subsection (b) that the implement ... be one for making a security of any particular kind of entity." *United States v. Pebworth*,112 F.3d 168, (4th Cir. 1997) Thus, implements include blank checks of defunct organizations. Implements also include items such as signature stamps, tools, instruments, and distinctive papers. *United States v. Holloman*, 981 F.2d 690, 692 (3d Cir. 1992).

18 U.S.C. § 521 CRIMINAL STREET GANGS

Title 18, United States Code, Section 521 makes it a crime to commit certain crimes while participating in a criminal street gang. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that there was a criminal street gang;
- Second, that the defendant participated in the criminal street gang with knowledge that its members engaged in a continuing series of [federal drug felonies and/or federal felony crimes of violence, or conspiracies to commit either];
- Third, that the defendant [committed or conspired to commit a federal drug felony, or a federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another];[228]
- Fourth, that the defendant's general purpose in committing [the drug felony or crime of violence felony] was to promote or further the criminal activities of the street gang or to maintain or increase his position in the gang;[229] and
- Fifth, that the defendant had been convicted within the past five years for [one of the enumerated offenses].

"Criminal street gang" means

(1) an ongoing group, club, organization, or association of 5 or more persons that has as one of its primary purposes the commission of one or more [of the offenses enumerated in § 521(c)];

(2) the members of the street gang engage, or have engaged within the past five years, in a continuing series [of the offenses enumerated in § 521(c)]; and

(3) the activities of the criminal street gang affect interstate or foreign commerce. [§ 521(a)].

[228] The court should have already instructed on the predicate offense.

[229] *See United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994) (18 U.S.C. § 1959 prosecution).

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

The government must prove that the street gang, or the activities of the street gang, had some effect upon interstate commerce. This effect on interstate commerce can occur in any way and it need only be minimal.[230]

The government does not need to show a connection between interstate commerce and the specific crime alleged.[231]

_____NOTE_____

Section 521 is a sentence enhancement statute. *United States v. Matthews*, 178 F.3d 295, 302 (5th Cir. 1999).

Cases interpreting 18 U.S.C. § 1959 might be informative.

18 U.S.C. § 541 ENTRY OF GOODS FALSELY CLASSIFIED

Title 18, United States Code, Section 541 makes it a crime to effect the entry of goods into the United States through false classification of such goods. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant brought into the United States any goods, wares, or merchandise;
- Second, that the defendant did so at less than the true weight or measure, or upon a false classification as to quality or value, or by the payment of less than the amount of duty legally due; and
- Third, that the defendant did so knowingly.

The government need not prove that it suffered any loss of revenue.[232]

_____NOTE_____

For "value," see 19 U.S.C. § 1401a. Transaction value is defined as the price actually paid or payable for the merchandise, exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise. *See United States v. Ismail*, 97 F.3d 50, 62 (4th Cir. 1996) (quoting 19 U.S.C. §§ 1401a(b)(1) and 1401a(b)(4)(A)).

In *United States v. Godinez*, 922 F.2d 752, 756 (11th Cir. 1991), the district court did not instruct the jury on the definition of "entry" contained in 19 C.F.R. § 141.0a(a). The Eleventh Circuit agreed that a special jury instruction on the term "entry" was not necessary as the plain meaning of the word was apparent.

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS

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[230] *See United States v. Fernandez*, 388 F.3d 1199, 1249 (9th Cir. 2004) (18 U.S.C. § 1959 prosecution).

[231] *See id.* at 1250. *See also United States v. Feliciano*, 223 F.3d 102, 117 (2d Cir. 2000).

[232] *See United States v. Ahmad*, 213 F.3d 805, 811 (4th Cir. 2000).

Title 18, United States Code, Section 542 makes it a crime to effect the entry of goods into the United States by means of false statements. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant entered or introduced, or attempted to enter or introduce, into the commerce of the United States any imported merchandise;
- Second, that the defendant did so by means of any false or fraudulent invoice, declaration, affidavit, letter, paper, statement, or practice; and
- Third, that the defendant did so knowingly.

OR

- First, that the defendant made, or procured the making of, a false statement in any declaration without reasonable cause to believe the truth of such statement;
- Second, that the false statement was material to the introduction of imported merchandise into the commerce of the United States;
- Third, that the defendant knew the statement was false; and
- Fourth, the defendant introduced or attempted to introduce imported goods into interstate commerce.[233]

A statement (or claim) is material if it has a natural tendency to influence, or is capable of influencing, the decision of the body to which it was addressed. It is irrelevant whether the false statement (or claim) actually influenced or affected the decision-making process. The capacity to influence must be measured at the point in time that the statement (or claim) was made.[234]

The government need not prove that it suffered any loss of revenue.[235]

NOTE

See United States v. Hassanzadeh, 271 F.3d 574 (4th Cir. 2001) (prosecution under §§ 542 and 545).

For "value," see 19 U.S.C. § 1401a. Transaction value is defined as the price actually paid or payable for the merchandise, exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise. *United States v. Ismail*, 97 F.3d 50, 62 (4th Cir. 1996) (quoting 19 U.S.C. §§ 1401a(b)(1) and 1401a(b)(4)(A)).

Section 542 is more specific than § 541.

18 U.S.C. § 545 SMUGGLING

Title 18, United States Code, Section 545 makes it a crime to smuggle goods into the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant smuggled or clandestinely introduced or attempted to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or made out or passed, or attempted to pass, through

[233] *United States v. Ackerman*, 704 F.2d 1344, 1347 (5th Cir. 1983).
[234] *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998).
[235] *Ahmad*, 213 F.3d at 811.

the customhouse any false, forged, or fraudulent invoice or other document or paper; and

- Second, that the defendant did so knowingly, willfully, and with intent to defraud the United States.

¶ 2

- First, that the defendant imported or brought into the United States, any merchandise;
- Second, that the importation was contrary to law [the court should identify the elements of the law allegedly violated[236]]; and
- Third, that the defendant did so fraudulently or knowingly.[237]

OR

- First, that the defendant received, concealed, bought, sold, or in any manner facilitated the transportation, concealment, or sale of merchandise which had been imported into the United States contrary to law [the court should identify the elements of the law allegedly violated]; and
- Second, that the defendant knew the merchandise had been imported or brought into the United States contrary to law.

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[238]

The government need not prove that it suffered any loss of revenue.[239]

NOTE

See United States v. Hassanzadeh, 271 F.3d 574 (4th Cir. 2001) (prosecution under §§ 542 and 545).

"Contrary to law" encompasses substantive or legislative-type regulations that have the force and effect of law. *United States v. Mitchell*, 39 F.3d 465, 476 (4th Cir. 1994). The regulation must have been promulgated pursuant to a congressional grant of quasi-legislative authority and in conformity with congressionally-imposed procedural requirements. *Id*. at 470. In *Mitchell*, the defendant imported untanned animal hides and thereby violated Fish and Wildlife Service and Department of Agriculture regulations.

Specific intent to defraud is not an element of the second paragraph of § 545. *United States v. Davis*, 597 F.2d 1237, 1238 (9th Cir. 1979).

18 U.S.C. § 546 SMUGGLING INTO FOREIGN COUNTRIES

Title 18, United States Code, Section 546 makes it a crime to smuggle goods into a foreign country. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

[236] *See United States v. Davis*, 597 F.2d 1237, 1239 (9th Cir. 1979).

[237] *Id.* at 1238. The *mens rea* is either fraudulently or knowingly, but not both. *Id.* at 1239.

[238] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[239] *United States v. Ahmad*, 213 F.3d 805, 811 (4th Cir. 2000).

- First, that the defendant:
  1. owned in whole or in part any vessel of the United States; or
  2. was a citizen of the United States, or domiciled in the United States, or was a corporation incorporated in the United States and controlled or substantially participated in the control of a vessel, directly or indirectly, through ownership of corporate shares or otherwise; or
  3. was found, or discovered to have been on board the vessel and participating or assisting in the criminal venture;
- Second, that the defendant employed, or participated in, or allowed the employment of the vessel for the purpose of smuggling, or attempting to smuggle, or assisting in smuggling, any merchandise into the territory of any foreign government in violation of the laws of that foreign government [the court should identify the elements of the law allegedly violated]; and
- Third, that the laws of the foreign government prohibit smuggling into the United States.[240]

18 U.S.C. § 641 THEFT OF GOVERNMENT PROPERTY

Title 18, United States Code, Section 641 makes it a crime to steal property, or possess stolen property, belonging to the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant embezzled, stole, purloined, or knowingly converted to his/her own use or the use of another any record, voucher, money or thing of value;
- Second, that the record, voucher, money or thing of value belonged to the United States and was valued in excess of $1,000.00; and
- Third, that the defendant did so willfully.

OR

- First, that the defendant sold, conveyed, or disposed of any record, voucher, money, or thing of value;
- Second, that the record, voucher, money or thing of value belonged to the United States and was valued in excess of $1,000.00;
- Third, that the defendant did so without authority; and
- Fourth, that the defendant knew that the property belonged to the United States.[241]

¶ 2

- First, that the defendant received, concealed, or retained with intent to convert to his use or gain any record, voucher, money or thing of value;
- Second, that the record, voucher, money or thing of value belonged to the United States and was valued in excess of $1,000.00; and
- Third, that the defendant knew the record, voucher, money or thing of value had been embezzled, stolen, purloined, or converted.

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[240] *See Pasquantino v. United States*, 544 U.S. 349, 380 (2005) (Ginsburg, J., dissenting).

[241] *United States v. Yokum*, 417 F.2d 253, 255 (4th Cir. 1969). *See also United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991); *United States v. Zettl*, 889 F.2d 51, 53 (4th Cir. 1989).

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

"Value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. [§ 641][242]

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[243]

"Steal" means to take away from a person in lawful possession without right with the intention to keep wrongfully.[244]

Conversion is the act of control or dominion over the property of another that seriously interferes with the rights of the owner. The act of control or dominion must be without authorization from the owner. The government must prove both that the defendant knew the property belonged to another and that the taking was not authorized.[245]

Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and in tact.[246]

The government does not have to prove ownership, but the government must prove that the United States had some interest in the property.[247]

The government must prove that the property belonged to the United States but the government does not have to prove that the defendant knew that the property belonged to the United States. The government has to prove that the defendant knew the property belonged to someone other than himself.[248]

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[242] Where the stolen property is blank money order forms, the Fifth Circuit has rejected the argument that the money orders are valueless "beyond the paper on which they are printed and have held that the value requirement may be met by the face value of, or the amount received for, filled in blank money orders, or the value of the blanks in a thieves' market for blank money orders." *United States v. Wright*, 661 F.2d 60, 61 (5th Cir. 1981).

[243] *See United States v. Smith*, 373 F.3d 561, 564-65 (4th Cir. 2004). Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269.

[244] *Morissette v. United States*, 342 U.S. 246, 271 (1952).

[245] *See United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986).

[246] *Morissette*, 342 U.S. at 271-72.

[247] *United States v. Mack*, No. 89-5520, 1990 WL 26880 (4th Cir. Feb. 26, 1990) (citing *United States v. Benefield*, 721 F.2d 128, 129 (4th Cir. 1983)). "The Fourth Circuit takes a broad view of what constitutes a 'thing of value of the United States.'" *United States v. Gill*, 193 F.3d 802, 804 (4th Cir. 1999).

[248] In *Morissette*, 342 U.S. at 270-71, the Supreme Court held that "knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. [I]t is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property." In *United States v. X-Citement Video, Inc.*, 513

(continued...)

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession participated in some way in the theft of the property[249] or knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.[250] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[251]

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[252] You are reminded that the Constitution never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[253]

The government does not have to prove an actual property loss.[254]

It is not enough for the government to prove that the conveyance was without authority. The government must also prove that the defendant either knew that he was conveying the record, voucher, money, or thing of value without authority or acted with reckless disregard as to whether he had authority.[255]

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[248] (...continued)
U.S. 64 (1994), the Supreme Court noted that it had "used the background presumption of evil intent to conclude that the term 'knowingly' also require[s] that the defendant have knowledge of the facts that made the taking a conversion — *i.e.*, that the property belonged to the United States." 513 U.S. at 70 (citing *Morissette*, 342 U.S. at 271). In *United States v. LaPorta*, 46 F.3d 152 (2d Cir. 1994), the Second Circuit clarified that government ownership is a jurisdictional fact. "*Morissette* does not require that the defendant know the property in fact belonged to the U. S. government; it requires merely that the defendant know it belongs to someone other than himself." 46 F.3d at 158.

[249] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[250] *Id.*

[251] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[252] *See Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[253] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[254] *United States v. Stockton*, 788 F.2d 210, 219 n.13 (4th Cir. 1986) (29 U.S.C. § 501 prosecution). *But see United States v. Collins*, 464 F.2d 1163, 1165 (9th Cir. 1972) (essential element that the government have suffered an actual property loss).

[255] In *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991), the defendant complained that
(continued...)

It is a defense to a charge of conveyance without authority that the defendant either had actual authority or that he believed he had authority and that this belief was reasonable under all of the circumstances.[256]

NOTE

The Fourth Circuit takes a broad view of what constitutes a "thing of value of the United States." In *United States v. Benefield*, 721 F.2d 128, 128-30 (4th Cir. 1983), a cashier at an Officer's Club owned by the United States took a check intended as tip money for all employees and wrote in her own name as the payee. The tip money was "a thing of value of the United States" until disbursed to the entitled employees. In *United States v. Littriello*, 866 F.2d 713, 717 (4th Cir. 1989), the Fourth Circuit held that money embezzled from the American Postal Workers Union Health Plan was "a thing of value of the United States" because of the extensive federal control and supervision over the fund. In *United States v. Gill*, 193 F.3d 802, 803 n.1 (4th Cir. 1999), the defendant intercepted social security checks, endorsed them, and drew out funds for her own benefit — thus preventing the money from reaching the government's intended beneficiary. "In most cases finding the government interest insufficient to convict under § 641, title, ownership, or control had passed fully from the federal government." *Id.* at 804 n.2.

Secret Navy documents and photographs are United States property. *United States v. Morison*, 844 F.2d 1057, 1076 (4th Cir. 1988).

Because information is a species of property and a thing of value, conversion and conveyance of governmental information can violate § 641. *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991).

Embezzlement may constitute a continuing offense for statute of limitations purposes. *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004).

Aggregation

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

In determining whether a series of takings are properly aggregated, the fact-finder must examine the intent of the actor at the first taking. "If the actor formulated a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis, the crime may be charged in a single count." *Smith*, 373 F.3d at 564.

18 U.S.C. § 656 EMBEZZLING FROM A BANK

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[255] (...continued)
a "reckless disregard" instruction might be proper only if given with an instruction on "conscious avoidance." 932 F.2d at 317. The district court later instructed concerning "a conscious purpose as opposed to negligence or mistake to avoid learning an existing fact." The court ruled that although the district court did not combine these principles in one instruction, the instructions satisfied the rationale of *United States v. Biggs*,761 F.2d 184, 188 (4th Cir. 1985), that an instruction on reckless disregard is proper when the court also instructs on conscious avoidance.

[256] In *Fowler*, the defendant complained that the instruction told the jury his belief must be objectively reasonable. The court found that the jury was not instructed expressly or impliedly that the defendant's belief had to be objectively reasonable. Moreover, "[w]hen the court spoke of 'all of the circumstances,' it was referring to the factual circumstances under which Fowler obtained the documents and how he handled them afterwards." 932 F.2d at 318. The Fourth Circuit did not believe the word "reasonable" misled the jury; if the instruction was erroneous, it was harmless.

Title 18, United States Code, Section 656 makes it a crime to embezzle or misapply funds from a federally-insured bank. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was an officer, agent, or employee of or connected in any capacity with the bank at the time alleged in the indictment;
- Second, that the accounts of the bank were federally insured at the time alleged in the indictment [or some other basis for federal jurisdiction];
- Third, that the defendant embezzled, abstracted, purloined, or misapplied more than $1,000.00 in funds [or other things of value] belonging to, or entrusted to the care of, the bank;
- Fourth, that the defendant did so willfully; and
- Fifth, that the defendant did so with the intent to inflict financial injury to the bank or to defraud the bank.[257]

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[258]

To "abstract" means to take or withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted, without the knowledge and consent of the bank, and with the intent to injure or defraud the bank.[259]

To "misapply" a bank's money or property means the willful conversion or taking by a bank employee of such money or property for his own use or benefit, or the use and benefit of another, whether or not such money or property has been intrusted to his care, and with intent to defraud the bank.[260] It is not necessary that the defendant be in actual

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[257] The fifth element is a judicially created element of the offense. *United States v. Cherry*, 330 F.3d 658, 664 (4th Cir. 2003) (quoting *United States v. Caldwell*, 544 F.2d 691, 696 (4th Cir. 1976)). The additional language of "pecuniary injury" comes from *United States v. Arthur*, 602 F.2d 660 (4th Cir. 1979). "It is settled that an essential element of misapplication of bank funds ... is the intent to injure or defraud the bank." 602 F.2d at 663. "[A] jury ... must be properly instructed that intent to inflict pecuniary injury to the bank is an essential element of the offense, but that a jury may properly find that such intent existed when the proof shows the expenditure of bank funds to bribe public officials." *Id.*

Intent to injure and intent to defraud are not the same. Intent to injure is met when "the [ ] officer engaged in acts, the natural tendency of which would be to injure the bank. Intent to defraud the bank, on the other hand, means to take financial advantage of a confidential relationship and does not require any intent to injure the bank" *United States v. Bates*, 96 F.3d 964, 968 (7th Cir. 1996) (quotations and citation omitted).

[258] *See United States v. Smith*, 373 F.3d 561, 564-65 (4th Cir. 2004). Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269.

[259] *United States v. Northway*, 120 U.S. 327, 334 (1887).

[260] *United States v. Blackwood*, 735 F.2d 142, 144 (4th Cir. 1984). "In order to misapply the funds of the bank it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him." *Northway*, 120 U.S. at 332.

possession of the money or property by virtue of a trust committed to him.[261] For example, using nominee borrowers to obtain money from a bank for a person who does not otherwise qualify for a bank loan constitutes a willful misapplication of bank funds.[262]

"Intent to injure or defraud" can be established by proving that the defendant acted in reckless disregard of the bank's interest.[263] To act with intent to injure or defraud means to act with intent to deceive or cheat, for the purpose of causing a financial loss to the bank, although it is not necessary that the bank has suffered an actual loss, or to bring financial gain or benefit to one's self.[264]

The term "injure" includes only pecuniary loss to the bank.[265]

The evidence does not have to show that the bank actually lost money as a result of the embezzlement or misapplication of funds. Nor is proof of personal gain necessary. It is sufficient that the defendant at least temporarily deprived the bank of the possession, control, or use of the funds.[266] It is not essential that the proof show that the defendant intended to deprive the bank of its property permanently.[267]

NOTE

Subsequent restitution may be relevant on the issue of intent, but it is not a defense since the crime is complete when the embezzlement or misapplication occurs. *See United States v. Duncan*, 598 F.2d 839, 858 (4th Cir. 1979).

In *United States v. Luke*, 701 F.2d 1104, 1107 (4th Cir. 1983), the Fourth Circuit adopted the three categories of "misapplications" established in *United States v. Gens*, 493 F.2d 216, 221-22 (1st Cir. 1974), as follows:

1. those in which bank officials knew that the named debtor was either fictitious or unaware his name was being used;
2. those in which bank officials knew that the named debtor was financially incapable of paying the loan; and
3. those in which bank officials assured the named debtor that they would look only to the third party who actually received the loan proceeds for repayment.

These loans can be characterized as "sham" or "dummy" loans, because there is little likelihood or expectation that the named debtor will repay. "The knowing participation of bank officials in such loans could consequently be found to have a 'natural tendency' to injure or defraud their banks and thus constitute willful misapplication within the meaning of § 656." *United States v. Blackwood*, 735 F.2d 142, 145 (4th Cir. 1984).

The use of bank funds for the illegal purposes of bribing state officials or making unlawful political contributions constitutes a misapplication within the meaning of [§ 656]

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[261] *Northway*, 120 U.S. at 332.

[262] *United States v. Luke*, 701 F.2d 1104, 1107 (4th Cir. 1983); *United States v. Gens*, 493 F.2d 216, 222 (1st Cir. 1974).

[263] *United States v. Hoffman*, No. 95-5181, 1996 WL 469901 (4th Cir. Aug. 20, 1996) (citations omitted).

[264] *See Blackwood*, 735 F.2d at 144-45.

[265] "While damage to a bank's reputation may eventually result in some deterioration in the bank's financial condition, such loss would be too indirect and speculative and we decline to construe [§ 656] as comprehending it." *United States v. Arthur*, 544 F.2d 730, 736 (4th Cir. 1976).

[266] *United States v. Duncan*, 598 F.2d 839, 858 (4th Cir. 1979).

[267] *Arthur*, 602 F.2d at 662.

regardless of any anticipated benefit to the bank. *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976).

18 U.S.C. § 657 EMBEZZLING FROM A CREDIT UNION [LAST UPDATED 7/3/14]

Title 18, United States Code, Section 657 makes it a crime to embezzle or misapply funds from a federally-insured credit union or other similar institution. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was an officer, agent, or employee of or connected in any capacity with the institution at the time alleged in the indictment;
- Second, that the accounts of the [lending, credit, or insurance institution] were federally insured at the time alleged in the indictment;
- Third, that the defendant embezzled or misapplied more than $1,000.00 in funds [or other things of value] belonging to, or entrusted to the care of, the institution;
- Fourth, the defendant did so willfully; and
- Fifth, the defendant did so with the intent to inflict financial injury to the institution or to defraud the institution.[268]

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[269]

To "misapply" an institution's money or property means the willful conversion or taking by an institution employee of such money or property for his own use or benefit, or the use and benefit of another, whether or not such money or property has been intrusted to his care, and with intent to defraud the institution.[270] For example, using nominee borrowers to obtain money from an institution for a person who does not otherwise qualify for a loan constitutes a willful misapplication of institution funds.[271]

"Intent to injure or defraud" can be established by proving that the defendant acted in reckless disregard of the institution's interest.[272] To act with intent to injure or defraud

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[268] This is a judicially created element of the offense. *United States v. Cherry*, 330 F.3d 658, 664 (4th Cir. 2003) (quoting *United States v. Caldwell*, 544 F.2d 691, 696 (4th Cir. 1976)). The additional language of "pecuniary injury" comes from *United States v. Arthur*, 602 F.2d 660 (4th Cir. 1979). "It is settled that an essential element of misapplication of bank funds ... is the intent to injure or defraud the bank." 602 F.2d at 663. "[A] jury ... must be properly instructed that intent to inflict pecuniary injury to the bank is an essential element of the offense, but that a jury may properly find that such intent existed when the proof shows the expenditure of bank funds to bribe public officials." *Id.*

[269] *See United States v. Smith*, 373 F.3d 561, 564-65 (4th Cir. 2004). Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269.

[270] *United States v. Blackwood*, 735 F.2d 142, 144 (4th Cir. 1984).

[271] *United States v. Luke*, 701 F.2d 1104, 1107 (4th Cir. 1983); *United States v. Gens*, 493 F.2d 216, 222 (1st Cir. 1974).

[272] *United States v. Hoffman*, No. 95-5181, 1996 WL 469901 (4th Cir. Aug. 20, 1996)

(continued...)

means to act with intent to deceive or cheat, for the purpose of causing a financial loss to the financial institution, although it is not necessary that the institution has suffered an actual loss, or to bring financial gain or benefit to one's self.[273]

The term "injure" includes only pecuniary loss to the institution.[274]

The evidence does not have to show that the institution actually lost money as a result of the embezzlement or misapplication of funds. Nor is proof of personal gain necessary. It is sufficient that the defendant at least temporarily deprived the institution of the possession, control, or use of the funds.[275] It is not essential that the proof show that the defendant intended to deprive the institution of its property permanently.[276]

To be "connected in any capacity with" the institution, the person should exercise some control and/or be active in the affairs of the institution.[277]

The government does not have to prove that the defendant performed the ministerial task of disbursing funds.[278]

NOTE

Subsequent restitution may be relevant on the issue of intent, but it is not a defense since the crime is complete when the [embezzlement or] misapplication occurs. *United States v. Duncan*, 598 F.2d 839, 858 (4th Cir. 1979).

In *United States v. Luke*, 701 F.2d 1104, 1107 (4th Cir. 1983), the Fourth Circuit adopted the three categories of "misapplications" established in *United States v. Gens*, 493 F.2d 216, 221-22 (1st Cir. 1974), as follows:

1. those in which bank officials knew that the named debtor was either fictitious or unaware his name was being used;
2. those in which bank officials knew that the named debtor was financially incapable of paying the loan; and
3. those in which bank officials assured the named debtor that they would look only to the third party who actually received the loan proceeds for repayment.

See Luke, 701 F.2d at 1107.

These loans can be characterized as "sham" or "dummy" loans, because there is little likelihood or expectation that the named debtor will repay. "The knowing participation of bank officials in such loans could consequently be found to have a 'natural tendency' to injure or defraud their banks and thus constitute willful misapplication within the meaning of § 656." *United States v. Blackwood*, 735 F.2d 142, 145 (4th Cir. 1984).

The use of institution funds for the illegal purposes of bribing state officials or making unlawful political contributions constitutes a misapplication within the meaning of [§ 656]

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[272] (...continued)
(citations omitted).

[273] *See Blackwood*, 735 F.2d at 144-45.

[274] "While damage to a bank's reputation may eventually result in some deterioration in the bank's financial condition, such loss would be too indirect and speculative and we decline to construe [§ 656] as comprehending it." *United States v. Arthur*, 544 F.2d 730, 736 (4th Cir. 1976).

[275] *United States v. Duncan*, 598 F.2d 839 (4th Cir. 1979).

[276] *Arthur*, 602 F.2d at 662.

[277] *United States v. Davis*, 953 F.2d 1482, 1490 (10th Cir. 1992).

[278] *Id*.

regardless of any anticipated benefit to the bank. *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976).

Actual disbursement of money is not required under § 657. *United States v. Stuart*, 718 F.2d 931, 934 (9th Cir. 1983).

The Ninth Circuit does not require "that a conversion either be proven or alleged in a misapplication charge" because conversion is not a necessary element of misapplication. *United States v. Musacchio*, 968 F.2d 782, 787-88 (9th Cir. 1991)

In a case where funds are actually disbursed, the crime is complete when the funds leave the control of the institution from which they were misapplied. *Id*. at 790.

In *United States v. Davis*, 953 F.2d 1482, 1489 (10th Cir. 1992), the Tenth Circuit reiterated that the person "connected in any capacity with" language of § 657 should be given a broad interpretation. Thus, a property manager who diverts funds from an apartment complex owned by a savings and loan association, a stockholder who exerts control, a financial adviser of a credit union, and the president of a real estate subsidiary wholly owned by a savings and loan may be within reach of the statute. *See id*. at 1489-90.

If the trier of fact determines that a principal within the class has committed bank fraud, a person outside the class such as a bank customer may be held liable as an aider and abetter. *Id*. at 1489 n.6.

18 U.S.C. § 658 CONVERTING PROPERTY PLEDGED TO FARM CREDIT AGENCIES

Title 18, United States Code, Section 658 makes it a crime to convert property pledged to the Farm Credit Administration or other production credit association or other similar institution. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant concealed, removed, disposed of, or converted to his own use or to that of another;
- Second, property mortgaged or pledged to, or held by, [identify the agency or institution from the statute identified in the indictment];
- Third, that the defendant did so knowingly and with intent to defraud; and
- Fourth, that the value of the property converted exceeded $1,000.

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[279]

NOTE

See United States v. Lott, 751 F.2d 717 (4th Cir. 1985) (citing *United States v. Mitchell*, 666 F.2d 1385, 1388 (11th Cir. 1982)) (an advance received on crops subjected to an FHA lien constituted proceeds and fell within the provisions of this statute)).

[279] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

18 U.S.C. § 659 THEFT FROM AN INTERSTATE SHIPMENT

Title 18, United States Code, Section 659 makes it a crime to steal property from an interstate shipment or interstate carrier. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant embezzled, stole, or unlawfully took, carried away, or concealed, or obtained by fraud or deception from [the facility or vehicle as set forth in the statute and charged in the indictment] goods or chattels;
- Second, that the value of the goods or chattels was $1,000.00 or greater;
- Third, that the property was moving as, was a part of, or constituted an interstate or foreign shipment of freight, express, or other property; and
- Fourth, that the defendant did so unlawfully and with intent to convert the property to his own use.

¶ 2

- First, that the defendant bought, received, or had in his possession property;
- Second, that the property had been embezzled, stolen, or unlawfully taken, carried away, or concealed, or obtained by fraud or deception from [the facility or vehicle as set forth in the statute and charged in the indictment], and was moving as, was a part of, or constituted an interstate or foreign shipment of freight, express, or other property;
- Third, that the value of the property was $1,000.00 or greater; and
- Fourth, that the defendant knew the property had been embezzled or stolen.

The government must prove that the defendant knew the property was stolen, but the government does not have to prove that the defendant knew it was stolen from an interstate shipment.[280]

¶ 3

- First, that the defendant embezzled, stole, or unlawfully took, carried away, or obtained by fraud or deception any baggage;
- Second, that the baggage had come into the possession of any common carrier for transportation in interstate or foreign commerce;
- Third, that the value of the baggage was $1,000.00 or greater; and
- Fourth, that the defendant did so unlawfully and with intent to convert the property to his own use.

OR

- First, that the defendant broke into, stole, took, carried away, or concealed any of the contents of baggage;
- Second, that the baggage had come into the possession of any common carrier for transportation in interstate or foreign commerce; and
- Third, that the value of the baggage was $1,000.00 or greater.

OR

[280] *Thomas v. United States*, 11 F.2d 27, 28 (4th Cir. 1926).

- First, that the defendant bought, received, or had in his possession baggage or the contents of baggage;
- Second, that the baggage or the contents of baggage had come into the possession of any common carrier for transportation in interstate or foreign commerce;
- Third, that the value of the baggage or its contents was $1,000.00 or greater; and
- Fourth, that the defendant knew the baggage or contents had been embezzled or stolen.

The government must prove that the defendant knew the property was stolen, but the government does not have to prove that the defendant knew it was stolen from an interstate shipment.[281]

¶ 4

- First, that the defendant embezzled, stole, or unlawfully took by any fraudulent device, scheme, or game any money, baggage, goods, or property;
- Second, that the property was taken from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier, or from any passenger on any railroad car, bus, vehicle, steamboat, vessel or aircraft operated by any common carrier moving in interstate or foreign commerce; and
- Third, that the value of the property was $1,000 or greater.

OR

- First, that the defendant bought, received, or had in his possession money, baggage, goods, or property embezzled or stolen from any railroad car, bus, vehicle, steamboat, vessel, aircraft, or any passenger on any railroad car, bus, vehicle, steamboat, vessel or aircraft operated by any common carrier moving in interstate or foreign commerce;
- Second, that the value of the property was $1,000.00 or greater; and
- Third, that the defendant knew the money, baggage, goods, or property had been embezzled or stolen.

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

The government must prove that the defendant knew the property was stolen, but the government does not have to prove that the defendant knew it was stolen from an interstate shipment.[282]

"Value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.[283]

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[284]

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[281] *Id.*

[282] *Id.*

[283] 18 U.S.C. § 641. *See also United States v. Watson*, 570 F.2d 282, 283-84 (8th Cir. 1978).

[284] *See United States v. Smith*, 373 F.3d 561 (4th Cir. 2004) (a § 641 prosecution).

"Steal" means to take away from a person in lawful possession without right with the intention to keep wrongfully.[285]

Conversion is the act of control or dominion over the property of another that seriously interferes with the rights of the owner. The act of control or dominion must be without authorization from the owner. The government must prove both that the defendant knew the property belonged to another and that the taking was not authorized.[286]

Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and in tact.[287]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

An interstate or foreign shipment of goods or property begins when the property is segregated for interstate shipment and comes into the possession of those who are assisting its course in interstate transportation and continues until the property arrives at its destination and is there delivered.[288]

It is not necessary that the goods be actually moving in interstate commerce at the time of the theft. It is sufficient if they are a part of an interstate shipment.[289]

There is no absolute requirement that the flow of commerce be continuous if there is the clear intention to resume the journey after a brief pause.[290]

The determination that a shipment is interstate is essentially a practical one based on common sense. It depends on such indicia of interstate commerce as the relationship of the consignee, consignor, and carrier, if they are separate entities, the physical location of the shipment when stolen, whether the goods have been delivered to a carrier at the time of theft, where there is no carrier what steps the owner has taken to carry out an interstate shipment, and the certainty with which interstate shipment is contemplated, as evidenced by shipping documents.[291]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession participated in some way in the theft of the property[292] or knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such

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[285] *Morissette v. United States*, 342 U.S. 246, 271 (1952).

[286] *See United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986).

[287] *Morissette*, 342 U.S. at 271-72.

[288] *United States v. Williams*, 559 F.2d 1243, 1246 (4th Cir. 1977).

[289] *Id.* at 1247.

[290] *United States v. Maddox*, 394 F.2d 297, 300 (4th Cir. 1968).

[291] *United States v. Astolas*, 487 F.2d 275, 279-80 (2d Cir. 1973).

[292] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

possession.[293] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[294]

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[295] You are reminded that the Constitution never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[296]

NOTE

The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.[297]

Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269.

There are three ways in which the commerce requirement can be met: the goods can be (1) moving as an interstate shipment, (2) part of an interstate shipment, or (3) constituting an interstate shipment. *United States v. Astolas*, 487 F.2d 275, 279 (2d Cir. 1973).

Although § 659 contains its own venue provision, it is a continuing offense, and therefore 18 U.S.C. § 3237 also applies. *United States v. Hankish*, 502 F.2d 71, 75 (4th Cir. 1974). The *Hankish* court also stated that the crime "is not crossing a state line with stolen goods, but carrying or transporting stolen goods." *Id*. Thus, the interstate commerce nexus "is simply a jurisdictional peg without which the offense could not be tried in the federal courts but it is not, strictly speaking, an element of the criminal offense." *Id.* at 76. It is, nevertheless, a jurisdictional element which the government must prove.

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[293] *Id.*

[294] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[295] *See Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[296] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[297] 18 U.S.C. § 659 ¶ 8. *See also United States v. Williams*, 559 F.2d 1243, 1246 (4th Cir. 1977).

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

Aggregation of individual offenses to exceed $1,000 is proper when each was part of a single scheme or plan. *United States v. Smith*, 373 F.3d 561 (4th Cir. 2004) (a § 641 case).

18 U.S.C. § 660 EMBEZZLEMENT FROM COMMON CARRIER [LAST UPDATED 7/3/14]

Title 18, United States Code, Section 660 makes it a crime to embezzle from a common carrier. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was a president, director, officer, or manager, of a firm, association, or corporation engaged in commerce as a common carrier; OR
- First, that the defendant was an employee of a common carrier riding in or upon any railroad car, motor truck, steamboat, vessel, aircraft, or other vehicle of such carrier moving in interstate commerce;
- Second, that the defendant embezzled, stole, abstracted, or willfully misapplied, or willfully permitted to be misapplied, or willfully or knowingly converted to his own use or to the use of another any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part.

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[298]

"Steal" and "convert" mean the wrongful taking of property belonging to another with intent to deprive the owner of its use or benefit either temporarily or permanently.

"Common carrier" means one who holds himself, or itself, out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering its services to the public generally.[299]

_____NOTE_____

Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269. *See also United States v. Stockton*, 788 F.2d 210 (4th Cir. 1986) (embezzlement under 29 U.S.C. § 501(c); relationship of trust not required).

Although §§ 659 and 660 contain their own venue provision, embezzlement is a continuing offense, and therefore 18 U.S.C. § 3237 also applies. *United States v. Hankish*, 502 F.2d 71, 75 (4th Cir. 1974). The *Hankish* court also stated that the crime "is not crossing a state line with stolen goods, but carrying or transporting stolen goods." 502 F.2d at 76. Thus, the interstate commerce nexus "is simply a jurisdictional peg without which the

[298] *See United States v. Smith*, 373 F.3d 561 (4th Cir. 2004) (a § 641 prosecution).

[299] *See United States v. Jones*, 712 F.2d 1316, 1322 (9th Cir. 1983); *United States v. Queen*, 445 F.2d 358, 361 (10th Cir. 1971). *See also* 13 Am. Jur. 2d *Car* § 2.

offense could not be tried in the federal courts but it is not, strictly speaking, an element of the criminal offense." *Id*. It is, nevertheless, a jurisdictional element which must be proven.

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

18 U.S.C. § 661 THEFT OF PERSONAL PROPERTY

Title 18, United States Code, Section 661 makes it a crime to steal personal property within the special territorial jurisdiction of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant took and carried away;
- Second, personal property of another person;
- Third, valued in excess of $1,000.00;
- Fourth, that the defendant did so with intent to steal or purloin; and
- Fifth, that the conduct occurred within the special maritime and territorial jurisdiction of the United States.[300]

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[301]

To steal or purloin means any taking whereby a person, by some wrongful act, willfully obtains or retains possession of property belonging to another without the permission or beyond any permission given with the intent to deprive the owner of the benefit of ownership.[302]

The government is not required to prove that the defendant intended to deprive the owner of his property permanently.[303]

_____NOTE_____

[300] *See United States v. Love*, 516 F.3d 683, 687 (8th Cir. 2008); *United States v. Spencer*, 905 F.2d 1260, 1262 (9th Cir. 1990).

[301] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[302] Instruction given by district court and approved in *United States v. Henry*, 447 F.2d 283, 286 (3d Cir. 1971).

[303] *Id*.

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

Special territorial jurisdiction does not include proprietary jurisdiction. Most federal buildings, such as courthouses and office buildings, are proprietary jurisdictions, and are usually covered only by regulations of the General Services Administration published in the Code of Federal Regulations.

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

In determining whether a series of takings are properly aggregated, the fact-finder must examine the intent of the actor at the first taking. "If the actor formulated 'a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (a § 641 case). The *Smith* majority also believed that the specific conduct at issue in that case (appropriating the Social Security checks of the defendant's deceased mother) "is more properly characterized as a continuing offense rather than a series of separate acts" for statute of limitations purposes. *Id.* The court noted that not all conduct constituting embezzlement may necessarily be treated as a continuing offense as opposed to merely a series of acts that occur over a period of time.

18 U.S.C. § 662 RECEIVING STOLEN PROPERTY

Title 18, United States Code, Section 662 makes it a crime to receive stolen property within the special territorial jurisdiction of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant bought, received or concealed;
- Second, money, goods or other thing which had been feloniously taken, stolen or embezzled;
- Third, that the money, goods or other thing had a value in excess of $1,000.00;
- Fourth, that the defendant did so within the special maritime and territorial jurisdiction of the United States; and
- Fifth, that the defendant knew the property was feloniously taken, stolen, or embezzled.[304]

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

"Feloniously taken" means taken with intent to steal.[305]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United

[304] *See United States v. Jones*, 797 F.2d 184, 186 (4th Cir. 1986).

[305] *United States v. Simmons*, 247 F.3d 118, 123 (4th Cir. 2001). "The government need not show that the underlying theft was a felony." *Id.* at 124.

States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[306]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession participated in some way in the theft of the property[307] or knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.[308] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[309]

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[310] You are reminded that the Constitution never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[311]

NOTE

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and

[306] *See* 18 U.S.C. § 7 (listing other definitions). In *Passaro*, the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." *Id.* at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[307] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[308] *Id.*

[309] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[310] *See Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[311] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

State v. Zeigler, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds*, *Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

Special territorial jurisdiction does not include proprietary jurisdiction. Most federal buildings, such as courthouses and office buildings, are proprietary jurisdictions, and are usually covered only by regulations of the General Services Administration published in the Code of Federal Regulations.

If a disputed issue is whether the property stolen had a value exceeding $1,000, the court should consider giving a lesser included offense instruction.

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

Title 18, United States Code, Section 664 makes it a crime to steal from an employee benefit plan. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant embezzled, stole, abstracted, or converted to his own use or to the use of another;
- Second, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected with either plan; and
- Third, that the defendant did so with the specific intent to deprive the plan of its moneys, funds, property, or other assets.[312]

In determining whether the defendant acted willfully in causing a disbursement of moneys by a plan or connected fund, you may consider whether or not the defendant had a good faith belief that the disbursement was authorized.[313]

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[314]

A good faith intent to return embezzled funds does not negate a showing that the defendant acted with the intent to embezzle the funds in the first place.[315]

"Steal" means to take away from a person in lawful possession without right and with the intention to keep wrongfully.[316]

Conversion is the act of control or dominion over the property of another that seriously interferes with the rights of the owner. The act of control or dominion must be without

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[312] *United States v. Jackson*, 524 F.3d 532, 544 (4th Cir. 2008), *vacated on other grounds*, 555 U.S. 1163 (2009). *Jackson* involved unpaid employer contributions. On certiorari to the Supreme Court, the Solicitor General confessed error that unpaid employer contributions are not assets of an ERISA plan. On remand, the ERISA convictions were vacated. *United States v. Jackson,* 336 F. App'x 282 (4th Cir. 2009).

[313] *United States v. Shipsey*, 190 F.3d 1081, 1084 (9th Cir. 1999).

[314] *See United States v. Smith*, 373 F.3d 561, 565 (4th Cir. 2004) (a § 641 case). Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269. Therefore, a fiduciary relationship is not an essential element of embezzlement under this statute under § 641 (unlike others, such as 18 U.S.C. §§ 656 and 666, and 29 U.S.C. § 501).

[315] *United States v. Busacca*, 936 F.2d 232, 240 (6th Cir. 1991).

[316] *Morissette v. United States*, 342 U.S. 246, 271 (1952).

authorization from the owner. The government must prove both that the defendant knew the property belonged to another and that the taking was not authorized.[317] Conversion includes using, in a manner or to an extent not authorized by the owner of property placed in one's custody for a limited use or purpose.[318]

Conversion can occur without any intent to keep and without any wrongful taking, and the initial possession by the converter may be entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use.[319]

NOTE

See discussion of embezzlement under 29 U.S.C. § 501.

United States v. Jackson, 524 F.3d 532 (4th Cir. 2008), discusses what constitutes an asset of the plan. *See also* 29 U.S.C. § 1103.

In *United States v. Busacca*, 936 F.2d 232, 239 (6th Cir. 1991), the defendant argued that the government had split up one offense of embezzlement into six separate offenses. The Sixth Circuit held that the allowable unit of prosecution was each time the defendant caused a check to be issued by the Fund which inflicted a separate injury on the members of the Fund.

See United States v. Parris, 88 F. Supp. 2d 555, 564 (E.D. Va. 2000), where the court stated the defendant could not be found guilty unless he removed, without authorization, funds from the Trust beyond the amount that he actually contributed.

In *United States v. Shipsey*, 190 F.3d 1081 (9th Cir. 1999), the Ninth Circuit reversed a § 664 conviction. The district court instructed the jury that it could convict if it found any wrongful taking from the pension fund. The Ninth Circuit ruled that the indictment charged only theft by false pretenses. The indictment [poorly drafted] incorporated by reference the language from the related mail and wire fraud counts, which involved false representations, as the means by which the defendant stole money from the fund. However, the district court's jury instructions permitted the jury to convict the defendant if he obtained the pension fund money by a wrongful act or if he converted the money. The Ninth Circuit considered this constructively amending the indictment.

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

In determining whether a series of takings are properly aggregated, the fact-finder must examine the intent of the actor at the first taking. "If the actor formulated 'a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (defendant convicted of violating 18 U.S.C. § 641). The *Smith* majority also believed that the specific conduct at issue in that case (appropriating the Social Security checks of the defendant's deceased mother) "is more properly characterized as a continuing offense rather than a series of separate acts" for statute of limitations purposes. *Id.* at 568. The court did note that not all conduct constituting embezzlement may necessarily be treated as a continuing offense as opposed to merely a series of acts that occur over a period of time.

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[317] *See United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986).

[318] *Morissette*, 342 U.S. at 271-72.

[319] *Id.*

18 U.S.C. § 665 THEFT FROM EMPLOYMENT AND TRAINING FUNDS

Title 18, United States Code, Section 665 makes it a crime to steal Job Training Partnership Act funds. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 665(a)

- First, that the defendant was an officer, director, agent, or employee of, or connected in any capacity with any agency or organization receiving financial assistance or any funds under the Job Training Partnership Act or the Workforce Investment Act;
- Second, that the defendant embezzled, willfully misapplied, stole, or obtained by fraud [or enrolled an ineligible participant];
- Third, any of the moneys, funds, assets, or property[320] which are the subject of a financial assistance agreement or contract pursuant to the Job Training Partnership Act or the Workforce Investment Act;
- Fourth, that the amount of moneys, funds, assets, or property exceeded $1,000.00; and
- Fifth, that the defendant did so knowingly, and with intent to defraud and injure [the United States].[321]

☞ **If there is an issue that the value did not exceed $1,000, the court should consider giving a lesser included offense instruction.**

§ 665(b)

- First, that the defendant induced any person to give up any money or thing of any value to any person (including an organization or agency receiving funds under the Job Training Partnership Act or the Workforce Investment Act); and
- Second, that the defendant did so by threat or procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a financial assistance agreement or contract under the Job Training Partnership Act or the Workforce Investment Act.

§ 665(c)

- First, that the defendant obstructed or impeded or endeavored to obstruct or impede an investigation or inquiry under the Job Training Partnership Act or the Workforce Investment Act, or the regulations issued pursuant to either Act; and
- Second, the defendant did so willfully.

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[320] In *United States v. Coleman*, 590 F.2d 228, 231 (7th Cir. 1979), the Seventh Circuit held that the services of trainees compensated by CETA grant funds were property.

[321] *See Coleman*, 590 F.2d. at 230. *See also United States v. Garcia*, 751 F.2d 1033, 1035 (9th Cir. 1985) (relying on cases interpreting 18 U.S.C. § 656 to hold that "an intent to injure or defraud the United States" was an element of "willfully misapply."). *But see United States v. Hamilton*, 726 F.2d 317, 320 (7th Cir. 1984) (court relied on cases interpreting 18 U.S.C. § 641 to hold government did not have to prove that defendant aware of federal interest in the funds).

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[322]

Steal means the wrongful and dishonest taking of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[323]

To misapply money or property means a willful conversion or taking of such money or property to one's own use and benefit or the use and benefit for another, with intent to defraud.[324]

NOTE

See discussion of embezzlement under 29 U.S.C. § 501.

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

In determining whether a series of takings are properly aggregated, the court must examine the intent of the actor at the first taking. "If the actor formulated 'a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (defendant convicted of violating 18 U.S.C. § 641). The *Smith* majority also believed that the specific conduct at issue in that case (appropriating the Social Security checks of the defendant's deceased mother) "is more properly characterized as a continuing offense rather than a series of separate acts" for statute of limitations purposes. *Id.* at 568. The court did note that not all conduct constituting embezzlement may necessarily be treated as a continuing offense as opposed to merely a series of acts that occur over a period of time.

18 U.S.C. § 666 THEFT OR BRIBERY CONCERNING PROGRAMS RECEIVING FEDERAL FUNDS

Title 18, United States Code, Section 666 makes it a crime to [steal property from an agency that receives federal funds] [accept a bribe as, or give a bribe to, an agent of an agency that receives federal funds]. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 666(a)(1)(A)

- First, that the defendant was, at the time alleged in the indictment, an agent of an organization or of any state or local government or agency that received, in any one year period, benefits in excess of $10,000 under a Federal program involving any form of Federal assistance; and

[322] *United States v. Smith*, 373 F.3d 561, 565 (4th Cir. 2004).

[323] In *United States v. Turley*, 353 U.S. 407, 411 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings of [property] with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." 353 U.S. at 417. *See also Morissette v. United States*, 342 U.S. 246, 271 (1952).

[324] *United States v. Tamargo*, 637 F. 2d 346, 350 (5th Cir. 1981). *See also United States v. Brown*, 742 F.2d 363, 366-67 (7th Cir. 1984) (conversion of [JTPA] funds for the use of uncertified workers when defendant knew of their uncertified status was willful misapplication of funds for purposes of § 665).

- Second, that the defendant embezzled, stole, obtained by fraud, without authority knowingly converted to the use of any person other than the rightful owner, or intentionally misapplied property valued at $5,000 or more owned by or under the care, custody or control of said agency.

§ 666(a)(1)(B)

- First, that the defendant was, at the time alleged in the indictment, an agent of an organization or of any state or local government or agency that received, in any one year period, benefits in excess of $10,000 under a Federal program involving any form of Federal assistance; and
- Second, that the defendant solicited or demanded for the benefit of any person, or accepted or agreed to accept, anything of value from any person;
- Third, that the defendant intended to be influenced or rewarded in connection with any business, transaction, or series of transactions of the organization, state or local government or agency involving any thing of value of $5,000 or more; and
- Fourth, that the defendant did so corruptly.

§ 666(a)(2)

- First, that the defendant gave, offered, or agreed to give anything of value to any person;
- Second, that the defendant did so with intent to influence or reward an agent of an organization or of a state or local government or agency that received, in any one year period, benefits in excess of $10,000 under a Federal program involving any form of Federal assistance in connection with any business, transaction, or series of transactions of that organization, government, or agency involving anything of value of $5,000 or more; and
- Third, that the defendant did so corruptly.

An agent of an organization means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative. [§ 666(d)(1)]

"One year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense. [§ 666(d)(5)]

The government does not have to prove that federal funds were involved in the bribery transaction, or that the bribe had any particular influence on federal funds.[325]

An act is done "corruptly" if it is done with the intent to engage in some more or less specific *quid pro quo*,[326] that is, to receive a specific benefit in return for the payment,[327] or to induce a specific act.[328]

A payment is made with corrupt intent only if it was made or promised with the intent to corrupt the particular official. Not every payment made to influence or reward an official

[325] *Salinas v. United States*, 522 U.S. 52, 60, 61 (1997).

[326] *United States v. Jennings*, 160 F.3d 1006, 1021 n.6 (4th Cir. 1998) (citing *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976)).

[327] *Id.* at 1013.

[328] *Id.* at 1021.

is intended to corrupt him. One has the intent to corrupt an official only if he makes a payment or promise with the intent to engage in a fairly specific *quid pro quo* with that official. The defendant must have intended for the official to engage in some specific act or omission or course of action or inaction in return for the payment charged in the indictment.[329]

To influence means that a payment was made before the official action. To reward means that a payment was made afterwards. Payments made to influence official action and to reward official action are both prohibited, but payments made without corrupt intent are not criminal acts.[330]

Payments, sometimes referred to as goodwill gifts, made with no more than some generalized hope or expectation of ultimate benefit on the part of the donor are neither bribes nor gratuities, since they are made neither with the intent to engage in a relatively specific *quid pro quo* with an official nor for or because of a specific official act.[331]

NOTE

In *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), the defendant was convicted of violating § 666(a)(2) for giving payments to a Baltimore city housing official. On appeal, Jennings argued that § 666 outlawed only bribes, not gratuities. The Fourth Circuit discussed at length the distinction between bribes and gratuities in § 201. "Whether a payment is a bribe or an illegal gratuity under § 201 depends on the intent of the payor." *Id.* at 1013. The Fourth Circuit assumed that the "reward" language in § 666(a)(2) clarifies that "the distinction between a bribe and a gratuity is a matter of intent, not simply a matter of timing ...." *Id*. at 1015, n.3. Moreover, under § 666(a)(2), it is the intent of the payor, not the intent of the payee, that is determinative of whether a crime occurred. *Id*. at 1017. Because the Fourth Circuit held that the evidence was sufficient to prove that Jennings committed bribery, it specifically reserved the question whether § 666 prohibits gratuities.

Section 666(a)(2) does not reach mere goodwill gifts.

In *United States v. Grubb*, 11 F.3d 426, 434 (4th Cir. 1993), the court rejected the defendant's argument that § 666(a)(2) did not apply to the granting of employment in exchange for political contributions.

The court's discussion of § 201 in *Jennings* is helpful.

See NOTE section for 18 U.S.C. § 201.

In *Salinas v. United States*, 522 U.S. 52 (1997), the Supreme Court held that "as to the bribes forbidden and the entities covered," there is no support for the appellant's interpretation that federal funds must be affected to violate § 666(a)(1)(B). "The prohibition is not confined to a business or transaction which affects federal funds." *Id.* at 57.

Where multiple conversions are part of a single scheme, it is appropriate to aggregate the value of property stolen in order to reach the $5,000 minimum required for prosecution. *United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992).

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

[329] *Id.* at 1018-19.

[330] *Id.* at 1020.

[331] *United States v. Jennings*, 160 F.3d 1006, 1020 n.5 (4th Cir. 1998).

In determining whether a series of takings are properly aggregated, the court must examine the intent of the actor at the first taking. "If the actor formulated 'a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (defendant convicted of violating 18 U.S.C. § 641). The *Smith* majority also believed that the specific conduct at issue in that case (appropriating the Social Security checks of the defendant's deceased mother) "is more properly characterized as a continuing offense rather than a series of separate acts" for statute of limitations purposes. *Id.* at 568. The court did note that not all conduct constituting embezzlement may necessarily be treated as a continuing offense as opposed to merely a series of acts that occur over a period of time.

18 U.S.C. § 751 ESCAPE

Title 18, United States Code, Section 751 makes it a crime to escape from federal custody. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had been in the custody of the Attorney General;

The government can satisfy this burden by demonstrating that the defendant was:

(1) in the custody of the Attorney General or his authorized representative,

(2) in any institution or facility in which he was confined by direction of the Attorney General,

(3) in custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or

(4) in the custody of an officer or employee of the United States pursuant to a lawful arrest;

- Second, that the defendant's custody was as the result of a conviction [or by virtue of being arrested for a felony]; and
- Third, that the defendant escaped, or attempted to escape, from that custody.[332]

☞ **The court should consider giving a lesser included offense instruction if the custody is for extradition, immigration proceedings, because of an arrest for a misdemeanor, or committed before the defendant's 18th birthday. [18 U.S.C. §§ 751(a) and (b).]**

Escape means absenting oneself from custody without permission.[333]

Custody does not require actual physical restraint.[334]

The government must prove that the defendant knew his actions would result in his leaving physical confinement without permission.[335]

AFFIRMATIVE DEFENSE

The defendant is excused from committing a crime if the defendant committed the crime because of duress [or compulsion or coercion].

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[332] *See United States v. Evans*, 159 F.3d 908, 910 (4th Cir. 1998).

[333] *United States v. Bailey*, 444 U.S. 394, 407 (1980).

[334] *Evans*, 159 F.3d at 911.

[335] *Bailey*, 444 U.S. at 408. "Intent to avoid confinement" is not an element of § 751(a). *Id.*

To establish the defense of duress, the defendant must show, by a preponderance of the evidence,[336] the existence of all of the following conditions:

- First, that the defendant-prisoner was faced with a specific threat of death or substantial bodily injury in the immediate future;
- Second, that there was no time for a complaint to the authorities or there must exist a history of futile complaints which make any benefit from such complaints illusory;
- Third, that there was no evidence of force or violence used towards prison personnel or other innocent persons in the escape attempt; and
- Fourth, that the defendant-prisoner must intend to report immediately to the proper authorities when he attains a position of safety from the immediate threat.[337]

The defendant must prove that he made a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity lost its coercive force.[338]

Imminent means ready to take place, near at hand, likely to occur at any moment, impending.[339]

NOTE

A writ of habeas corpus *ad prosequendum* does not effect a transfer of custody for purposes of § 751. Thus, a federal prisoner loaned to a local jurisdiction pursuant to such a writ who escapes is subject to prosecution for violating § 751. *United States v. Evans*, 159 F.3d 908 (4th Cir. 1998).

See also United States v. Wilson, 262 F.3d 305 (4th Cir. 2001), where a federal prisoner at F.C.I. Butner was transferred to Nevada under the Interstate Agreement on Detainers Act to answer to state theft charges. He was released by Nevada authorities, and prosecuted in the Eastern District of North Carolina for escape. The Fourth Circuit affirmed that venue was in the Eastern District, because Wilson "remained in the legal custody of Butner when he was sent to Nevada on detainer. [Thus] he escaped from the constructive custody of federal authorities in the Eastern District of North Carolina." 262 F.3d at 321.

Duress does not controvert an element of the offense which the government must prove beyond a reasonable doubt. As the Supreme Court stated in *Dixon v. United States*, 548 U.S. 1, 7-8 (2006), "[l]ike the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to avoid liability because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *See also United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993).

In *United States v. Bailey*, 444 U.S. 394 (1980), the Court discussed the differences between duress and necessity.

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[336] "In the context of the firearms offenses at issue [18 U.S.C. §§ 922(a)(6) and (n)] — as will usually be the case, given the long-established common-law rule — we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence." *Dixon v. United States*, 548 U.S.1, 17 (2006).

[337] *United States v. Sarno*, 24 F.3d 618, 620 (4th Cir. 1994) (citing *United States v. Bifield*, 702 F.2d 342, 345-46 (2d Cir. 1983)).

[338] *Bailey*, 444 U.S. at 415.

[339] *United States v. Hua*, 207 F. App'x 311 (4th Cir. 2006) (citing *Buczek v. Continental Cas. Ins. Co.*, 378 F.3d 284, 291 (3d Cir. 2004)).

> Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity. *** Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail.

444 U.S. at 410.

Modern cases have blurred the distinction. An escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, escape was his only reasonable alternative. An escapee must first offer evidence justifying his continued absence from custody as well as his initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. *Id.* at 410-13.

If an affirmative defense consists of several elements [as duress does] and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense. *Id.* at 416.

Escape is a continuing offense, and an escapee can be held liable for failure to return to custody as well as for his initial departure. *Id.* at 413.

18 U.S.C. § 752 ASSISTING ESCAPE

Title 18, United States Code, Section 752 makes it a crime to assist a federal prisoner to escape from custody. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 752(a)

- First, that the defendant rescued or attempted to rescue, or instigated, aided or assisted the escape or attempt to escape;
- Second, of a person
  - (a) arrested upon a warrant or other process issued under any law of the United States; or
  - (b) committed to the custody of the Attorney General or to any institution or facility by his direction;
- Third, that the custody or confinement was by virtue of an arrest on a charge of a felony, or conviction of any offense; and
- Fourth, that the defendant acted willfully.[340]

[340] *See United States v. Sanders*, 862 F.2d 79, 83 (4th Cir. 1988) (§ 2233 prosecution; holding forcible rescue of seized property requires willfulness).

☞ **If the custody or confinement was for extradition, for exclusion or expulsion proceedings under the immigration laws, by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the court should consider giving a lesser included offense charge. [18 U.S.C. § 752(a).]**

§ 752(b)

- First, that the defendant rescued or attempted to rescue, or instigated, aided or assisted the escape or attempt to escape;
- Second, of a person
  - (a) in the custody of the Attorney General or his authorized representative;
  - (b) arrested upon a warrant or other process issued under any law of the United States; or
  - (c) from any institution or facility in which that person was confined by the direction of the Attorney General;
- Third, that the custody or confinement was by virtue of a lawful arrest for a violation of any law of the United States not punishable by death or life imprisonment and committed before the person's eighteenth birthday, and the Attorney General had not specifically directed the institution of criminal proceedings, or by virtue of a commitment as a juvenile delinquent [under 18 U.S.C. § 5034]; and
- Fourth, that the defendant acted willfully.[341]

Escape means absenting oneself from custody without permission.[342]

"Rescue" means taking a person in a manner that defies and frustrates the government's possession of that person, where the government has lawfully asserted dominion and lawfully maintained custody.[343]

The government need not prove that the defendant knew the person being rescued or assisted was in federal custody.[344]

18 U.S.C. § 793 TRANSMITTING DEFENSE INFORMATION

§ 793(a)

Title 18, United States Code, Section 793(a) makes it a crime to obtain defense information to injure the United States or to help a foreign nation. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant went upon, entered, flew over, or otherwise obtained information concerning any vessel, aircraft, work of defense, navy yard, naval

[341] *Id.*

[342] *United States v. Bailey*, 444 U.S. 394, 407 (1980).

[343] *Sanders*, 862 F.2d at 83.

[344] In *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993), the defendant was charged with attempting to rescue a federal prisoner. Appellant argued that the government was required to prove he was aware of the federal status of the intended target. The Fourth Circuit found that "[b]ecause knowledge is not explicitly mentioned, it is not an essential element of [this] offense and, therefore, is unnecessary for the government to prove." 983 F.2d at 1310.

station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war were being made, prepared, repaired, stored, or were the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force was being prepared or constructed or stored, information as to which prohibited place the President had determined would be prejudicial to the national defense;

- Second, that the defendant did so for the purpose of obtaining information respecting the national defense; and
- Third, that the defendant did so with intent or reason to believe that the information was to be used to the injury of the United States or to the advantage of any foreign nation.

§ 793(b)

Title 18, United States Code, Section 793(b) makes it a crime to make copies of defense information to injure the United States or to help a foreign nation. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant copied, took, made, or obtained, or attempted to copy, take, make, or obtain;
- Second, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense;
- Third, that the defendant did so for the purpose of obtaining information respecting the national defense; and
- Fourth, that the defendant did so with intent or reason to believe that the information was to be used to the injury of the United States or to the advantage of any foreign nation.

§ 793(c)

Title 18, United States Code, Section 793(c) makes it a crime to receive defense information to injure the United States or to help a foreign nation. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received or obtained, or agreed or attempted to receive or obtain from any person or any source whatever;

- Second, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, or anything connected with the national defense;
- Third, that the defendant did so for the purpose of obtaining information respecting the national defense with intent or reason to believe that the material would be used to the injury of the United States or to the advantage of any foreign nation; and
- Fourth, that the defendant knew, or had reason to believe, at the time the defendant received or obtained, or agreed or attempted to receive or obtain, the above material, that the material had been or would be obtained, taken, made, or disposed of by any person contrary to law, that is, with intent or reason to believe that the information was to be used to the injury of the United States or to the advantage of any foreign nation.

§ 793(d) [345]

Title 18, United States Code, Section 793(d) makes it a crime to deliver defense information to any person not entitled to receive it. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had lawful possession of, access to, control over, or was entrusted with;
- Second, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense;
- Third, that the defendant had reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation;
- Fourth, that the defendant communicated, delivered, or transmitted (or attempted or caused to be communicated, delivered, or transmitted) the above material to any person not entitled to receive it;

OR

- Fourth, that the defendant retained the above material and failed to deliver it on demand to the officer or employee of the United States entitled to receive it; and
- Fifth, that the defendant did so willfully.

§ 793(e)[346]

Title 18, United States Code, Section 793(e) makes it a crime to deliver defense information to any person not entitled to receive it. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant, without authorization, had possession of, access to, or control over;

[345] Defendant had access to national defense information (NDI) by virtue of his official position. *See United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).

[346] This provision applies where the defendant had no employment or contractual relationship with the government, and therefore did not exploit a relationship of trust to obtain the NDI, but instead generally obtained the NDI from one who did violate such a trust. *See id.*

- Second, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense;
- Third, that the defendant had reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation;
- Fourth, that the defendant communicated, delivered, or transmitted (or attempted or caused to be communicated, delivered, or transmitted) the above material to any person not entitled to receive it;

OR

- Fourth, that the defendant retained the above material and failed to deliver it to the officer or employee of the United States entitled to receive it; and
- Fifth, that the defendant did so willfully.[347]

§ 793(f)(1)

Title 18, United States Code, Section 793(f)(1) makes it a crime to allow defense information to be lost or stolen through gross negligence. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had been entrusted with or had lawful possession or control of;
- Second, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information relating to the national defense;
- Third, that the defendant permitted the above material to be removed from its proper place of custody or delivered to anyone in violation of the defendant's trust, or to be lost, stolen, abstracted, or destroyed; and
- Fourth, that the defendant did so through gross negligence.

§ 793(f)(2)

Title 18, United States Code, Section 793(f)(2) makes it a crime to fail to report the loss or destruction of defense information. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had been entrusted with or had lawful possession or control of;
- Second, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information relating to the national defense;
- Third, that the defendant knew that the above material had been illegally removed from its proper place of custody or delivered to anyone in violation of the defendant's trust, or had been lost, stolen, abstracted, or destroyed; and

[347] Unlike § 793(d), § 793(e) requires one with unlawful possession of national defense information to return it to the government even in the absence of a demand for that information. *Id.* at 613.

- Fourth, that the defendant failed to make prompt report of such loss, theft, abstraction or destruction to a superior officer.

"Information" applies to both tangible and intangible information.[348]

The term "national defense" includes all matters that are directly connected, or may reasonably be connected, with the defense of the United States against any of its enemies. It refers to the military and naval establishments and the related activities of national preparedness. To prove that the information or material in question related to national defense there are two things that the government must prove:

First, that the information was closely held by the government in that it had not been made public and was not available to the general public. Where the information has been made public by the United States government and is found in sources lawfully available to the general public, the information does not relate to the national defense. Similarly, where sources of information are lawfully available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.[349]

Second, that disclosure of the information would be potentially damaging to the United States or might be useful to an enemy of the United States.[350]

"Not entitled to receive" means not authorized to receive. The government can prove that a person was not authorized to receive national defense information if a validly promulgated executive branch regulation or order restricted the disclosure of information to a certain set of identifiable people, and that person was outside this set.[351]

An act is done "willfully" if it is done voluntarily and intentionally and with the specific intent to do something that the law forbids, that is to say, with a bad purpose either to disobey or to disregard the law.[352]

"Reason to believe" means that the defendant knew facts from which he could conclude or reasonably should have concluded that the information could be used for the prohibited purposes. It does not mean that the defendant acted negligently.[353]

The official nature of documents involved in the case are pertinent to whether their transmission would injure the United States or aid a foreign nation.[354]

Moreover, you, the jury, must find that the information transmitted was not available in the public domain.[355]

NOTE

[348] *Id.* at 616 (statute defines tangibles and describes *intangibles*: "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation") (quotation and citation omitted).

[349] *United States v. Squillacote*, 221 F.3d 542, 576 (4th Cir. 2000); *United States v. Dedeyan*, 584 F.2d 36, 39-40 (4th Cir. 1978).

[350] *See United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988).

[351] *See id.* at 1076; *United States v. Rosen*, 445 F. Supp. 2d 602, 643 (E.D. Va. 2006).

[352] *Morison*, 844 F.2d at 1071.

[353] *United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir.1980).

[354] *Id.* at 918 n.9.

[355] *See id.*

Section 793(g) contains a separate conspiracy provision.

See United States v. Rosen, 445 F. Supp. 2d 602, 623-26 (E.D. Va. 2006), where the court characterized the elements of § 793(d) and (e) as the following:

- First, that the defendant knew the information was national defense information, that is, the information was closely held by the government and that the disclosure of the information would be damaging to the national security;
- Second, that the defendant knew the persons to whom the disclosures would be made were not authorized to receive the information;
- Third, that the defendant knew the disclosures would be unlawful;
- Fourth, that the defendant had reason to believe the information disclosed could be used to the injury of the United States or to the aid of a foreign nation; and
- Fifth, that the defendant intended that such injury to the United States or aid to the foreign nation result from the disclosure.

Congress intended to create a hierarchy of offenses against national security, ranging from "classic spying" to merely losing classified materials through gross negligence. *United States v. McGuinness*, 35 M.J. 149, 153 (CMA, 1992).

The government must notify the defendant of the portions of the material that it expects to rely on to establish the national defense or classified information element of the offense. 18 U.S.C. App. 3 § 10.

18 U.S.C. § 794 DELIVERING DEFENSE INFORMATION TO AID FOREIGN GOVERNMENT

§ 794(a)

Title 18, United States Code, Section 794(a) makes it a crime to deliver defense information to help a foreign government. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant communicated, delivered, or transmitted, or attempted to communicate, deliver, or transmit;
- Second, to a foreign government, or any faction or party or military or naval force within a foreign country, or to any representative, officer, agent, employee, subject, or citizen of a foreign country;
- Third, a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense; and
- Fourth, that the defendant did so with intent or reason to believe that it was to be used to the injury of the United States or to the advantage of a foreign nation.[356]

[356] *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965). The government does not have to prove both "injury" and "advantage," or both "intent" and "reason to believe." The statute reads in the alternative. *Id*. at 153.

"Information" applies to both tangible and intangible information.[357]

The term "national defense" includes all matters that directly or may reasonably be connected with the defense of the United States against any of its enemies. It refers to the military and naval establishments and the related activities of national preparedness. To prove that the information or material in question related to national defense there are two things that the government must prove:

First, that the information was closely held by the government in that it had not been made public and was not available to the general public. Where the information has been made public by the United States government and is found in sources lawfully available to the general public, the information does not relate to the national defense. Similarly, where sources of information are lawfully available to the public and the Untied States government has made no effort to guard such information, the information itself does not relate to the national defense.[358]

Second, that disclosure of the information would be potentially damaging to the United States or might be useful to an enemy of the United States.[359]

"Reason to believe" means that the defendant knew facts from which he could conclude or reasonably should have concluded that the information could be used for the prohibited purposes. It does not mean that the defendant acted negligently.[360]

The official nature of documents involved in the case are pertinent to whether their transmission would injure the United States or aid a foreign nation.[361]

Moreover, you, the jury, must find that the information transmitted was not available in the public domain.[362]

DEATH PENALTY FACTORS

1. Did the offense result in the identification by a foreign power of an individual acting as an agent of the United States and the death of that individual?

2. Did the information communicated directly concern nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans, communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy?

NOTE

Section 794(c) contains a separate conspiracy provision.

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[357] *United States v. Rosen*, 445 F. Supp. 2d 602, 616 (E.D. Va. 2006) (statute defines all types of tangibles and describes *intangibles*: "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation") (quotation and citation omitted).

[358] *United States v. Squillacote*, 221 F.3d 542, 576 (4th Cir. 2000); *United States v. Dedeyan*, 584 F.2d 36, 39-40 (4th Cir. 1978).

[359] *See United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988). *See also United States v. Truong Dinh Hung*, 629 F.2d 908, 918 (4th Cir. 1980); *United States v. Drummond*, 354 F.2d 132, 151 (2d Cir. 1965).

[360] *Truong Dinh Hung*, 629 F.2d at 919.

[361] *Id.* at 918 n.9.

[362] *See id.*

United States v. Walker, 796 F.2d 43 (4th Cir. 1986).

This is a specific intent crime. *See United States v. Lee*, 589 F.2d 980, 986 (9th Cir. 1979).

The government must notify the defendant of the portions of the material that it expects to rely on to establish the national defense or classified information element of the offense. 18 U.S.C. App. 3 § 10.

18 U.S.C. § 844(d) TRANSPORTING OR RECEIVING AN EXPLOSIVE

Title 18, United States Code, Section 844(d) makes it a crime to transport or receive in interstate commerce any explosive with knowledge or intent that it would be used to kill, injure, or intimidate any individual or damage or destroy any building. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported or received, or attempted to transport or receive in interstate commerce any explosive; and
- Second, that the defendant did so with the knowledge or the intent that it would be used to kill, injure, or intimidate any individual, or unlawfully to damage or destroy any building, vehicle, or other real or personal property.[363]

AGGRAVATED PENALTIES

1. Did personal injury result to any person, including any public safety officer performing duties, as a direct or proximate result of defendant's conduct?

2. Did death result to any person, including any public safety officer performing duties, as a direct or proximate result of defendant's conduct?

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

18 U.S.C. § 844(h) USING FIRE TO COMMIT A FELONY

Title 18, United States Code, Section 844(h) makes it a crime to use fire or an explosive to commit a felony, or carry an explosive during the commission of a felony. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 844(h)(1)

- First, that the defendant used fire or an explosive; and
- Second, that the defendant did so to commit a felony which may be prosecuted in federal court.[364]

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[363] *See United States v. Yousef*, 327 F.3d 56, 158 (2d Cir. 2003).

[364] "The district court must either instruct the jury as to all the essential elements of the underlying crime or refer to its previous instruction of those elements with regard to the underlying crime." *United States v. Johnson*, 71 F.3d 139, 145 (4th Cir. 1995).

The use of fire or an explosive need not result in damage or destruction of property.[365]

§ 844(h)(2)

- First, that the defendant carried an explosive; and
- Second, that the defendant did so during the commission of a felony which may be prosecuted in federal court.[366]

The government does not have to prove a relationship between the explosive carried and the underlying felony.[367]

NOTE

United States v. Nguyen, 28 F.3d 477, 481 (5th Cir. 1994).

"The 'use' of fire covered by this provision is not limited to arson and encompasses, for example, the use of fire to intimidate or threaten another person." *United States v. Martin*, 523 F.3d 281, 288 (4th Cir. 2008).

The Fourth Circuit has recognized that § 844(h) is almost identical to § 924(c). *United States v. Barnette*, 211 F.3d 803, 813 (4th Cir. 2000). Therefore, venue lies where the underlying crime of violence occurred.

In *United States v. Sutton*, 961 F.2d 476, 479 (4th Cir. 1992), a § 924(c) prosecution, the defendant argued that the indictment was defective for not alleging scienter. The Fourth Circuit rejected the argument because the indictment tracked the statutory language of the section, language that does not include the element of scienter, and because the defendant failed to raise the objection prior to verdict, which warranted a more permissive review of the sufficiency of the charge.

The defendant need not be convicted of the predicate offense, as long as all of the elements of that offense are proved and found beyond a reasonable doubt. *United States v. Crump*, 120 F.3d 462, 466 (4th Cir. 1997) (§ 924(c) prosecution). This assumes proper instruction on the elements of the predicate offense.

For example, using fire to commit mail fraud requires the government to connect the arson to the mail fraud. The statutory elements of arson and mail fraud can be met in a single prosecution without the government connecting the two crimes. Therefore, using fire to commit mail fraud has an additional element which makes it a separate offense from the combination or arson and mail fraud. *United States v. Martin*, 523 F.3d 281, 293 (4th Cir. 2008) (citing *United States v. Patel*, 370 F.3d 108, 117 (1st Cir. 2004)).

There is no *mens rea* supplied for § 844(h). Therefore, it would appear that the *mens rea* from the underlying felony supplies the *mens rea*.

18 U.S.C. § 844(i) ARSON

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[365] *United States v. Martin*, 523 F.3d 281, 292 (4th Cir. 2008) ("[T]he 'malicious damage' element in the arson statute is not an element of proof in the using fire statute.").

[366] *Johnson*, 71 F.3d at 145 ("The district court must either instruct the jury as to all the essential elements of the underlying crime or refer to its previous instruction of those elements with regard to the underlying crime.")

[367] *United States v. Ressam*, 553 U.S. 272 (2008). The required link is temporal, not relational.

Title 18, United States Code, Section 844(i) makes it a crime to damage or destroy by fire or explosive any property used in interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant damaged or destroyed, or attempted to damage or destroy, any building, vehicle, or other real or personal property;
- Second, that the defendant did so by means of fire or an explosive;
- Third, that the building, vehicle, real or personal property was used in interstate or foreign commerce or in any activity affecting interstate commerce; and
- Fourth, that the defendant did so maliciously.[368]

"Maliciously" means acting intentionally or with willful disregard of the likelihood that damage or injury will result.[369]

"Used in an activity affecting commerce" means active employment for commercial purposes, and not merely passive, passing, or past connection to commerce.[370]

NOTE

In *United States v. Gullett*, 75 F.3d 941 (4th Cir. 1996), the explosion occurred in the parking lot of a machine shop, but damaged rental property nearby. The appellant stipulated that the rental property was used in an activity affecting interstate commerce, but argued that he did not maliciously intend to damage the rental property. The Fourth Circuit approved the following charge:

> A defendant may not be excused from responsibility for the harmful consequences of his actions simply because that harm was not precisely the harm in which he intended. That is, if the only difference between what a defendant intended to flow from his action and what actually occurred as a result of his action is that some property was damaged other than that which the defendant intended, the defendant, under the law, may still be held responsible to the same extent that he would have been responsible had the intended harm resulted, so long as the actual result is similar to and not remote from the intended result. Of course, the defendant must have acted maliciously and with specific intent, and the government must prove all of the essential elements of the offense beyond a reasonable doubt in order for you to find the defendant guilty.

75 F.3d at 948. The court stated this was "a correct statement of the law," as Gullett "may' be legally responsible for his actions even though some 'property was damaged other than that which the defendant intended.'" *Id.*

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[368] *See United States v. Gullett*, 75 F.3d 941, 948 (4th Cir. 1996).

[369] *Id.*

[370] *United States v. Cristobal*, 293 F.3d 134, 146 (4th Cir. 2002). *See also Jones v. United States*, 529 U.S. 848, 854 (2000) ("The proper inquiry ... 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.'"). *Jones* held that an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity. Receiving natural gas, being subject to a mortgage, or being insured are not enough.

Regarding the interstate character of the property, the first inquiry is into the function of the property itself, and second whether the function affects interstate commerce. *United States v. Cristobal*, 293 F.3d 134, 145 (4th Cir. 2002).

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

Title 18, United States Code, Section 871 makes it a crime to threaten the President of the United States.[371] For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant deposited or caused to be delivered by mail a communication;
- Second, that the communication contained a threat to kill, kidnap, or injure the President of the United States [or other official listed in the statute]; and
- Third, that the defendant did so knowingly and willfully.

OR

- First, that the defendant made a threat to kill, kidnap, or injure the President of the United States [or other official listed in the statute]; and
- Second, that the defendant did so knowingly and willfully.

The threat must be a true threat[372] [as opposed to political hyperbole] accompanied by a present intention either to injure the [President or other official listed in the statute], or incite others to injure him, or to restrict his movements. The jury may find evidence of this intention from how the threat was communicated, that is, whether the defendant making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the [President or other official listed in the statute].[373]

NOTE

A threatening statement must amount to a "true threat" rather than mere political hyperbole or idle chatter. *Watts v. United States*, 394 U.S. 705, 708 (1969). In *Watts*, the Supreme Court identified four factors in determining that the statement was not a true threat. The Court noted that the communication was: (1) made in jest; (2) to a public audience; (3) in political opposition to the President; and (4) conditioned upon an event the speaker himself vowed would never happen. *Id.* at 707-08.

Unlike other threat statutes, § 871 has obvious First Amendment implications. In *Watts*, the Supreme Court reversed a conviction where the "threat" was "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 705. The court stated that the government must prove a true threat. "We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term." *Id.* at 708. Moreover, the court was concerned about the "expressly conditional nature of the statement." *Id.*

[371] The statute extends to "the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect ...." 18 U.S.C. § 871.

[372] *United States v. Lockhart*, 382 F.3d 447, 450 (4th Cir. 2004).

[373] *United States v. Patillo*, 438 F.2d 13, 16 (4th Cir. 1971) (*en banc*).

"[W]here ... a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction ... only if made with a present intention to do injury to the President." *United States v. Patillo*, 438 F.2d 13, 15 (4th Cir. 1971) (*en banc*).

"When a threat is published with an intent to disrupt presidential activity, we think there is sufficient *mens rea* under the secondary sanction of the statute." *Id*. at 15-16.

"[A] defendant must knowingly deposit a threatening communication in the mail." *United States v. Maxton*, 940 F.2d 103, 106 (4th Cir. 1991).

Or the defendant must cause the communication to be mailed. In *Petschel v. United States*, 369 F.2d 769 (8th Cir. 1966), the inmate-defendant admitted writing and addressing the threatening letter, but testified he gave it to a fellow inmate to deliver personally. The fellow inmate testified that instead of personally delivering the letter, he mailed it. The Eighth Circuit affirmed the conviction, stating "[i]t is well-established that proof of mailing and causing mailing may be made by circumstantial evidence [and] '[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.'" 369 F.2d at 772.

See NOTE Sections for §§ 875 and 876.

18 U.S.C. § 875 INTERSTATE THREATENING COMMUNICATIONS [LAST UPDATED: 1/20/2016]

Title 18, United States Code, Section 875 makes it a crime to transmit in interstate commerce a threatening communication. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 875(a)

- First, that the defendant transmitted in interstate or foreign commerce a communication;
- Second, that the communication contained a demand or request for a ransom or reward for the release of any kidnapped person; and
- Third, that the defendant did so knowingly.

§ 875(b)

- First, that the defendant transmitted in interstate or foreign commerce a communication;
- Second, that the communication contained a threat to kidnap any person or a threat to injure a person; and
- Third, that the defendant did so with intent to extort any money or other thing of value from any person, firm, association, or corporation.

§ 875(c)

- First, that the defendant knowingly transmitted a communication in interstate or foreign commerce;
- Second, that the defendant subjectively intended the communication as a threat; and

- Third, that the content of the communication contained a "true threat" to kidnap or injure.[374]

To prove the second element of a § 875(c) conviction, the Government "must establish that the defendant transmitted the communication 'for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat,' or, perhaps, with reckless disregard for the likelihood that the communication will be viewed as a threat."[375]

To prove the third element of a § 875(c) conviction, "the [Government] must show that an ordinary, reasonable recipient who is familiar with the context in which the statement is made would interpret it as a serious expression of an intent to do harm."[376]

§ 875(d)

- First, that the defendant transmitted in interstate or foreign commerce a communication;
- Second, that the communication contained a threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime; and
- Third, that the defendant did so with intent to extort any money or other thing of value from any person, firm, association, or corporation.

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

While the government must prove that the communication was transmitted in interstate commerce, the government need not prove that the defendant knew the communication would be transmitted in interstate commerce.[377]

NOTE

See generally 30 A.L.R.Fed. 874 concerning mailing threatening communications.

A threatening statement must amount to a "true threat" rather than mere political hyperbole or idle chatter. *Watts v. United States*, 394 U.S. 705, 708 (1969). In *Watts*, the Supreme Court identified four factors in determining that the statement was not a true threat. The Court noted that the communication was: (1) made in jest; (2) to a public audience; (3) in political opposition to the President; and (4) conditioned upon an event the speaker himself vowed would never happen. *Id.* at 707-08.

"True threats have been characterized by the Supreme Court as statements made by a speaker who 'means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group.'" *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

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[374] *United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016); *United States v. Elonis*, 135 S. Ct. 2001 (2015).

[375] *White*, 810 F.3d at 221.

[376] *Id.*

[377] *See United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), *abrogated on other grounds* in *United States v. Elonis*, 135 S. Ct. 2001 (2015).

18 U.S.C. § 876 MAILING THREATENING COMMUNICATIONS [LAST UPDATED: 7/3/14]

Title 18, United States Code, Section 876 makes it a crime to mail a threatening communication. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 876(a)

- First, that the defendant deposited a communication in any post office or authorized depository for mail, to be sent or delivered by the Postal Service or caused to be delivered by mail;
- Second, that the communication contained a demand or request for ransom or reward for the release of a kidnapped person; and
- Third, that the defendant did so knowingly.

§ 876(b)

- First, that the defendant deposited a communication in any post office or authorized depository for mail, to be sent or delivered by the Postal Service or caused to be delivered by mail;
- Second, that the communication contained a threat to kidnap any person or a threat to injure the person to whom the letter was addressed or another person; and
- Third, that the defendant did so with intent to extort any money or other thing of value.[378]

§ 876(c)

- First, that the defendant deposited a communication in any post office or authorized depository for mail, to be sent or delivered by the Postal Service or caused to be delivered by mail;
- Second, that the communication contained a threat to kidnap any person or a threat to injure the person to whom the letter was addressed or another person; and
- Third, that the defendant did so knowingly.

AGGRAVATED PENALTY

1. Was the communication addressed to a United States judge, a Federal law enforcement officer, or a federal official [covered by 18 U.S.C. § 1114]?

§ 876(d)

- First, that the defendant deposited a communication in any post office or authorized depository for mail, to be sent or delivered by the Postal Service or caused to be delivered by mail;

[378] *See United States v. Bly*, 510 F.3d 453, 460-61 (4th Cir. 2007), in which the court referred to the second element as the "Threat Element" and the third element as the "Extortion Element." The Threat Element is limited to live persons, the Extortion Element is not, and may include corporate entities.

- Second, that the communication contained a threat to injure the property or reputation of the person to whom the letter was addressed or another person, or the reputation of a deceased person, or a threat to accuse the person to whom the letter was addressed or another person of a crime; and
- Third, that the defendant did so knowingly and with intent to extort any money or other thing of value.

AGGRAVATED PENALTY

1. Was the communication addressed to a United States judge, a Federal law enforcement officer, or a federal official [covered by 18 U.S.C. § 1114]?

A person causes the mails to be used when one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.[379]

The government must establish that the defendant intended to transmit the interstate communication and that the communication contained a "true threat."

A communication constitutes a "true threat" if an ordinary reasonable recipient who is familiar with the context of the communication would interpret the communication as a threat of injury.[380]

The government does not have to prove that the defendant subjectively intended for the recipient to understand the communication as a threat.[381]

The government need not prove intent or ability to carry out the threat.[382]

While the government must prove that the communication was transmitted in interstate commerce, the government need not prove that the defendant knew the communication would be transmitted in interstate commerce.[383]

NOTE

See generally 30 A.L.R. Fed. 874 concerning mailing threatening communications.

A threatening statement must amount to a "true threat" rather than mere political hyperbole or idle chatter. *Watts v. United States*, 394 U.S. 705, 708 (1969). In *Watts*, the Supreme Court identified four factors in determining that the statement was not a true threat. The Court noted that the communication was: (1) made in jest; (2) to a public audience; (3) in political opposition to the President; and (4) conditioned upon an event the speaker himself vowed would never happen. *Id.* at 707-08.

Section 876 does not require specific intent to threaten. The government is required to prove only a general intent to threaten. The only proof of specific intent required is that the defendant *knowingly deposited* a threatening letter in the mails, not that he intended or was able to carry out the threat. *United States v. Worrell*, 313 F.3d 867, 874 (4th Cir. 2002). *See also United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994); *United*

[379] *Petschel v. United States*, 369 F.2d 769, 772 (8th Cir. 1966).
[380] *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009).
[381] *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994).
[382] *Id*. at 1064 n.3.
[383] *Id*. at 1067.

States v. Maxton, 940 F.2d 103, 106 (4th Cir. 1991) ("[A] defendant must knowingly deposit a threatening communication in the mail.").

Or the defendant must cause the communication to be mailed. In *Petschel v. United States*, 369 F.2d 769 (8th Cir. 1966), the inmate-defendant admitted writing and addressing the threatening letter, but testified he gave it to a fellow inmate to deliver personally. The fellow inmate testified that instead of personally delivering the letter, he mailed it. The Eighth Circuit affirmed the conviction, stating "[i]t is well-established that proof of mailing and causing mailing may be made by circumstantial evidence [and] ... '[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.'" 369 F.2d at 772 (quoting *Pereira v. United States*, 347 U.S. 1, 8, 9 (1954)).

"If there is substantial evidence that tends to show beyond a reasonable doubt that an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury, the court should submit the case to the jury." *Maxton*, 940 F.2d at 106. "[T]he defendant must have a general intent to threaten the recipient at the time of the mailing. [M]ost of the time such intent can be gleaned from the very nature of the words used in the communication; extrinsic evidence to prove an intent to threaten should only be necessary when the threatening nature of the communication is ambiguous." *Id.*

"True threats have been characterized by the Supreme Court as statements made by a speaker who 'means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group.'" *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

"Whether a letter that is susceptible of more than one meaning — one of which is a threat of physical injury — constitutes a threat must be determined in the light of the context in which it was written." *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973).

See United States v. Barcley, 452 F.2d 930, 932-34 n.6 (8th Cir. 1971):

> Written words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published. * * * * [W]hen [language is] employed by members of our society in context with an extortion demand its necessary implications are precisely clear. * * * * In order to sustain its burden or proof under Section 876, the government must present evidence sufficiently strong to establish beyond a reasonable doubt that the communication in question conveys a threat of injury. Where a communication contains language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the government carries the burden of presenting evidence serving to remove that ambiguity. Absent such proof, the trial court must direct a verdict of acquittal. * * * * In prosecutions for extortion, proof of the effect of an allegedly threatening communication upon the victim may be crucial. [Citations omitted.] [I]t seems that proof of the effect of an allegedly threatening letter upon the addressee would throw light upon the intent of the sender within the context of the dialogue between the parties to the correspondence.

"The only proof of specific intent required to support a conviction ... is that the defendant knowingly deposits a threatening letter in the mails, not that he intended or was able to carry out the threat." *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978).

In *United States v. Rendelman*, 641 F.3d 36 (4th Cir. 2011), the court stated that the person or entity to whom the threatening communication is addressed is not an essential element of a § 876(c) offense. "The phrase 'addressed to any other person' simply means that an accused does not violate that provision by mailing a threatening communication addressed to himself." *Id*. at 44.

Rendelman had mailed letters to the United States Marshal in which he threatened the President. The Fourth Circuit determined that § 876(c) "deals with threatening communications and not just the envelopes containing them." *Id*. at 48. The court recognized that its ruling in this regard was at odds with the Ninth Circuit's ruling in *United States v. Havelock*, 619 F.3d 1091 (9th Cir. 2010), which concluded that a "communication" under § 876(c) is only "addressed to" the person named on the envelope. *Id.* at 48 n.13.

18 U.S.C. § 892 MAKING EXTORTIONATE EXTENSIONS OF CREDIT

Title 18, United States Code, Section 892 makes it a crime to make any extortionate extension of credit. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made, or conspired to make, an extortionate extension of credit; and
- Second, that the defendant did so knowingly.

To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred. [§ 891(1)]

"Creditor" refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit. [§ 891(2)]

"Debtor" refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the extension of credit. [§ 891(3)]

The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit. [§ 891(4)]

To collect an extension of credit means to induce in any way any person to make repayment of the extension of credit. [§ 891(5)]

An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person. [§ 891(6)]

An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person. [§ 891(7)]

"Understanding" means comprehending, rather than agreeing.[384]

_____NOTE_____

See United States v. Natale, 526 F.2d 1160 (2d Cir. 1975).

The act of making the agreement to make an extortionate extension of credit could be an extension of credit within the meaning of the statute, and thus, the crime is complete when the credit agreement is made. *United States v. Totaro*, 550 F.2d 957, 958 (4th Cir. 1977).

18 U.S.C. § 894 COLLECTION OF EXTENSIONS OF CREDIT BY EXTORTIONATE MEANS

Title 18, United States Code, Section 894 makes it a crime to use extortionate means to collect any extension of credit, or to punish any person for not repaying an extension of credit. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant participated in any way, or conspired to do so, in the use of any extortionate means;
- Second, to collect or attempt to collect any extension of credit, or to punish any person for not repaying an extension of credit; and
- Third, that the defendant did so knowingly.

To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred. [§ 891(1)]

"Creditor" refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit. [§ 891(2)]

"Debtor" refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the extension of credit. [§ 891(3)]

The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit. [§ 891(4)]

To collect an extension of credit means to induce in any way any person to make repayment of the extension of credit. [§ 891(5)]

An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or

[384] *United States v. Zizzo*, 120 F.3d 1338, 1353 (7th Cir. 1997).

other criminal means to cause harm to the person, reputation, or property of any person. [§ 891(6)]

An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person. [§ 891(7)]

NOTE

See United States v. Natale, 526 F.2d 1160 (2d Cir. 1975).

It is irrelevant that the debt is disputed or that it did not arise from a typical scenario involving a loan. *United States v. Brinkman*, 739 F.2d 977, 983 (4th Cir. 1984).

Section 894 does not make it a crime to use extortion to collect debts, but only to exact repayment of credit previously extended. Agreement to defer payment is conduct within the reach of § 894. *Id.* at 983 n.5.

Convictions under § 894 have been sustained although the victim denied that a defendant used extortionate means during attempts to collect extensions of credit. A jury may discount a loan-sharking victim's unwillingness to testify and may base its verdict on independent evidence of extortion. *United States v. Isaacs*, 947 F.2d 112, 114 (4th Cir. 1991).

18 U.S.C. § 911 REPRESENTING ONESELF TO BE A UNITED STATES CITIZEN [LAST UPDATED: 5/1/14]

Title 18, United States Code, Section 911 makes it a crime to falsely and willfully represent oneself to be a citizen of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant falsely represented himself to be a United States citizen; and
- Second, that the defendant did so willfully.[385]

The defendant must state or claim to be a citizen of the United States. To claim to be born in a state or territory of the United States is not sufficient to constitute a claim of United States citizenship.[386]

18 U.S.C. § 912 IMPERSONATING A FEDERAL EMPLOYEE

Title 18, United States Code, Section 912 makes it a crime to impersonate a federal employee. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant falsely assumed or pretended to have been a federal agent, officer, or employee; and

[385] *United States v. Castillo-Pena*, 675 F.3d 318, 320 (4th Cir. 2012). The Ninth Circuit requires an additional element necessary for a § 911 conviction; that is, that the misrepresentation be "conveyed to someone with good reason to inquire into [the defendant's] citizenship status." *United States v. Karaouni*, 379 F.3d 1139, 1142 & n.7 (9th Cir. 2004). The Fourth Circuit did not reach this issue based upon the facts of the case before it. *Castillo-Pena*, 675 F.3d at 320 n.1.

[386] Jury instruction cited approvingly in *Castillo-Pena*, 675 F.3d at 322.

- Second, that the defendant acted as such.[387]

OR

- Second, that the defendant demanded or obtained any money, paper, document, or other thing of value in such pretended character.[388]

Concerning acting "as such," the government need only show that the defendant asserted his pretended authority over another person in some fashion, not that he sought or obtained any material advantage.[389] This act must involve an assertion of claimed authority derived from the office which the defendant pretended to hold.[390]

NOTE

Intent to defraud is not an element of a charge under part (1) of § 912. *United States v. Guthrie*, 387 F.2d 569, 571 (4th Cir. 1967). In *Guthrie*, the Fourth Circuit respectfully declined to follow *Honea v. United States*, 344 F.2d 798, 803-04 (5th Cir. 1965), in which the Fifth Circuit held fatally defective an indictment under part (2) of § 912 that failed to allege "intent to defraud."

However, in *United States v. Parker*, 699 F.2d 177, 180 (4th Cir. 1983), the Fourth Circuit said that the general intent to make false utterances is inherently an element of this crime.

The statute defines two separate and distinct offenses: one, pretending to be an employee acting under the authority of the United States and acting as such, and two, in such pretended character, demanding or obtaining something of value. *United States v. Leggett*, 312 F.2d 566, 569 (4th Cir. 1962).

Although the government does not need to allege an "overt" act which describes how the defendant "acted as" a federal agent, *id.* at 569, the element of "acting as such" requires more than a mere representation of being a federal officer or employee. In *Parker*, the defendant satisfied this element by asserting false authority over another individual when he claimed that he was investigating a report that taxes were not being paid. *Parker*, 699 F.2d at 179.

The prohibition in § 912 is on impersonating the officer or employee that the person is not, regardless of what the person's actual position may be. *United States v. Roe*, 606 F.3d 180, 186 (4th Cir. 2010). Thus, an employee of one department of the government may be held guilty of falsely impersonating an officer of another department.

Acting "as such" should be understood to mean performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold. The defendant must do something more than simply assert his status as a federal employee. *United States v. Rosser*, 528 F.2d 652 (D.C. Cir. 1976).

The following are not defenses: nonexistence of the office which the impersonator pretends to hold, and the authority claimed by the impersonator is not actually possessed by any officer or employee of the United States. *Id.*

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[387] *United States v. Parker*, 699 F.2d 177, 178 (4th Cir. 1983).

[388] *Id.*

[389] *Id.* at 180.

[390] *United States v. Rosser*, 528 F.2d 652, 658 (D.C. Cir. 1976).

18 U.S.C. § 915 IMPERSONATING A FOREIGN DIPLOMAT

Title 18, United States Code, Section 915 makes it a crime to impersonate a foreign diplomat. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant falsely assumed or pretended to have been a diplomatic, consular or other official of a foreign government duly accredited as such to the United States; and
- Second, that the defendant acted as such.

OR

- Second, that the defendant demanded, obtained, or attempted to obtain any money, paper, document, or other things of value in such pretended character.[391]

_____NOTE_____

Since this statute is similar to 18 U.S.C. § 912, cases interpreting § 912 should be instructive.

In *United States v. Shaabu El*, 275 F. App'x 205 (4th Cir. 2008), the court stated that "to prove its case under [§ 915], the government must demonstrate that a defendant intended to falsely represent himself as a diplomat, and that he intended to gain a thing of value by doing so." The court cited *Cortez v. United States*, 328 F.2d 51, 52 (5th Cir. 1964), where the Fifth Circuit identified the elements of this statute as follows:

1. false assumption or pretension to be a consular official duly accredited as such to the United States;
2. in such pretended character the obtaining of a thing of value; and
3. an intent to defraud.

But see United States v. Gayle, 967 F.2d 483, 487 (11th Cir. 1992) (indictment under § 912 "need not allege an intent to defraud because such intent can be inferred from the alleged acts").

In *United States v. Parker*, 699 F.2d 177, 179 (4th Cir. 1983), the Fourth Circuit said that specific intent to defraud is not an element of § 912, but the general intent to make false utterances is inherently an element of that section. *See also United States v. Callaway*, 446 F.2d 753 (3d Cir. 1971).

18 U.S.C. § 921 DEFINITIONS [LAST UPDATED: 2/14/14]

"Interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).
[§ 921(a)(2)]

[391] *See Parker*, 699 F.2d 177.

"Firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. The term "firearm" does not include an antique firearm. [§ 921(a)(3)][392] The government does not have to prove that the firearm was operable.[393]

"Destructive device" means

(A) any explosive, incendiary, or poison gas–

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordinance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

[§ 921(a)(4)]

"Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger. [§ 921(a)(5)]

"Short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification or otherwise) if such a weapon as modified has an overall length of less than twenty-six inches. [§ 921 (a)(6)]

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[392] The antique firearms exception is an affirmative defense to a charge under § 922(g). *United States v. Royal*, 731 F.3d 333, 338 (4th Cir. 2013).

[393] *See United States v. Williams*, 445 F.3d 724, 732 n.3 (4th Cir. 2006); *United States v. Willis*, 992 F.2d 489, 491 n.2 (4th Cir. 1993).

"Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger. [§ 921(a)(7)]

"Short-barreled rifle" means a rifle having one or more barrels less than sixteen inches in length and any weapon made from rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches. [§ 921(a)(8)]

"Importer" means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term "licensed importer" means any such person licensed under the provisions of this chapter. [§ 921(a)(9)]

"Manufacturer" means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this chapter. [§ 921(a)(10)]

"Dealer" means any person engaged in the business of selling firearms at wholesale or retail, any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or any person who is a pawnbroker. [§ 921(a)(11)]

"Antique firearm" means[394] (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or (B) any replica of any firearm such firearm if such replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or uses rimfire or conventional centerfire fixed ammunition which is not longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof. [§ 921(a)(16)]

"Ammunition" means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm. [§ 921(a)(17)(A)]

"Armor piercing ammunition" means (i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or (ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile. [§ 921(a)(17)(B)]

"Engaged in the business" means, as applied to a dealer in firearms, a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or

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[394] The antique firearms exception is an affirmative defense to a prosecution under § 922(g). *Royal*, 731 F.3d at 338.

business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms. [§ 921(a)(21)(C)][380]

"Principal objective of livelihood and profit" means the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection; *Provided,* That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. [§ 921(a)(22)]

"Machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. [§ 921(a)(23), 26 U.S.C. § 5845(b)]

"Firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including a combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication. [§ 921(a)(24)]

"Semiautomatic rifle" means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, which requires a separate pull of the trigger to fire each cartridge. [§ 921(a)(28)]

"Handgun" means (A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled. [§ 921(a)(29)]

_____NOTE_____

To convict a defendant of a violation of § 922, the government does not need to prove that the defendant knew that possession of a particular type of firearm was prohibited. *See United States v. Jones*, 471 F.3d 535, 540 (4th Cir. 2006) (to establish knowing violation of § 922(g), Government 'must prove defendant's knowledge with respect to possession of the firearm but not with respect to other elements of the offense')." However, when a defendant's status "as a convicted felon turns, under state law pertaining to restoration of civil rights, on his possession of a particular type of firearm, the Government must prove, under appropriate instructions, not only that he possessed such a firearm, but that he did so knowing of its particular nature." *United States v. Tomlinson*, 67 F.3d 508, 513 (4th Cir. 1995).

The antique firearms exception is an affirmative defense to a prosecution under § 922(g). *United States v. Royal*, 731 F.3d 333, 338 (4th Cir. 2013).

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[380] See subsection for variations as to manufacturer/importer, and as to ammunition instead of firearm.

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

Title 18, United States Code, Section 922(a)(1) makes it a crime to engage in the business of importing, manufacturing or dealing in firearms or ammunition without a federal license. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did not have a federal firearms license;
- Second, that the defendant engaged in the business of importing, manufacturing or dealing in firearms or ammunition; and
- Third, that the defendant did so willfully.[381]

"Dealer" means any person engaged in the business of selling firearms at wholesale or retail, any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or any person who is a pawnbroker. [18 U.S.C. § 921(a)(11)]

"Engaged in the business" means devoting time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms. [18 U.S.C. § 921(a)(21)(C)]

"Principal objective of livelihood and profit" means the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection, except proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. [18 U.S.C. § 921(a)(23)]

The government need not prove that the defendant's primary business was dealing in firearms or that he necessarily made a profit from such dealing. The government must prove a willingness on the defendant's part to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist. The government may do this by showing that the defendant had guns on hand or was ready and able to procure guns and sell them to such persons as might accept them as customers.[382]

A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, although the person need not be aware of the specific law or rule that his conduct may be violating. In other words, the government is not required to prove that the defendant knew that a federal license was required.[383]

_____NOTE_____

[381] 18 U.S.C. § 924(a)(1)(D).

[382] *United States v. Masters*, 622 F.2d 83, 88 (4th Cir. 1980).

[383] *See Bryan v. United States*, 524 U.S. 184 (1998), which explicitly rejected the position that the government must prove that a defendant acted with knowledge of the § 922(a)(1)(A) licensing requirement.

"[To the extent an otherwise federally licensed firearms dealer conducts business at locations not specified on his or her license and in a manner not otherwise authorized by federal law, he or she exceeds the scope of his or her license and acts as an unlicensed dealer in violation of 18 U.S.C. § 922(a)(1)(A)." *United States v. Ogles*, 406 F.3d 586, 595 (9th Cir. 2005). *Contra United States v. Caldwell*, 49 F.3d 251 (6th Cir. 1995) (statute contains no language stripping dealer's license status for selling firearms away from licensed premises).

18 U.S.C. § 922(a)(6) FALSE STATEMENTS TO A FIREARMS DEALER

Title 18, United States Code, Section 922(a)(6) makes it a crime to make a false statement in connection with the acquisition of a firearm or ammunition. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant acquired or attempted to acquire a firearm [or ammunition] from a federally-licensed firearms dealer;
- Second, that in doing so, the defendant made a false or fictitious oral or written statement or furnished or exhibited any false, fictitious, or misrepresented identification intended or likely to deceive the firearms dealer;
- Third, that the false statement or identification was material to the lawfulness of the sale of the firearm [or ammunition]; and
- Fourth, that the defendant did so knowingly.[384]

A false statement or identification is likely to deceive if the nature of the statement or identification, considering all of the surrounding circumstances at the time it is made, is such that a reasonable person of ordinary prudence would have been actually deceived or misled.[385]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the dealer. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the dealer.[386]

The government does not need to prove that the defendant knew the dealer from whom he purchased the firearm was federally licensed.[387]

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[384] 18 U.S.C. § 924(a)(2). *See also United States v. Rahman*, 83 F.3d 89, 92 (4th Cir.1996).

[385] This instruction was approved in *Rahman*, 83 F.3d at 92. Appellant argued that the false statement must be likely to deceive the specific dealer, not a reasonable dealer. The Fourth Circuit held that the instruction "properly directed the jury to apply an objective, or reasonable person, standard in evaluating the likelihood that a statement would deceive anyone." *Id*. at 92-93. The government may carry its burden with respect to the second element in either of two ways. It may prove that a defendant's statement was intended to deceive the dealer or that the statement was likely to deceive the dealer. "Intended to deceive" focuses on the subjective mental state of the defendant. Under the "likely to deceive" prong, the intent of the defendant to deceive the dealer is irrelevant. *Id.* at 93 n.*

[386] *See United States v. Gaudin*, 515 U.S. 506 (1995).

[387] *United States v. Green*, 544 F.2d 746, 747 (4th Cir. 1976) ("[K]nowledge that the dealer has a federal license is not an essential element of the crime. The fact that the dealer was licensed serves only to establish a basis for federal jurisdiction.")

18 U.S.C. § 922(b) SELLING OR DELIVERING FIREARM(S) OR AMMUNITION TO PROHIBITED PERSONS

Title 18, United States Code, Section 922(b) makes it a crime to sell or deliver a firearm or ammunition to a prohibited person. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 922(b)(1)

- First, that the defendant was a federally licensed importer, manufacturer, dealer, or collector;
- Second, that the defendant sold or delivered a firearm or ammunition to any person the defendant knew or had reason to know was less than 18 years of age [or less than 21, if the firearm is other than a shotgun or rifle, or ammunition for a shotgun or rifle]; and
- Third, that the defendant did so willfully.[388]

§ 922(b)(2)

- First, that the defendant was a federally licensed importer, manufacturer, dealer, or collector;
- Second, that the defendant sold or delivered a firearm to any person in a state where the purchase or possession by that person of that firearm was in violation of state law [or any published ordinance applicable at the place of sale, delivery, etc]; and
- Third, that the defendant did so willfully.[389]

§ 922(b)(3)[390]

- First, that the defendant was a federally licensed importer, manufacturer, dealer, or collector;
- Second, that the defendant sold or delivered a firearm or ammunition to any person the defendant knew or had reason to believe did not reside in [South Carolina–the state in which the defendant's place of business was located];
- Third, that the person to whom the firearm or ammunition was transferred was not a licensed dealer, importer, manufacturer, or collector; and
- Fourth, that the defendant did so willfully.[391]

§ 922(b)(4)

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[388] 18 U.S.C. § 924(a)(1)(D).

[389] *Id.*

[390] In *United States v. Douglas*, 974 F.2d 1046, 1049 (9th Cir. 1992), the Ninth Circuit interpreted § 922(b)(3) to mean that a dealer licensed in one state, who attends a gun show in another state, may display and possess guns, negotiate price, and receive money for guns as long as the transfer of the firearm is through a licensee of the state in which the gun show is located. That licensee must fill out the appropriate forms.

[391] 18 U.S.C. § 924(a)(1)(D). *See United States v. Kelly*, 276 F. App'x 261, 266 (4th Cir. 2007) ("The willfulness (and knowledge) requirement does not apply to the 'dealer to dealer' provision in section 922(b), which is an exception to the statute's application and not an element of the offense."; Government is not required to prove that defendant knew that transferee not federally licensed firearms dealer).

- First, that the defendant was a federally licensed importer, manufacturer, dealer, or collector;
- Second, that the defendant sold or delivered a destructive device, machine gun, short-barreled shotgun, or short-barreled rifle to any person except as specifically authorized; and
- Third, that the defendant did so willfully.[392]

§ 922(b)(5)

- First, that the defendant was a federally licensed importer, manufacturer, dealer, or collector;
- Second, that the defendant sold or delivered a firearm or armor-piercing ammunition without noting in his records, required to be kept, the name, age, and place of residence of the person [or identity and principal and local places of business if a business]; and
- Third, that the defendant did so willfully.[393]

18 U.S.C. § 922(d) SELLING OR DISPOSING OF FIREARM(S) OR AMMUNITION TO PROHIBITED PERSONS

Title 18, United States Code, Section 922(d) makes it a crime to sell or dispose of a firearm or ammunition to prohibited persons. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant sold or otherwise disposed of a firearm or ammunition;
- Second, that the defendant acted knowingly;
- Third, that the person to whom the firearm or ammunition was transferred:
  1. was under indictment for, or had been convicted in some court of, a crime punishable by imprisonment for a term exceeding one year;[394]
  2. was a fugitive from justice;
  3. was an unlawful user of, or addicted to any controlled substance;
  4. had been adjudicated as a mental defective or had been committed to a mental institution;
  5. was an alien illegally in the United States or admitted under a non-immigrant visa [see exceptions at § 922(y)(2)];
  6. had been discharged from the Armed Forces under dishonorable conditions;

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[392] 18 U.S.C. § 924(a)(1)(D).

[393] *Id.*

[394] "Crime punishable by imprisonment for a term exceeding one year" has exclusions in § 921(a)(20), and the court may have to address this element if it is an issue. The determination of what constitutes a disabling conviction, including the restoration of civil rights, is governed by the law of the convicting jurisdiction. *Beecham v. United States*, 511 U.S. 368, 371, 372 (1994).

Foreign convictions are not included. *Small v. United States*, 544 U.S. 385 (2005). Convictions from United States military courts are included. *United States v. Grant*, 753 F.3d 480 (4th Cir. 2014).

7. having been a citizen of the United States, had renounced his citizenship;
8. was subject to a court order that restrained that person from harassing, stalking, or threatening an intimate partner or child of such intimate partner or such person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; provided, the court order was issued after a hearing of which the person received actual notice and had an opportunity to participate and the order included a finding that the person represented a credible threat to the physical safety of such partner or child or by its terms explicitly prohibited the use, attempted use, or threatened use of physical force against such partner or child that would be reasonably expected to cause bodily injury; or
9. had been convicted of a misdemeanor crime of domestic violence;[395] and

- Fourth, that at the time of the transfer of the firearm or ammunition, the defendant either knew or had reasonable cause to believe that the recipient of the firearm or ammunition [fit the category identified above.][396]

_____NOTE_____

In *United States v. Parker*, 262 F.3d 415 (4th Cir. 2001), the government introduced a certificate of non-pardon from the state of Maryland and a certificate of non-restoration of civil rights from the Department of the Treasury. One of the issues was the status of the felony conviction on the date of the offense. The Fourth Circuit reiterated the general principle "that a condition once shown to exist is presumed to continue," 262 F.3d at 423, and discussed two previous cases: *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991), and *United States v. Thomas*, 52 F.3d 82 (4th Cir. 1995). These two cases arose from prior North Carolina convictions. North Carolina law restores to a convicted felon limited rights to possess firearms five years after his unconditional release from state supervision. In *Essick*, because the North Carolina felony occurred more than five years before the § 922(g)(1) offense, the government had to prove the continuing vitality of the state felony. In *Thomas*, however, the North Carolina felony had occurred less than one year before the § 922(g)(1) offense, and therefore the government did not have the burden of proving that fact independently. Thus, it appears that the fact that the defendant's civil rights have been restored is an affirmative defense, and the opposite fact is not an element of a § 922 offense. *See Parker*, at 422-23.

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[395] The misdemeanor crime of domestic violence must have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim.

In addition, the person must have been represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case, and, if entitled to a jury trial, either tried by a jury or knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise. The determination of what constitutes a disabling conviction, including the restoration of civil rights, is governed by the law of the convicting jurisdiction. *Beecham*, 511 U.S. at 371, 372.

[396] *United States v. Parker*, 262 F.3d 415, 423 (4th Cir. 2001).

18 U.S.C. § 922(e) DELIVERING A FIREARM TO A COMMON CARRIER

Title 18, United States Code, Section 922(e) makes it a crime to deliver a firearm to a common carrier without written notice. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant delivered or caused to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce a package or container in which there was a firearm or ammunition;
- Second, that the package or container was to be delivered to a person other than a licensed importer, manufacturer, dealer, or collector; and
- Third, that the defendant did so without giving written notice to the carrier that a firearm or ammunition was being transported or shipped.

NOTE

Failure to give notice to the carrier requires only general intent. *United States v. Wilson*, 721 F.2d 967, 973 (4th Cir. 1983).

18 U.S.C. § 922(g)(1) POSSESSION OF FIREARM BY CONVICTED FELON [LAST UPDATED: 12/10/14]

Title 18, United States Code, Section 922(g)(1) makes it a crime for a person who has been convicted of certain crimes to possess a firearm or ammunition. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had been convicted in some court of a crime punishable by imprisonment for a term exceeding one year;[397]

[397] "Crime punishable by imprisonment for a term exceeding one year" has exclusions in § 921(a)(20), and the court may have to address this element if it is an issue. The determination of what constitutes a disabling conviction, including the restoration of civil rights, is governed by the law of the convicting jurisdiction. *Beecham*, 511 U.S. at 371, 372.

Foreign convictions are not included. *Small*, 544 U.S. 385. Convictions from United States military courts are included. *Grant*, 753 F.3d 480.

The nature of the conviction is not a necessary element. *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979). Therefore, when the defendant stipulates to the prior conviction, there is no need to describe the nature of the conviction. However, the defendant cannot keep out any reference to a prior conviction by stipulating, because a prior conviction is an element of the offense which must be proved. *United States v. Milton*, 52 F.3d 78, 81 (4th Cir. 1995).

A stipulation does not render evidence tending to prove the underlying stipulation irrelevant under Rule of Evidence 401 or 402. *Old Chief v. United States*, 519 U.S. 172, 178-79 (1997); *United States v. Dunford*, 148 F.3d 385, 394-95 (4th Cir. 1998). Exclusion must rest on Rule of Evidence 403. In *Old Chief*, the Supreme Court held that Rule 403 prohibited the government from introducing the name or nature of a prior felony conviction in a § 922(g)(1) case when such information would tend to "lure a juror into a sequence of bad character reasoning" regarding a defendant who had stipulated to his felon status. *Old Chief*, 519 U.S. at 185.

The test is the maximum sentence that a particular defendant could have received, not the sentence that any hypothetical defendant charged with the crime could have received. *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011)

- Second, that the defendant possessed [or shipped or transported in interstate commerce, or received] a firearm or ammunition;
- Third, that the firearm or ammunition had traveled in interstate or foreign commerce at some point during its existence; and
- Fourth, that the defendant did so knowingly; that is, the defendant must know that the item was a firearm [or ammunition] and the possession must be voluntary and intentional.[398]

The government need not prove that the defendant knew of his status as a result of the prior conviction or that the firearm or ammunition had been shipped or transported in interstate commerce.[399]

The government may establish the interstate commerce requirement by showing that the firearm or ammunition at any time had traveled across a state boundary line, or was manufactured outside the state where the defendant possessed it.[400]

The government must prove that the defendant voluntarily and intentionally possessed the firearm [or ammunition].[401]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

(noting *Carachuri-Rosendo*'s overruling of *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005)).

"[T]he firearms prosecution does not open the predicate conviction to a new form of collateral attack." In other words, the defendant cannot relitigate the validity of the underlying conviction. *Lewis v. United States*, 445 U.S. 55, 67 (1980) (prosecution under predecessor statute, 18 U.S.C. App. § 1202).

[398] *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005); *United States v. Langley*, 62 F.3d 602, 605-06 (4th Cir. 1995) (*en banc*). The court's three elements have been subdivided into four, by putting "knowingly" into a separate element.

[399] *Langley*, 62 F.3d at 605-06. To convict a defendant of a violation of § 922, the Government does not need to prove that the defendant knew that possession of a particular type of firearm was prohibited. *See United States v. Jones*, 471 F.3d 535, 540 (4th Cir. 2006) (to establish knowing violation of § 922(g), Government 'must prove defendant's knowledge with respect to possession of the firearm but not with respect to other elements of the offense')." However, when "a defendant's status as a convicted felon turns, under state law pertaining to restoration of civil rights, on his possession of a particular type of firearm, the Government must prove, under appropriate instructions, not only that he possessed such a firearm, but that he did so knowing of its particular nature." *United States v. Tomlinson*, 67 F.3d 508, 513 (4th Cir. 1995).

[400] *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001); *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000).

[401] *Scott*, 424 F.3d at 435.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[402]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[403]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[404]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[405]

☞ **[When the defendant is charged with possessing more than one firearm, the jury should be instructed that they must agree unanimously on the specific firearm possessed:**

You must also agree, all of you, that the defendant possessed the same firearm. You cannot convict, for example, if six of you believe he possessed one of the guns, and six of you believe he possessed another of the guns. You have to unanimously agree that he possessed the firearms charged or ... one of the firearms charged before he can be convicted.][406]

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[402] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *Id.* 424 F.3d at 435-36. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[403] *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005); *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[404] *Herder*, 594 F.3d at 358.

[405] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[406] *United States v. Saunders*, 501 F.3d 384, 393-94 (4th Cir. 2007). The Fourth Circuit "assume[d], without deciding, that a conviction under § 922(g)(1) requires the jury to agree unanimously on the specific gun possessed by the defendant." 501 F.3d at 393. The court cited, but ultimately disagreed with, cases from the Sixth, First, and Fifth Circuits that concluded a conviction under § 922(g) does not require juror unanimity on the specific gun possessed. An acceptable alternative is to submit a special verdict form. However, one was not needed in *Saunders*, in light of the specific unanimity instruction.

JUSTIFICATION DEFENSE

In certain circumstances, a prohibited person is justified in possessing a firearm. The defendant has the burden of proving the following by a preponderance of the evidence:[407]

- First, that the defendant or someone else was under an unlawful and present threat of death or serious bodily injury;[408]
- Second, that the defendant did not recklessly place himself in the situation where he would be forced to engage in criminal conduct;
- Third, that the defendant had no reasonable legal alternative that would avoid both the criminal conduct and the threatened harm; and
- Fourth, that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.[409]

The defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.[410]

In addition, the defendant must produce evidence that he took reasonable steps to dispossess himself of the firearm, and/or ammunition, once the threat was over.[411]

_____NOTE_____

In *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (*en banc*), the Fourth Circuit held that the government need not prove that the defendant knew of his felony status or interstate nexus of the firearm. "[A] person who pleads guilty to, or is convicted by a jury of, a felony cannot, thereafter, reasonably expect to be free from regulation when possessing a firearm, notwithstanding his or her unawareness of his or her felony status or the firearm's interstate nexus." 62 F.3d at 607.

Intent is an element of § 922(g)(1). In *United States v. Scott*, 424 F.3d 431 (4th Cir. 2005), a constructive possession prosecution, the court emphasized that the jury must be instructed that the defendant intentionally exercised dominion and control over the firearm, or had the power and intention to exercise dominion and control over the firearm.

Constructive possession of the firearm must also be voluntary. Therefore, in defining constructive possession, the best practice is to reemphasize the *mens rea* element of *knowingly* exercising dominion and control.

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[407] *United States v. Mooney*, 497 F.3d 397,409 n.2 (4th Cir. 2007). The burden of proving affirmative defenses, such as justification, rests on the defendant. *See Dixon v. United States*, 548 U.S. 1, 17 (2006).

[408] Generalized fears do not support the defense of justification. *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

[409] *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir. 1995); *See also Crittendon*, 883 F.2d at 330.

[410] *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007) (citing *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982)).

[411] *United States v. Ricks*, 573 F.3d 198, 203 (4th Cir. 2009).

In *United States v. Parker*, 262 F.3d 415 (4th Cir. 2001), the government introduced a certificate of non-pardon from the state of Maryland and a certificate of non-restoration of civil rights from the Department of the Treasury. One of the issues was the status of the felony conviction on the date of the offense. The Fourth Circuit reiterated the general principle "that a condition once shown to exist is presumed to continue," 262 F.3d at 423, and discussed two previous cases: *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991), and *United States v. Thomas*, 52 F.3d 82 (4th Cir. 1995). These two cases arose from prior North Carolina convictions. North Carolina law restores to a convicted felon limited rights to possess firearms five years after his unconditional release from state supervision. In *Essick*, because the North Carolina felony occurred more than five years before the § 922(g)(1) offense, the government had to prove the continuing vitality of the state felony. In *Thomas*, however, the North Carolina felony had occurred less than one year before the § 922(g)(1) offense, and therefore the government did not have the burden of proving that fact independently. Thus, it appears that the fact that the defendant's civil rights have been restored is an affirmative defense, and the opposite fact is not an element of a § 922 offense. *See Parker*, at 422-23.

Whether the defendant is a member of one of the disqualifying classes, or all, a single act of possession constitutes a single offense. *United States v. Dunford*, 148 F.3d 385, 388 (4th Cir. 1998). In addition, possession of multiple firearms and ammunition seized at the same time from the defendant's house supported only one conviction of § 922(g), unless there is evidence that the weapons were stored in different places or acquired at different times. *Id.* at 390.

In *United States v. Adams*, 194 F. App'x 115 (4th Cir. 2006), the defendant refused to stipulate that he was a convicted felon. A special verdict form was provided to the jury to determine whether Adams had been convicted of each of his seven prior convictions. It was not unfairly prejudicial to submit this question to the jury.

In *United States v. Xavier*, 2 F.3d 1281 (3d Cir. 1993), the Third Circuit held that "there can be no criminal liability for aiding and abetting a violation of § 922(g)(1) without knowledge or having cause to believe the possessor's status as a felon." 2 F.3d at 1286.

"INNOCENT POSSESSION" DEFENSE

The Fourth Circuit has joined the Seventh and Tenth Circuits in rejecting the innocent and transitory possession defense. *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005).

VOLUNTARY INTOXICATION DEFENSE

Section 922(g)(1) is a general intent crime. Therefore, voluntary intoxication is not a defense. *United States v. Fuller*, 436 F. App'x 167 (4th Cir. 2011).

18 U.S.C. § 922(g)(2)-(7) POSSESSION OF FIREARM BY PROHIBITED PERSONS [LAST UPDATED: 4/7/14]

Title 18, United States Code, Section 922(g) makes it a crime for certain individuals to transport firearms or ammunition in interstate commerce, possess firearms or ammunition in or affecting commerce, or receive firearms or ammunition which have been shipped in interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant

  [was a fugitive from justice]

  [was an unlawful user of, or addicted to any controlled substance]

  [had been adjudicated as a mental defective or had been committed[412] to a mental institution]

  [was an alien illegally or unlawfully in the United States]

  [had been discharged from the Armed Forces under dishonorable conditions]

  [had renounced his citizenship in the United States];
- Second, that the defendant possessed [or shipped or transported in interstate commerce, or received] a firearm or ammunition;
- Third, that the firearm or ammunition had traveled in interstate or foreign commerce at some point during its existence; and
- Fourth, that the defendant did so knowingly; that is, the defendant must know that the item was a firearm [or ammunition] and the possession must be voluntary and intentional,[413] and the defendant must know of his status or acted in deliberate disregard for the truth with a conscious purpose to avoid learning the truth.[414]

☞ **for § 922(g)(2)**

"Fugitive from justice" means any person who has fled from any state to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding. [§ 921(a)(15)]

This term includes any person who, knowing that criminal charges are pending, purposely leaves the jurisdiction where the charges are pending and refuses to answer those charges by appearing before a court in that jurisdiction.[415]

☞ **for § 922(g)(3)**

"Unlawful user of any controlled substance" is not defined in the statute. The government must prove that the defendant was an unlawful user or addict at the time the defendant possessed the firearm or ammunition in question.[416]

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[412] In *United States v. Midgett*, 198 F.3d 143, 146 (4th Cir. 1999), a judicial order was issued committing the defendant to a mental institution and he was actually confined there.

[413] *United States v. Langley*, 62 F.3d 602, 605-06 (4th Cir. 1995) (*en banc*); *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[414] *United States v. Hester*, 880 F.2d 799, 803 n.4 (4th Cir. 1989).

[415] *United States v. Spillane*, 913 F.2d 1079, 1082 (4th Cir. 1990). "The fact that he may not have been aware that his failure to appear led to the issuance of a warrant for his arrest is not an impediment to prosecution under § 922, as the appellant's reckless disregard for the truth satisfies the scienter requirement of this statute." *Id*. at 1082. The *Spillane* court used the term "reckless disregard" and cited *Hester*, 880 F.2d 799, which used the term "deliberate disregard." *See United States v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993) (collecting cases).

[416] *See United States v. Carter*, 669 F.3d 411, 419 (4th Cir. 2012) (Section 922(g)(3) "only applies to persons who are *currently* unlawful users or addicts."). In *United States v. Jackson*, 280 F.3d 403 (4th Cir. 2002), the Fourth Circuit rejected the defendant's argument that one must be in

(continued...)

☞ **for § 922(g)(4)**

"Committed" means to be placed officially in confinement or custody.[417]

The government need not prove that the defendant knew that the firearm or ammunition had been shipped or transported in interstate commerce.[418]

"Commerce" is defined as travel between one state, territory or possession of the United States and another state, territory, or possession of the United States, including the District of Columbia. The government may establish the interstate commerce requirement by showing that a firearm was manufactured outside the state where the defendant possessed it.[419]

The government must prove that the defendant possessed the firearm [or ammunition].[420]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[421]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[422]

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[416] (...continued)
possession of a controlled substance at the same time one possesses a firearm. Section 922(g)(3) does not forbid possession of a firearm while unlawfully using a controlled substance. It forbids unlawful users from possessing firearms. In *Jackson*, the district court instructed the jury that the government must establish a pattern of use and recency of use. The Fourth Circuit held the district court "applied the statute reasonably." *Id.* at 406.

[417] *See United States v. Midgett*, 198 F.3d 143, 146 (4th Cir. 1999).

[418] In *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (*en banc*).

[419] *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001).

[420] *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[421] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *Id.* 424 F.3d at 435-36. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[422] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247
(continued...)

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[423]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[424]

> ☞ **[When the defendant is charged with possessing more than one firearm, the jury should be instructed that they must agree unanimously on the specific firearm possessed:**
>
> You must also agree, all of you, that the defendant possessed the same firearm. You cannot convict, for example, if six of you believe he possessed one of the guns, and six of you believe he possessed another of the guns. You have to unanimously agree that he possessed the firearms charged or ... one of the firearms charged before he can be convicted.][425]

JUSTIFICATION DEFENSE

In certain circumstances, a prohibited person is justified in possessing a firearm. The defendant has the burden of proving the following by a preponderance of the evidence:[426]

- First, that he or someone else was under an unlawful and present threat of death or serious bodily injury;[427]
- Second, that he did not recklessly place himself in the situation where he would be forced to engage in criminal conduct;
- Third, that he had no reasonable legal alternative that would avoid both the criminal conduct and the threatened death or injury; and

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[422] (...continued)
F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[423] *Herder*, 594 F.3d at 358.

[424] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[425] *See United States v. Saunders*, 501 F.3d 384, 393-94 (4th Cir. 2007). The Fourth Circuit "assume[d], without deciding, that a conviction under § 922(g)(1) requires the jury to agree unanimously on the specific gun possessed by the defendant." *Id.* 393. The court did cite cases from the Sixth, First, and Fifth Circuits that concluded that a conviction under § 922(g) does not require juror unanimity on the specific gun possessed. An acceptable alternative is to submit a special verdict form. However, one was not needed in *Saunders*, in light of the specific unanimity instruction.

[426] *United States v. Mooney*, 497 F.3d 397,409 n.2 (4th Cir. 2007). The burden of proving affirmative defenses, such as justification, rests on the defendant.

[427] Generalized fears do not support the defense of justification. *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

- Fourth, that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.[428]

The defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.[429]

In addition, the defendant must produce evidence that he took reasonable steps to dispossess himself of the firearm, and/or ammunition, once the threat was over.[430]

_____NOTE_____

In *United States v. Scott*, 424 F.3d 431 (4th Cir. 2005), a constructive possession prosecution, the court emphasized that the jury must be instructed that the defendant intentionally exercised dominion and control over the firearm, or had the power and intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Therefore, in defining constructive possession, the best practice is to reemphasize the *mens rea* element of *knowingly* exercising dominion and control.

Whether the defendant is a member of one of the disqualifying classes, or all, a single act of possession constitutes a single offense. *United States v. Dunford*, 148 F.3d 385, 388 (4th Cir. 1998). In addition, possession of multiple firearms and ammunition seized at the same time from the defendant's house supported only one conviction of § 922(g), unless there is evidence that the weapons were stored in different places or acquired at different times. *Id.* at 390.

"INNOCENT POSSESSION" DEFENSE

The Fourth Circuit has joined the Seventh and Tenth Circuits in rejecting the innocent and transitory possession defense. *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005).

18 U.S.C. § 922(g)(8) POSSESSION OF FIREARM BY A PERSON SUBJECT TO A DOMESTIC VIOLENCE PROTECTION ORDER

[LAST UPDATED: 8/13/14]

Title 18, United States Code, Section 922(g)(8) makes it a crime for a person subject to a domestic violence protection order to transport firearms or ammunition in interstate commerce, possess firearms or ammunition in or affecting commerce, or receive firearms or ammunition which have been shipped in interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was subject to a protection order that [must prove all three]:

[428] *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir. 1995). *See also Crittendon*, 883 F.2d at 330.

[429] *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007) (citing *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982)).

[430] *United States v. Ricks*, 573 F.3d 198, 203 (4th Cir. 2009).

1. was issued after a hearing of which the defendant received actual notice and had an opportunity to participate;
2. restrains the defendant from harassing, stalking, or threatening his/her intimate partner or child of such intimate partner or the defendant, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
3. includes a finding that the defendant represents a credible threat to the physical safety of such partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such partner or child that would be reasonably expected to cause bodily injury.

- Second, that the defendant possessed [or shipped or transported in interstate commerce, or received] a firearm or ammunition;
- Third, that the firearm or ammunition had traveled in interstate or foreign commerce at some point during its existence; and
- Fourth, that the defendant did so knowingly; that is, the defendant must know that the item was a firearm [or ammunition] and the possession must be voluntary and intentional,[431] and the defendant must know of his status or acted in deliberate disregard for the truth with a conscious purpose to avoid learning the truth.[432]

The government need not prove that the defendant knew that the firearm or ammunition had been shipped or transported in interstate commerce.[433]

Commerce is defined as travel between one state, territory or possession of the United States and another state, territory, or possession of the United States, including the District of Columbia. The government may establish the interstate commerce requirement by showing that a firearm or ammunition was manufactured outside the state where the defendant possessed it.[434]

The government must prove that the defendant possessed the firearm [or ammunition].[435]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

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[431] *United States v. Langley*, 62 F.3d 602, 605-06 (4th Cir. 1995) (*en banc*); *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[432] *United States v. Hester*, 880 F.2d 799, 803 n.4 (4th Cir. 1989).

[433] *Langley*, 62 F.3d at 605-06.

[434] *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001).

[435] *Scott*, 424 F.3d at 435.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[436]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[437]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[438]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[439]

JUSTIFICATION DEFENSE

In certain circumstances, a prohibited person is justified in possessing a firearm. The defendant has the burden of proving the following by a preponderance of the evidence:[440]

- First, that he or someone else was under an unlawful and present threat of death or serious bodily injury;[441]
- Second, that he did not recklessly place himself in the situation where he would be forced to engage in criminal conduct;
- Third, that he had no reasonable legal alternative that would avoid both the criminal conduct and the threatened death or injury; and

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[436] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[437] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted) .

[438] *Herder*, 594 F.3d at 358.

[439] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[440] *United States v. Mooney*, 497 F.3d 397, 409 n.2 (4th Cir. 2007). The burden of proving affirmative defenses, such as justification, rests on the defendant.

[441] Generalized fears do not support the defense of justification. *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

- Fourth, that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.[442]

The defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.[443]

In addition, the defendant must produce evidence that he took reasonable steps to dispossess himself of the firearm, and/or ammunition, once the threat was over.[444]

NOTE

In *United States v. Bostic*, 168 F.3d 718 (4th Cir. 1995), the Fourth Circuit rejected the appellant's argument that § 922(g)(8) was unconstitutional because it violated the notice and fair warning principles embodied in the Fifth Amendment. "Like a felon [in *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (*en banc*)], a person in Bostic's position cannot reasonably expect to be free from regulation when possessing a firearm." *Id*. at 722. Bostic knew he possessed a firearm and he knew he was subject to a domestic violence restraining order which included a finding that he represented a physical threat and/or prohibited him from abusing the mother or child. The court concluded "that due process does not entitle Bostic to notice that his conduct was illegal." *Id*. at 723. In other words, the government does not have to prove that the defendant knew he was violating the law; the government has to prove that the defendant knew he possessed a firearm and that he was subject to an order which meets the statutory requirements.

The validity of the final order is not relevant to the determination of whether the defendant violated § 922(g)(8). "[T]he overwhelming weight of federal case law precludes a defendant in a § 922(g)(8) prosecution from mounting a collateral attack on the merits of the underlying state protective order." *United States v. Reese*, 627 F.3d 792, 804-05 (10th Cir. 2010).

In *United States v. Scott*, 424 F.3d 431 (4th Cir. 2005), a constructive possession prosecution, the court emphasized that the jury must be instructed that the defendant intentionally exercised dominion and control over the firearm, or had the power and intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Therefore, in defining constructive possession, the best practice is to reemphasize the *mens rea* element of *knowingly* exercising dominion and control.

Whether the defendant is a member of one of the disqualifying classes, or all, a single act of possession constitutes a single offense. *United States v. Dunford*, 148 F.3d 385, 388 (4th Cir. 1998). In addition, possession of multiple firearms and ammunition seized at the same time from the defendant's house supported only one conviction of § 922(g), unless there is evidence that the weapons were stored in different places or acquired at different times. *Id.* at 390.

"INNOCENT POSSESSION" DEFENSE

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[442] *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir. 1995). *See also Crittendon*, 883 F.2d at 330.

[443] *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007) (citing *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982)).

[444] *United States v. Ricks*, 573 F.3d 198, 203 (4th Cir. 2009).

The Fourth Circuit has joined the Seventh and Tenth Circuits in rejecting the innocent and transitory possession defense. *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005).

18 U.S.C. § 922(g)(9) POSSESSION OF FIREARM BY PERSON CONVICTED OF DOMESTIC VIOLENCE [LAST UPDATED: 8/15/16]

Title 18, United States Code, Section 922(g)(9) makes it a crime for a person convicted of domestic violence to transport firearms or ammunition in interstate commerce, possess firearms or ammunition in or affecting commerce, or receive firearms or ammunition which have been shipped in interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had been convicted of a misdemeanor crime of domestic violence;
- Second, that the defendant possessed [or shipped or transported in interstate commerce, or received] a firearm or ammunition;
- Third, that the firearm or ammunition had traveled in interstate or foreign commerce at some point during its existence; and
- Fourth, that the defendant did so knowingly; that is, the defendant must know that the item was a firearm [or ammunition], the possession must be voluntary and intentional,[445] and the defendant must know of his status or act in deliberate disregard for the truth with a conscious purpose to avoid learning the truth.[446]

"Misdemeanor crime of domestic violence" means an offense that is a misdemeanor under Federal, State, or Tribal law and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim.[§ 921(a)(33)(A)][447]

"Physical force" includes means offensive touching.[448]

"Threatened use of a deadly weapon," within the definition of "misdemeanor crime of domestic violence," has three essential components:

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[445] *United States v. Langley*, 62 F.3d 602, 605-06 (4th Cir. 1995) (*en banc*);*United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[446] *United States v. Hester*, 880 F.2d 799, 803 n.4 (4th Cir. 1989).

[447] In *United States v. Hayes*, 555 U.S. 415, 429 (2009), the Supreme Court concluded that "Congress defined 'misdemeanor crime of domestic violence' to include an offense 'committed by' a person who had a specific domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime." In *Voisine v. United States*, the Supreme Court ruled that a misdemeanor crime of domestic violence includes offenses pursuant to state laws with a "recklessness" mens rea. 136 S. Ct. 2272, 2278 (2016).

[448] *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405, 1410 (2014). *Castleman* reversed the Fourth Circuit's decision in *United States v. White*, 606 F.3d 144 (4th Cir. 2010).

1. that one has threatened to use;
2. a weapon; and
3. that weapon is deadly.[449]

In addition, the defendant must have been represented by counsel in the misdemeanor domestic violence case, or knowingly and intelligently waived the right to counsel, and, if entitled to a jury trial, either tried by a jury or knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise. [§ 921(a)(33)(B)][450]

The government need not prove that the defendant knew that the firearm had been shipped or transported in interstate commerce.[451]

Commerce is defined as travel between one state, territory or possession of the United States and another state, territory, or possession of the United States, including the District of Columbia. The government may establish the interstate commerce requirement by showing that the firearm or ammunition was manufactured outside the state where the defendant possessed it.[452]

The government must prove that the defendant voluntarily and intentionally possessed the firearm [or ammunition].[453]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[454]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person

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[449] *United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007), *rev'd on other grounds,* 555 U.S. 415 (2009).

[450] The determination of what constitutes a disabling conviction, including the restoration of civil rights, is governed by the law of the convicting jurisdiction. *Beecham v. United States*, 511 U.S. 368, 371, 372 (1994).

[451] *See United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (*en banc*).

[452] *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001).

[453] *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[454] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *Id.* 424 F.3d at 435-36. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

exercises or has the power and intention to exercise control or authority over that item or property.[455]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[456]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[457]

JUSTIFICATION DEFENSE

In certain circumstances, a prohibited person is justified in possessing a firearm. The defendant has the burden of proving the following by a preponderance of the evidence:[458]

- First, that he or someone else was under an unlawful and present threat of death or serious bodily injury;[459]
- Second, that he did not recklessly place himself in the situation where he would be forced to engage in criminal conduct;
- Third, that he had no reasonable legal alternative that would avoid both the criminal conduct and the threatened death or injury; and
- Fourth, that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.[460]

The defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.[461]

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[455] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[456] *Herder*, 594 F.3d at 358.

[457] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[458] *United States v. Mooney*, 497 F.3d 397, 409 n.2 (4th Cir. 2007). The burden of proving affirmative defenses, such as justification, rests on the defendant.

[459] Generalized fears do not support the defense of justification. *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

[460] *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir. 1995). *See also Crittendon*, 883 F.2d at 330.

[461] *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007) (citing *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982)).

In addition, the defendant must produce evidence that he took reasonable steps to dispossess himself of the firearm, and/or ammunition, once the threat was over.[462]

_____NOTE_____

In *United States v. Scott*, 424 F.3d 431 (4th Cir. 2005), a constructive possession prosecution, the court emphasized that the jury must be instructed that the defendant intentionally exercised dominion and control over the firearm, or had the power and intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Therefore, in defining constructive possession, the best practice is to reemphasize the *mens rea* element of *knowingly* exercising dominion and control.

Whether the defendant is a member of one of the disqualifying classes, or all, a single act of possession constitutes a single offense. *United States v. Dunford*, 148 F.3d 385, 388 (4th Cir. 1998). In addition, possession of multiple firearms and ammunition seized at the same time from the defendant's house supported only one conviction of § 922(g), unless there is evidence that the weapons were stored in different places or acquired at different times. *Id.* at 390.

"INNOCENT POSSESSION" DEFENSE

The Fourth Circuit has joined the Seventh and Tenth Circuits in rejecting the innocent and transitory possession defense. *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005).

18 U.S.C. § 922(h) POSSESSION OF FIREARM IN COURSE OF EMPLOYMENT [LAST UPDATED: 12/29/14]

Title 18, United States Code, Section 922(h) makes it a crime for a person to possess a firearm or ammunition while employed for certain prohibited persons. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant possessed [or shipped, transported, or received] a firearm or ammunition;
- Second, [that the defendant did so in or affecting interstate or foreign commerce] [that the firearm or ammunition had traveled in interstate or foreign commerce at some point during its existence];
- Third, that the defendant did so in the course of being employed for a prohibited person;
- Fourth, that the defendant did so knowingly; that is, the defendant must know that the person for whom the defendant was employed was a prohibited person, that the item was a firearm [or ammunition] and the possession must be voluntary and intentional.[463]

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[462] *United States v. Ricks*, 573 F.3d 198, 203 (4th Cir. 2009).

[463] *United States v. Weaver*, No. 2:09-cr-00222, 2010 WL 2739979 at *4 (S.D. W.Va. July 9, 2010), *rev'd on other grounds*, 659 F.3d 353 (4th Cir. 2010). *See also United States v. Lahey*, 967 F. Supp. 2d 731, 745 (S.D.N.Y. 2013) (noting that § 922(h) not subject to arbitrary enforcement (continued...)

"Prohibited person" means a person who: had been convicted in some court of a crime punishable by imprisonment for a term exceeding one year;[464] was a fugitive from justice; was an unlawful user of, or addicted to any controlled substance; had been adjudicated as a mental defective or had been committed[465] to a mental institution; was

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[463] (...continued)
because the statute requires defendant must know he is being employed for a prohibited person when he possesses firearm); *United States v. Weaver*, No. 2:09-cr-00222, 2012 WL 727488 at *7 (S.D. W.Va. Mar. 6, 2012) (after remand from Fourth Circuit affirming that "implicit in the concept of 'employment' is an additional knowledge requirement [in] § 922(h): the defendant must know that he is carrying a firearm on behalf of a known prohibited person.").

[464] "Crime punishable by imprisonment for a term exceeding one year" has exclusions in § 921(a)(20), and the court may have to address this element if it is an issue. The determination of what constitutes a disabling conviction, including the restoration of civil rights, is governed by the law of the convicting jurisdiction. *Beecham v. United States*, 511 U.S. 368, 371, 372 (1994).

Foreign convictions are not included. *Small v. United States*, 544 U.S. 385 (2005). Convictions from United States military courts are included. *United States v. Grant*, 753 F.3d 480 (4th Cir. 2014).

The nature of the conviction is not a necessary element. *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979). Therefore, when the defendant stipulates to the prior conviction, there is no need to describe the nature of the conviction. However, the defendant cannot exclude the evidence by stipulating, because the prior conviction is an element of the offense which must be proved. *United States v. Milton*, 52 F.3d 78, 81 (4th Cir. 1995).

A stipulation does not render evidence tending to prove the underlying stipulation irrelevant under Rule of Evidence 401 or 402. *Old Chief v. United States*, 519 U.S. 172, 178-79 (1997); *United States v. Dunford*, 148 F.3d 385, 394-95 (4th Cir. 1998). Exclusion must rest on Rule of Evidence 403. In *Old Chief*, the Supreme Court held that Rule 403 prohibited the government from introducing the name or nature of a prior felony conviction in a § 922(g)(1) case when such information would tend to "lure a juror into a sequence of bad character reasoning" regarding a defendant who had stipulated to his felon status. *Old Chief*, 519 U.S. at 185.

The test is the maximum sentence that a particular defendant could have received, not the sentence that any hypothetical defendant charged with the crime may have received. *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (noting *Carachuri-Rosendo*'s overruling of *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005)).

"[T]he firearms prosecution does not open the predicate conviction to a new form of collateral attack." In other words, the defendant cannot relitigate the validity of the underlying conviction. *Lewis v. United States*, 445 U.S. 55, 67 (1980) (prosecution under predecessor statute).

[465] *See* 27 C.F.R. § 478.11 (regulation applicable to § 922(g) definition which defines "committed to a mental institution" as "[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.") In *United States v. Midgett*, 198 F.3d 143 (4th Cir. 1999), the Fourth Circuit found a prior judicial proceeding sufficient even though it was not termed a formal commitment. The Fourth Circuit found that the confinement "f[ell] squarely" within the statutory meaning of § 922(g)(4) because:

> (1) [the defendant] was examined by a competent mental health practitioner; (2) he was represented by counsel; (3) factual findings were made by a judge who heard evidence; (4) a conclusion was reached by the judge that [the defendant] suffered from a mental illness to such a degree that he was in need of inpatient hospital care;

(continued...)

an alien illegally or unlawfully in the United States or admitted under a non-immigrant visa [see exceptions at § 922(y)(2)]; had been discharged from the Armed Forces under dishonorable conditions; had renounced his citizenship in the United States; was subject to an order of protection;[466] or had been convicted in any court of a misdemeanor crime of domestic violence.[467]

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[465] (...continued)

(5) a judicial order was issued committing [the defendant] to a mental institution; and (6) he was actually confined there.

198 F.3d at 146.

[466] The government must prove the protection order meets all three of the following requirements:

1. it was issued after a hearing of which the person received actual notice and had an opportunity to participate;
2. the order restrains the person from harassing, stalking, or threatening his/her intimate partner or child of such intimate partner of the person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
3. the order includes a finding that the person represents a credible threat to the physical safety of such partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such partner or child that would be reasonably expected to cause bodily injury.

18 U.S.C. § 922(g)(8)(A)-(C).

[467] *See* 18 U.S.C. § 921(a)(33) ("Misdemeanor crime of domestic violence" means "an offense that is a misdemeanor under Federal, State, or Tribal law, and that has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim.").

In addition, the defendant must have been represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case, and, if entitled to a jury trial, either tried by a jury or knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise. 18 U.S.C. § 921(a)(33)(B).

"Threatened use of a deadly weapon" has three essential components: 1. that one has threatened to use; 2. a weapon; and 3. that weapon is deadly. *United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007), *overruled on other grounds*, 555 U.S. 415 (2009).

"The domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." *United States v. Hayes*, 555 U.S. 415, 418 (2009).

As applied to a different subsection of § 922, the Supreme Court has determined that the "common-law meaning of 'force' [applies] to § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence' as an offense that 'has, as an element, the use or attempted use of physical force.' We therefore hold that the requirement of 'physical force' is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction." *United States v. Castleman*, 572 U.S. __, __, 134 S. Ct. 1405, 1413 (2014) (discussing a conviction under 18 U.S.C. § 922(g)).

"Employed for" is not limited to "an employer-employee relationship that is proven only by payment of wages or some other form of tangible compensation."[468]

The government need not prove that the defendant knew that the firearm or ammunition had been shipped or transported in interstate commerce.[469]

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession, or the District of Columbia. [18 U.S.C. § 10]

The government may establish the interstate commerce requirement by showing that the firearm or ammunition at any time had traveled across a state boundary line, or was manufactured outside the state where the defendant possessed it.[470]

"Firearm" means any weapon including a starter gun which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, the frame or receiver of any such weapon, any firearm muffler or firearm silencer, or any destructive device. [§ 921(a)(3)]

"Ammunition" means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm. [§ 921(a)(17)(A)]

The government must prove that the defendant voluntarily and intentionally had physical possession of the firearm [or ammunition].[471]

Possession may be established by proof of either actual or constructive possession.[472] Actual possession is defined as physical control over property. Constructive possession occurs when a person exercises or has the power to exercise dominion and control over an item of property.

Possession may also be either sole, by the defendant himself, or joint, with other persons, as long as the defendant exercised dominion and control over the firearm or ammunition.

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with inferred knowledge of its presence may be sufficient proof to establish constructive

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[468] *United States v. Weaver*, 659 F.3d 353 (4th Cir. 2011). Defendants were members of a motorcycle gang who carried firearms to protect the national vice president, who was a convicted felon. The district court found that the statute required the government to prove some form of payment to the defendants. The Fourth Circuit reversed, declining "to draft at this preliminary stage of proceedings a definitive definition of the disputed term," but holding that "compensation cannot be the sine qua non of the words 'employed for' in § 922(h)." 659 F.3d at 358. The court noted that it had previously defined "employ" to mean "to make use of" or "to use advantageously." *Id*. at 357 (quoting *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994)).

[469] *Langley*, 62 F.3d at 605-06.

[470] *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001); *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000).

[471] *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[472] See NOTE for discussion of constructive possession.

possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[473]

The government is not required to prove that the firearm was operable, only that it "may readily be converted to expel a projectile by the action of an explosive."

> ☞ **[When the defendant is charged with possessing more than one firearm, the jury should be instructed that they must agree unanimously on the specific firearm possessed:**
>
> You must also agree, all of you, that the defendant possessed the same firearm. You cannot convict, for example, if six of you believe he possessed one of the guns, and six of you believe he possessed another of the guns. You have to unanimously agree that he possessed the firearms charged or ... one of the firearms charged before he can be convicted.][474]

_____NOTE_____

The current version of Section 922(h) was enacted in 1986 "to prevent individuals listed in subsection(g) from circumventing the firearm prohibition by employing armed bodyguards." *United States v. Weaver*, 659 F.3d 353, 357 (4th Cir. 2011).

There is very little case law interpreting this statute. Therefore, it has not been decided whether constructive possession is sufficient to sustain a conviction under § 922(h). If constructive possession is sufficient for conviction under § 922(h), the government must show that "the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 436 (4th Cir. 2005). Constructive possession can be established by evidence showing ownership, dominion, or control over the item or property itself, or the premises, vehicle, or container in which the item or property is concealed, such that the defendant exercises or has the power to exercise dominion and control over that item or property.

18 U.S.C. § 922(i) TRANSPORTING STOLEN FIREARM

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[473] The definitive case in the Fourth Circuit on "mere proximity" is *United States v. Herder*, 594 F.3d 352 (4th Cir. 2010), in which the court reiterated the legal principle that proximity of a defendant to an item establishes accessibility only, not dominion and control. *See also United States v. Shorter*, 328 F.3d 167 (4th Cir. 2003) (contraband found in the defendant's residence permitted an inference of constructive possession; inference bolstered by evidence that contraband was in plain view or that material associated with the contraband was found in the closet of the bedroom where defendant's personal papers located); *United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[474] The Fourth Circuit "assume[d], without deciding, that a conviction under § 922(g)(1) requires the jury to agree unanimously on the specific gun possessed by the defendant." *United States v. Saunders*, 501 F.3d 384, 393 (4th Cir. 2007). The court cited cases from the First, Fifth, and Sixth Circuits that concluded that a conviction under § 922(g) does not require juror unanimity on the specific gun possessed. An acceptable alternative is to submit a special verdict form. However, one was not needed in *Saunders*, in light of the specific unanimity instruction.

Title 18, United States Code, Section 922(i) makes it a crime to transport a stolen firearm or ammunition in interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported or shipped in interstate or foreign commerce;
- Second, a stolen firearm or ammunition; and
- Third, that the defendant knew or had reasonable cause to believe the firearm or ammunition was stolen.[475]

The government must prove that the defendant possessed the firearm or ammunition.

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[476]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[477]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[478]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish

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[475] 18 U.S.C. § 924(a)(2).

[476] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[477] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[478] *Herder*, 594 F.3d at 358.

constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[479]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession participated in some way in the theft of the property[480] or knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.[481] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[482]

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[483] You are reminded that the Constitution never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[484]

18 U.S.C. § 922(j) POSSESSION OF STOLEN FIREARM [LAST UPDATED: 4/7/14]

Title 18, United States Code, Section 922(j) makes it a crime to possess, conceal, store, barter, sell, or dispose of a stolen firearm or ammunition which has been shipped or transported in interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

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[479] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[480] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[481] *Id.*

[482] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[483] *See Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[484] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

- First, that the defendant received, possessed, concealed, stored, bartered, sold, or disposed of, or pledged or accepted as security for a loan, a stolen firearm or ammunition;
- Second, that the firearm or ammunition had been shipped or transported in interstate commerce before or after being stolen; and
- Third, that the defendant knew or had reasonable cause to believe the firearm or ammunition was stolen.[485]

The government must prove that the defendant possessed the firearm or ammunition.

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[486]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[487]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[488]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[489]

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[485] 18 U.S.C. § 924(a)(2). See also *United States v.* Davis, 714 F.3d 809, 814 (4th Cir. 2013).

[486] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[487] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[488] *Herder*, 594 F.3d 352.

[489] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference

(continued...)

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession participated in some way in the theft of the property[490] or knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.[491] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[492]

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[493] You are reminded that the Constitution never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[494]

18 U.S.C. § 922(k) POSSESSION OF FIREARM WITH OBLITERATED SERIAL NUMBER

Title 18, United States Code, Section 922(k) makes it a crime to transport or possess a firearm with an obliterated serial number. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported, shipped, or received in interstate or foreign commerce;
- Second, a firearm which has had the serial number removed, obliterated, or altered; and

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[489] (...continued)
of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[490] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[491] *Id.*

[492] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[493] *See Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[494] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

- Third, that the defendant did so knowingly;

OR

- First, that the defendant possessed or received a firearm;
- Second, that the firearm had the serial number removed, obliterated, or altered;
- Third, that the firearm had traveled in interstate or foreign commerce at some point during its existence; and
- Fourth, that the defendant acted knowingly, including knowing that the serial number had been removed, obliterated, or altered.[495]

The government may establish the interstate commerce requirement by showing that the firearm at any time had traveled across a state boundary line, or was manufactured outside the state where the defendant possessed it.[496]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[497]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[498]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[499]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled

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[495] 18 U.S.C. § 924(a)(1)(B). *See also United States v. Santiago*, 344 F. App'x 847 (4th Cir. 2009).

[496] *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001).

[497] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[498] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[499] *Herder*, 594 F.3d at 358.

with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[500]

The government must prove that the defendant knew that the serial number had been removed, obliterated, or altered. You may infer this knowledge from evidence that the defendant possessed the firearm under conditions under which an ordinary person would have inspected the firearm and discovered that the serial number was removed, obliterated, or altered. The statute does not require that all serial numbers be removed, obliterated, or altered.[501]

_____NOTE_____

Proof of the date on which a firearm was manufactured is not an element of § 922(k). *United States v. Galloway*, 55 F. App'x 634 (4th Cir. 2003).

18 U.S.C. § 922(n) SHIPPING OR RECEIVING OF FIREARM BY PERSON UNDER INDICTMENT

Title 18, United States Code, Section 922(n) makes it a crime for a person under indictment to ship, transport, or receive a firearm or ammunition. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was under indictment for a crime punishable by imprisonment for a term exceeding one year;
- Second, that the defendant shipped or transported a firearm or ammunition in interstate or foreign commerce, or received a firearm or ammunition that had been shipped or transported in interstate commerce; and
- Third, that the defendant did so willfully.[502] In other words, the government must prove that the defendant knew he was under indictment.[503]

18 U.S.C. § 922(*o*) POSSESSION OF MACHINEGUN

Title 18, United States Code, Section 922(*o*) makes it a crime to possess a machinegun. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant possessed a machinegun; and
- Second, that the defendant did so knowingly.[504]

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[500] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[501] *United States v. Sullivan*, 455 F.3d 248, 261 (4th Cir. 2006) (citing *United States v. Haywood*, 363 F.3d 200, 206 (3d Cir. 2003) (collecting cases)). *United States v. Johnson*, 381 F.3d 506, 508 (5th Cir. 2004); *United States v. Hooker*, 997 F.2d 67, 72 (5th Cir. 1993) (two scienter elements, possession and that the serial number was removed).

[502] 18 U.S.C. § 924(a)(1)(D).

[503] *United States v. Forbes*, 64 F.3d 928, 932 (4th Cir. 1995).

[504] 18 U.S.C. § 924(a)(2).

Knowingly in this context includes not only that the defendant knew he possessed a machinegun but also that the defendant knew the firearm was a machinegun.[505] A machinegun is defined as any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. [§ 921(a)(23) incorporates the definition in 26 U.S.C. § 5845(b)].

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[506]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[507]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[508]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[509]

_____NOTE_____

[505] *United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997).

[506] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[507] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[508] *Herder*, 594 F.3d at 358.

[509] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

This is not a specific intent crime, but in *Staples v. United States*, 511 U.S. 600 (1994), a 26 U.S.C. § 5861 prosecution, the Supreme Court held that the defendant must in fact know that the firearm is a machinegun. Courts of Appeals have construed *Staples* as applying to § 922(*o*). *See United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997).

The statutory exceptions in § 922(*o*)(2) are affirmative defenses and the defendant bears the burden of proving he comes within the exceptions. *Id.*

18 U.S.C. § 922(q) POSSESSION OF FIREARM IN A SCHOOL ZONE

Title 18, United States Code, Section 922(q) makes it a crime to possess or discharge a firearm in a school zone. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 922(q)(2)(A)

- First, that the defendant possessed a firearm in a school zone;
- Second, that the firearm had traveled in interstate or foreign commerce at some point during its existence;
- Third, that the defendant knew, or had reasonable cause to believe, he was in a school zone; and
- Fourth, that the defendant acted knowingly.[510]

§ 922(q)(3)(A)

- First, that the defendant discharged or attempted to discharge a firearm in a school zone;
- Second, that the firearm had traveled in interstate or foreign commerce at some point during its existence;
- Third, that the defendant knew he was in a school zone; and
- Fourth, that the defendant acted knowingly or with reckless disregard for the safety of another.[511]

"School zone" means in, or on the grounds of, a public, parochial, or private school, of within a distance of 1,000 feet from the grounds of a public, parochial, or private school. [§ 921(a)(25)]

"School" means a school which provides elementary or secondary education, as determined under state law. [§ 921(a)(26)]

The government may establish the interstate commerce requirement by showing that the firearm at any time had traveled across a state boundary line, or was manufactured outside the state where the defendant possessed it.[512]

The government need not prove that the defendant knew that the firearm had been shipped or transported in interstate commerce.[513]

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[510] 18 U.S.C. § 924(a)(1)(B).

[511] *Id.*

[512] *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001); *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000).

[513] *See United States v. Langley*, 62 F.3d 602, 605-06 (4th Cir. 1995) (*en banc*).

The government must prove that the defendant possessed the firearm.[514]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[515]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[516]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[517]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[518]

☞ **[When the defendant is charged with possessing more than one firearm, the jury should be instructed that they must agree unanimously on the specific firearm possessed:**

You must also agree, all of you, that the defendant possessed the same firearm. You cannot convict, for example, if six of you believe he possessed one of the guns, and six of you believe he possessed another of the guns. You have to

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[514] *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[515] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[516] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[517] *Herder*, 594 F.3d at 358.

[518] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

unanimously agree that he possessed the firearms charged or ... one of the firearms charged before he can be convicted.][519]

JUSTIFICATION DEFENSE

In certain circumstances, a prohibited person is justified in possessing a firearm. The defendant has the burden of proving the following by a preponderance of the evidence:[520]

- First, that he or someone else was under an unlawful and present threat of death or serious bodily injury;[521]
- Second, that he did not recklessly place himself in the situation where he would be forced to engage in criminal conduct;
- Third, that he had no reasonable legal alternative that would avoid both the criminal conduct and the threatened death or injury; and
- Fourth, that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.[522]

The defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.[523]

In addition, the defendant must produce evidence that he took reasonable steps to dispossess himself of the firearm, and/or ammunition, once the threat was over.[524]

_____NOTE_____

United States v. Dorsey, 418 F.3d 1038 (9th Cir. 2005).

In *United States v. Scott*, 424 F.3d 431 (4th Cir. 2005), a constructive possession prosecution, the court emphasized that the jury must be instructed that the defendant intentionally exercised dominion and control over the firearm, or had the power and intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Therefore, in defining constructive possession, the best practice is to reemphasize the *mens rea* element of *knowingly* exercising dominion and control.

"INNOCENT POSSESSION" DEFENSE

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[519] The Fourth Circuit "assume[d], without deciding, that a conviction under § 922(g)(1) requires the jury to agree unanimously on the specific gun possessed by the defendant." *United States v. Saunders*, 501 F.3d 384, 393 (4th Cir. 2007). The court cited, but ultimately disagreed with, cases from the Sixth, First, and Fifth Circuits concluding that a conviction under § 922(g) does not require juror unanimity on the specific gun possessed. An acceptable alternative is to submit a special verdict form. However, one was not needed in *Saunders*, in light of the specific unanimity instruction.

[520] *United States v. Mooney*, 497 F.3d 397, 409 n.2 (4th Cir. 2007). The burden of proving affirmative defenses, such as justification, rests on the defendant.

[521] Generalized fears do not support the defense of justification. *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

[522] *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir. 1995). *See also Crittendon*, 883 F.2d at 330.

[523] *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007) (citing *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982)).

[524] *United States v. Ricks*, 573 F.3d 198, 203 (4th Cir. 2009).

The Fourth Circuit has joined the Seventh and Tenth Circuits in rejecting the innocent and transitory possession defense. *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005).

18 U.S.C. § 922(u) STEALING FIREARMS FROM A DEALER

Title 18, United States Code, Section 922(u) makes it a crime to steal firearms from a federally-licensed firearms dealer. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant stole, took, or unlawfully carried away from the person or premises of a licensed firearms dealer, importer, or manufacturer;
- Second, a firearm in the licensee's business inventory;
- Third, that the firearm had been shipped and transported in interstate commerce; and
- Fourth, the defendant did so knowingly.[525]

18 U.S.C. § 922(x) SELLING A HANDGUN TO A JUVENILE

Title 18, United States Code, Section 922(x) makes it a crime to sell or transfer a handgun to a juvenile. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant sold, delivered, or otherwise transferred a handgun or ammunition suitable for use only in a handgun;
- Second, to a juvenile; and
- Third, that the defendant knew or had reasonable cause to believe the person was a juvenile.[526]

"Juvenile" means a person who is less than 18 years of age. [§ 922(x)(5)]

AGGRAVATED PENALTY

1. Did the defendant know or have reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence?[527]

A "crime of violence" means an offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. [§ 924(c)(3)]

NOTE

Section 922(x) does not include an interstate commerce jurisdictional element. *United States v. Michael R.*, 90 F.3d 340 (9th Cir. 1996).

18 U.S.C. § 924(a)(1)(A) FALSE STATEMENTS

[525] 18 U.S.C. § 924(i)(1).

[526] *See* 18 U.S.C. § 924(a)(6)(B). *See also United States v. Parker*, 262 F.3d 415, 423 (4th Cir. 2001).

[527] 18 U.S.C. § 924(a)(6)(B)(ii).

Title 18, United States Code, Section 924(a)(1)(A) makes it a crime to make a false statement with respect to information required by federal firearms laws. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made a false statement or representation;
- Second, that the statement or representation concerned information required by law in one of the following categories:

  (a) in the records of a federally-licensed dealer, importer, or manufacturer;

  (b) in applying for a federal license; or

  (c) in applying for any exemption or relief from disability under this law; and
- Third, that the defendant did so knowingly.[528]

18 U.S.C. § 924(b) RECEIVING A FIREARM WITH INTENT TO COMMIT AN OFFENSE

Title 18, United States Code, Section 924(b) makes it a crime to receive a firearm or ammunition with intent to commit an offense. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant shipped, transported, or received in interstate or foreign commerce a firearm or ammunition; and
- Second, that the defendant did so with intent to commit an offense punishable by imprisonment for a term exceeding one year with the firearm or ammunition;

OR

- Second, that the defendant did so with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year was to be committed with the firearm or ammunition.

☞ **The court must either instruct the jury as to all the essential elements of the underlying crime or refer to its previous instruction of those elements.**[529]

NOTE

"When the indictment charges the intent to violate a specifically designated statute, it follows logically that the defendant must be convicted only upon proof of the intent to violate each element of the underlying substantive offense." *United States v. Trevino*, 720 F.2d 395, 400 (5th Cir. 1983). In *Trevino*, the defendant was convicted of violating § 924(b) with intent to violate 18 U.S.C. § 2113. The Fifth Circuit reversed, because the government did not prove all of the statutory elements of the underlying offense.

In *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983), the Fourth Circuit vacated sentences imposed on § 924(b) and 22 U.S.C. § 2278 for violating double jeopardy. The § 2778 violations, which furnished the predicate felonies for the § 924(b) convictions, also proved the § 924(b) violations.

[528] *See United States v. Rahman*, 83 F.3d 89, 92 (4th Cir. 1996).

[529] *United States v. Johnson*, 71 F.3d 139, 145 (4th Cir. 1995).

18 U.S.C. § 924(c) USING OR CARRYING A FIREARM DURING A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME, OR POSSESSING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME[530] [LAST UPDATED: 4/30/14]

§ 924(c)(1)[531]

Title 18, United States Code, Section 924(c)(1) makes it a crime to use or carry a firearm during and in relation to a crime of violence or a drug trafficking crime, or to possess a firearm in furtherance of a crime of violence or a drug trafficking crime. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant used or carried a firearm; and
- Second, that the defendant did so during and in relation to a crime of violence or a drug trafficking crime which may be prosecuted in federal court [the court should instruct the jury as to all the essential elements of the underlying crime].[532]

OR

- First, that the defendant possessed a firearm;
- Second, that the defendant did so in furtherance of a crime of violence or a drug trafficking crime which may be prosecuted in federal court [the court should instruct the jury as to all the essential elements of the underlying crime].[533]

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[530] In *United States v. King*, 628 F.3d 693 (4th Cir. 2011), the Fourth Circuit found that § 924(c) penalizes two separate types of conduct: "use or carrying of a firearm during and in relation to" and "possession of a firearm in furtherance of" a crime of violence or drug trafficking crime. 628 F.3d at 699.

On March 5, 2014, the Supreme Court held that to convict a defendant of aiding and abetting a violation of § 924(c), pursuant to 18 U.S.C. § 2, the Government must prove "the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond v. United States*, 572 U.S. __, __, 134 S. Ct. 1240, 1243 (2014). A separate aiding and abetting instruction is set out *infra*.

[531] *See King*, 628 F.3d 693.

[532] *United States v. Lipford*, 203 F.3d 259, 266-67 (4th Cir. 2000). "[T]he predicate crime of violence or drug trafficking crime charged in the indictment is an essential element of a § 924(c) offense." *United States v. Randall*, 171 F.3d 195, 200 (4th Cir. 1999).

In *United States v. Sutton*, 961 F.2d 476, 479 (4th Cir. 1992), the appellant argued post-conviction that the indictment was defective for not alleging scienter. The Fourth Circuit rejected the argument; the indictment tracked the statutory language of the section, language that does not include the element of scienter, and appellant failed to raise the objection prior to verdict.

[533] *Lipford*, 203 F.3d at 266-67. "[T]he predicate crime of violence or drug trafficking crime charged in the indictment is an essential element of a § 924(c) offense." *Randall*, 171 F.3d at 200.

In *Sutton*, 961 F.2d at 479, the appellant argued post-conviction that the indictment was defective for not alleging scienter. The Fourth Circuit rejected the argument; the indictment tracked the statutory language of the section, language that does not include the element of scienter, and appellant failed to raise the objection prior to verdict.

ADDITIONAL ELEMENTS, AS APPROPRIATE:[534]

1. that the firearm was brandished;
2. that the firearm was discharged;
3. that the firearm was a short-barreled rifle or short-barreled shotgun;
4. that the firearm was a machine gun or a destructive device, or was equipped with a firearm silencer or firearm muffler.[535]

§ 924(c)(5)

Title 18, United States Code, Section 924(c)(5) makes it a crime to use or carry armor piercing ammunition during and in relation to a crime of violence or a drug trafficking crime, or to possess armor piercing ammunition in furtherance of a crime of violence or a drug trafficking crime. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant used or carried armor piercing ammunition; and
- Second, that the defendant did so during and in relation to a crime of violence or a drug trafficking crime which may be prosecuted in federal court [the court should instruct the jury as to all the essential elements of the underlying crime].[536]

OR

- First, that the defendant possessed armor piercing ammunition; and
- Second, that the defendant did so in furtherance of a crime of violence or a drug trafficking crime which may be prosecuted in federal court [the court should instruct the jury as to all the essential elements of the underlying crime].[537]

ADDITIONAL ELEMENT, AS APPROPRIATE:

1. Did death result from the use of the ammunition?

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[534] Brandishing a firearm in violation of subsection (C)(1)(a)(ii) is an element which must be alleged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. *Alleyne v. United* States, 570 U.S. __, 133 S. Ct. 2151 (2013), *overruling Harris v. United States*, 536 U.S. 545 (2002). By implication, discharging a firearm in violation of (C)(1)(a)(iii) would be an element rather than a sentencing factor.

[535] *United States v. O'Brien*, 560 U.S. 218 (2010). "[T]he statute uses the word 'machine gun' (and similar words) to state an element of a separate offense." *Castillo v. United States*, 530 U.S. 120, 121 (2000).

[536] *Lipford*, 203 F.3d at 266-67. "[T]he predicate crime of violence or drug trafficking crime charged in the indictment is an essential element of a § 924(c) offense." *Randall*, 171 F.3d at 200.

In, *Sutton*, 961 F.2d at 479, the appellant argued post-conviction that the indictment was defective for not alleging scienter. The Fourth Circuit rejected the argument; the indictment tracked the statutory language of the section, language that does not include the element of scienter, and appellant failed to raise the objection prior to verdict.

[537] *United States v. Lipford*, 203 F.3d 259, 266-67 (4th Cir. 2000). "[T]he predicate crime of violence or drug trafficking crime charged in the indictment is an essential element of a § 924(c) offense." *United States v. Randall*, 171 F.3d 195, 200 (4th Cir. 1999).

In *United States v. Sutton*, 961 F.2d 476, 479 (4th Cir. 1992), the appellant argued post-conviction that the indictment was defective for not alleging scienter. The Fourth Circuit rejected the argument; the indictment tracked the statutory language of the section, language that does not include the element of scienter, and appellant failed to raise the objection prior to verdict.

☞ **See instructions for 18 U.S.C. §§ 1111 and 1112 if murder/manslaughter is an issue.**

"Crime of violence" means any federal felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or, that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. [§ 924(c)(3)]

Thus, "crime of violence" has three essential components:

1. that one uses, threatens, or attempts to use force;
2. that is physical; and
3. is against another person or his property.[538]

"Drug trafficking crime" means [any felony under Title 21, United States Code, Sections 801 *et seq*.]

To "use" a firearm requires "active employment," which includes brandishing, displaying, bartering, striking with, and firing or attempting to fire a firearm.[539] However, it would not include storing a firearm near drugs or drug proceeds.[540]

The term "carry" requires knowing possession and movement, conveying, transporting, or bearing the firearm in some manner. However, the firearm does not have to be readily accessible.[541]

"Brandish" means to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person. [§ 924(c)(4)]

A firearm, or ammunition, is carried "in relation to" a drug trafficking crime or crime of violence if it has some purpose or effect with respect to the crime and if its presence was not the result of accident or coincidence. The firearm must facilitate, or potentially facilitate, the crime.[542]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

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[538] *United States v. Hayes*, 482 F.3d 749, 756 (4th Cir. April 16, 2007), *rev'd on other grounds*, 555 U.S. 415 (2009).

[539] *Bailey v. United States*, 516 U.S. 137, 148 (1995).

[540] In *Bailey*, 516 U.S. 137, the Supreme Court made clear that "use" involved "active employment" of a firearm, which would include bartering a firearm for drugs (*Smith v. United States*, 508 U.S. 223 (1993)), but would not include storing a firearm near drugs or drug proceeds. Storage, without its more active employment, is not reasonably distinguishable from possession. Thus, storage could be covered under the element of possession "in furtherance of ...."

[541] *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997).

[542] An example would be as protection for or to embolden the actor. *Mitchell*, 104 F.3d at 653-54. The relation between the firearm and the predicate crime is best established by their relation to each other, and not by the distance between the owner and gun at the moment of arrest. *United States v. Lipford*, 203 F.3d 259, 266 (4th Cir. 2000) (citing *United States v. Molina*, 102 F.3d 928, 932 (7th Cir. 1976)).

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[543]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[544]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[545]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[546]

"In furtherance of" means the act of furthering, advancing, or helping forward. Therefore, the government must prove that the possession of a firearm furthered, advanced, or helped forward the crime of violence or drug trafficking crime.[547]

The mere accidental or coincidental presence of a firearm at the scene of a drug trafficking offense is not enough to establish that it was possessed in furtherance of the drug offense.[548] For drug trafficking crimes, factors which the jury may consider in making this determination may include the following: the type of drug activity that was being conducted, accessibility of the firearm, the type of firearm, whether the firearm was stolen, the status of the possession (whether it was legitimate or illegal), whether the firearm was loaded, the proximity of the firearm to either drugs or drug profits, the time and circumstances under which the firearm was found, whether the firearm provided a

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[543] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[544] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[545] *Herder*, 594 F.3d at 352.

[546] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers were located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992)(mere presence on the premises or association with the possessor is insufficient to establish possession).

[547] *United States v. Sullivan*, 455 F.3d 248, 260 (4th Cir. 2006) (citing *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002)).

[548] *Id. See also United States v. Lipford*, 203 F.3d 259, 266 (4th Cir. 2000).

defense against the theft of drugs, and/or reduced the probability that such a theft might be attempted.[549] The possession is in furtherance if the purpose of the firearm is to protect or embolden the defendant.[550]

The government does not have to prove that the firearm was loaded.[551]

The government does not have to prove that the firearm was operable, only that it "may readily be converted to expel a projectile by the action of an explosive." [18 U.S.C. § 921(a)(3)][552]

§ 924(c) AID AND ABET USING/CARRYING FIREARM DURING AND IN RELATION TO DRUG TRAFFICKING CRIME/ CRIME OF VIOLENCE (18 U.S.C. § 2)

To prove aiding and abetting the charge of using or carrying a firearm during and in relation to a drug trafficking crime or crime of violence, the government must prove beyond a reasonable doubt:

- The [drug trafficking crime/crime of violence] was in fact committed by someone other than the defendant;
- The defendant actively participated in the [drug trafficking crime/crime of violence] as something he wished to bring about;
- The defendant associated himself with the [drug trafficking crime/crime of violence] with advance knowledge that someone else involved in the [drug trafficking crime/crime of violence] would use or carry a firearm during and in relation to the drug trafficking crime/crime of violence; and
- The defendant sought by his actions to make the criminal venture succeed.

Therefore, the first requirement is that you find that another person committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do

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[549] *Lomax*, 293 F.3d at 705. The Fourth Circuit indicated that in making a factual determination about "furtherance," the jury is

> free to consider the numerous ways in which a firearm might further or advance drug trafficking. For example, a gun could provide a defense against someone trying to steal drugs or drug profits, or it might lessen the chance that a robbery would even be attempted. Additionally, a gun might enable a drug trafficker to ensure that he collects during a drug deal. And a gun could serve as protection in the event that a deal turns sour. Or it might prevent a transaction from turning sour in the first place. Furthermore, a firearm could help a drug trafficker defend his turf by deterring others from operating in the same area.

Id.

[550] *Sullivan*, 455 F.3d at 260. In *United States v. Davis*, 343 F. App'x 878 (4th Cir. 2009), the defendant, charged with violating § 924(c)(1), requested that the jury be instructed that "the mere possession of a firearm at the scene of the crime is not sufficient [to convict]." The Fourth Circuit wrote that the district court did not abuse its discretion by rejecting the proposed instruction because it "would not convey a complete portrait of the legal landscape on this issue, as mere possession of a firearm while committing a drug trafficking crime can be sufficient, if the possession is for protection or to embolden the actor." 343 F. App'x at 881.

[551] *United States v. Coburn*, 876 F.2d 372, 375 (5th Cir. 1989).

[552] *See United States v. Williams*, 445 F.3d 724, 732 n.3 (4th Cir. 2006); *United States v. Willis*, 992 F.2d 489, 491 n.2 (4th Cir. 1993).

find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit an offense under Section 924(c), a defendant must have sufficient advance knowledge that someone else would use or carry a firearm during and in relation to the underlying [drug trafficking crime/crime of violence] and, given this advance knowledge, defendant must have chosen not to withdraw from the criminal venture. That is, defendant must have had a "'realistic opportunity' to refrain from engaging in the conduct at issue, but chose not to do so.[553]

Defendant also must voluntarily and knowingly seek by some act to help make the crime succeed.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

_____NOTE_____

See generally United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).

On March 5, 2014, the Supreme Court held that to convict a defendant of aiding and abetting under § 924(c), the Government must prove "the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond v. United States*, 572 U.S. __, __, 134 S. Ct. 1240, 1243 (2014). The Fourth Circuit had previously held that if the defendant is charged as an accomplice, the government must "establish that the defendant knew 'to a practical certainty that the principal would be [using] a gun.'" *United States v. Donel*, 211 F. App'x 180 (4th Cir. 2006) (citing *United States v. Spinney*, 65 F.3d 231, 238 (1st Cir. 1995)). "This essentially requires proof of actual knowledge that a gun would be used." *Id.*[554]

"A defendant may be convicted of a § 924(c) charge on the basis of a co-conspirator's use of a gun [*Pinkerton* liability] if the use was in furtherance of the conspiracy and was reasonably foreseeable to the defendant." *United States v. Wilson*, 135 F.3d 291, 305 (4th Cir. 1998) (citing *United States v. Chorman*, 910 F.2d 102, 110-11 (4th Cir. 1990)). Neither aiding and abetting liability nor *Pinkerton* liability need be contained in the indictment. *United States v. Blackman*, 746 F.3d 137 (4th Cir. 2014). *See also United States v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010).

Trading a gun for drugs constitutes use during and in relation to a drug trafficking offense. *Smith v. United States*, 508 U.S. 223 (1993). Trading drugs for a gun is not using a firearm during and in relation to a drug trafficking crime. *Watson v. United States*, 552 U.S. 74 (2007). However, the Supreme Court reserved the issue of whether trading drugs for a gun resulted in "possession in furtherance of a drug trafficking

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[553] *Rosemond*, 572 U.S. __, __, 134 S. Ct. 1240, 1253 (Alito, J., dissenting) (quoting *Rosemond*, 572 U.S. at __, 134 S. Ct. at 1249).

[554] The standard is admittedly lower for an accomplice to armed bank robbery. The government need only show that the defendant was on notice of the likelihood that a gun or other dangerous weapon would be used in the robbery. *United States v. McCaskill*, 676 F.2d 995, 998 (4th Cir. 1982). *See also United States v. Sanborn,* 563 F.2d 488, 491 (1st Cir. 1977). See *United States v. Spinney*, 65 F.3d 231 (1st Cir. 1995) for excellent discussion of different standards for an accomplice to both § 2113(d) and § 924(c).

crime." *Id.* In *United States v. Robinson*, 627 F.3d 941 (4th Cir. 2010), the Fourth Circuit held that "trading drugs for guns constitutes possession in furtherance within the meaning of § 924(c)." 627 F. 3d at 955.

If the crime of violence is a continuing crime, such as kidnapping, in violation of 18 U.S.C. § 1201, then venue for this offense is in any district where the kidnapping could be prosecuted. *Rodriguez-Moreno*, 526 U.S. at 282.

The government is not required to establish that the destructive device operate as intended. *United States v. Uzenski*, 434 F.3d 690 (4th Cir. 2006) (citing *United States v. Langan*, 263 F.3d 613 (6th Cir. 2001)). In *Langan*, the defendant was convicted of bank robbery and using a destructive device in committing the robbery, in violation of § 924(c). The definition of destructive device in § 921(a)(4) is similar to the definition in 26 U.S.C. § 5845(f). The Sixth Circuit does not require that the destructive device operate as intended, or that any particular component be present for a device to qualify as a destructive device. The government must prove that the device is "capable of exploding or be readily made to explode." *Langan*, 263 F.3d at 625.

Proof of a predicate offense is an essential element of a § 924(c) violation. "[T]he government is under no obligation to specify a specific predicate offense in a § 924(c) charge." *United States v. Randall*, 171 F.3d 195, 205 (4th Cir. 1999). However, "if the government specifies in the indictment a particular type of § 924(c) predicate offense ... the government is required to prove the essential elements of the specified predicate offense (or, at a minimum, a lesser included offense of the predicate offense)." *Id.* In *Randall*, the government alleged distribution, but proved possession with intent to distribute, and the Fourth Circuit reversed for a fatal variance.

A § 924(c) conviction does not depend on a previous or contemporaneous conviction for the predicate offense. Indeed, the defendant need not even be charged with the underlying crime, so long as the underlying offense is one for which the defendant could be prosecuted and the elements of that offense are proved beyond a reasonable doubt. *United States v. Hopkins*, 310 F.3d 145, 152-53 (4th Cir. 2002); *United States v. Crump*, 120 F.3d 462, 466 (4th Cir. 1997).

Section 924(c) contains two distinct conduct elements for venue purposes, use of the firearm and commission of the drug offense. *United States v. Smith*, 452 F.3d 323, 335-36 (4th Cir. 2006).

Simple possession of the statutory threshold amount of cocaine base can be a felony and therefore qualifies as a drug trafficking offense and a predicate offense under § 924(c). *United States v. Garnett*, 243 F.3d 824, 830-31 (4th Cir. 2001).

In *United States v. Perry*, 560 F.3d 246 (4th Cir. 2009), the defendant complained that the district court erred in instructing the jury in the disjunctive on both the firearms and the predicate offenses, and in not requiring the jury to be unanimous as to which firearm supported the § 924(c) conviction. The court rejected his argument concerning the firearms, because where the charge involves multiple firearms, jury unanimity with respect to the particular firearm used or possessed in furtherance of a drug trafficking offense is generally not required for a § 924(c) conviction. The court cited *United States v. Hernandez-Albino*, 177 F.3d 33, 40 (1st Cir. 1999), for the proposition that the jury need not reach unanimous agreement on the identity of the weapon so long as none of the weapons justifies more than the statutory minimum sentence. The defendant's argument concerning the multiple predicate offenses had "some initial appeal" to the court, but it was not necessary to decide the issue because Perry was not convicted of one of the alleged predicate offenses. *Perry*, 560 F.3d at 258.

In light of *Perry*, district courts would be advised to instruct on unanimity if more than one predicate offense is alleged.

In *United States v. Luskin*, 926 F.2d 372 (4th Cir. 1991), the Fourth Circuit stated that "[a]s long as the underlying crimes are not identical under the [*United States v.*] *Blockburger*[, 284 U.S. 299 (1932),] analysis, then consecutive section 924(c) sentences are permissible." 926 F.2d at 377.

"Multiple, consecutive sentences under § 924(c)(1) are appropriate whenever there have been multiple, separate acts of firearm use or carriage, even when all of those acts relate to a single predicate offense." *United States v. Lighty*, 616 F.3d 321, 371 (4th Cir. 2010).

SECOND CIRCUIT

In *United States v. Finley*, 245 F.3d 199 (2d Cir. 2001), the Second Circuit was confronted with two predicate offenses, distribution and possession with intent, and a single gun continually possessed. After distributing, the defendant was arrested, and had more drugs in his possession. The defendant was convicted of two counts of § 924(c). The Second Circuit reversed because the "two criminal transactions [were] so inseparably intertwined." 245 F.3d at 208. *See also United States v. Wallace*, 447 F.3d 184 (2d Cir. 2006) (defendant convicted of two counts of § 924(c) for using firearm during drug offense and during a drive-by shooting; remanded, citing *Finley*).

FIFTH CIRCUIT

Employment of more than one firearm will not support more than one conviction under 924(c) based upon the same predicate crime. *United States v. Correa-Ventura*, 6 F.3d 1070, 1085 (5th Cir. 1993). However, the Fifth Circuit noted that a different situation might be presented when the firearms fall within different classes of § 924(c)'s proscribed weapons. 6 F.3d at 1087 n.35.

In *United States v. Phipps*, 319 F.3d 177 (5th Cir. 2003), the defendant used a single firearm a single time for a dual criminal purpose, carjacking and kidnapping. The Fifth Circuit concluded that the unit of prosecution is not the use of the firearm, or the predicate offense, but the two combined. Although the Fifth Circuit concluded that § 924(c) did not authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses, it did not adopt the Second Circuit's holding in *Finley*, "that § 924(c)(1) does not authorize multiple convictions based on 'continuous' possession of a firearm during 'simultaneous' predicate offenses consisting of 'virtually' the same conduct." 319 F.3d at 188 n.11.

18 U.S.C. § 924(j) CAUSING DEATH THROUGH USE OR POSSESSION OF A FIREARM[555]

Title 18, United States Code, Section 924(j) makes it a crime to cause the death of another person through the use of a firearm during and in relation to a crime of violence or a drug trafficking crime, or the possession of a firearm in furtherance of a crime of violence or drug trafficking crime. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant used or carried a firearm;
- Second, that the defendant did so during and in relation to a crime of violence or a drug trafficking crime which may be prosecuted in federal court [the

[555] See text and footnotes for § 924(c).

court should instruct the jury as to all the essential elements of the underlying crime]; and

- Third, that the defendant caused the death of a person through the use of the firearm.

OR

- First, that the defendant possessed a firearm;
- Second, that the defendant did so in furtherance of a crime of violence or a drug trafficking crime which may be prosecuted in federal court [the court should instruct the jury as to all the essential elements of the underlying crime]; and
- Third, that the defendant caused the death of a person through the use of the firearm.[556]

☞ **The jury must determine if the killing was murder or manslaughter. Section 924(j) incorporates the definitions of murder and manslaughter found in §§ 1111 and 1112; therefore, the jury must be instructed on the elements of those offenses.**

NOTE

United States v. Robinson, 275 F.3d 371 (4th Cir. 2002); *United States v. Ricketts*, 317 F.3d 540 (6th Cir. 2003).

Section 924(j) incorporates the statutory definitions of murder and manslaughter in §§ 1111 and 1112, but does not incorporate the jurisdictional requirement. Section 924(j) incorporates the jurisdictional requirement of § 924(c). *United States v. Young*, 248 F.3d 260, 275 (4th Cir. 2001).

See also United States v. Reid, 523 F.3d 310 (4th Cir. 2008).

Section 924(c) is itself a conduct element of § 924(j) for venue purposes. *United States v. Smith*, 452 F.3d 323, 336 (4th Cir. 2006).

18 U.S.C. § 924(k) SMUGGLING A FIREARM

Title 18, United States Code, Section 924(k) makes it a crime to smuggle a firearm into the United States, with intent to promote a drug offense or crime of violence. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant smuggled or brought into the United States a firearm, [or attempted to do so];
- Second, that the defendant did so with intent to engage in or to promote conduct that
  1. constitutes a federal drug crime [as defined]; or
  2. constitutes a state drug crime [as defined]; or
  3. constitutes a crime of violence; and
- Third, that the defendant did so knowingly.

[556] *See United States v. Foster*, 507 F.3d 233, 245 (4th Cir. 2007).

☞ **The district court must instruct the jury as to all essential elements of the underlying crime.**[557]

18 U.S.C. § 924(*l*) THEFT OF FIREARM FROM AN INTERSTATE SHIPMENT

Title 18, United States Code, Section 924(*l*) makes it a crime to steal firearms from an interstate shipment. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant stole a firearm;
- Second, that the firearm was moving as, was a part of, or had moved in interstate or foreign commerce; and
- Third, that the defendant did so unlawfully.

_____NOTE_____

See instructions for 18 U.S.C. § 659. Section 924(*l*) is similar to § 659, but contains "or which has moved in" which § 659 does not. Thus, it could be argued that this section could be used to prosecute a person who stole any firearm, if the firearm had previously traveled in interstate commerce, and not just a firearm from an interstate shipment.

18 U.S.C. § 924(m) THEFT OF FIREARM FROM A LICENSED DEALER

Title 18, United States Code, Section 924(m) makes it a crime to steal a firearm from a licensed importer, manufacturer, dealer, or collector. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant stole a firearm;
- Second, that the firearm was stolen from a federally licensed importer, manufacturer, dealer, or collector; and
- Third, that the defendant did so unlawfully.

18 U.S.C. § 924(*o*) CONSPIRING TO VIOLATE § 924(c)[558]

Title 18, United States Code, Section 924(*o*) makes it a crime to conspire to use or carry a firearm during and in relation to a crime of violence or a drug trafficking crime, or to possess a firearm in furtherance of a crime of violence or a drug trafficking crime. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that two or more persons agreed to do one of the following:
  1. to use or carry a firearm during and in relation to a crime of violence or a drug trafficking crime which may be prosecuted in federal court ; or
  2. to possess a firearm in furtherance of a crime of violence or a drug trafficking crime which may be prosecuted in federal court [the court

[557] *United States v. Johnson*, 71 F.3d 139, 145 (4th Cir. 1995).

[558] See text and NOTES for Sections 924(c) and 371.

should instruct the jury as to all the essential elements of the underlying crime];

- Second, that the defendant knew of this agreement, or conspiracy; and
- Third, that the defendant knowingly and voluntarily participated in or became a part of this agreement or conspiracy.

ADDITIONAL ELEMENT, AS APPROPRIATE:

1. Was the firearm a machinegun or destructive device, or was it equipped with a firearm silencer or muffler?[559]

18 U.S.C. § 930 POSSESSION OF FIREARMS AND DANGEROUS WEAPONS IN FEDERAL FACILITIES

Title 18, United States Code, Section 930 makes it a crime for a person to possess a firearm or dangerous weapon in a federal facility. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 930(a)

- First, that the defendant possessed or caused to be present, or attempted to possess or cause to be present, a firearm or other dangerous weapon;
- Second, in a Federal facility [other than a Federal court facility]; and
- Third, that the defendant did so knowingly.

§ 930(b)

- First, that the defendant possessed or caused to be present, or attempted to possess or cause to be present, a firearm or other dangerous weapon;
- Second, in a Federal facility;
- Third, that the defendant did so knowingly; and
- Fourth, that the defendant did so with the intent that the firearm or other dangerous weapon be used in the commission of a crime.[560]

§ 930(c)

- First, that the defendant killed, or attempted or conspired to kill, another person; and
- Second, that the death occurred in the course of possessing or causing to be present in a Federal facility or Federal court facility a firearm or other dangerous weapon, or in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon.

☞ **See 18 U.S.C. §§ 1111 and 1112 for instructions on murder and manslaughter**.

§ 930(e)

- First, that the defendant possessed or caused to be present, or attempted to possess or cause to be present, a firearm or other dangerous weapon;

[559] "[T]he statute uses the word 'machine gun' (and similar words) to state an element of a separate offense." *Castillo v. United States*, 530 U.S. 120, 121 (2000).

[560] *See United States v. Hardy*, 101 F.3d 1210, 1213 (7th Cir. 1996).

- Second, in a Federal court facility; and
- Third, that the defendant did so knowingly.

"Federal facility" means a building or part of a building owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties. [§ 930(g)(1)]

"Dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length. [§ 930(g)(2)]

"Federal court facility" means the courtroom, judges' chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, offices of the court clerks, the United States attorney, and the United States marshal, probation and parole offices, and adjoining corridors of any court of the United States. [§ 930(g)(3)]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[561]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[562]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[563]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish

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[561] To prove constructive possession, the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[562] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[563] *Herder*, 594 F.3d at 358.

constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[564]

AFFIRMATIVE DEFENSE[565] **[§ 930(h)]**

The defendant has introduced evidence that notice that possession of firearms or other dangerous weapons in a Federal facility is prohibited was lacking.

The government must prove, beyond a reasonable doubt, that notice that possession of a firearm or other dangerous weapon in a Federal facility, with or without intent that the firearm or other dangerous weapon be used in the commission of a crime, is unlawful, was posted conspicuously at each public entrance.

A notice is conspicuously posted in a public entrance if considering the manner and place of its posting, the notice is reasonably calculated to warn the public of the prohibition of the possession of a firearm or other dangerous weapon.[566]

JUSTIFICATION DEFENSE

In certain circumstances, a prohibited person is justified in possessing a firearm. The defendant has the burden of proving the following by a preponderance of the evidence:[567]

- First, that he or someone else was under an unlawful and present threat of death or serious bodily injury;[568]
- Second, that he did not recklessly place himself in the situation where he would be forced to engage in criminal conduct;
- Third, that he had no reasonable legal alternative that would avoid both the criminal conduct and the threatened death or injury; and
- Fourth, that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.[569]

The defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.[570]

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[564] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[565] The Eleventh Circuit, in *United States v. McArthur*, 108 F.3d 1350, 1356 (11th Cir. 1997), construed the provisions of subsection (h) as establishing an affirmative defense, such that, unless the defendant introduces evidence that notice was lacking, the government "need not prove that notice of the ban on such possession was posted conspicuously at the facility."

[566] Instruction approved in *United States v. Lunstedt*, 997 F.2d 665, 668 (9th Cir. 1993).

[567] *United States v. Mooney*, 497 F.3d 397, 409 n.2 (4th Cir. 2007). The burden of proving affirmative defenses, such as justification, rests on the defendant.

[568] Generalized fears do not support the defense of justification. *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

[569] *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir. 1995). *See also Crittendon*, 883 F.2d at 330.

[570] *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007) (citing *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982)).

In addition, the defendant must produce evidence that he took reasonable steps to dispossess himself of the firearm, and/or ammunition, once the threat was over.[571]

_____NOTE_____

"INNOCENT POSSESSION" DEFENSE

The Fourth Circuit has joined the Seventh and Tenth Circuits in rejecting the innocent and transitory possession defense. *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005).

18 U.S.C. § 931 POSSESSION OF BODY ARMOR BY VIOLENT FELON

Title 18, United States Code, Section 931 makes it a crime for a person who has been convicted of certain crimes to possess body armor. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had been convicted of a crime of violence [as defined in 18 U.S.C. § 16, or of an offense under state law that would constitute a crime of violence if it occurred within the special maritime and territorial jurisdiction of the United States];
- Second, that the defendant purchased, owned, or possessed body armor;
- Third, that the body armor had traveled in interstate or foreign commerce at some point during its existence; and
- Fourth, that the defendant did so knowingly; that is, the defendant must know that the item was body armor and the possession must be voluntary and intentional.[572]

"Body armor" means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment. [§ 921(a)(35)]

The government may establish the interstate commerce requirement by showing that the body armor at any time had traveled across a state boundary line, or was manufactured outside the state where the defendant possessed it.[573]

The government must prove that the defendant voluntarily and intentionally had physical possession of the body armor.[574]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

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[571] *United States v. Ricks*, 573 F.3d 198, 203 (4th Cir. 2009).

[572] *United States v. Langley*, 62 F.3d 602, 605-06 (4th Cir. 1995) (*en banc*); *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005).

[573] *See United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001) (§ 922 case); *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000) (same).

[574] *Scott*, 424 F.3d at 435.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[575]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[576]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[577]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[578]

AFFIRMATIVE DEFENSE [§ 931(b)][579]

It is an affirmative defense if:

(1) the defendant obtained prior written certification from his or her employer that the defendant's purchase, use, or possession of body armor was necessary for the safe performance of lawful business activity, and

(2) the use and possession by the defendant were limited to the course of such performance.

"Employer" means any other individual employed by the defendant's business that supervises the defendant's activity. [§ 931(b)(2)]

_____NOTE_____

[575] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *Id.* 424 F.3d at 435-36. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[576] *Scott*, 424 F.3d 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[577] *Herder*, 594 F.3d at 358.

[578] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[579] *United States v. Mooney*, 497 F.3d 397, 408 n.2 (4th Cir. 2007). The burden of proving affirmative defenses, such as justification, rests on the defendant.

See United States v. Patton, 451 F.3d 615 (10th Cir. 2006) (interstate nexus requirement treated same as for a firearm, as long as the body armor traveled in interstate commerce at some point).

In *United States v. Adams*, 194 F. App'x 115 (4th Cir. 2006), the defendant refused to stipulate that he was a convicted felon. A special verdict form was provided to the jury to determine whether Adams had been convicted of each of his seven prior convictions. It was not unfairly prejudicial to submit this question to the jury.

On the authority of *United States v. Xavier*, 2 F.3d 1281, 1286 (3d Cir. 1993), a § 922(g) case, there can be no criminal liability for aiding and abetting a violation of § 931 without knowledge or having cause to believe the possessor's status as a felon.

"INNOCENT POSSESSION" DEFENSE

The Fourth Circuit has joined the Seventh and Tenth Circuits in rejecting the innocent and transitory possession defense. *United States v. Gilbert*, 430 F.3d 215, 218-20 (4th Cir. 2005).

18 U.S.C. § 960 EXPEDITION AGAINST FRIENDLY NATION

Title 18, United States Code, Section 960 makes it a crime to take part in any expedition against a friendly nation. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant began or set on foot or provided or prepared a means for or furnished the money for, or took part in, any military or naval expedition or enterprise to be carried on against the territory or dominion of any foreign state with whom the United States is at peace;
- Second, that the defendant did so within the United States; and
- Third, that the defendant did so knowingly.

_____NOTE_____

United States v. Khan, 461 F.3d 477 (4th Cir. 2006).

18 U.S.C. § 982 FORFEITURE

Title 18, United States Code, Section 982 provides that certain property shall be forfeited to the United States. For property to be forfeited, the government must prove the following by a preponderance of the evidence:[580]

§ 982(a)(1)

- First, that the defendant was convicted of [18 U.S.C. §§ 1956, 1957, or 1960]; and
- Second, that the real or personal property was involved in the offense, or the property was traceable to property involved in the offense.

§ 982(a)(2)

- First, that the defendant was convicted of [enumerated violation]; and

[580] Because forfeiture represents a penalty, the preponderance standard governs. *United States v. Cherry*, 330 F.3d 658, 669 (4th Cir. 2003).

- Second, that the property constituted, or was derived from, proceeds the defendant obtained directly or indirectly, as the result of such violation.

§ 982(a)(3)

- First, that the defendant was convicted of [enumerated violation]; and
- Second, that the offense involved the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration; as conservator or liquidating agent or a financial institution; and
- Third, that real or personal property represented or was traceable to the gross receipts obtained directly or indirectly, as the result of such violation.[581]

§ 982(a)(5)

- First, that the defendant was convicted of [enumerated violation]; and
- Second, that the real or personal property represented or was traceable to the gross proceeds obtained directly or indirectly, as the result of such violation.

§ 982(a)(6)

- First, that the defendant was convicted of [enumerated violation]; and
- Second, that the vehicle, vessel, or aircraft was used in the commission of the offense, or that the real or personal property constituted, or was derived from, or was traceable to proceeds obtained directly or indirectly from the commission of the offense, or was used to facilitate, or was intended to be used to facilitate, the commission of the offense.

§ 982(a)(7)

- First, that the defendant was convicted of [a health care offense]; and
- Second, that the real or personal property constituted, or was derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

§ 982(a)(8)

- First, that the defendant was convicted of [enumerated violation]; and
- Second, that the real or personal property was used or intended to be used to commit, to facilitate, or to promote the commission of the offense, and constituted, was derived from, or was traceable to the gross proceeds the defendant obtained directly or indirectly, as a result of such violation.

For § 982(a)(1), "property involved in" criminal activity includes property that is substantially connected to that activity, in that it furthered, facilitated, or aided in the commission of the activity. The property need not have been indispensable to the commission of the crime as long as it played a significant role in the prohibited

[581] If the offense involves a scheme to defraud, gross receipts includes any property obtained as a result of such offense. Section 982(a)(4).

activity.[582] But the property must have more than an incidental or fortuitous connection to the criminal activity.[583]

NOTE

"A forfeiture violates the Excessive Fines Clause only if it is (1) punitive, and (2) grossly disproportional to the gravity of the defendant's offense." *United States v. Jalaram, Inc.*,599 F.3d 347, 351, 351 (4th Cir. 2010) (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). The Fourth Circuit noted that the Supreme Court weighed a number of factors to determine whether the forfeiture was grossly disproportional to the charged offense: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime. *Jalaram*, 599 F.3d at 355-56.

In *Bajakajian*, the defendant attempted to leave the United States without reporting the he was transporting more than $10,000 in currency, in violation of 31 U.S.C. § 5316. The government attempted to forfeit the entire, $357,144, pursuant to § 982(a)(1). The maximum fine for the reporting violation was $5,000. Apparently, the money was proceeds of legal activity and was to be used to repay a lawful debt. The Supreme Court held that forfeiture of the entire amount would violate the Excessive Fines Clause of the Eighth Amendment because it would be grossly disproportional to the gravity of the defendant's offense.

In *United States v. Herder*, 594 F.3d 352, 364 (4th Cir. 2010), which involved a forfeiture pursuant to 21 U.S.C. § 853(a), the Fourth Circuit expressly adopted the "substantial connection" standard from case law interpreting the nearly identical civil forfeiture language in 21 U.S.C. § 881. The government must establish that there was a "substantial connection between the property to be forfeited and the offense. Substantial connection may be established by showing that use of the property made the prohibited conduct less difficult or more or less free from obstruction or hindrance." 594 F.3d at 364 (quotation and citation omitted). The government may rely on circumstantial evidence. *Id.*

18 U.S.C. § 1001 FALSE STATEMENT TO A FEDERAL AGENCY [LAST UPDATED: 7/3/14]

Title 18, United States Code, Section 1001 makes it a crime to make a false statement to a government agency. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1001(a)(1)

- First, that the defendant falsified, concealed, or covered up a material fact by any trick, scheme, or device;
- Second, that the falsified, concealed, or covered up fact was material to a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States; and

[582] *United States v. Matai*, No. 97-4129, 1999 WL 61913 (4th Cir. Feb. 10, 1999). The court relied on *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990), a 21 U.S.C. § 881 forfeiture of a dentist's office.

[583] *Schifferli*, 895 F.2d at 990.

- Third, that the defendant acted knowingly and willfully.[584]

The government must prove that the material fact was affirmatively concealed by ruse or artifice, by scheme or device.[585]

§ 1001(a)(2)

- First, that the defendant made a false, fictitious, or fraudulent statement or representation;
- Second, that the false, fictitious, or fraudulent statement or representation was material to a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States; and
- Third, that the defendant acted knowingly and willfully, that is, the defendant knew the statement or representation was false, fictitious, or fraudulent.[586]

§ 1001(a)(3)

- First, that the defendant made or used a false writing or document;
- Second, that the defendant knew the writing or document contained a false, fictitious, or fraudulent statement or entry;
- Third, that the false, fictitious, or fraudulent statement or entry was material to a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States; and
- Fourth, that the defendant acted knowingly and willfully.[587]

An act is done willfully if it is done deliberately and intentionally, as contrasted with accidentally, carelessly, or unintentionally.[588]

"Within the jurisdiction" differentiates the official, or authorized functions of an agency or department from matters that are peripheral to the business of the agency or department, and refers to the department's or agency's power to exercise authority in a particular situation, and that power need not include the power to make final or binding determinations.[589]

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[584] *United States v. Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993).

[585] *See United States v. Irwin*, 654 F.2d 671, 678 (10th Cir. 1981) (as to concealment or nondisclosure of material facts, "it was incumbent on the Government to prove that the defendant had the duty to disclose the material facts at the time he was alleged to have concealed them."). *See also United States v. Safavian*, 528 F.3d 957, 964, 965 n.8 (D.C. Cir. 2008) ("Concealment cases ... have found a duty to disclose material facts on the basis of specific requirements for disclosure of specific information[,]" and "concealment must be accomplished in a particular way: by a 'trick, scheme, or device.'").

The Fourth Circuit acknowledged *Irwin* in *United States v. Richeson*, 825 F.2d 17, 20 (4th Cir. 1987), where the court held that by operation of § 2(b), the defendant's willful intent to cause a concealment combined with the financial institution's duty to report, constituted the elements of actionable concealment under § 1001.

[586] *Arch Trading Co.*, 987 F.2d 1087.

[587] *Id.*

[588] *United States v. Daughtry*, 48 F.3d 829 (4th Cir. 1995), *vacated on other grounds*, 516 U.S. 984 (1995).

[589] *United States v. Jackson*, 608 F.3d 193 (4th Cir. 2010).

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[590]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[591]

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[592]

The government does not need to prove that the defendant had actual knowledge that the matter was within the jurisdiction of the Government of the United States.[593]

_____NOTE_____

See also United States v. Gaudin, 515 U.S. 506 (1995).

Intent to deceive is immaterial under this statute. *United States v. Sparks*, 67 F.3d 1145, 1152 (4th Cir. 1995).

Brogan v. United States, 522 U.S. 398 (1998), abrogated *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988), and every other Circuit Court decision which upheld the "exculpatory no" doctrine. "[T]he plain language of § 1001 admits of no exception for an 'exculpatory no.'" 522 U.S. at 408. Brogan, a labor union official, accepted cash payments from a real estate company whose employees were represented by the union. Federal agents investigating the real estate company asked Brogan whether he had received any cash or gifts from the real estate company. He answered "no," and was convicted of violating § 1001.

Multiple false statements charged in a single count may require a special unanimity instruction. In *United States v. Holley*, 942 F.2d 916, 925-29 (5th Cir. 1991), the Fifth Circuit concluded that the indictment was duplicitous for charging in one count multiple false statements which could be proven only by showing distinct facts. The court reversed because the district court did not give a special unanimity instruction. In *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998), the trial judge did instruct the jury that "each member had to agree unanimously on one of the instances of conduct." In *United States v. Adams*, 335 F. App'x 338 (4th Cir. 2009), the district court instructed the jury as follows:

> The government is not required to prove that all of these statements that are alleged in Counts Five and Six as false are in fact false. Each juror must agree, however, with each of the other jurors that the same statement or representation is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but in order to convict, must unanimously agree upon at least one such statement as false, fictitious, or fraudulent when knowingly made or used by the defendant.

335 F.App'x at 347-48.

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[590] *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978). *See also United States v. Race*, 632 F.2d 1114 (4th Cir. 1980).

[591] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[592] *Anderson*, 579 F.2d at 460. *See also Race*, 632 F.2d at 1114.

[593] *United States v. Yermian*, 468 U.S. 63, 69, 75 (1984).

See also O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* § 40.15 (5th ed. 2000):

> Each juror must agree with each of the other jurors that the same statement or representation, alleged to be false, fictitious, or fraudulent, is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but, in order to convict, must unanimously agree upon at least one such statement as false, fictitious or fraudulent when knowingly made or used by the defendant.

In *United States v. Race*,632 F.2d 1114 (4th Cir. 1980), the court held that "one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract." 632 F.2d at 1120. Race was prosecuted for submitting false invoices for payment of services and materials under a Navy contract.

The executive branch has the authority not to pay a false invoice, no matter through how many intermediaries' hands it passes. *United States v. Jackson*, 608 F.3d 193 (4th Cir. 2010).

A statement may concern a matter within the federal jurisdiction described in this section, even if the statement is not submitted directly to the federal department or agency involved, and the federal agency involvement is limited to reimbursement of expenditures. *Id.* at 197 (citing *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir. 1978)).

Venue lies in the district where the statement is made, used, or "passed through" by an intermediary. *United States v. Barsanti*, 943 F.2d 428, 435 (4th Cir. 1991) (defendant made the false statements in his attorney's office in Washington, D.C., knowing that they would go to a lending institution in Virginia and then on to HUD in Washington, so "pass through" venue was proper in the Eastern District of Virginia.)

In *United States v. Oceanpro Industries, Ltd.*, 674 F.3d 323 (4th Cir. 2012), the defendant was convicted of making a false statement to a federal law enforcement officer at the company office in the District of Columbia. The Fourth Circuit ruled that the "essential conduct prohibited by statute is 'making any materially false statement.'" 674 F.3d at 329 (quoting statute). In this case, proving materiality necessarily required evidence of the existence of a federal investigation in Maryland and the potential effect of the false statement on that investigation. Therefore, venue was proper in the District of Maryland.

"There is no safe harbor for recantation or correction of a prior false statement that violates § 1001." *United States v. Fondren*, 417 F. App'x 327, 336 (4th Cir. 2011) (quoting *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006)).

The government does not bear the initial burden of proving lack of authority. *United States v. West*, 666 F.2d 16, 19 (2d Cir. 1981). In *West*, the defendant argued that he had authority to sign his wife's name on documents submitted to a credit union and a federal agency, in violation of §§ 1014 and 1001. The Second Circuit went on to write that the defendant's "state of mind, including his reasonable belief that he had authority, was relevant to the question of whether he 'knowingly' submitted false documents." *Id.* at 20.

Literal truth is a complete defense to a charge of violating § 1001(a)(1). *United States v. Safavian*, 528 F.3d 957, 967 (D.C. Cir. 2008).

18 U.S.C. § 1005 FALSE ENTRY IN BANK'S BOOKS

Title 18, United States Code, Section 1005 makes it a crime to make a false entry in the records of a federally-insured bank. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant was an officer, director, agent, or employee of the branch, agency, or organization or company operating under section 25 or section 25(a) of the Federal Reserve Act[594] at the time alleged in the indictment;[595]
- Second, that the accounts of the bank were insured by the Federal Deposit Insurance Corporation [or some other basis of jurisdiction under the statute] at the time alleged in the indictment;
- Third, that the defendant issued or put in circulation any notes of the [bank]; and
- Fourth, that the defendant did so without authority from the directors of the [bank].

¶ 2

- First, that the defendant made, drew, issued, put forth, or assigned;
- Second, a certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation or mortgage, judgment or decree of a bank the accounts of which were insured by the Federal Deposit Insurance Corporation [or some other basis of jurisdiction under the statute]; and
- Third, that the defendant did so without authority from the directors of the [bank].

¶ 3

- First, that the defendant made a false entry in any book, report, or statement of the [bank];
- Second, that the accounts of the bank were federally insured at the time alleged in the indictment [or some other basis of jurisdiction under the statute];
- Third, that the defendant knew that the entry was false when it was made; and
- Fourth, that the defendant did so with the intent to injure or defraud the bank or to deceive any officer of the bank or any agent or examiner appointed to examine the affairs of the bank.[596]

¶ 4

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[594] "[A]ny Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act ...." 18 U.S.C. § 1005.

[595] The status of the defendant is an element of the first paragraph of § 1005, but not of the third paragraph. *See United States v. Campbell*, 64 F.3d 967, 974 (5th Cir. 1995).

[596] "[A]part from an intent to injure and defraud, an intent to deceive the officers of the bank or the examining officials also violates § 1005." *United States v. Biggerstaff*, 383 F.2d 675, 679 (4th Cir. 1967).

- First, that the defendant participated or shared in or received directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of the bank;
- Second, that the accounts of the bank were federally insured at the time alleged in the indictment [or some other basis of jurisdiction under the statute]; and
- Third, that the defendant did so with intent to defraud the bank, the United States or any agency of the United States.

"Intent to injure or defraud" can be established by proving that the defendant acted in reckless disregard of the bank's interest.[597] To act with intent to injure or defraud means to act with intent to deceive or cheat, for the purpose of causing a financial loss to someone else, although it is not necessary that the bank has suffered an actual loss, or to bring financial gain or benefit to one's self.[598]

The term "injure" includes only pecuniary loss to the bank.[599]

NOTE

In *United States v. Barel*, 939 F.2d 26, 38-41 (3d Cir. 1991), the Third Circuit held that the legislative history of § 1005 shows that Congress intended the statute to apply only to bank insiders or their accomplices and not to bank customers acting on their own.

In *United States v. Hoffman*, No. 95-5181, 1996 WL 469901 (4th Cir. Aug. 20, 1996), the Fourth Circuit did not need to decide that issue because Hoffman was convicted under 18 U.S.C. § 2 for aiding and abetting the false entry in a bank record made by a bank officer.

18 U.S.C. § 1006 FALSE ENTRY IN FINANCIAL RECORDS

Title 18, United States Code, Section 1006 makes it a crime to make a false entry in the records of certain financial institutions. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was an officer, director, agent, or employee of or connected in some capacity with [the institution] at the time alleged in the indictment;
- Second, that the accounts of the [named institution] were insured by [the Federal Deposit Insurance Corporation/National Credit Union Administration Board][or other basis for federal jurisdiction];

THEN, ONE GROUP OF THE FOLLOWING:

- Third, that the defendant made a false entry in any book, report, or statement of the institution, or to the institution;

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[597] *United States v. Hoffman*, No. 95-5181, 1996 WL 469901 (4th Cir. Aug. 20, 1996) (citations omitted).

[598] This charge has been modified to correct the language which the Fourth Circuit found erroneous in *United States v. Blackwood*, 735 F.2d 142, 145-46 (4th Cir. 1984).

[599] "While damage to a bank's reputation may eventually result in some deterioration in the bank's financial condition, such loss would be too indirect and speculative and we decline to construe [§ 656] as comprehending it." *United States v. Arthur*, 544 F.2d 730, 736 (4th Cir. 1976).

- Fourth, that the defendant knew that the entry was false when it was made; and
- Fifth, the defendant did so with the intent to injure or defraud the institution or any individual or to deceive any officer, auditor, examiner or agent of the institution, or department or agency of the United States.[600]

OR

- Third, that the defendant drew an order or bill of exchange, or made an acceptance, or issued, put forth, or assigned a note, debenture, bond, or other obligation or draft, bill of exchange, mortgage, judgment or decree of [the institution];
- Fourth, that the defendant did so without being duly authorized; and
- Fifth, that the defendant did so with the intent to injure or defraud the institution or any individual or to deceive any officer, auditor, examiner or agent of the institution, or department or agency of the United States.[601]

OR

- Third, that the defendant participated or shared in or received directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of the institution; and
- Fourth, that the defendant did so with intent to defraud the institution, the United States or any agency of the United States.[602]

The defendant must personally benefit, either directly or indirectly, through the loan, transaction, or other act of the institution.[603]

"Intent to injure or defraud" can be established by proving that the defendant acted in reckless disregard of the bank's interest.[604] To act with intent to injure or defraud means to act with intent to deceive or cheat, for the purpose of causing a financial loss to someone else, although it is not necessary that the bank has suffered an actual loss, or to bring financial gain or benefit to one's self.[605]

The term "injure" includes only pecuniary loss to the bank.[606]

18 U.S.C. § 1007 FALSE STATEMENT TO FDIC

Title 18, United States Code, Section 1007 makes it a crime to make a false statement to influence the actions of the Federal Deposit Insurance Corporation. For you

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[600] *See Biggerstaff*, 383 F.2d at 679 (§ 1005 prosecution; intent to injure and defraud as well as an intent to deceive officers of bank or examining officials violates § 1005).

[601] *United States v. Biggerstaff*, 383 F.2d 675, 679 (4th Cir. 1967).

[602] *See United States v. Vebeliunas*, 76 F.3d 1283, 1289 (2d Cir. 1996).

[603] *Id.* at 1290.

[604] *United States v. Hoffman*, No. 95-5181, 1996 WL 469901 (4th Cir. Aug. 20, 1996) (citations omitted).

[605] This charge has been modified to correct the language which the Fourth Circuit found erroneous in *United States v. Blackwood*, 735 F.2d 142, 145-46 (4th Cir. 1984).

[606] "While damage to a bank's reputation may eventually result in some deterioration in the bank's financial condition, such loss would be too indirect and speculative and we decline to construe [§ 656] as comprehending it." *United States v. Arthur*, 544 F.2d 730, 736 (4th Cir. 1976).

to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made or invited reliance on a false, forged, or counterfeit statement, document, or thing;
- Second, that the defendant knew that the statement, document, or thing, was false, forged, or counterfeit; and
- Third, that the defendant did so for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation.

_____NOTE_____

See *United States v. Burns*, 162 F.3d 840, 850 (5th Cir. 1998); *United States v. Taliaferro*, 979 F.2d 1399, 1405 (10th Cir. 1992).

18 U.S.C. § 1010 FALSE STATEMENT TO HUD

Title 18, United States Code, Section 1010 makes it a crime to make a false statement to influence the actions of the Department of Housing and Urban Development. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made, passed, uttered, or published a false statement [or counterfeited any instrument, paper, or document / or uttered, published, or passed as true any altered, forged, or counterfeited instrument, paper, or document / or overvalued any security, asset, or income];
- Second, that the defendant did so for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit be offered to or accepted by the Department of Housing and Urban Development for insurance / or for the purpose of influencing in any way the action of the Department of Housing and Urban Development; and
- Third, that the defendant did so knowingly [concerning a false statement] or willfully [concerning overvaluing security, asset, or income].

_____NOTE_____

See United States v. McLean, 131 F. App'x 34 (4th Cir. 2005). The district court charged that the government was required to prove defendants "knew that the mortgage notes were actually false or counterfeited" and that they "knew [the notes] would be offered for some purpose to HUD." 131 F. App'x at 41. The court determined that "[a]s long as defendants knew the information on the documents they procured was false and that the documents were headed to HUD (*i.e.*, Ginnie Mae), defendants' belief that the scheme was lawful, even if true, was not a defense." *Id.*

"The essence of a violation of this section is the uttering and publishing of false documents with the intent to influence the F.H.A." *Bins v. United States*, 331 F.2d 390, 392 (5th Cir. 1964).

The filing of each false document would constitute a crime. *Id.* at 393.

18 U.S.C. § 1014 FALSE STATEMENT TO A BANK

Title 18, United States Code, Section 1014 makes it a crime to make a false statement to influence the actions of a federally insured bank or other financial institution. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made a false statement or report, or overvalued any land, property or security;
- Second, to a financial institution covered by the statute;
- Third, that the defendant did so for the purpose of influencing in any way the actions of the financial institution; and
- Fourth, that the defendant did so knowingly [concerning a false statement] or willfully [concerning overvaluing land, property, or security].[607]

The government need not prove that the defendant made the false statement directly to the insured financial institution, as long as the proof shows that the false statement was made to anyone for the purpose of influencing the action of the financial institution.[608]

The government need not prove that the financial institution faced a risk of financial loss.[609]

_____NOTE_____

Materiality is not an element of § 1014. *United States v. Wells*, 519 U.S. 482 (1997), *abrogating United States v. Bonnette*, 663 F.2d 495 (4th Cir. 1981).

Intent to deceive is irrelevant. The only specific intent that matters is the intent to influence the bank's actions. Therefore, lack of intent to deceive is not a viable affirmative defense. *United States v. Sparks*, 67 F.3d 1145, 1151-52 (4th Cir. 1995).

Reliance is not an essential element of § 1014. *Bonnette*, 663 F.2d at 498. Therefore, the jury need not be instructed on justifiable reliance.

"The essence of the offense in the making of the false statement with the intent to influence the lender is not dependent on the accomplishment of that purpose. It is a crime of a subjective intent requiring neither reliance by the bank officers nor an actual defrauding." *United States v. Kennedy*, 564 F.2d 1329, 1341 (9th Cir. 1977).

The government does not bear the initial burden of proving lack of authority. *United States v. West*, 666 F.2d 16, 19 (2d Cir. 1981). In *West*, the defendant argued that he had authority to sign his wife's name on documents submitted to a credit union and a federal agency, in violation of §§ 1014 and 1001. The Second Circuit went on to write that the defendant's "state of mind, including his reasonable belief that he had authority, was relevant to the question of whether he 'knowingly' submitted false documents." *Id.* at 20.

18 U.S.C. § 1020 HIGHWAY FRAUD

Title 18, United States Code, Section 1020 makes it a crime to make a false statement concerning a highway project approved by the Secretary of Transportation. For

[607] *See Elliott v. United States*, 332 F.3d 753, 759 (4th Cir. 2003); *United States v. Bonnette*, 663 F.2d, 495 (4th Cir. 1981), *abrogated by United States v. Wells*, 519 U.S. 482 (1997).

[608] *United States v. Smith*, 29 F.3d 914, 917 (4th Cir. 1994). In *Smith*, the defendant made false statements to Dime Real Estate, a fully owned subsidiary of Dime Savings Bank.

[609] *Elliott*, 332 F.3d at 764. Thus, § 1014 differs from § 1344.

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

¶ 1

- First, that the defendant made a false statement, false representation, or false report;
- Second, that the false statement, representation, or report pertained to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the costs of the work performed or to be performed, in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project submitted for approval to the Secretary of Transportation; and
- Third, that the defendant did so knowingly.

¶ 2

- First, that the defendant made a false statement, false representation, false report, or false claim;
- Second, that the false statement, representation, report, or claim pertained to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; and
- Third, that the defendant did so knowingly.

¶ 3

- First, that the defendant made a false statement or false representation;
- Second, that the false statement or representation was in any statement, certificate, or report submitted pursuant to the Federal-Aid Road Act;
- Third, that the false statement or representation was material; and
- Fourth, that the defendant did so knowingly.

_____NOTE_____

Willfulness is not an element of § 1020. *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 254-55 (4th Cir. 2001), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

The first two paragraphs do not distinguish between the types of contracts, that is, preliminary engineering contracts as opposed to contracts for actual construction, but rather distinguish between statements made in connection with projects submitted for approval and those already approved. *Id.* at 256.

18 U.S.C. § 1027 FALSE STATEMENT, ERISA

Title 18, United States Code, Section 1027 makes it a crime to make a false statement in any records of an employee benefit plan. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made a false statement or representation of fact;

- Second, in any document required by the Employee Retirement Income Security Act (ERISA) to be published or kept as part of the records of any employee welfare or pension benefit plan; and
- Third, that the defendant knew the statement or representation was false.

OR

- First, that the defendant concealed, covered up, or failed to disclose a fact;
- Second, that the disclosure of the fact was required by the Employee Retirement Income Security Act (ERISA) or the fact was necessary to verify, explain, clarify, or check for accuracy and completeness any report required by ERISA to be published or certified; and
- Third, that the defendant acted knowingly.[610]

The court should define employee pension benefit plan or employee welfare benefit plan, as appropriate.

In order to be covered by the statute, the false statement or representation of fact must be made in a document required by ERISA to be either (1) published by an employee welfare benefit plan or employee pension benefit plan, (2) kept as part of the records of such a plan, or (3) certified to the administrator of such a plan. A concealment, cover-up, or failure to disclose likewise must occur in a similar document, but it also must relate to a fact the disclosure of which is required by ERISA or is necessary to verify, explain, or check for accuracy and completeness any information required by ERISA to be published.[611]

_____NOTE_____

Employee pension benefit plan and employee welfare benefit plan are defined in 29 U.S.C. § 1002.

The records that must be kept, which are not limited to financial records, are described in 29 U.S.C. § 1027.

Multiple false statements charged in a single count may require a special unanimity instruction. In *United States v. Holley*, 942 F.2d 916, 925-29 (5th Cir. 1991), the Fifth Circuit concluded that the indictment was duplicitous for charging in one count multiple false statements which could be proven only by showing distinct facts. The court reversed because the district court did not give a special unanimity instruction. In *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998), the trial judge instructed the jury that "each member had to agree unanimously on one of the instances of conduct." In *United States v. Adams*, 335 F. App'x 338 (4th Cir. 2006), the district court instructed the jury as follows:

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[610] *See United States v. Parris*, 88 F. Supp. 2d 555, 566 n.32 (E.D. Va. 2000).

[611] *United States v. Sarault*, 840 F.2d 1479, 1482 (9th Cir. 1988). In *Sarault*, the defendant, a lawyer, wrote a letter as general counsel for an insurance company falsely stating that the insurance company had in excess of $20 million in reserves in its trust account and was prepared to set aside an actuarial reserve for fiduciary liability insurance coverage. The Ninth Circuit affirmed the conviction, concluding that Sarault's letter was a record required by 29 U.S.C. § 1029 in order to verify, explain, clarify, and check for accuracy and completeness information reported on Form 5500, an annual report that ERISA required be published and filed and which disclosed premiums paid for fiduciary liability insurance. "If fiduciary insurance providers and their agents are not sanctioned for providing false statements about worthless fiduciary insurance, plan participants may suffer." *Id.* at 1484.

> The government is not required to prove that all of these statements that are alleged in Counts Five and Six as false are in fact false. Each juror must agree, however, with each of the other jurors that the same statement or representation is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but in order to convict, must unanimously agree upon at least one such statement as false, fictitious, or fraudulent when knowingly made or used by the defendant.

335 F. App'x at 347-48.

See also O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* § 40.15 (5th ed. 2000):

> Each juror must agree with each of the other jurors that the same statement or representation, alleged to be false, fictitious, or fraudulent, is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but, in order to convict, must unanimously agree upon at least one such statement as false, fictitious or fraudulent when knowingly made or used by the defendant.

18 U.S.C. § 1028 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS [LAST UPDATED: 7/1/14]

§ 1028(a)(1)

Title 18, United States Code, Section 1028(a)(1) makes it a crime to produce an identification document without lawful authority. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant produced an identification document, authentication feature, or false identification document;
- Second, that the defendant did so knowingly and without lawful authority; and
- Third, that the identification document, authentication feature, or false identification document was or appeared to be issued by or under the authority of the United States, or the production was in or affected interstate or foreign commerce, or the identification document, or false identification document was transported in the mail in the course of the production prohibited by this law.[612]

§ 1028(a)(2)[613]

Title 18, United States Code, Section 1028(a)(2) makes it a crime to transfer a false identification document knowing it was stolen or produced without lawful authority. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transferred a false identification document, authentication feature, or false identification document;

[612] *See United States v. Braithwaite*, 242 F. App'x 900 (4th Cir. 2007) (indictment need not allege intended unlawful use of the fraudulent document).

[613] *See United States v. Luke*, 628 F.3d 114 (4th Cir. 2010).

- Second, that the defendant knew that the identification document, authentication feature, or false identification document was stolen or produced without lawful authority; and
- Third, that the identification document, authentication feature, or false identification document was or appeared to be issued by, or under the authority of the United States, or the transfer was in or affected interstate or foreign commerce, including the transfer of a document by electronic means, or the means of identification, identification document, or false identification document was transported in the mail in the course of the transfer prohibited by this law.

§ 1028(a)(3)

Title 18, United States Code, Section 1028(a)(3) makes it a crime to possess with intent to use unlawfully five or more false identification documents. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant possessed five or more false identification documents, authentication features, or false identification documents;
- Second, that the defendant knew the identification documents were false;
- Third, that the identification documents, authentication features, or false identification documents were or appeared to be issued by or under the authority of the United States, or the possession was in or affected interstate or foreign commerce, including the transfer of a document by electronic means, or the means of identification, identification document, or false identification document was transported in the mail in the course of the possession prohibited by this law; and
- Fourth, that the defendant did so with the intent to use or transfer the identification documents unlawfully.[614] [This requires an additional instruction on the elements of the crime the defendant intended to commit using the identification documents.]

The government must establish the uses to which the defendant intended to put the false identification documents and that those intended uses would violate one or more federal, state, or local laws. The government does not have to prove that the defendant actually put the document to the unlawful use, only that the defendant's intended use would have violated some law. [Therefore, the court must charge the jury on the elements of the particular law which the government contends the defendant intended to violate.][615]

§ 1028(a)(4)[616]

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[614] *United States v. Mora*, No. 00-4328, 2001 WL 856095 (4th Cir. July 31, 2001); *United States v. Bowling*, 442 F. App'x 72, 73 (4th Cir. 2011) ("[Section] 1028(a)(3) criminalizes not just the possession of false identification documents, but also possession of genuine identification documents with the intent to use or transfer unlawfully.").

[615] *United States v. Rohn*, 964 F.2d 310, 313-14 (4th Cir. 1992). "We also do not hold that the government must prove that Rohn had specific knowledge that her intended use of the false identifications was contrary to law. We require only that the government demonstrate the unlawfulness of that use." *Id*. at 314 n.3.

[616] *See Luke*, 628 F.3d 114.

Title 18, United States Code, Section 1028(a)(4) makes it a crime to possess an identification document, authentication feature, or false identification document, with the intent that it be used to defraud the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant possessed a false identification document, authentication feature, or false identification document; and
- Second, that the defendant did so with the intent to defraud the United States.

§ 1028(a)(5)

Title 18, United States Code, Section 1028(a)(5) makes it a crime to possess document-making implements with the intent that they be used to make false identification documents. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant produced, transferred, or possessed a document-making implement or authentication feature;
- Second, that the defendant did so with the intent that the document-making implement or authentication feature would be used in the production of a false identification document or another document-making implement or authentication feature which would be so used; and
- Third, that the document-making implement was designed or suited for making an identification document, authentication feature, or false identification document that is or appears to be issued by or under the authority of the United States, or the production, transfer, or possession was in or affected interstate or foreign commerce, or the document-making implement was transported in the mail in the course of the production, transfer, or possession prohibited by this law.

§ 1028(a)(6)

Title 18, United States Code, Section 1028(a)(6) makes it a crime to possess an identification document or authentication feature knowing it was stolen or produced without lawful authority. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant possessed an identification document or authentication feature that was or appeared to be an identification document or authentication feature of the United States or a sponsoring entity of an event designated as a special event of national significance;
- Second, that the defendant did so knowingly;
- Third, that the identification document or authentication feature was stolen or produced without lawful authority; and
- Fourth, that the defendant knew the identification document or authentication feature was stolen or produced without lawful authority.

§ 1028(a)(7)

Title 18, United States Code, Section 1028(a)(7) makes it a crime to transfer, possess, or use, without lawful authority, a means of identification of another person with the intent to commit any unlawful activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transferred, possessed, or used, without lawful authority;
- Second, a means of identification of another person;
- Third, that the defendant did so knowingly;
- Fourth, that the defendant did so with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law [the court must identify the elements of the predicate unlawful activity]; and
- Fifth, that the transfer, possession, or use was in or affected interstate or foreign commerce (including the transfer of a document by electronic means) or the means of identification was transported in the mail in the course of its transfer, possession, or use.[617]

The government must prove that the defendant knew the means of identification belonged to another individual.[618]

§ 1028(a)(8)

Title 18, United States Code, Section 1028(a)(8) makes it a crime to traffic in false or actual authentication features for use in false identification documents, document-making implements, or means of identification. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant trafficked in false or actual authentication features for use in false identification documents, document-making implements, or means of identification;
- Second, that the authentication feature or false identification document was or appeared to be issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance; and
- Third, that the defendant did so knowingly.

"Authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified. [§ 1028(d)(1)]

"Document-making implement" means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document-making implement. [§ 1028(d)(2)]

"Identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a

[617] In *United States v. Lessington*, 372 F. App'x 379 (4th Cir. 2010), the Fourth Circuit did not include one of the circumstances in § 1028(c). However, the text specifies five elements.

[618] *See United States v. Berry*, 369 F. App'x 500 (4th Cir. 2010) (holding *United States v. Flores-Figueroa,* 556 U.S. 646 (2009), which construed similar language in § 1028A, applies also to §1028(a)(7)).

sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals. [§ 1028(d)(3)]

"False identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that -

(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and

(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization. [§ 1028(d)(4)]

"False authentication feature" means an authentication feature that -

(A) is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit;

(B) is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with a lawfully made identification document, document-making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or

(C) appears to be genuine, but is not. [§ 1028(d)(5)]

"Issuing authority" means

(A) any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and

(B) includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government or quasi-governmental organization. [§ 1028(d)(6)]

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any -

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device.
[§ 1028(d)(7)]

"Access device" means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument). [§ 1029(e)(1)]

"Personal identification card" means an identification document issued by a State or local government solely for the purpose of identification. [§ 1028(d)(8)]

"Produce" includes alter, authenticate, or assemble. [§ 1028(d)(9)]

"Transfer" includes selecting an identification document, false identification document, or document-making implement and placing or directing the placement of such identification document, false identification document, or document-making implement on an online location where it is available to others. [§ 1028(d)(10)]

"State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States. [§ 1028(d)(11)]

"Traffic" means -

(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or

(B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of. [§ 1028(d)(12)]

"An example of a document-making implement is a device specially designed or primarily used to produce a small photograph and assemble laminated identification cards. The term may also include any official seals or signatures, or text in a distinctive type face and layout ... [or] specialized paper or ink or other materials used in the production of an identification document."[619]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

_____NOTE_____

An identification document not issued by or under the authority of the United States Government appears to be issued by or under the authority of the United States

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[619] *United States v. Pearce*, 65 F.3d 22, 25 (4th Cir. 1995). In *Pearce*, the Fourth Circuit also approved the following instruction regarding interstate commerce:

> If you find beyond a reasonable doubt that the document-making implements, or any one of them, or any component parts of them, were made outside the state of North Carolina and delivered here from another state or foreign country, then the element of "in interstate commerce" will have been satisfied. If you find beyond a reasonable doubt that the intended use of the document-making implements affect interstate commerce in an adverse manner, then you may find that the element of "affect upon interstate commerce" has been satisfied.

Id.

Government when a reasonable person of ordinary intelligence would believe that it was issued by or under the authority of the United States Government. *See generally United States v. Jaensch*, 665 F.3d 83 (4th Cir. 2011).

In *United States v. Mora*, No. 00-4328, 2001 WL 856095 (4th Cir. July 31, 2001), the indictment did not allege the specific unlawful use to which the defendant intended to put the false identification documents. The conviction was reversed, because the district court did not instruct the jury on all of the elements of the predicate intended unlawful use.

In *United States v. Johnson*, 261 F. App'x 611 (4th Cir. 2008), the defendant argued that because of the definition in § 1028(d)(7), Congress meant to limit aggravated identity theft to those involving natural persons, not companies. The court found that use of a person's name as part of the company name (Gail Brinn Wilkins, Incorporated) was sufficient evidence to satisfy the means of identification element of § 1028A. Independently, the court also found that use of an individual's name as the signatory on company checks was sufficient to identify a specific individual under the statute.

18 U.S.C. § 1028A AGGRAVATED IDENTITY THEFT [LAST UPDATED: 7/1/14]

Title 18, United States Code, Section 1028A makes it a crime to transfer, possess, or use a means of identification during and in relation to certain other crimes. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1028A(a)(1)

- First, that the defendant transferred, possessed, or used,
- Second, without lawful authority;[620]
- Third, a means of identification of another person;
- Fourth, that the defendant did so during and in relation to [one of the felonies enumerated in § 1028A(c), the elements of which must be identified]; and
- Fifth, that the defendant did so knowingly.[621]

§ 1028A(a)(2)

- First, that the defendant transferred, possessed, or used,
- Second, without lawful authority;
- Third, a means of identification of another person;
- Fourth, that the defendant did so during and in relation to [a crime of terrorism, § 2332b(g)(5), the elements of which must be identified]; and
- Fifth, that the defendant did so knowingly.

[620] In *United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010), the Fourth Circuit rejected the defendant's contention that the means of identification must have been stolen or misappropriated, and affirmed his conviction. The defendant lawfully possessed Medicaid patients' identifying information, but used it to submit fraudulent billing claims.

[621] *See id.*; *United States v. Occident*, 243 F. App'x 777 (4th Cir. 2007) (citing *United States v. Montejo,* 442 F.3d 213 (4th Cir. 2006), *abrogated by United States v. Flores-Figueroa*, 556 U.S. 646 (2009)).

The government must prove that the defendant knew the particular numbers (or identifiers) belonged to another individual.[622]

"Authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified. [§ 1028(d)(1)]

"Identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals. [§ 1028(d)(3)]

"False identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that -

(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and

(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization. [§ 1028(d)(4)]

"False authentication feature" means an authentication feature that -

(A) is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit;

(B) is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with a lawfully made identification document, document-making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or

(C) appears to be genuine, but is not. [§ 1028(d)(5)]

"Issuing authority" means

(A) any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and

(B) includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government or quasi-governmental organization. [§ 1028(d)(6)]

[622] *Flores-Figueroa*, 556 U.S. 646.

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any -

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device. [§ 1028(d)(7)]

"Access device" means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument). [§ 1029(e)(1)]

"Personal identification card" means an identification document issued by a State or local government solely for the purpose of identification. [§ 1028(d)(8)]

"Transfer" includes selecting an identification document, false identification document, or document-making implement and placing or directing the placement of such identification document, false identification document, or document-making implement on an online location where it is available to others. [§ 1028(d)(10)]

"State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States. [§ 1028(d)(11)]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Without lawful authority" means without a form of authorization recognized by law.[623]

NOTE

In *United States v. Mora*, No. 00-4328, 2001 WL 856095 (4th Cir. July 31, 2001), the conviction was reversed because the district court did not instruct the jury on all of the elements of the predicate intended use.

In *United States v. Johnson*, 261 F. App'x 611 (4th Cir. 2008), the defendant argued that because of the definition in § 1028(d)(7), Congress meant to limit aggravated identity theft to those involving natural persons, not companies. The court found sufficient evidence to satisfy the means of identification element of § 1028A. The court also found that use of an individual's name as the signatory on company checks was sufficient.

[623] *United States v. Otuya*, 720 F.3d 183, 189 (4th Cir. 2013) (quoting *United States v. Abdelshafi*, 592 F.3d 602, 609 (4th Cir. 2010)).

18 U.S.C. § 1029 CREDIT CARD FRAUD[624]

Title 18, United States Code, Section 1029 makes it a crime to commit credit card fraud. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1029(a)(1)

- First, that the defendant produced, used, or trafficked in one or more counterfeit access devices;
- Second, that the conduct affected interstate or foreign commerce; and
- Third, that the defendant did so knowingly and with intent to defraud.

§ 1029(a)(2)

- First, that the defendant trafficked in or used one or more unauthorized access devices;
- Second, that, by such conduct, the defendant obtained anything of value aggregating $1,000 or more during a one-year period;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.[625]

§ 1029(a)(3)

- First, that the defendant possessed fifteen or more access devices;
- Second, that the access devices were either counterfeit or unauthorized;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.

§ 1029(a)(4)

- First, that the defendant produced, trafficked in, had control or custody of, or possessed;
- Second, device-making equipment;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.

§ 1029(a)(5)

- First, that the defendant effected transactions with one or more access devices issued to another person or persons;
- Second, that the defendant did so to receive payment or any other thing of value aggregating $1,000 or more during any one-year period;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.[626]

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[624] 18 U.S.C. § 1029(b)(1) prohibits attempts, and § 1029(b)(2) has different penalties for conspiracy. Effect on interstate or foreign commerce is an essential element of a § 1029(b)(2) conspiracy. *United States v. Akpi*, No. 92-5481, 1993 WL 130207 (4th Cir. Apr. 27, 1993).

[625] *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996).

[626] *See United States v. Davenport*, 445 F.3d 366, 373 (4th Cir. 2006), *overruled in part on other grounds by Irizarry v. United States*, 553 U.S. 708 (2008).

§ 1029(a)(6)

- First, that the defendant solicited another person for the purpose of (1) offering an access device, or (2) selling information regarding or an application to obtain an access device;
- Second, that the defendant did so without the authorization of the issuer of the access device;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.

§ 1029(a)(7)

- First, that the defendant used, produced, trafficked in, had control or custody of, or possessed;
- Second, a telecommunications instrument that had been modified or altered to obtain unauthorize d use of telecommunications services;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.

§ 1029(a)(8)

- First, that the defendant used, produced, trafficked in, had control or custody of, or possessed;
- Second, a scanning receiver;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.

§ 1029(a)(9)

- First, that the defendant used, produced, trafficked in, had control or custody of, or possessed;
- Second, hardware or software that had been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that the instrument could be used to obtain telecommunication service without authorization;
- Third, that the defendant knew the hardware or software had been so configured;
- Fourth, that the conduct affected interstate or foreign commerce; and
- Fifth, that the defendant did so knowingly.

§ 1029(a)(10)

- First, that the defendant caused or arranged for another person to present to a credit card system member or its agent, for payment, one or more evidences or records of transactions made by an access device;
- Second, that the defendant did so without the authorization of the credit card system member or its agent;
- Third, that the conduct affected interstate or foreign commerce; and
- Fourth, that the defendant did so knowingly and with intent to defraud.

"Access device" means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number or other

telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument). [§ 1029(e)(1)]

"Counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device. [§ 1029(e)(2)]

"Unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud. [§ 1029(e)(3)][627]

The term "produce" includes design, alter, authenticate, duplicate, or assemble. [§ 1029(e)(4)]

The term "traffic" means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of. [§ 1029(e)(5)]

The term "device-making equipment" means any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device. [§ 1029(e)(6)]

The term "credit card system member" means a financial institution or other entity that is a member of a credit card system, including an entity, whether affiliated with or identical to the credit card issuer, that is the sole member of a credit card system. [§ 1029(e)(7)]

The term "scanning receiver" means a device or apparatus that can be used to intercept a wire or electronic communication in violation of [federal law] or to intercept an electronic serial number, mobile identification number, or other identifier of any telecommunications service, equipment, or instrument. [§ 1029(e)(8)]

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used. [§ 1029(e)(9) and 47 U.S.C. § 153(46)]

The term "facilities-based carrier" means an entity that owns communications transmission facilities, is responsible for the operation and maintenance of those facilities, and holds an operating license issued by the Federal Communications Commission under the authority of ... the Communications Act of 1934. [§ 1029(e)(10)]

The term "telecommunications identifying information" means electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account, or a specific communication transmitted from a telecommunications instrument. [§ 1029(e)(11)]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or

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[627] "None of the statutory language suggests that the cards must have been originally obtained by the rightful cardholder. *** All the statute requires is that the defendant obtain the credit card with the intent to defraud." *United States v. Akinkoye*, 185 F.3d 192, 200, 201 (4th Cir. 1999).

bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[628]

_____NOTE_____

See United States v. Blake, 81 F.3d 498, 506 (4th Cir. 1996) (offense does not include theft of credit cards used).

The identity of the particular credit cards is not an element of the offense; therefore, it is not necessary for the jury to be unanimous on which credit cards the defendant used. *United States v. Goldstein*, 442 F.3d 777, 782 (2d Cir. 2006). However, the district court did instruct the jury it must agree unanimously on which $1,000 worth of goods, services or money and which twelve-month period the government proved beyond a reasonable doubt. *Id.* at 782-83.

18 U.S.C. § 1030 COMPUTER CRIMES [LAST UPDATED: 7/1/14]

§ 1030(a)(2)

Title 18, United States Code, Section 1030(a)(2) makes it a crime to access a computer without authorization. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant accessed a computer without authorization or exceeded authorized access to a computer;
- Second, that the defendant thereby obtained any of the following:
  1. information contained in a financial record of a financial institution, or of a card issuer [as defined in 15 U.S.C. § 1602(n)] or contained in a file of a consumer reporting agency on a consumer [15 U.S.C. § 1681 *et seq*.];
  2. information from any department or agency of the United States; or
  3. information from any protected computer if the conduct involved an interstate or foreign communication; and
- Third, that the defendant did so intentionally.[629]

AGGRAVATED PENALTY [§ 1030(c)(2)(B)]

1. Did the defendant commit the offense for purposes of commercial advantage or private financial gain?

2. Did the defendant commit the offense in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State? [The court should identify the elements of the criminal or tortious act.]

3. Did the value of the information obtained exceed $5,000.00?

The defendant need not know that the value of the information obtained had a particular value.[630]

§ 1030(a)(3)

[628] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).
[629] *See United States v. Willis*, 476 F.3d 1121, 1125 (10th Cir. 2007).
[630] *Id.* at 1126.

Title 18, United States Code, Section 1030(a)(3) makes it a crime to access certain government computers. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did one of the following:

  1. accessed a nonpublic computer of a department or agency of the United States without authorization;

  2. accessed a nonpublic computer of a department or agency of the United States that is exclusively for the use of the Government of the United States; or

  3. accessed a nonpublic computer of a department or agency of the United States that is used by or for the Government of the United States and such conduct affected that use by or for the Government of the United States; and

- Second, that the defendant did so intentionally.

§ 1030(a)(4)

Title 18, United States Code, Section 1030(a)(4) makes it a crime to access a protected computer without authorization. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant accessed a protected computer without authorization, or exceeded authorized access to a protected computer;
- Second, that, by means of such conduct, the defendant furthered the intended fraud and obtained anything of value;[631] and
- Third, that the defendant did so knowingly and with intent to defraud.

§ 1030(a)(5)

Title 18, United States Code, Section 1030(a)(5) makes it a crime to cause damage to certain computers. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1030(a)(5)(A)

- First, that the defendant caused the transmission of a program, information, code, or command;
- Second, that the defendant did so knowingly;
- Third, that as a result of such conduct, the defendant caused damage without authorization to a protected computer; and
- Fourth, that the defendant did so intentionally.

AGGRAVATED PENALTY[632]

1. Did the offense cause loss to one or more persons during any one-year period aggregating at least $5,000 in value? [§ 1030(c)(4)(A)(i)(I)]

2. Did the offense cause the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals? [§ 1030(c)(4)(A)(i)(II)]

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[631] "Unless the object of the fraud and thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any one-year period." 18 U.S.C. § 1030(a)(4).

[632] "[O]r, in the case of an attempted offense, would the offense, if completed, have caused any of the listed circumstances ...." 18 U.S.C. § 1030(c)(4)(A)(i).

3. Did the offense cause physical injury to any person? [§ 1030(c)(4)(A)(i)(III)]

4. Did the offense cause a threat to public health or safety? [§ 1030(c)(4)(A)(i)(IV)]

5. Did the offense cause damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security? [§ 1030(c)(4)(A)(i)(V)]

6. Did the offense cause damage affecting ten or more protected computers during any one-year period? [§ 1030(c)(4)(A)(i)(VI)]

7. Did the defendant attempt to cause or knowingly or recklessly cause serious bodily injury from the alleged conduct? [§ 1030(c)(4)(E)]

8. Did the defendant attempt to cause or knowingly or recklessly cause death from the alleged conduct? [§ 1030(c)(4)(F)]

§ 1030(a)(5)(B)

- First, that the defendant accessed a protected computer without authorization;
- Second, that the defendant did so intentionally;[633]
- Third, that as a result of such conduct, the defendant caused damage; and
- Fourth, that the defendant did so recklessly.[634]

AGGRAVATED PENALTY[635]

1. Did the offense cause loss to one or more persons during any one-year period aggregating at least $5,000 in value? [§ 1030(c)(4)(A)(i)(I)]

2. Did the offense cause the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals? [§ 1030(c)(4)(A)(i)(II)]

3. Did the offense cause physical injury to any person? [§ 1030(c)(4)(A)(i)(III)]

4. Did the offense cause a threat to public health or safety? [§ 1030(c)(4)(A)(i)(IV)]

5. Did the offense cause damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security? [§ 1030(c)(4)(A)(i)(V)]

6. Did the offense cause damage affecting ten or more protected computers during any one-year period? [§ 1030(c)(4)(A)(i)(VI)]

§ 1030(a)(5)(C)

- First, that the defendant accessed a protected computer without authorization;
- Second, that the defendant did so intentionally;[636]
- Third, that as a result of such conduct, the defendant caused damage and loss.

§ 1030(a)(6)

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[633] *See United States v. Morris*, 928 F.2d 504, 509 (2d Cir. 1991) (interpreting predecessor statute).

[634] *See United States v. Sablan*, 92 F.3d 865, 867 (9th Cir. 1996) (interpreting predecessor statute).

[635] "[O]r, in the case of an attempted offense, would the offense, if completed, have caused any of the listed circumstances ...." 18 U.S.C. § 1030(c)(4)(A)(i).

[636] *See Morris*, 928 F.2d at 509 (interpreting predecessor statute).

Title 18, United States Code, Section 1030(a)(6) makes it a crime to traffic in any password. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant trafficked in any password or similar information through which a computer may be accessed without authorization;
- Second, that such trafficking affected interstate or foreign commerce, or such computer was used by or for the Government of the United States; and
- Third, that the defendant did so knowingly and with intent to defraud.

§ 1030(a)(7)

Title 18, United States Code, Section 1030(a)(7) makes it a crime to access certain government computers. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did transmit a communication containing one of the following:
  1. a threat to cause damage to a protected computer;
  2. a threat to obtain information from a protected computer without authorization or in excess of authorization or to impair the confidentiality of information obtained from a protected computer without authorization or by exceeding authorized access; or
  3. a demand or request for money or other thing of value in relation to damage to a protected computer, where such damage was caused to facilitate the extortion;
- Second, that the transmission was in interstate or foreign commerce; and
- Third, that the defendant did so with intent to extort from any person any money or other thing of value.

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. [§ 1030(e)(1)]

"Protected computer" means a computer exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government, or a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States. [§ 1030(e)(2)]

"Financial institution" means an institution with deposits insured by the Federal Deposit Insurance Corporation; the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank; a credit union with accounts insured by the National Credit Union Administration; a member of the Federal home loan bank system and any home loan bank; any institution of the Farm Credit System under the Farm Credit Act of 1971; a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934; the Securities Investor Protection Corporation; a branch or agency of a foreign bank (as defined in the International Banking

Act of 1978); and an organization operating under section 25 or section 25(a) of the Federal Reserve Act. [§ 1030(e)(4)]

"Financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution. [§ 1030(e)(5)]

"Exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter. [§ 1030(e)(6)][637]

"Damage" means any impairment to the integrity or availability of data, a program, a system, or information. [§ 1030(e)(8)]

"Government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign county, and any state, province, municipality, or other political subdivision of a foreign country. [§ 1030(e)(9)]

"Loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service. [§ 1030(e)(11)]

"Person" means any individual, form, corporation, educational institution, financial institution, governmental entity, or legal or other entity. [§ 1030(e)(12)]

A "worm" is a program that travels from one computer to another but does not attach itself to the operating system of the computer it infects.[638]

A "virus" is a migrating program that attaches itself to the operating system of any computer it enters and can infect any other computer that uses files from the infected computer.[639]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[640]

NOTE

Section 1030(b) criminalizes conspiring and attempts.

The crimes described in §§ 1030 and 2701 "are similar, and a violation of § 1030 may be a lesser included offense of a violation of § 2701, since a person usually must obtain information through access to a computer in order to obtain access to

[637] In *Morris*, the Second Circuit said that since "authorization" was a word of common usage, without any technical or ambiguous meaning, the district court was not obliged to instruct the jury on its meaning. 928 F.2d at 511.

[638] *Id.* at 505.

[639] *Id.*

[640] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

communications in electronic storage." *United States v. Cioni*, 649 F.3d 276, 282 (4th Cir. 2011).

In *Cioni*, the defendant was convicted of violating § 1030(a)(2)(C), in furtherance of a violation of 18 U.S.C. § 2701(a), which elevated the offense from a misdemeanor to a felony. The Fourth Circuit held that the offense was improperly elevated, and vacated the felony convictions, because of "merger," where the facts or transactions alleged to support one offense are also the same used to support another.

There are aggravated penalties in § 1030(c).

18 U.S.C. § 1031 MAJOR FRAUD AGAINST THE UNITED STATES

Title 18, United States Code, Section 1031 makes it a crime to execute or attempt to execute a scheme to defraud the United States in any contract with the United States, if the value of the contract is $1,000,000 or more. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1031(a)(1)

- First, that the defendant was a prime contractor with the United States for the procurement of property or services, or a subcontractor or supplier on a contract in which there was a prime contractor with the United States for the procurement of property or services;
- Second, that the value of the contract, subcontract, or any constituent part of the contract or subcontract was $1,000,000 or more;
- Third, that the defendant executed or attempted to execute a scheme or artifice; and
- Fourth, that the defendant did so with intent to defraud the United States or to obtain money or property by means of false or fraudulent pretenses, representations, or promises [that were material].[641]

§ 1031(a)(2)

- First, that the defendant was a prime contractor with the United States for the procurement of property or services, or a subcontractor or supplier on a contract in which there was a prime contractor with the United States for the procurement of property or services;
- Second, that the value of the contract, subcontract, or any constituent part of the contract or subcontract was $1,000,000 or more;
- Third, that the defendant executed or attempted to execute a scheme or artifice; and
- Fourth, that the defendant did so with intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises [that were material].[642]

[641] Materiality is an element of mail, wire, and bank fraud. *Neder v. United States*, 527 U.S. 1, 23-25 (1999). The Fourth Circuit has not addressed this issue relating to § 1031.

[642] Materiality is an element of mail, wire, and bank fraud. *Id.* The Fourth Circuit has not addressed this issue relating to § 1031.

The government must prove that the prime contract, subcontract, supply agreement, or any constituent part of such a contract, is valued at $1,000,000 or more.[643] However, the government is not required to prove the final cost of the contract, or even whether the contract was completed.[644]

The words "scheme and artifice" include any plan or course of action intended to deceive others and to obtain by either false or fraudulent pretenses, representations or promises, either money or property from persons who are so deceived. A statement or representation is false or fraudulent if known to be untrue or made with reckless indifference as to the truth or falsity and made or caused to be made with the intent to deceive or defraud.[645]

"To defraud" means wronging one in his property rights by dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit, chicanery or overreaching. The concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.[646]

Fraud is an intentional or deliberate misrepresentation of the truth for the purpose of inducing another to part with a thing of value or to surrender a legal right. Fraud, then, is a deceit which, whether perpetrated by words, conduct, or silence, is designed to cause another to act upon it to his legal injury. A statement, claim or document is fraudulent if it was falsely made, or made with reckless indifference as to its truth or falsity, and made or caused to be made with an intent to deceive. The phrases "any scheme or artifice to defraud" and "any scheme or artifice for obtaining money or property" mean any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value. A scheme or artifice to defraud may describe a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general life of the community. There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension. A scheme to defraud may occur even absent a false statement or false representation, and may be based on fraudulent omissions. A scheme to defraud includes the knowing concealment of facts and information done with the intent to defraud.

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[647]

A scheme to defraud requires that the government prove that the defendant acted with the specific intent to deceive or cheat for the purpose of getting financial gain for

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[643] *United States v. Brooks*, 111 F.3d 365, 368-69 (4th Cir. 1997). *But see United States v. Nadi*, 996 F.2d 548, 551 (2d Cir. 1993) (in *dicta* finding that "value of the contract is determined by looking to the specific contract upon which the fraud is based.").

[644] *Brooks*, 111 F.3d at 370.

[645] *See United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir. 1983). "[R]epresentations known by a person to be false is a type of a scheme to defraud." *Id.* at 1344.

[646] *Carpenter v. United States*, 484 U.S. 19, 27 (1987).

[647] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

one's self or causing financial loss to another. Thus, the government must prove that the defendant intended to deceive the United States through the scheme.[648]

Fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent another person from acquiring material information.[649] Thus, a scheme to defraud can be shown by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter.[650]

The government can prove a scheme to defraud by evidence of active concealment of material information.[651]

The government must prove that the false or fraudulent pretenses, representations, or promises were material.

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[652]

A statement or representation is false or fraudulent if it is known to be untrue or is made with reckless indifference as to its truth or falsity, when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. "No actual misrepresentation of fact is necessary to make the crime complete."[653]

☞ **For multiple defendants:**

> In order to find the defendants responsible for participating in the fraudulent scheme as alleged in the indictment, each of you must find that the defendants participated in the same single scheme to defraud and that the scheme to defraud in which the defendants are found to have participated is substantially the same scheme as the overall fraudulent scheme alleged in the indictment. To sustain its burden of proof, however, the government is not required to prove all of the components of the scheme to defraud that are alleged in the indictment. If the government proves beyond a reasonable doubt a scheme to defraud that contains some or all of the components in the indictment, but is simply more narrow than the scheme to defraud as defined in the indictment, then the government has carried its burden of proof. You must unanimously agree, however, on the components of the scheme to defraud.[654]

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[648] *See United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002) (§ 1344 prosecution).

[649] *United States v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000). The court found that

> [concealment] is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. [Nondisclosure] is characterized by mere silence. Although silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an action for fraud, suppression of the truth with the intent to deceive (concealment) does.

Id. at 899.

[650] *Id.* at 901.

[651] *Id.* at 907.

[652] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[653] *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960).

[654] Instruction that the jury agree unanimously on the identity and extent of the scheme to

(continued...)

NOTE

The unit of prosecution is each execution of the scheme, not each act in furtherance of the scheme. "When an act is chronologically and substantively independent from the other acts charged as the scheme, it constitutes an execution." *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000) (a § 1344 prosecution) (quotations and citation omitted). "In contrast, acts that are planned or contemplated together may indicate that they are dependent on one another and cannot be separately charged." *Id.*

In *United States v. Hickman*, 331 F.3d 439 (5th Cir. 2003), a § 1347 prosecution, the Fifth Circuit determined that whether a transaction is "an 'execution' of the scheme or merely a component of the scheme will depend on several factors including (1) the ultimate goal of the scheme, (2) the nature of the scheme, (3) the benefits intended, (4) the interdependence of the acts, and (5) the number of parties involved." 331 F.3d at 446. Hickman had billed Medicare, Medicaid, and private insurance companies in a series of fraudulent transactions. The defendant submitted each claim separately and, with each submission, owed a new and independent obligation to be truthful to the insurer. Therefore, each claim submission was a separate execution of the scheme. "[A]ny scheme can be executed a number of times, and each execution may be charged as a separate count." *Id.*

18 U.S.C. § 1035 FALSE STATEMENT RELATINGTO HEALTH CARE MATTERS

Title 18, United States Code, Section 1035 makes it a crime to cover up by trick a material fact, or make any false statements in connection with the delivery of or payment for health care benefits. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1035(a)(1)

- First, that the defendant falsified, concealed, or covered up by any trick, scheme, or device a material fact;
- Second, in connection with the delivery of or payment for health care benefits, items, or services involving a health care benefit program; and
- Third, that the defendant did so knowingly and willfully.

§ 1035(a)(2)

- First, that the defendant made a materially false, fictitious, or fraudulent statement or representation;
- Second, in connection with the delivery of or payment for health care benefits, items, or services involving a health care benefit program; and
- Third, that the defendant did so knowingly and willfully.

OR

- First, that the defendant made or used a materially false writing or document;
- Second, that the defendant knew the materially false writing or document contained a materially false, fictitious, or fraudulent statement or entry;

[654] (...continued)
defraud. *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995).

- Third, in connection with the delivery of or payment for health care benefits, items, or services involving a health care benefit program; and
- Fourth, that the defendant did so knowingly and willfully.

"Health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item or service for which payment may be made under the plan or contract. [18 U.S.C. § 24(b)–note the interstate commerce nexus.][655]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[656]

A statement or representation is false or fraudulent if it is known to be untrue or is made with reckless indifference as to its truth or falsity, when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. "No actual misrepresentation of fact is necessary to make the crime complete."[657]

_____NOTE_____

Because § 1035 is modeled after § 1001, see NOTE section for § 1001.

Intentionally concealing a material fact and the act of knowingly making a false statement in connection with the delivery of health care benefits constitute two separate offenses where the concealment and the statement are separate acts. *United States v. Dose*, (N.D. Iowa 2005).

See United States v. Lucien, 347 F.3d 45, 52 (2d Cir. 2003), where the Second Circuit held that 18 U.S.C. § 1347 applied to the defendants' conduct as passengers in staged auto accidents to defraud the New York state no-fault automobile insurance program because the program qualified as a health care benefit program under § 24(b).

18 U.S.C. § 1071 HARBORING A FUGITIVE

Title 18, United States Code, Section 1071 makes it a crime to harbor a fugitive. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that a federal warrant or process had been issued for the arrest of the fugitive;
- Second, that the defendant knew that the warrant or process had been issued;
- Third, that the defendant harbored or concealed the fugitive; and

[655] In *United States v. Hickman*, 331 F.3d 439, 443 (5th Cir. 2003), the Fifth Circuit said that the jurisdictional element of affecting commerce is probably an essential element of the offense.

[656] *Sarihifard*, 155 F.3d at 307.

[657] *Lemon*, 278 F.2d at 373.

- Fourth, that the defendant intended to prevent the fugitive's discovery or arrest.[658]

AGGRAVATED PENALTY

1. Did the warrant or process that had been issued charge a felony, or had the fugitive been convicted of any offense?

NOTE

See generally United States v. Bowens, 224 F.3d 309 (4th Cir. 2000); *United States v. Silva*, 745 F.2d 840, 848 (4th Cir. 1984).

Lying to the police about the location of a fugitive does not constitute harboring or concealing. Providing general financial assistance does not constitute actual harboring or concealing. Actual harboring or concealing requires some affirmative, physical action by the defendant. Generally, the government must prove a physical act of providing assistance to aid the fugitive in avoiding detection and apprehension, such as arranging for hotels and vehicles, renting apartments, shopping for the fugitive, providing the fugitive with false identification, or closing the door on law enforcement officers who were attempting to apprehend the fugitive. *See United States v. Mitchell*, 177 F.3d 236, 239 (4th Cir. 1999).

Venue is where the harboring occurs, not where the warrant is issued. *Bowens*, 224 F.3d at 309.

18 U.S.C. § 1111 MURDER

Title 18, United States Code, Section 1111 makes it a crime to commit murder within the special territorial jurisdiction of the United States.

First degree:

For you to find the defendant guilty of first degree murder, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant unlawfully killed another human being;
- Second, that the murder took place within the special maritime and territorial jurisdiction of the United States;
- Third, that the defendant did so with malice aforethought; and
- Fourth, that the murder was perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, OR committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery, or perpetrated as part of a pattern or practice of assault or torture against a child or children, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the person killed.[659]

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[658] *United States v. Mitchell*, 177 F.3d 236, 238 (4th Cir. 1999).

[659] *See Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967); *United States v. Browner*, 889 F.2d 549 (5th Cir. 1989). Malice encompasses four distinct mental states: (1) intent to kill, (2) intent to do serious bodily injury, (3) having a "depraved heart," a term of art that refers to a level of extreme recklessness and wanton disregard for human life, and (4) the "felony murder" rule. *Browner*,

(continued...)

"Lying in wait" generally requires a watching and waiting in a concealed position with an intent to kill or do serious bodily harm to another. It does not require being in a prone position.[660]

Second degree:[661]

For you to find the defendant guilty of second degree murder, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant unlawfully killed another human being;
- Second, that the murder took place within the special maritime and territorial jurisdiction of the United States; and
- Third, that the defendant did so with malice aforethought.

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[662]

"Assault" means [§ 1111(c)(1) refers to § 113, but assault is not defined in § 113].

"Assault" has three meanings. First, a battery; second an attempt to commit a battery; and third, an act that puts another in reasonable apprehension of receiving immediate bodily harm.[663]

An assault is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.[664]

"Child" means a person who has not attained the age of 18 and is either under the care or control of the defendant, or at least 6 years younger than the defendant. [§ 1111(c)(2)]

"Child abuse" means intentionally or knowingly causing death or serious bodily injury to a child. [§ 1111(c)(3)]

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[659] (...continued)
889 F.2d at 551-52 and n.2.

[660] *United States v. Shaw*, 701 F.2d 367, 393 n.21 (5th Cir. 1983).

[661] The distinction between first and second degree murder is the presence or absence of premeditation. Premeditation and malice are not synonymous. *Beardslee*, 387 F.2d at 280.

[662] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[663] *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999).

[664] *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (citation omitted).

"Pattern or practice of assault or torture" means assault or torture engaged in on at least two occasions. [§ 1111(c)(4)]

"Serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty. [18 U.S.C. §§ 1111(c)(5) and 1365(h)(3)]

"Torture" means conduct specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control (§ 2340(1)("severe mental pain or suffering" is defined in § 2340(2)). [§ 1111(c)(6)]

Malice is a legal term which bears little if any relationship to the ordinary meaning of the word.[665]

To prove malice aforethought, the government does not have to show that the defendant harbored hatred or ill will against the victim or others. Nor does the government have to prove an intent to kill or injure. The government may prove malice by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that you, the jury, may infer that the defendant was aware of a serious risk of death or serious bodily harm. Thus, the government need only prove that the defendant acted with a "depraved heart," that is, without regard for the life and safety of others, and that a death resulted.[666]

Premeditation involves a prior design to commit murder, but no particular period of time is necessary for such deliberation and premeditation. There must be some appreciable time for reflection and consideration before execution of the act, although the period of time does not require the lapse of days or hours or even minutes. Perhaps the best that can be said of deliberation is that it requires a cool mind that is capable of reflection, and of premeditation that it requires that the one with the cool mind did, in fact, reflect, at least for a short period of time before his act of killing.[667]

The government must prove beyond a reasonable doubt that the victim is deceased. Death may be proved solely by circumstantial evidence.[668]

NOTE

The common law "year and a day rule" that the victim's death occur within a year and a day of the alleged fatal stroke, blow, or injury perpetrated by the defendant is a substantive rule of law. *United States v. Chase*, 18 F.3d 1166, 1173 (4th Cir. 1994). Moreover, an indictment for murder "must include an allegation that death occurred within a year and a day of the fatal blow." *Id*. at 1170-71. In *Chase*, the Fourth Circuit reversed a murder conviction where the victim died 17 years after the fatal assault.

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[665] *United States v. Browner*, 889 F.2d 549, 551 (5th Cir. 1989).

[666] *See United States v. Williams*, 342 F.3d 350, 356 (4th Cir. 2003); *United States v. Fleming*, 739 F.2d 945, 947-48 (4th Cir. 1984) (citing *United States v. Shaw*, 701 F.2d 367, 392 n.20 (5th Cir. 1983)).

[667] *Shaw*, 701 F.2d at 392-93.

[668] *United States v. Russell*, 971 F.2d 1098, 1110 (4th Cir. 1992).

For discussion of special territorial jurisdiction, see the following cases: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

Evidence demonstrating that an act was done so recklessly or wantonly as to manifest depravity of mind and disregard of human life satisfies the malice requirement for second degree murder. The key point is that malice requires that the circumstances have been such that the jury could conclude that defendant's entering into the risk created by his conduct evidenced a depraved mind without regard for human life. *United States v. Fleming*, 739 F.2d 945, 949 n.5 (4th Cir. 1984).

"First degree murder is defined as including any murder which is *either* premeditated *or* committed in the perpetration of any of the listed felonies ...." *United States v. Sides*, 944 F.2d 1554, 1557 (10th Cir. 1991).

In *United States v. Russell*, 971 F.2d 1098 (4th Cir. 1992), the court declined to hold "that any specific type of circumstantial evidence is required to prove the *corpus delicti* when the victim's body has not been located." 971 F.2d at 1100. To establish the *corpus delicti* in a homicide case, the government must prove (1) that the victim is dead, and (2) that the death was caused by a criminal act, rather than by accident, suicide, or natural causes. *Id*. at 1110 n.22.

Voluntary and involuntary manslaughter are lesser included offenses of murder. *United States v. Browner*, 889 F.2d 549, 552 (5th Cir. 1989).

Special territorial jurisdiction does not include proprietary jurisdiction. Most federal buildings, such as courthouses and office buildings, are proprietary jurisdictions, and are usually covered only by regulations of the General Services Administration published in the Code of Federal Regulations.

18 U.S.C. § 1112 MANSLAUGHTER[669]

Title 18, United States Code, Section 1112 makes it a crime to kill another human being unlawfully within the special territorial jurisdiction of the United States.

Voluntary

For you to find the defendant guilty of voluntary manslaughter, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant killed another human being;
- Second, that the defendant did so upon a sudden quarrel or heat of passion; and
- Third, that the defendant did so within the special territorial jurisdiction of the United States.

[669] The distinction between murder and manslaughter is the presence or absence of malice. *Browner*, 889 F.2d at 552.

"Heat of passion" means a passion of fear or rage in which the defendant loses his normal self-control as a result of circumstances that would provoke such a passion in an ordinary person, but which did not justify the use of deadly force.[670]

Involuntary

For you to find the defendant guilty of involuntary manslaughter, the government must prove each of the following beyond a reasonable doubt:

- First, the defendant killed another person;
- Second, that the defendant did so in committing an unlawful act or in committing a lawful act which might produce death in an unlawful manner or without due caution and circumspection; and
- Third, that the defendant did so within the special territorial jurisdiction of the United States.

The "unlawful act" has two separate parts. First, it is an act in its nature dangerous to life. Second, it is an act constituting gross negligence, to be determined on the consideration of all the facts of the particular case.[671]

"Gross negligence" is defined as exacting proof of a wanton or reckless disregard for human life. The government must show that the defendant had actual knowledge that his conduct was a threat to the lives of others, or that he had knowledge of such circumstances[672] as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others.[673]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[674]

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[670] *United States v. Harris*, 420 F.3d 467, 476 (5th Cir. 2005).

[671] *United States v. Pardee*, 368 F.2d 368, 374 (4th Cir. 1966) ("If the resultant deaths were merely accidental or the result of a misadventure or due to simple negligence, or an honest error of judgment in performing a lawful act, the existence of gross negligence should not be found.").

[672] In *United States v. Escamilla*, 467 F.2d 341 (4th Cir. 1972), a case in which the killing occurred on T-3, an island of glacial ice in the Arctic Ocean, "such circumstances" included that T-3 had no governing authority, no police force, no medical facilities, and the dwellings lacked locks.

[673] *Pardee*, 368 F.2d at 374.

[674] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

The government must prove beyond a reasonable doubt that the victim is deceased. Death may be proved solely by circumstantial evidence.[675]

_____NOTE_____

"While it is frequently said there is not Federal criminal common law — Federal crimes being exclusively dependent upon statutes of the United States — certainly the statute's terms, when known to and often derived from the common law, are referable to it for interpretation." *United States v. Pardee*, 368 F.2d 368, 374 (4th Cir. 1966).

Neither intent nor malice are factors of involuntary manslaughter. *Id.* at 373.

In *United States v. Russell*, 971 F.2d 1098 (4th Cir. 1992), the court declined to hold "that any specific type of circumstantial evidence is required to prove the *corpus delicti* when the victim's body has not been located." 971 F.2d at 1110. To establish the corpus delicti in a homicide case, the government must prove (1) that the victim is dead, and (2) that the death was caused by a criminal act, rather than by accident, suicide, or natural causes. *Id*. at 1110 n.22.

For discussion of special territorial jurisdiction, see the following cases: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

18 U.S.C. § 1163 THEFT FROM INDIAN TRIBAL ORGANIZATION

Title 18, United States Code, Section 1163 makes it a crime to steal property, or possess stolen property, belonging to an Indian tribal organization. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant embezzled, stole, converted to his/her own use or the use of another, misapplied, or permitted another person to misapply property;
- Second, that the property belonged to an Indian tribal organization or was intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization;
- Third, that the property was valued in excess of $1,000.00; and
- Fourth, that the defendant did so willfully.

¶ 2

- First, that the defendant received, concealed, or retained with intent to convert to his use or the use of another property;

[675] In *United States v. Russell*, 971 F.2d 1098, 1110 (4th Cir. 1992), the court declined to hold "that any specific type of circumstantial evidence is required to prove the *corpus delicti* when the victim's body has not been located." To establish the *corpus delicti* in a homicide case, the government must prove (1) that the victim is dead, and (2) that the death was caused by a criminal act, rather than by accident, suicide, or natural causes. *Id*. at 1110 n.22.

- Second, that the property belonged to an Indian tribal organization;
- Third, that the property was valued in excess of $1,000.00; and
- Fourth, that the defendant knew the property had been embezzled, stolen, converted, or misapplied.

☞ **If a disputed issue is whether the property stolen had a value exceeding $1,000.00, the court should consider giving a lesser included offense instruction.**

"Indian tribal organization" means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws. [§ 1163, ¶ 4]

"Value" means the April 16, 2015face, par, or market value, or cost price, either wholesale or retail, whichever is greater. [§ 641]

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property. The lawful possession need not be acquired through a relationship of trust.[676]

"Steal" means to take away from a person in lawful possession without right with the intention to keep wrongfully.[677]

Conversion is the act of control or dominion over the property of another that seriously interferes with the rights of the owner. The act of control or dominion must be without authorization from the owner. The government must prove both that the defendant knew the property belonged to another and that the taking was not authorized.[678]

Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and in tact.[679]

To "misapply" means to use the funds or property of the Indian tribal organization knowing that such use was unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful taking or use of the money or property of the Indian tribal organization, by its agent for his or her own benefit, the use or benefit of some other person, or an unauthorized purpose, even if such use benefitted the Indian tribal organization.[680]

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[676] *See United States v. Smith*, 373 F.3d 561, 564-65 (4th Cir. 2004).
[677] *Morissette v. United States*, 342 U.S. 246, 271 (1952).
[678] *See United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986).
[679] *Morissette*, 342 U.S. at 271-72.
[680] *See United States v. Falcon*, 477 F.3d 573, 578 (8th Cir. 2007).

The government must prove that the property belonged to, or had been intrusted to, an Indian tribal organization, and the government must prove that the defendant knew that the property belonged to an Indian tribal organization.[681]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession participated in some way in the theft of the property[682] or knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession.[683] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[684]

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[685] You are reminded that the Constitution never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[686]

The government does not have to prove an actual property loss.[687]

NOTE

Embezzlement may constitute a continuing offense, for statute of limitations purposes. *See United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (prosecution under § 641).

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[681] *United States v. Markiewicz*, 978 F.2d 786, 803-05 (2d Cir. 1992).

[682] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[683] *Id.*

[684] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[685] *See Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[686] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[687] *United States v. Bailey*, 734 F.2d 296, 301, 305 (7th Cir. 1984) ("whether or not the government suffered monetary loss is immaterial").

Section 1163 does not require intent to injure or defraud. *United States v. Wadena*, 152 F.3d 831, 855 (8th Cir. 1998).

Aggregation

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

In determining whether a series of takings are properly aggregated, the fact finder must examine the intent of the actor at the first taking. "If the actor formulated 'a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004).

18 U.S.C. § 1201 KIDNAPPING

Title 18, United States Code, Section 1201 makes it a crime to kidnap another person. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away another person;
- Second, that the defendant held that person for ransom or reward or other reason; and
- Third, [one of the following jurisdictional components]:
    1. that the person was willfully transported in interstate or foreign commerce regardless of whether the person was alive when transported across a state boundary; or the defendant traveled in interstate or foreign commerce or used the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;[688]
    2. that the [act against the person] was done within the special maritime and territorial jurisdiction of the United States [see 18 U.S.C. §§ 7, 13, and 113 for definition];
    3. that the [act against the person] was done within the special aircraft jurisdiction of the United States [defined in 49 U.S.C. § 46501];
    4. that the person was a foreign official, internationally protected person, or official guest [defined in § 1116(b)]; or
    5. that the person was a federal officer or employee [as designated in § 1114] and the act was done while the person was engaged in, or on account of, the performance of official duties.[689]

[688] The phrase "transports in foreign commerce" requires that the victim be kidnapped in the United States and then transported to a foreign state. *United States v. McRary*, 665 F.2d 674, 678 (5th Cir. Unit B 1982).

[689] Section 1201(a) creates a single crime with separate federal jurisdictional bases. *United States v. Lewis*, 662 F.2d 1087, 1089 (4th Cir. 1981).

ADDITIONAL ELEMENT, IF APPROPRIATE:

1. Did the defendant's actions result in the death of the person?

2. Was the victim under 18 years of age and was the defendant 18 years of age or older and not a parent, grandparent, brother, sister, aunt, uncle, or individual who had legal custody of the victim? [§ 1201(g)]

"Kidnap" means to take and carry a person by force and against his will.[690]

"To inveigle or decoy" a person means to lure or entice or lead a person astray by false representations or promises or other deceitful means.[691]

"To hold" means to detain, seize, or confine a person in some manner against that person's will. It is not necessary that the government prove that the holding occurred prior to the transportation in interstate commerce. The holding need only be for an appreciable period of time. The holding or detention must be separate and distinct from the kidnapping or seizure as well as the transportation.[692]

In other words, the government must prove that the defendant interfered with, and exercised control over, the victim's actions.[693]

The defendant need not use overt force to accomplish his purpose. He may use deceit and trickery. Inducing an individual by misrepresentation to do something can constitute interfering with and exercising control over another.[694]

The government must prove that the defendant held his victim for any reason which would in any way benefit the defendant.[695]

The reason does not have to benefit the defendant monetarily, and the reason need not be illegal in itself.[696]

The government must prove that the kidnapping occurred prior to the interstate transportation.[697]

Transportation begins when the victim is willfully moved from the place of abduction.[698]

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[690] *United States v. Young*, 512 F.2d 321, 323 (4th Cir. 1975). But, the statute is broader than common-law kidnapping. The involuntariness of seizure and detention is the very essence of the crime and the true elements of the offense are an unlawful seizure and holding. *Id.*

[691] "Inveiglement becomes an unlawful form of kidnapping under the statute when the alleged kidnapper interferes with his victim's actions, exercising control over his victim through the willingness to use forcible action should his deception fail." *United States v. Lentz*, 383 F.3d 191, 202-03 (4th Cir. 2004). *See also United States v. Hoog*, 504 F.2d 45, 50-51 (8th Cir. 1974) (inducing victim to accept ride and remain in vehicle under false pretenses constitutes inveigling or decoying).

[692] *Lentz*, 383 F.3d at 202-03. *See also United States v. Lewis*, 662 F.2d 1087, 1088-89 (4th Cir. 1981) ("[t]he holding may be brief"); *United States v. Blackmon*, 209 F. App'x 321 (4th Cir. 2006) (three to four hours satisfied the "appreciable period of time" requirement). "The statute has no requirement of prior restraint." *United States v. Wills*, 346 F.3d 476, 493(4th Cir. 2003) (*Wills II*).

[693] *United States v. Wills*, 234 F.3d 174, 178 (4th Cir. 2000) (*Wills I*).

[694] *See United States v. Hughes*, 716 F.2d 234, 239 (4th Cir. 1983).

[695] *See Lentz*, 383 F.3d at 203.

[696] *See United States v. Healy*, 376 U.S. 75, 82 (1964).

[697] *Hughes*, 716 F.2d at 237; *United States v. Young*, 248 F.3d 260, 273 (4th Cir. 2001).

[698] *United States v. Horton*, 321 F.3d 476, 481 (4th Cir. 2003).

The government does not have to prove that the defendant actually accompanied or physically transported or provided for the physical transportation of the victim in interstate commerce. In other words, a defendant willfully transports a victim in interstate commerce if the defendant willfully caused the victim to travel or even transport himself unaccompanied across state lines.[699]

_____NOTE_____

See generally United States v. Lentz, 383 F.3d 191 (4th Cir. 2004).

Sections 1201(c) and (d) punish conspiracy and attempt, respectively.

"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 so to confine the victim. If the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement then must be against the will of the parents or legal guardian of the victim." *Chatwin v. United States,* 326 U.S. 455, 460 (1946).

The kidnapping statute was amended to make the thrust of the offense the kidnapping itself rather than the interstate transporting of the kidnapped person. *United States v. Wills*, 234 F.3d 174, 176 (4th Cir. 2000) (*Wills I*). Interstate transportation of the victim is merely a basis for federal jurisdiction rather than an integral part of the substantive crime. *Id.* Alternative jurisdictional components include the act being done within the special maritime, territorial, and aircraft jurisdictions of the United States, and if the person kidnapped is a designated person. 18 U.S.C. §§ 1201(a)(2)-(5).

Consent is a defense to kidnapping. *See United States v. Helem*, 186 F.3d 449, 456 (4th Cir. 1999).

If death resulted from the kidnapping, that is an additional element which must be found by the jury. *Lentz*, 383 F.3d at 202-03.

Venue provisions of § 3237 apply, because kidnapping is a continuing crime which begins the moment the victim is seized. *Wills II*, 346 F. 3d at 488.

If jurisdiction is based on § 1201(a)(2) or (a)(3), there is nothing in the statute or case law to suggest that all of the acts (seizing, confining, inveigling, decoying, kidnapping, abducting, or carrying away) must occur within the special maritime, territorial, or aircraft jurisdiction of the United States. *United States v. Blackmon*, 209 F. App'x 321 (4th Cir. 2006) (citing *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997)).

In *United States v. Horton*, 321 F.3d 476 (4th Cir. 2003), the jury was instructed concerning the statutory presumption allowing the jury to infer that the victim was transported out of the state if she was not released within 24 hours after she was abducted. 18 U.S.C. § 1201(b). The Fourth Circuit ruled any error was harmless because "there was no reasonable basis in the record for the jury to find that the interstate transportation element was not satisfied." 321 F.3d at 481.

For discussion of special territorial jurisdiction, see the following cases: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v.*

[699] *United States v. Wills*, 346 F.3d 476, 492 (4th Cir. 2003) (*Wills II*). Thus, the victim could be "inveigled" by means of false pretenses to travel in interstate commerce.

Zeigler, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

Special territorial jurisdiction does not include proprietary jurisdiction. Most federal buildings, such as courthouses and office buildings, are proprietary jurisdictions, and are usually covered only by regulations of the General Services Administration published in the Code of Federal Regulations.

18 U.S.C. § 1203 HOSTAGE TAKING

Title 18, United States Code, Section 1203 makes it a crime to detain another person in order to compel a third person or governmental organization to do something. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant seized or detained another person [or attempted or conspired to do so];
- Second, that the defendant threatened to kill, injure, or to continue to detain that person; and
- Third, that the defendant did so with the purpose of compelling a third person or government organization to act in some way, either to do or abstain from doing any act as a condition for the release of the person detained.[700]

ADDITIONAL ELEMENT, IF APPROPRIATE:

1. Did the death of any person result from the offense?

"National of the United States" means (A) a citizen of the United States or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. [8 U.S.C. § 1101(a)(22)]

To seize or detain means to hold or confine a person against the person's will for an appreciable period of time.[701]

AFFIRMATIVE DEFENSES

§ 1203(b)(1)

The defendant must prove:

- First, that the conduct required for the offense occurred outside the United States, and
- Second,
  (a) that the offender or person seized or detained was not a national of the United States;

[700] *United States v. Carrion-Caliz*, 944 F.2d 220, 223 (5th Cir. 1991). *But see United States v. Corporan-Cuevas*, 244 F.3d 199 (1st Cir. 2001) (indictment did not allege facts showing compliance with the international aspect of the hostage taking statute, because the government contended it is an affirmative defense only).

[701] *Carrion-Caliz*, 944 F.2d at 225.

(b) that the offender was not found in the United States; or

(c) that the governmental organization sought to be compelled was not the Government of the United States.

§ 1203(b)(2)

The defendant must prove:

- First, that the conduct required for the offense occurred inside the United States;
- Second, that each alleged offender and each person seized or detained was a national of the United States;
- Third, that each alleged offender was found in the United States; and
- Fourth, that the governmental organization sought to be compelled was not the Government of the United States.

_____NOTE_____

Section 1203 criminalizes the seizure or detention of a person in order to compel a third person or government organization to act or refrain from acting as a condition for release of the person detained. *United States v. Santos-Riviera*, 183 F.3d 367, 369 (5th Cir. 1999).

Section 1201 and § 1203 are quite similar, so that it is reasonable to look to one for help in deciphering the other. *United States v. Carrion-Caliz*, 944 F.2d 220, 223 (5th Cir. 1991).

The Hostage Taking Act applies only to acts of kidnapping or hostage taking which have some international aspect or involve the United States government. *Id.* at 224.

18 U.S.C. § 1204 INTERNATIONAL PARENTAL KIDNAPPING

Title 18, United States Code, Section 1204 makes it a crime to remove a child from the United States with intent to obstruct the lawful exercise of parental rights. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant removed or attempted to remove a child from the United States, or retained a child (who had been in the United States) outside the United States; and
- Second, that the defendant did so with the intent to obstruct the lawful exercise of parental rights.

"Child" means a person who has not attained the age of 16 years. [§ 1204(b)(1)]

"Parental rights," with respect to a child, means the right to physical custody of the child, whether joint or sole, and includes visitation rights. The right to physical custody or visitation can arise in three ways: by operation of law, by court order, or by a legally binding agreement. [§ 1204(b)(2)]

AFFIRMATIVE DEFENSES

1. The defendant acted within the provisions of a valid court order. *See* § 1204(c)(1).

2. The defendant was fleeing an incidence or pattern of domestic violence. *See* §1204(c)(2).
3. The defendant failed to return the child as a result of circumstances beyond the defendant's control and made reasonable attempts to notify the other parent. *See* § 1204(c)(3).

_____NOTE_____

See United States v. Clenney, 434 F.3d 780 (5th Cir. 2005) (venue lies in district from which child removed, not necessarily where child or custodial parent resides).

This statute looks to state family law for purposes of defining parental rights. *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 45 (1st Cir. 2004). In a prosecution of the father, deciding whether the mother had parental rights under state law required the determination of three factual issues: (1) whether she was the mother of the children; (2) whether there existed a court order altering the custody rights as established by operation of law; and (3) whether there existed an agreement between her and the father altering the custody rights. *Id*. at 49.

18 U.S.C. § 1341 MAIL FRAUD

Title 18, United States Code, Section 1341 makes it a crime to use the mails or any common carrier to execute a scheme to defraud. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant devised or intended to devise a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises that were material; and
- Second, that, for the purpose of executing or attempting to execute the scheme, the defendant did one of the following:
    1. placed in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service;
    2. deposited or caused to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier;
    3. took or received from any matter or thing whatever delivered by the Postal Service or any private or commercial interstate carrier; or
    4. caused to be delivered by mail or private or commercial interstate carrier according to the address on the item any matter or thing whatever.[702]

ADDITIONAL ELEMENTS

1. Did the violation occur in relation to, or involving any benefit authorized, transported, transmitted, transferred, dispersed, or paid in connection with, a presidentially declared major disaster or emergency [as defined in 42 U.S.C. § 5122]?

[702] *See United States v. Harvey*, 532 F.3d 326, 333 (4th Cir. 2008) (identifying four elements). *But see United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001) (identifies only two essential elements of (1) a scheme to defraud and (2) the use of the mails or wire communication in furtherance of the scheme). Intent to defraud is inherently part of proving the scheme to defraud.

2. Did the scheme affect a financial institution?

A financial institution is affected only if the institution itself was victimized by the fraud, as opposed to the scheme's mere utilization of the financial institution in the transfer of funds.[703]

The words "scheme and artifice" include any plan or course of action intended to deceive others and to obtain by either false or fraudulent pretenses, representations or promises, either money or property from persons who are so deceived. A statement or representation is false or fraudulent if known to be untrue or made with reckless indifference as to the truth or falsity and made or caused to be made with the intent to deceive or defraud.[704]

A scheme to defraud requires that the government prove that the defendant acted with the specific intent to deceive or cheat for the purpose of getting financial gain for one's self or causing financial loss to another. Thus, the government must prove that the defendant intended to deceive someone through the scheme.[705]

Fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent another person from acquiring material information.[706] Thus, a scheme to defraud can be shown by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter.[707]

The government can prove a scheme to defraud by evidence of active concealment of material information.[708]

The government must prove that the defendant acted with the specific intent to defraud.[709]

Fraud is an intentional or deliberate misrepresentation of the truth for the purpose of inducing another to part with a thing of value or to surrender a legal right. Fraud, then, is a deceit which, whether perpetrated by words, conduct, or silence, is designed to cause another to act upon it to his legal injury. A statement, claim or document is fraudulent if it was falsely made, or made with reckless indifference as to its truth or falsity, and made or caused to be made with an intent to deceive. The phrases "any scheme or artifice to

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[703] *United States v. Ubakanma*, 215 F.3d 421, 426 (4th Cir. 2000).

[704] *See United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir. 1983). "Representations known by a person to be false is a type of a scheme to defraud." *Id.* at 1344.

[705] *See United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002).

[706] *United States v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000). The court found that

> [concealment] is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. [Nondisclosure] is characterized by mere silence. Although silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an action for fraud, suppression of the truth with the intent to deceive (concealment) does.

Id. at 899.

[707] *Id.* at 901.

[708] *See id.* at 907.

[709] *United States v. McNeil*, 45 F. App'x 225 (4th Cir. 2002) (citing *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001)).

defraud" and "any scheme or artifice for obtaining money or property" mean any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value. A scheme or artifice to defraud may describe a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general life of the community. There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension. A scheme to defraud may occur even absent a false statement or false representation, and may be based on fraudulent omissions. A scheme to defraud includes the knowing concealment of facts and information done with the intent to defraud.[710]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[711]

A "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value.[712]

"To defraud" means wronging one in his property rights by dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit, chicanery or overreaching. The concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.[713]

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the mailed material was itself false or fraudulent, or that the alleged scheme actually succeeded in defrauding anyone, or that the use of the mail or common carrier was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mails or a common carrier was closely related to the scheme, in that the defendant either mailed something or caused it to be mailed or delivered by common carrier in an attempt to execute or carry out the

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[710] Jury instruction approved in *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997).

[711] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[712] *United States v. Deters*, 184 F.3d 1253, 1257 (10th Cir. 1999). In *United States v. Cronic*, 900 F.2d 1511 (10th Cir. 1990), the Tenth Circuit found that

> [i]f a scheme [to defraud] is devised with the intention of defrauding, and the mails are used in executing it, it makes no difference that there is not a misrepresentation of a single existing fact. A scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, on the other hand, focuses on the means by which money was obtained. False or fraudulent pretenses, representations or promises are an essential element of the crime.

900 F.2d at 1513-14 (citations omitted).

[713] *Carpenter v. United States,* 484 U.S. 19, 27 (1987).

scheme. To cause the mails or common carrier to be used is to do an act with knowledge that the use will follow in the ordinary course of business or where such use can reasonably be foreseen even though the defendant did not intend or request the mails or common carrier to be used.[714]

The government must prove that the defendant knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of causing some loss to another.[715]

The government does not have to prove precisely when the intent to defraud first materialized.[716]

Nor does the government have to prove that the fraud succeeded.[717]

A statement or representation is false or fraudulent if it is known to be untrue or is made with reckless indifference as to its truth or falsity, when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. "No actual misrepresentation of fact is necessary to make the crime complete." [718]

Good faith on the part of the defendant is not consistent with an intent to defraud.[719]

However, no amount of honest belief that an enterprise will eventually succeed can excuse willful misrepresentations.[720]

You are instructed that if the defendant participated in the scheme to defraud, then a belief by the defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that the defendant acted in good faith.

If the defendant participated in the scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on the part of the defendant that the scheme would not cause a loss, would excuse fraudulent actions or false representations by him.

A defendant's belief that the victim of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime charged in the indictment.[721]

The intent to repay eventually is not relevant to the question of guilt.[722]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the

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[714] *See Pereira v. United States*, 347 U.S. 1, 8, 9 (1954).
[715] *United States v. Allen*, 491 F.3d 178, 187 (4th Cir. 2007).
[716] *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).
[717] *United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995).
[718] *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960).
[719] *United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997).
[720] *United States v. Painter*, 314 F.2d 939, 943 (4th Cir. 1963).
[721] Instructions from *Allen*, 491 F.3d 178.
[722] *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).

agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[723]

It is not necessary for the defendant to be directly or personally involved in the delivery by mail or common carrier, as long as such delivery was reasonably foreseeable in the execution of the alleged scheme in which the defendant is accused of participating.

This does not mean that the defendant must have specifically authorized others to make the delivery. When one does an act with knowledge that the use of the mail or common carrier will follow in the ordinary course of business or where such use can reasonably be foreseen, even though not actually intended, then he causes the mails or common carrier to be used.[724]

The use of the mails need not in and of itself be fraudulent to constitute an offense under this statute. The materials that were mailed may be totally innocent. The use of the mails does not need to be an essential part of the fraudulent scheme,[725] but the government must prove that the mails played a significant part in the execution of the scheme.[726]

It is not necessary that the intended victims of the alleged scheme be the recipients of the material that was mailed.[727]

Property is anything in which one has a right that can be assigned, traded, bought, and otherwise disposed of. The property of which a victim is deprived need not be tangible property and the government does not have to prove that the victim suffered a financial loss. The government need only prove that the victim was deprived of some right

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[723] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[724] *See United States v. McNeil*, 45 F. App'x 225 (4th Cir. 2002); *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). *See also United States v. Coyle*, 943 F.2d 424, 426 (4th Cir. 1991); *United States v. Blecker*, 657 F.2d 629, 637 (4th Cir. 1981) (not necessary for the government to show that the defendant actually mailed or transported anything himself; it is sufficient if the defendant caused it to be done; sufficient if government proves that defendant had reasonable basis to foresee mails would be used by others in execution of scheme to defraud). The use of the mails can be proven through evidence of business practices or office custom. *United States v. Scott*, 730 F.2d 143, 146-47 (4th Cir. 1984). In *United States v. Edwards*, 188 F.3d 230 (4th Cir. 1999), the Fourth Circuit approved the following instruction:

> The crime of conspiracy to commit mail fraud does not require proof of an actual mailing. Instead, the crime of conspiracy to commit mail fraud requires, among other things, proof that the persons charged with the conspiracy reasonably contemplated the use of the mail or that the persons charged intended that the mails be used in furtherance of the scheme or that the nature of the scheme was such that the use of the mail was reasonably foreseeable.

188 F.3d at 233 n.1.

[725] *Edwards*, 188 F.3d at 235; *Pereira*, 347 U.S. at 8-9.

[726] *United States v. Caldwell*, 544 F.2d 691, 696 (4th Cir. 1976); *United States v. Murr*, 681 F.2d 246, 248 (4th Cir. 1982).

[727] *Coyle*, 943 F.2d at 427 (the victims were cable companies, but the mail recipients were cable customers).

over that property, such as the right to exclusive use.[728] This includes the right to be paid money.[729]

It makes no difference whether the intended victims are gullible or not, intelligent or not.[730]

The government does not have to prove that anyone actually relied on the false representations. Nor does the government have to prove that a victim actually suffered any damages. The statute prohibits a scheme to defraud rather than the completed fraud.[731]

☞ **For multiple defendants:**

In order to find the defendants responsible for participating in the fraudulent scheme as alleged in the indictment, each of you must find that the defendants participated in the same single scheme to defraud and that the scheme to defraud in which the defendants are found to have participated is substantially the same scheme as the overall fraudulent scheme alleged in the indictment. To sustain its burden of proof, however, the government is not required to prove all of the components of the scheme to defraud that are alleged in the indictment. If the government proves beyond a reasonable doubt a scheme to defraud that contains some or all of the components in the indictment, but is simply more narrow than the scheme to defraud as defined in the indictment, then the government has carried its burden of proof. You must unanimously agree, however, on the components of the scheme to defraud.[732]

NOTE

Materiality is an element of mail fraud that must be submitted to the jury. *Neder v. United States*, 527 U.S. 1 (1999).

The two phrases identifying the proscribed schemes are not separate offenses. The second phrase simply modifies the first by making it unmistakable that the statute reaches false promises and misrepresentations as to the future as well as other frauds involving money or property. *Cleveland v. United States*, 531 U.S. 12, 26 (2000).

Section 1341 reaches everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. *McNally v. United States*, 483 U.S. 350, 357-58 (1987).

Mail fraud has "as an element the specific intent to deprive one of something of value through a misrepresentation or other similar dishonest method, which indeed would cause him harm." *United States v. Wynn*, 684 F.3d 473, 478 (4th Cir. 2012).

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[728] *United States v. Adler*, 186 F.3d 574, 576-77 (4th Cir. 1999).

[729] *United States v. Pasquantino*, 544 U.S. 349, 356 (2005) (Canada defrauded of its right to collect tax revenue on smuggled liquor). *See Cleveland v. United States*, 531 U.S. 12 (2000) (a State's interest in an unissued video poker license is not property).

[730] *See United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000) (§ 1344 prosecution).

[731] *Neder v. United States*, 527 U.S. 1, 25 (1999). A pecuniary loss is not required. *United States v. Deters*, 184 F.3d 1253, 1258 (10th Cir. 1999).

[732] Instruction that the jury agree unanimously on the identity and extent of the scheme to defraud. *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995).

Traditionally, mail fraud had two elements: a scheme to defraud, and use of the mails in furtherance of the scheme. *Pereira v. United States*, 347 U.S. 1 (1954). However, *Neder* added materiality as an element to be determined by the jury. In *United States v. Ham*, 998 F.2d 1247 (4th Cir. 1993), the Fourth Circuit stated that "[t]o convict on mail fraud conspiracy, the jury must find that a defendant acted with specific intent to defraud." 998 F.2d at 1254. Arguably, this is simply another way of stating the *mens rea* associated with the scheme to defraud, because no other Fourth Circuit case has been found identifying "intent to defraud" as an element separate from the scheme itself.

The use of the mails must be a part of the execution of the fraud, however it need not be an essential element of the scheme; it is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot. *Schmuck v. United States*, 489 U.S. 705, 710 (1989).

"[Section] 1341 requires the object of the fraud to be 'property' in the victim's hands." *Cleveland*, 531 U.S. at 26.

"Fraud" prohibited by this statute only reaches money or property interests, as opposed to intangible general social interests. Nevertheless, the scope of property interests protected is to be construed fairly widely. In *United States v. Mancuso*, 42 F.3d 836, 845 (4th Cir. 1994), the court held that a right that could be assigned, traded, bought, and otherwise disposed of, fell within the universe of property that would support a bank fraud conviction.

The mail fraud statute contains no predicate violation requirement. *United States v. Bryan*, 58 F.3d 933, 941 (4th Cir. 1995).

A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate crime under § 1341, though there is but a single fraudulent scheme. *United States v. Blankenship*, 746 F.2d 233 (5th Cir. 1984).

In *United States v. Loayza*, 107 F.3d 257 (4th Cir. 1997), the Fourth Circuit held that "[t]he identity of the fraud victim is not an essential element of the crime." 107 F3d. at 261.

However, the amendment providing an enhanced sentence if the violation affects a financial institution would appear to make such a victim an element.

"Although the crime of common law fraud requires the intended victim to have justifiably and detrimentally relied on the defendant's misrepresentation, no such 'reliance' element must be proved to obtain a conviction for mail fraud." *Chisholm v. Transouth Fin. Corp.*, 95 F.3d 331, 336 (4th Cir. 1996) (civil RICO case alleging racketeering activity was mail fraud).

The mail fraud statute "protects the naive as well as the worldly-wise, and the former are more in need of protection than the latter." *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960).

Lulling Communications[733]

[733] A mailing is considered to be for the purpose of executing a fraudulent scheme if it is designed to lull the victims into a false sense of security, even if it is incident to an essential part of

Communications having a propensity to lull and forestall action on the part of the victim may form an integral part of the overall scheme to defraud. *United States v. Painter*, 314 F.2d 939, 943 (4th Cir. 1963) (citing *United States v. Sampson*, 371 U.S. 75, 80 (1962)).

Even if an individual had an innocent intent at the outset, a conviction can be sustained if that individual used the mails or wire communication to disseminate falsehoods designed to calm nervous buyers. *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).

Puffing

Puffing, exaggerated enthusiasm, and high-pressure salesmanship do not constitute fraud, provided they simply magnify an opinion of the advantages of a product without falsely asserting the existence of qualities the product does not possess. *United States v. Amlani*, 111 F.3d 705, 718 (9th Cir. 1997).

In *United States v. New South Farm & Home Co.*, 241 U.S. 64, 71 (1916), the Supreme Court stated the following:

> Mere puffing, indeed, might not be within [the meaning of the mail fraud statute]; that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has, but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces.

In *United States v. Cronic*, 900 F.2d 1511 (10th Cir. 1990), the Tenth Circuit held that a check kiting scheme constituted a scheme to defraud, but not a scheme to obtain by means of false representations, unless embellished by other acts or communications.

18 U.S.C. § 1342 USING A FALSE NAME IN A MAIL FRAUD

Title 18, United States Code, Section 1342 makes it a crime to use a false name in carrying on a mail fraud scheme. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant used or assumed, or requested to be addressed by, a fictitious, false, or assumed title, name, or address or name other than his own proper name;
- Second, that the defendant did so for the purpose of conducting, promoting, or carrying on by means of the Postal Service, a scheme or artifice to defraud or for

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the scheme. "Thus, a mailing that is accurate, routine, or sent after the goods have been received can support a mail fraud conviction, so long as the mailing was designed to make apprehension of the defendant less likely." *United States v. Bradshaw*, 282 F. App'x 264 (4th Cir. 2008) (quoting *United States v. Lane*, 474 U.S. 438, 451-52 (1986)).

obtaining money or property by means of false or fraudulent pretenses, representations, or promises that were material; and

- Third, that the defendant delivered or caused to be delivered by mail or by private or common carrier any matter or thing whatever for the purpose of executing the scheme to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises.

OR

- First, that the defendant took or received from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to a fictitious, false, or assumed title, name, or address or name other than the defendant's own proper name; and
- Second, that the defendant did so for the purpose of conducting, promoting, or carrying on by means of the Postal Service, a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises that were material.

☞ **See § 1341 for appropriate instructions.**

_____NOTE_____

See United States v. McCollum, 802 F.2d 344, 347 (9th Cir. 1986), which appears to stand for the proposition that using a fictitious name is the only additional element needed to establish a violation of § 1342.

See also United States v. Ham, 998 F.2d 1247 (4th Cir. 1993).

18 U.S.C. § 1343 WIRE FRAUD [LAST UPDATED: 7/3/14]

Title 18, United States Code, Section 1343 makes it a crime to use interstate wire communications to execute a scheme to defraud. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant devised or intended to devise a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises that were material; and
- Second, that, for the purpose of executing the scheme, the defendant transmitted or caused to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce any writings, signs, signals, pictures, or sounds.[734]

ADDITIONAL ELEMENTS

[734] *See United States v. Harvey*, 532 F.3d 326, 333 (4th Cir. 2008) (identifies four elements). *But see United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001) (identifies only the classic two essential elements of (1) a scheme to defraud and (2) the use of the mails or wire communication in furtherance of the scheme). *See also United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012) (quoting *United States v. Curry*, 461 F.3d 452, 457 (4th Cir. 2006), for the proposition that wire fraud has two elements, but then noting that the district court "instructed the jury in rather more detail."). The district court in *Jefferson* appeared to have followed the four elements identified in *Harvey*.

1. Did the violation occur in relation to, or involving any benefit authorized, transported, transmitted, transferred, dispersed, or paid in connection with, a presidentially declared major disaster or emergency [as defined in 42 U.S.C. § 5122]?

2. Did the scheme affect a financial institution?

A financial institution is affected only if the institution itself was victimized by the fraud, as opposed to the scheme's mere utilization of the financial institution in the transfer of funds.[735]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

The words "scheme and artifice" include any plan or course of action intended to deceive others and to obtain by either false or fraudulent pretenses, representations or promises, either money or property from persons who are so deceived. A statement or representation is false or fraudulent if known to be untrue or made with reckless indifference as to the truth or falsity and made or caused to be made with the intent to deceive or defraud.[736]

A scheme to defraud requires that the government prove that the defendant acted with the specific intent to deceive or cheat for the purpose of getting financial gain for one's self or causing financial loss to another. Thus, the government must prove that the defendant intended to deceive someone through the scheme.[737]

Fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent another person from acquiring material information.[738] Thus, a scheme to defraud can be shown by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter.[739]

The government can prove a scheme to defraud by evidence of active concealment of material information.[740]

The government must prove that the defendant acted with the specific intent to defraud.[741]

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[735] *United States v. Ubakanma*, 215 F.3d 421, 426 (4th Cir. 2000).

[736] *See United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir. 1983). "Representations known by a person to be false is a type of a scheme to defraud." *Id.* at 1344.

[737] *See United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002).

[738] *United States v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000). The court found that

> [concealment] is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. [Nondisclosure] is characterized by mere silence. Although silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an action for fraud, suppression of the truth with the intent to deceive (concealment) does.

Id. at 899.

[739] *Id.* at 901.

[740] *See id.* at 907.

[741] *United States v. McNeil*, 45 F. App'x 225 (4th Cir. 2002) (citation omitted).

Fraud is an intentional or deliberate misrepresentation of the truth for the purpose of inducing another to part with a thing of value or to surrender a legal right. Fraud, then, is a deceit which, whether perpetrated by words, conduct, or silence, is designed to cause another to act upon it to his legal injury. A statement, claim or document is fraudulent if it was falsely made, or made with reckless indifference as to its truth or falsity, and made or caused to be made with an intent to deceive. The phrases "any scheme or artifice to defraud" and "any scheme or artifice for obtaining money or property" mean any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value. A scheme or artifice to defraud may describe a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general life of the community. There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension. A scheme to defraud may occur even absent a false statement or false representation, and may be based on fraudulent omissions. A scheme to defraud includes the knowing concealment of facts and information done with the intent to defraud.

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[742]

A "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value.[743]

"To defraud" means wronging one in his property rights by dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit, chicanery or overreaching. The concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.[744]

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the material sent by wire, radio, or television was itself false or fraudulent, or that the alleged scheme actually succeeded in defrauding anyone, or that the use of the wire, radio, or television was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the wire, radio, or television was closely

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[742] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[743] *United States v. Deters*, 184 F.3d 1253, 1257 (10th Cir. 1999). In *United States v. Cronic*, 900 F.2d 1511 (10th Cir. 1990), the Tenth Circuit found that

> If a scheme [to defraud] is devised with the intention of defrauding, and the mails are used in executing it, it makes no difference that there is not a misrepresentation of a single existing fact. A scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, on the other hand, focuses on the means by which money was obtained. False or fraudulent pretenses, representations or promises are an essential element of the crime.

900 F.2d at 1513-14 (citations omitted).

[744] *Carpenter v. United States*, 484 U.S. 19, 27 (1987).

related to the scheme, in that the defendant either wired something or caused it to be wired for the purpose of executing or carrying out the scheme.[745]

The government must prove that the defendant knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of causing some loss to another.[746]

The government does not have to prove precisely when the intent to defraud first materialized.[747]

Nor does the government have to prove that the fraud succeeded.[748]

A statement or representation is false or fraudulent if it is known to be untrue or is made with reckless indifference as to its truth or falsity, when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. "No actual misrepresentation of fact is necessary to make the crime complete." [749]

Good faith on the part of the defendant is not consistent with an intent to defraud.[750]

However, no amount of honest belief that an enterprise will eventually succeed can excuse willful misrepresentations.[751]

You are instructed that if the defendant participated in the scheme to defraud, then a belief by the defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that the defendant acted in good faith.

If the defendant participated in the scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on the part of the defendant that the scheme would not cause a loss, would excuse fraudulent actions or false representations by him.

A defendant's belief that the victim of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime charged in the indictment.[752]

The intent to repay eventually is not relevant to the question of guilt.[753]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[754]

It is not necessary for the defendant to be directly or personally involved in the interstate transmission, as long as such transmission was reasonably foreseeable in the execution of the alleged scheme in which the defendant is accused of participating.

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[745] *See Pereira v. United States*, 347 U.S. 1, 8, 9 (1954).
[746] *United States v. Allen*, 491 F.3d 178, 187 (4th Cir. 2007).
[747] *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).
[748] *United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995).
[749] *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960).
[750] *United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997).
[751] *United States v. Painter*, 314 F.2d 939, 943 (4th Cir. 1963).
[752] Instructions from *Allen*, 491 F.3d 178 (4th Cir. 2007).
[753] *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).
[754] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

This does not mean that the defendant must have specifically authorized others to make the transmission. When one does an act with knowledge that the use of an interstate transmission will follow in the ordinary course of business or where such use can reasonably be foreseen, even though not actually intended, then he causes the interstate transmission to be made.[755]

The interstate transmission need not in and of itself be fraudulent to constitute an offense under this statute. The material that was transmitted may be totally innocent. The use of the interstate transmission does not need to be an essential part of the fraudulent scheme,[756] but the government must prove that the interstate transmission played a significant part in the execution of the scheme.[757]

It is not necessary that the intended victims of the alleged scheme be the recipients of the material that was transmitted.[758]

Property is anything in which one has a right that can be assigned, traded, bought, and otherwise disposed of. The property of which a victim is deprived need not be tangible property and the government does not have to prove that the victim suffered a financial loss. The government need only prove that the victim was deprived of some right over that property, such as the right to exclusive use.[759] This includes the right to be paid money.[760]

It makes no difference whether the intended victims are gullible or not, intelligent or not.[761]

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[755] See jury instruction in *United States v. McNeil*, 45 F. App'x 225 (4th Cir. 2002), and *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). *See also United States v. Coyle*, 943 F.2d 424, 426 (4th Cir. 1991); *United States v. Blecker*, 657 F.2d 629, 637 (4th Cir. 1981) ("It is not necessary for the government to show that the defendant actually mailed or transported anything himself; it is sufficient if the defendant caused it to be done. Thus, it is sufficient if the government proves that the defendant had a reasonable basis to foresee that the mails would be used by others in the execution of the scheme to defraud."). The use of the mails can be proven through evidence of business practices or office custom. *United States v. Scott*, 730 F.2d 143, 146-47 (4th Cir. 1984). In *United States v. Edwards*, 188 F.3d 230 (4th Cir. 1999), the Fourth Circuit approved the following instruction given by the district court:

> The crime of conspiracy to commit mail fraud does not require proof of an actual mailing. Instead, the crime of conspiracy to commit mail fraud requires, among other things, proof that the persons charged with the conspiracy reasonably contemplated the use of the mail or that the persons charged intended that the mails be used in furtherance of the scheme or that the nature of the scheme was such that the use of the mail was reasonably foreseeable.

188 F.3d 233 n.1.

[756] *See Edwards*, 188 F.3d at 235.

[757] *United States v. Caldwell*, 544 F.2d 691, 696 (4th Cir. 1976). *See also United States v. Murr*, 681 F.2d 246, 248 (4th Cir. 1982).

[758] *United States v. Coyle*, 943 F.2d 424, 427 (4th Cir. 1991) (the victims were cable companies, but the mail recipients were cable customers).

[759] *United States v. Adler*, 186 F.3d 574, 576-77 (4th Cir. 1999).

[760] *United States v. Pasquantino*, 544 U.S. 349, 356 (2005) (Canada defrauded of its right to collect tax revenue on smuggled liquor). *See Cleveland v. United States*, 531 U.S. 12 (2000) (a State's interest in an unissued video poker license is not property).

[761] *See United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000) (§ 1344 prosecution).

The government does not have to prove that anyone actually relied on the false representations. Nor does the government have to prove that a victim actually suffered any damages. The statute prohibits a scheme to defraud rather than the completed fraud.[762]

☞ **For multiple defendants:**

In order to find the defendants responsible for participating in the fraudulent scheme as alleged in the indictment, each of you must find that the defendants participated in the same single scheme to defraud and that the scheme to defraud in which the defendants are found to have participated is substantially the same scheme as the overall fraudulent scheme alleged in the indictment. To sustain its burden of proof, however, the government is not required to prove all of the components of the scheme to defraud that are alleged in the indictment. If the government proves beyond a reasonable doubt a scheme to defraud that contains some or all of the components in the indictment, but is simply more narrow than the scheme to defraud as defined in the indictment, then the government has carried its burden of proof. You must unanimously agree, however, on the components of the scheme to defraud.[763]

_____NOTE_____

See United States v. ReBrook, 58 F.3d 961, 966 (4th Cir. 1995), *abrogated on ground of materiality by Neder v. United States*, 527 U.S. 1 (1999).

A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). The same reasoning should apply to wire fraud.

The two phrases in § 1341 identifying the proscribed schemes are not separate offenses. The second phrase simply modifies the first by making it unmistakable that the statute reaches false promises and misrepresentations as to the future as well as other frauds involving money or property. *Cleveland v. United States*, 531 U.S. 12, 26 (2000). The same reasoning should apply to § 1343.

The use of the mails must be a part of the execution of the fraud, however it need not be an essential element of the scheme; it is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot. *Schmuck v. United States*, 489 U.S. 705, 710 (1989). The same reasoning should apply to use of an interstate wire.

"[Section] 1341 [and by implication § 1343] requires the object of the fraud to be 'property' in the victim's hands." *Cleveland*, 531 U.S. at 26.

"Fraud" prohibited by this statute only reaches money or property interests, as opposed to intangible general social interests. Nevertheless, the scope of property interests protected is to be construed fairly widely. In *United States v. Mancuso*, 42 F.3d 836, 845 (4th Cir. 1994), the court held that a right that could be assigned, traded, bought, and otherwise disposed of, fell within the universe of property that would support a bank fraud conviction.

In *United States v. Jefferson*, 674 F.3d 332 (4th Cir. 2012), the court reversed a wire fraud conviction for improper venue. The fraud scheme was devised and perpetrated in the Eastern District of Virginia, but the telephone call involved originated in Accra,

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[762] *Neder v. United States*, 527 U.S. 1, 25 (1999). A pecuniary loss is not required. *United States v. Deters*, 184 F.3d 1253, 1258 (10th Cir. 1999).

[763] Instruction that the jury agree unanimously on the identity and extent of the scheme to defraud. *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995).

Ghana, and terminated in Louisville, Kentucky. The essential conduct element in a wire fraud is the use of an interstate wire communication. Because the call neither originated nor terminated in the Eastern District of Virginia, venue there was improper. *See id*. at 364-69.

Lulling Communications[764]

Communications having a propensity to lull and forestall action on the part of the victim may form an integral part of the overall scheme to defraud. *United States v. Painter*, 314 F.2d 939, 943 (4th Cir. 1963) (citing *United States v. Sampson*, 371 U.S. 75, 80 (1962)).

Even if an individual had an innocent intent at the outset, a conviction can be sustained if that individual used the mails or wire communication to disseminate falsehoods designed to calm nervous buyers. *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).

Puffing

Puffing, exaggerated enthusiasm, and high-pressure salesmanship do not constitute fraud, provided they simply magnify an opinion of the advantages of a product without falsely asserting the existence of qualities the product does not possess. *United States v. Amlani*, 111 F.3d 705, 718 (9th Cir. 1997).

In *United States v. New South Farm & Home Co.*, 241 U.S. 64 (1916), the Supreme Court stated the following:

> Mere puffing, indeed, might not be within [the meaning of the mail fraud statute]; that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has, but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces.

241 U.S. at 71.

In *United States v. Cronic*, 900 F.2d 1511 (10th Cir. 1990), the Tenth Circuit held that a check kiting scheme constituted a scheme to defraud, but not a scheme to obtain by means of false representations, unless embellished by other acts or communications.

Wire fraud is a continuing offense, as defined in § 3237(a), properly tried in any district where a payment-related wire communication was transmitted in furtherance of the fraud scheme. *United States v. Ebersole*, 411 F.3d 517, 527 (4th Cir. 2005).

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[764] A mailing is considered to be for the purpose of executing a fraudulent scheme if it is designed to lull the victims into a false sense of security, even if it is incident to an essential part of the scheme. "Thus, a mailing that is accurate, routine, or sent after the goods have been received can support a mail fraud conviction, so long as the mailing was designed to make apprehension of the defendant less likely." *United States v. Bradshaw*, 282 F. App'x 264 (4th Cir. 2008) (quoting *United States v. Lane*, 474 U.S. 438, 451-52 (1986)).

18 U.S.C. § 1344 BANK FRAUD [LAST UPDATED: 12/16/14]

Title 18, United States Code, Section 1344, makes it a crime to execute or attempt to execute a scheme to defraud or to obtain money from a federally-insured financial institution by means of false or fraudulent pretenses, representations, or promises. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1344(1)[765]

- First, that the defendant knowingly executed [or attempted to execute] a scheme or artifice to defraud a financial institution;
- Second, that the financial institution was then federally insured [or otherwise fit one of the definitions in 18 U.S.C. § 20]; and
- Third, that the defendant did so with intent to defraud.[766]

§ 1344(2)

- First, that the defendant knowingly executed [or attempted to execute] a scheme or artifice to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody of, a financial institution by false or fraudulent pretenses, representations, or promises;
- Second, that the defendant did so with intent to defraud; and
- Third, that the financial institution was then federally insured [or otherwise fit one of the definitions in 18 U.S.C. § 20].[767]

Applicable to §§ 1344(1) and (2):

The words "scheme or artifice" include any plan or course of action intended to deceive or cheat others.

"To defraud" means wronging one in his property rights by dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit, chicanery, or overreaching.

A "financial institution" means that the financial institution was then federally insured [or otherwise fit one of the definitions in 18 U.S.C. § 20]

The government need not prove that the financial institution was the immediate victim, or that the institution suffered an actual loss, because it is sufficient if the government shows that the financial institution was exposed to an actual or potential risk of loss.[768]

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[765] Subsections (1) and (2) are disjunctive. Section 1344(1) requires an intent to defraud a financial institution; Section 1344(2) does not require an intent to defraud a financial institution directly, but does require that the defendant execute or attempt to execute the scheme by false or fraudulent pretenses. *See generally Loughrin v. United States*, 573 U.S. __, 134 S. Ct. 2384 (2014). *See also United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002); *United States v. Colton*, 231 F.3d 890, 897 (4th Cir. 2000).

[766] *Loughrin*, 573 U.S. at __, 134 S. Ct. at 2389-90. *See also United States v. Adepoju*, 756 F.3d 250, 255 (4th Cir. 2014) (listing elements).

[767] *Loughrin*, 573 U. S. at __, 134 S. Ct. at 2389. *See Adepoju*, 756 F.3d at 255 ("The major difference between the subsections is that § 1344(1) focuses on how the defendant's conduct affects a bank, while § 1344(2) focuses solely on the conduct.").

[768] *Brandon*, 298 F.3d at 312 (citing *Colton*, 231 F.3d 890 for proposition that because

(continued...)

Applicable to § 1344(1):

To prove a scheme to defraud, the government must prove that the defendant acted with the specific intent to deceive or cheat for the purpose of obtaining financial gain for one's self or causing financial loss to another. Thus, the government must prove that the defendant intended to deceive the financial institution through the scheme.[769]

The government can prove a scheme to defraud by evidence of active concealment of material information from the financial institution.[770] Therefore, "[n]o actual misrepresentation of fact is necessary to make the crime complete."[771]

A scheme to defraud can be shown by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter.[772]

Fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent another person from acquiring material information.[773]

The concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.[774]

It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[775]

Applicable to § 1344(2):

As relates to this section, a "scheme or artifice to obtain" means to pursue any plan or course of action intended to indirectly obtain assets of a financial institution by false or fraudulent pretenses, representations, or promises. In other words, a financial institution does not have to be the primary victim of the defendant's scheme. For example, the defendant may present a fraudulent check to a third party to obtain goods or services, who then submits that check to a financial institution for payment.

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[768] (...continued)
§ 1344 focuses on banks, not sufficient that person other than a bank was defrauded in a way that happened to involve banking without evidence that the bank was the intended victim).

[769] *Id.* at 311.

[770] 231 F.3d 890, 907 (4th Cir. 2000).

[771] *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960).

[772] *Colton*, 231 F.3d at 901.

[773] *Id.* at 898. The court found that

> [concealment] is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. [Nondisclosure] is characterized by mere silence. Although silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an action for fraud, suppression of the truth with the intent to deceive (concealment) does.

Id. at 899.

[774] *Carpenter v. United States*, 484 U.S. 19, 27 (1987).

[775] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

A statement or representation is false or fraudulent if known to be untrue or made with reckless indifference as to the truth or falsity and made or caused to be made with the intent to deceive or defraud.[776]

A statement or representation is also false or fraudulent when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

The government must prove that the false or fraudulent pretenses, representations, or promises were material.[777]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[778] In other words, it concerns what a reasonable financial institution would want to know in negotiating a particular transaction.[779]

A scheme is executed by the movement of money, funds or other assets from the institution, and this movement of the money from the financial institution completes the execution of the scheme.[780] [But see discussion of "execution" under NOTE.]

☞ **For multiple defendants:**

In order to find the defendants responsible for participating in the fraudulent scheme as alleged in the indictment, each of you must find that the defendants participated in the same single scheme to defraud and that the scheme to defraud in which the defendants are found to have participated is substantially the same scheme as the overall fraudulent scheme alleged in the indictment. To sustain its burden of proof, however, the government is not required to prove all of the components of the scheme to defraud that are alleged in the indictment. If the government proves beyond a reasonable doubt a scheme to defraud that contains some or all of the components in the indictment, but is simply more narrow than the scheme to defraud as defined in the indictment, then the government has carried its burden of proof. You must unanimously agree, however, on the components of the scheme to defraud.[781]

_____NOTE_____

In 2014, the Supreme Court noted that § 1344(1) requires an intent to defraud a financial institution; "indeed, that is § 1344(1)'s whole sum and substance." *Loughrin v. United States*, 573 U.S. __, __, 134 S. Ct. 2384, 2390 (2014). However, § 1344(2) only requires that the government prove the defendant was involved "in a knowing scheme to obtain property owned by, or in the custody of, a bank 'by means of false or fraudulent

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[776] *See United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir. 1983). "Representations known by a person to be false is a type of a scheme to defraud." *Id.* at 1344.

[777] *See Neder v. United States*, 527 U.S. 1 (1999).

[778] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[779] *United States v. Colton*, 231 F.3d 890, 903 n.5 (4th Cir. 2000).

[780] *United States v. Atkinson*, 158 F.3d 1147, 1159 (11th Cir. 1998) (citing *United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994)). *But see United States v. Brandon*, 298 F.3d 307, 312 (4th Cir. 2002) ("the government does not have to prove the bank suffered any monetary loss, only that the bank was put at potential risk by the scheme to defraud.").

[781] Instruction that the jury agree unanimously on the identity and extent of the scheme to defraud. *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995).

pretenses, representations, or promises.'" *Id.* at at 2387. *See also United States v. Adepoju*, 756 F.3d 250, 255 (4th Cir. 2014) (noting elements of both sections).

"Fraud" prohibited by this statute only reaches money or property interests, as opposed to intangible general social interests. Nevertheless, the scope of property interests protected is to be construed fairly widely. In *United States v. Mancuso*, 42 F.3d 836, 845 (4th Cir. 1994), the court held that a right that could be assigned, traded, bought, and otherwise disposed of, fell within the universe of property that would support a bank fraud conviction.

Materiality is an element of bank fraud that must be submitted to the jury. *Neder v. United States*, 527 U.S. 1 (1999).

See United States v. Bales, 813 F.2d 1289, 1293 (4th Cir. 1987), where the Fourth Circuit said that the trier of fact must find that the defendant "knowingly made false representations to the bank with the purpose of influencing its actions."

Reliance and damages are not elements of this offense. *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000). *See also United States v. Brandon*, 298 F.3d 307, 312 (4th Cir. 2002) ("the government does not have to prove the bank suffered any monetary loss, only that the bank was put at potential risk by the scheme to defraud"); *Colton*, 231 F.3d at 908 ("the 'scheme to defraud' clause of the bank fraud statute requires only that a financial institution be exposed to an actual or potential risk of loss").

Unit of Prosecution

The unit of prosecution is each execution of the scheme, not each act in furtherance of the scheme. An act chronologically and substantively independent from the other acts charged as the scheme constitutes an execution. Acts that are planned or contemplated together may indicate that they are dependent on one another and cannot be separately charged. *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000).

"[C]ircuit law ... has almost uniformly adopted the ... approach ... which allows a separate charge for each separate diversion of funds from the financial institution in question." *United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994). In *Mancuso*, the Fourth Circuit agreed with the district court that the diversion of a separately identifiable and discrete amount of money can be properly viewed as a separate execution of the scheme to defraud. *Id*. at 848.

In *United States v. Atkinson*, 158 F.3d 1147, 1159 (11th Cir. 1998), the Eleventh Circuit said that a scheme is executed by the movement of money, funds or other assets from the bank, and this movement of the money from the bank completes the execution of the scheme.

The Fifth Circuit has addressed the issue several times, finally concluding with a five-part test. *See*, *e.g.*, *United States v. Hord*, 6 F.3d 276 (5th Cir. 1993) (finding that opening account not an execution; five counts of conviction deposits of bogus checks, three counts attempted withdrawals; court held that the attempted withdrawals were multiplicitous; reversed); *See id.* at 281 ("[T]he deposits, without more, satisfy § 1344's prohibition ...."); *See id*. ("the scheme was executed with the deposit of each bogus check, because that was the event that triggered possible instant credit."); *United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992) (scheme involved two separate loans; court held only one execution of the scheme because loans were integrally related); *United States v. Lemons*, 941 F.2d 309 (5th Cir. 1991) (fraudulent scheme to procure money from bank; received in a series of transactions occurring over the course of several months; court held incremental movement of the benefit to the defendant was only part of but one execution of the scheme).

In *United States v. Hickman*, 331 F.3d 439 (5th Cir. 2003), a § 1347 prosecution, which is analogous, the Fifth Circuit said whether a transaction is "an 'execution' of the scheme or merely a component of the scheme will depend on several factors including (1) the ultimate goal of the scheme, (2) the nature of the scheme, (3) the benefits intended, (4) the interdependence of the acts, and (5) the number of parties involved." 331 F.3d at 446.

Officers, directors, or other employees of a financial institution cannot validate a fraud on the institution. Therefore, the knowledge of bank fraud by officers, directors, or other employees of the institution is not a defense to the charge of bank fraud. *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996).

In *United States v. Orr*, 932 F.2d 330 (4th Cir. 1991), a defendant opened a checking account using a false name and false identification. The initial deposit was withdrawn, and insufficient fund checks were written on the account. Losses were suffered by the merchants who took the checks, not by the bank. In vacating the convictions, the court stated that "Congress did not intend the bank fraud statute to cover ordinary state law offenses, where, as here, the fraud victim was not a federally insured bank." *Id*. at 332.

In *Brandon*, 298 F.3d at 313, the Fourth Circuit interpreted *Orr* "as establishing merely that a routine bad check case does not come within the scope of § 1344 where the defendant passes to a merchant a check from an account for which the defendant is an authorized signatory [even though the account was opened in a false name] and the drawee bank refuses to honor the check for lack of sufficient funds."

18 U.S.C. § 1346 HONEST SERVICES [LAST UPDATED: 8/15/2016]

To convict an individual of "honest services" fraud under [**insert section of fraud indicted]**, the government must prove:

[Insert Elements of the Type of Fraud]

- That there was a fraudulent scheme to deprive another of that person's right to receive honest services from the defendant through bribes or kickbacks supplied by a third party who has not been deceived;[782] and
- [**If the individual is a private employee**:] Second, that the defendant intended to breach a fiduciary duty to the defendant's employer, and that the defendant foresaw or reasonably should have foreseen that the employer might suffer an economic harm as a result of the breach.[783]

If proceeding under theory of *BRIBERY* against a *PUBLIC OFFICIAL*:

[782] *Skilling v. United States*, 561 U.S. 358, 409 (2010) ("[W]e now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre- *McNally* [*v. United States*, 483 U.S. 350 (1987)] case law.") (emphasis in original). *See also id.* at 404 (" In the main, the pre- *McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.")

[783] *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (adopting "reasonably foreseeable economic harm" test). *See also Skilling*, 561 U.S. at 408 n.41 (existence of fiduciary relationship in honest services cases "usually beyond dispute ...."). Additionally, the Ninth Circuit held in *United States v. Milovanovic*, 678 F.3d 713, 721 (9th Cir. 2012) (*en banc*), that "breach of fiduciary duty for honest services fraud ... does not require a formal fiduciary duty ...[;] a trust relationship ... is sufficient."

- that the payor provided a bribe to a public official intending that the official would thereby take favorable official acts or omissions that the official would not otherwise take; and
- that the official accepted the bribe intending, in exchange, to take official acts or omissions to benefit the payor.[784]

For Public Officials:

The "intangible right of honest services" refers to the public's right to a government official's honest, faithful, and disinterested service.[785]

Services must be owed under state [or local or federal] law and the government must prove that the services were in fact not delivered. The official must act or fail to act contrary to the requirements of the official's job under the appropriate law.[786]

The Government must show that the public official undertook an official act. To prove an "official act" the Government must prove two things.[787] First, the Government must identify a question, matter, cause, suit, proceeding, or controversy that may at any time be pending or may by law be brought before a public official.[788] This requires a showing of a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.[789] It must also be something specific and focused that is pending or may by law be brought before a public official.[790]

Second, the Government must prove that the public official made a decision or took an action on that question, matter, cause, suit, proceeding, or controversy, or that he agreed to do so.[791] That decision or action may include using his official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. Setting up a meeting, talking to another official, or organizing an event or agreeing to do so—without more—does not count as a decision or action on that matter.[792]

For Private Employees:

The "intangible right of honest services" refers to an employer's right to an

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[784] *See United States v. Andrews*, 681 F.3d 509, 527 (3d Cir. 2012).

[785] *United States v. Harvey*, 532 F.3d 326, 333 (4th Cir. 2008) (citing *United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979) (*en banc*)).

[786] *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997).

[787] *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016).

[788] *Id.*

[789] *Id.* at 2369, 2372.

[790] *Id.* at 2372.

[791] *Id.* at 2368.

[792] *Id.* at 2372, 2375.

employee's honest, faithful, and disinterested service.[793]

As to a private individual, the government must also prove that the defendant "intended to breach a fiduciary duty, and the [defendant] foresaw or reasonably should have foreseen that his victim might suffer an economic harm as a result of the breach."[794]

A "fiduciary" obligation exists whenever one [person] [entity] places special trust and confidence in another person – the fiduciary – in reliance that the fiduciary will exercise his [her] [its] discretion and expertise with the utmost honest and forthrightness in the interests of the [person] [entity], such that the [person] [entity] relaxes the care and vigilance which he [she] [it] would ordinarily exercise, and the fiduciary knowingly accepts that special trust and confidence and thereafter undertakes to act on behalf of the other [person] [entity] based on such reliance. It is only when one places, and another accepts, a special trust and confidence – usually involving the exercise of professional judgment and discretion – that a fiduciary relationship arises.[795]

Proof that the employer suffered only the loss of loyalty and fidelity of the employee is insufficient to convict.[796]

Bribe

A bribe is a payment made or promised corruptly, that is, with the intent to receive a specific benefit in return for the payment.[797] For a public official, the term "bribe" means to give or receive something of value with the intent to be influenced in the performance or nonperformance of the official's public duties.[798]

In a bribery case, the government is required to prove a *quid pro quo*;[799] however, the government is not required to prove "an expressed intention (or agreement) to engage in a *quid pro quo*" arrangement.[800] Additionally, a bribe need not be linked to a specific act. Rather, a bribe may come in the form of an ongoing course of conduct or a stream of benefits.[801] However, "gift or payment given with the generalized hope of some unspecified future benefit is not a bribe."[802]

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[793] *Harvey*, 532 F.3d at 333 (citing *Mandel*, 591 F.2d at 1362)).

[794] *United States v. Vinyard*, 266 F.3d 320, 327 (4th Cir. 2001) (quoting *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997)). *But see United States v. Milovanovic*, 678 F.3d 713, 727 (9th Cir. 2012) (*en banc*) (adopting materiality test; noting Circuit disagreement in private sector cases on whether government must prove "reasonably foreseeable economic harm" relating to a defendant's alleged fraud).

[795] *Milovanovic*, 678 F.3d at 723 n.9 (citing Eleventh Cir. Pattern Civil Jury Instructions – State Claims 3.3).

[796] *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997).

[797] *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998).

[798] *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007); *See also Jennings*, 160 F.3d at 1014; *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). Refer also to instruction for 18 U.S.C. § 201 (Bribery of Officials and Illegal Gratuities).

[799] Literally, "something for something." Black's Law Dictionary 1261 (7th ed. 1999).

[800] *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004) (quoting *United States v. Jennings*, 160 F.3d at 1014). For instruction on bribery, refer to 18 U.S.C. § 201(b).

[801] *United States v. Jefferson*, 674 F.3d 332, 359 (4th Cir. 2012) (citing *Ganim*, 510 F.3d at 149). *See also United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012) ("stream of benefits").

[802] In *McDonnell*, the Fourth Circuit stated that "there is little reason to doubt that if the

(continued...)

For public officials, a *quid pro quo* occurs when the public official "intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied."[803]

Public officials may lawfully accept a campaign contribution, and the official may lawfully accept a personal benefit if the official's intent in taking those items is solely to cultivate a relationship with the person or persons who provided them.[804]

Kickback

The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to a person for the purpose of improperly obtaining or rewarding favorable treatment in connection with some particular item or service.[805]

Undisclosed self-dealing is insufficient to convict.[806]

_____NOTE_____

Title 18 U.S.C. § 1346 provides that "[f]or the purposes of [Chapter 63 offenses], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Therefore, while prosecutions appear generally in conjunction with mail and wire fraud, honest services fraud is prosecutable under any of the fraud offenses listed in Chapter 63, including mail, wire, bank, health care, and securities fraud.

In *Skilling v. United States*, 561 U.S. 351 (2010), the Supreme Court held that "§1346 criminalizes *only*" schemes involving bribes and kickbacks. 561 U.S. at 409. Indeed, the Fourth Circuit has found it was error after *Skilling* to instruct a jury that an honest services fraud conviction could be based on conflict of interest. *See United States v. Hornsby*, 666 F.3d 296, 304 (4th Cir. 2012). *See also United States v. Pitt*, 482 F. App'x 787, 790 n.2 (4th Cir. 2012) (*Skilling*'s holding "requires proof of a bribery or kickback scheme to make out a case for honest services fraud ....").

In *United States v. Vinyard*, 266 F.3d 320 (4th Cir. 2001), the Fourth Circuit acknowledged that the honest services theory of fraud (in the case of Vinyard, mail fraud), is directed primarily at the deterrence and punishment of corruption among public officials, but it also encompasses dishonest acts perpetrated in private commercial settings by corporate officers or other private employees who "bear a duty of loyalty to the

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[802] (...continued)
defense had submitted a written instruction relating to goodwill gifts, the court would have accepted it." 792 F.3d at 514, *rev'd on other grounds in* 136 S. Ct. 2355 (2016). The court went on to state that the court's quid pro quo instruction adequately covered this point. *Id.*

[803] *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in judgment).

[804] *Ganim*, 510 F.3d 134, 149 (2d Cir. 2007) (approvingly citing district court jury instructions).

[805] *See* 41 U.S.C. § 8701(2).

[806] *Skilling v. United States*, 561 U.S. 351, 411 (2010). *See also United States v. Hornsby*, 666 F.3d 296, 304 (4th Cir. 2012).

employer, just as a public official owes the citizenry a duty to govern honestly and impartially." 266 F.3d at 326. Also in *Vinyard*, the Fourth Circuit adopted the so-called "reasonably foreseeable harm" test explained by the Sixth Circuit in *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997). That is, in private sector cases, the government "must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Vinyard*, 266 F.3d at 327 (quoting *Frost*, 125 F.3d at 386).

There is some disagreement between Circuits in "private sector" cases regarding the application of "reasonably foreseeable economic harm test" versus a broader "materiality test." Compare *Vinyard*, 266 F.3d at 327; *United States v. Martin*, 228 F.3d 1 (1st Cir. 2000); *United States v. deVegter*, 198 F.3d 1324 (11th Cir. 1999); *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998), *cert. granted in part and aff'd*, 526 U.S. 398 (1999); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), with *United States v. Rybicki*, 354 F.3d 354 F.3d 124 (2d Cir. 2003); *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997); *United States v. Gray*, 96 F.3d 769 (5th Cir. 1997); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996).

18 U.S.C. § 1347 HEALTH CARE FRAUD

Title 18, United States Code, Section 1347 makes it a crime to execute or attempt to execute a scheme to defraud a health care benefit program. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1347(1)[807]

- First, that the defendant executed or attempted to execute;
- Second, a scheme or artifice;
- Third, to defraud a health care benefit program which affects commerce;
- Fourth, in connection with the delivery of or payment for health care benefits, items, or services; and
- Fifth, that the defendant did so knowingly and willfully.[808]

§ 1347(2)

- First, that the defendant executed or attempted to execute;
- Second, a scheme or artifice;
- Third, to obtain any money or property owned by or under the custody and control of a health care benefit program which affects commerce, by means of false or fraudulent pretenses, representations, or promises which were

[807] Section 1347 is analogous to § 1344. Regarding § 1344, the Fourth Circuit has stated that subsections (1) and (2) are disjunctive and slightly different, so one may commit a bank fraud under (1) by defrauding a financial institution without making the false or fraudulent promises required by (2). *United States v. Colton*, 231 F.3d 890, 897 (4th Cir. 2000); *United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002). The same reasoning should apply to § 1347.

[808] *See United States v. Kirkham*, 129 F. App'x 61 (5th Cir. 2005).

material;[809]

- Fourth, in connection with the delivery of or payment for health care benefits; and
- Fifth, that the defendant did so knowingly and willfully.

"Health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item or service for which payment may be made under the plan or contract. [18 U.S.C. § 24(b)–note the interstate commerce nexus.][810]

The words "scheme and artifice" include any plan or course of action intended to deceive others and to obtain by either false or fraudulent pretenses, representations or promises, either money or property from persons who are so deceived. A statement or representation is false or fraudulent if known to be untrue or made with reckless indifference as to the truth or falsity and made or caused to be made with the intent to deceive or defraud.[811]

A scheme to defraud requires that the government prove that the defendant acted with the specific intent to deceive or cheat for the purpose of getting financial gain for one's self or causing financial loss to another. Thus, the government must prove that the defendant intended to deceive the health care benefit program through the scheme.[812]

"To defraud" means wronging one in his property rights by dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit, chicanery, or overreaching. The concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.[813]

Fraud is an intentional or deliberate misrepresentation of the truth for the purpose of inducing another to part with a thing of value or to surrender a legal right. Fraud, then, is a deceit which, whether perpetrated by words, conduct, or silence, is designed to cause another to act upon it to his legal injury. A statement, claim or document is fraudulent if it was falsely made, or made with reckless indifference as to its truth or falsity, and made or caused to be made with an intent to deceive. The phrases "any scheme or artifice to defraud" and "any scheme or artifice for obtaining money or property" mean any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value. A scheme or artifice to defraud may describe a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general life of the community. There must be proof of either a misrepresentation, false statement, or

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[809] The author has found no authority, one way or the other, that the representations must be material, but § 1344 is clearly analogous. Materiality is an element of bank fraud that must be submitted to the jury. *Neder v. United States*, 527 U.S. 1 (1999).

[810] In *United States v. Hickman*, 331 F.3d 439, 443 (5th Cir. 2003), the Fifth Circuit said that the jurisdictional element of affecting commerce is probably an essential element of the offense.

[811] *See United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir. 1983). "Representations known by a person to be false is a type of a scheme to defraud." *Id.* at 1344.

[812] *See United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002) (§ 1344 prosecution).

[813] *Carpenter v. United States*, 484 U.S. 19, 27 (1987).

omission calculated to deceive a person of ordinary prudence and comprehension. A scheme to defraud may occur even absent a false statement or false representation, and may be based on fraudulent omissions. A scheme to defraud includes the knowing concealment of facts and information done with the intent to defraud.

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[814]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[815]

A statement or representation is false or fraudulent if it is known to be untrue or is made with reckless indifference as to its truth or falsity, when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. "No actual misrepresentation of fact is necessary to make the crime complete."[816]

☞ **For multiple defendants:**

In order to find the defendants responsible for participating in the fraudulent scheme as alleged in the indictment, each of you must find that the defendants participated in the same single scheme to defraud and that the scheme to defraud in which the defendants are found to have participated is substantially the same scheme as the overall fraudulent scheme alleged in the indictment. To sustain its burden of proof, however, the government is not required to prove all of the components of the scheme to defraud that are alleged in the indictment. If the government proves beyond a reasonable doubt a scheme to defraud that contains some or all of the components in the indictment, but is simply more narrow than the scheme to defraud as defined in the indictment, then the government has carried its burden of proof. You must unanimously agree, however, on the components of the scheme to defraud.[817]

_____NOTE_____

Health care fraud is a continuing offense. *United States v. Hickman*, 331 F.3d 439, 447 n.8 (5th Cir. 2003).

Unit of Prosecution

The unit of prosecution is each execution of the scheme, not each act in furtherance of the scheme. An act chronologically and substantively independent from the other acts charged as the scheme constitutes an execution. Acts that are planned or contemplated together may indicate that they are dependent on one another and cannot be separately

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[814] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[815] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[816] *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960).

[817] Instruction that the jury agree unanimously on the identity and extent of the scheme to defraud. *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995).

charged. *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000).

"[A]ny scheme can be executed a number of times, and each execution may be charged as a separate count." *Hickman*, 331 F.3d at 446.

In *Hickman*, the Fifth Circuit said whether a particular transaction is "an 'execution' of the scheme or merely a component of the scheme will depend on several factors including (1) the ultimate goal of the scheme, (2) the nature of the scheme, (3) the benefits intended, (4) the interdependence of the acts, and (5) the number of parties involved." 331 F.3d at 446. Hickman had billed Medicare, Medicaid, and private insurance companies in a series of fraudulent transactions. The defendant submitted each claim separately and, with each submission, owed a new and independent obligation to be truthful to the insurer. Therefore, each claim submission was a separate execution of the scheme

See NOTE Section for § 1344.

18 U.S.C. § 1348 SECURITIES AND COMMODITIES FRAUD[818]

Title 18, United States Code, Section 1348 makes it a crime to execute a scheme to defraud in connection with a security. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1348(1)[819]

- First, that the defendant executed or attempted to execute a scheme or artifice to defraud any person;
- Second, that the scheme to defraud was in connection with any commodity for future delivery, or any option on a commodity or future delivery, or any security of an issuer with a class of securities registered under the Securities Exchange Act [15 U.S.C. § 78l] or that is required to file reports under the Securities Exchange Act [15 U.S.C. § 780(d)]; and
- Third, that the defendant did so knowingly and with intent to defraud.

§ 1348(2)

- First, that the defendant executed or attempted to execute a scheme or artifice to obtain any money or property by means of false or fraudulent pretenses, representations, or promises which were material;
- Second, that the scheme was in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under the Securities Exchange Act [15 U.S.C. § 78l] or that is required to file reports under the Securities Exchange Act [15 U.S.C. § 780(d)]; and
- Third, that the defendant did so knowingly and with intent to defraud.

The words "scheme and artifice" include any plan or course of action intended to

[818] Section 1348 is analogous to § 1344.

[819] Subsections (1) and (2) are disjunctive, so one may violate subsection (1) without making the false or fraudulent promises required by (2). *See United States v. Colton*, 231 F.3d 890, 897 (4th Cir. 2000) (a § 1344 bank fraud prosecution).

deceive others and to obtain by either false or fraudulent pretenses, representations or promises, either money or property from persons who are so deceived. A statement or representation is false or fraudulent if known to be untrue or made with reckless indifference as to the truth or falsity and made or caused to be made with the intent to deceive or defraud.[820]

The government must prove that the defendant acted with the specific intent to defraud.[821]

Fraud is an intentional or deliberate misrepresentation of the truth for the purpose of inducing another to part with a thing of value or to surrender a legal right. Fraud, then, is a deceit which, whether perpetrated by words, conduct, or silence, is designed to cause another to act upon it to his legal injury. A statement, claim or document is fraudulent if it was falsely made, or made with reckless indifference as to its truth or falsity, and made or caused to be made with an intent to deceive. The phrases "any scheme or artifice to defraud" and "any scheme or artifice for obtaining money or property" mean any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value. A scheme or artifice to defraud may describe a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general life of the community. There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension. A scheme to defraud may occur even absent a false statement or false representation, and may be based on fraudulent omissions. A scheme to defraud includes the knowing concealment of facts and information done with the intent to defraud.

Fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent another person from acquiring material information.[822] Thus, a scheme to defraud can be shown by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter.[823]

The government can prove a scheme to defraud by evidence of active concealment of material information.[824]

"To defraud" means wronging one in his property rights by dishonest methods or schemes and usually signifies the deprivation of something of value by trick, deceit,

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[820] *See United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir. 1983). "Representations known by a person to be false is a type of a scheme to defraud." *Id.* at 1344.

[821] *United States v. McNeil*, 45 F. App'x 225 (4th Cir. 2002) (citing *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001)).

[822] *United States v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000). The court found that

> [concealment] is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. [Nondisclosure] is characterized by mere silence. Although silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an action for fraud, suppression of the truth with the intent to deceive (concealment) does.

Id. at 899.

[823] *Id.* at 901.

[824] *Id.* at 907.

chicanery or overreaching. The concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.[825]

A "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value.[826]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[827]

The government must prove that the defendant knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of causing some loss to another.[828]

The government does not have to prove precisely when the intent to defraud first materialized.[829]

Property is anything in which one has a right that can be assigned, traded, bought, and otherwise disposed of. The property of which a victim is deprived need not be tangible property and the government does not have to prove that the victim suffered a financial loss. The government need only prove that the victim was deprived of some right over that property, such as the right to exclusive use.[830] This includes the right to be paid money.[831]

A statement or representation is false or fraudulent if it is known to be untrue or is made with reckless indifference as to its truth or falsity, when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. "No actual misrepresentation of fact is necessary to make the crime complete."[832]

A statement is material if it has a natural tendency to influence, or is capable of

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[825] *Carpenter v. United States*, 484 U.S. 19, 27 (1987).

[826] *United States v. Deters*, 184 F.3d 1253, 1257 (10th Cir. 1999). In *United States v. Cronic*, 900 F.2d 1511 (10th Cir. 1990), the Tenth Circuit found that

> If a scheme [to defraud] is devised with the intention of defrauding, and the mails are used in executing it, it makes no difference that there is not a misrepresentation of a single existing fact. A scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, on the other hand, focuses on the means by which money was obtained. False or fraudulent pretenses, representations or promises are an essential element of the crime.

900 F.2d at 1513-14 (citations omitted).

[827] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[828] *United States v. Allen*, 491 F.3d 178, 187 (4th Cir. 2007).

[829] *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).

[830] *United States v. Adler*, 186 F.3d 574, 576-77 (4th Cir. 1999).

[831] *United States v. Pasquantino*, 544 U.S. 349, 356 (2005) (Canada defrauded of its right to collect tax revenue on smuggled liquor). *See Cleveland v. United States*, 531 U.S. 12 (2000) (a State's interest in an unissued video poker license is not property).

[832] *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960).

influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[833]

Nor does the government have to prove that the fraud succeeded.[834]

Good faith on the part of the defendant is not consistent with an intent to defraud.[835]

However, no amount of honest belief that an enterprise will eventually succeed can excuse willful misrepresentations.[836]

You are instructed that if the defendant participated in the scheme to defraud, then a belief by the defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that the defendant acted in good faith.

If the defendant participated in the scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on the part of the defendant that the scheme would not cause a loss, would excuse fraudulent actions or false representations by him.[837]

The intent to repay eventually is not relevant to the question of guilt.[838]

A defendant's belief that the victim of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime charged in the indictment.[839]

It makes no difference whether the intended victim(s) was/were gullible or not, intelligent or not.[840]

The government does not have to prove that anyone actually relied on the false representations. Nor does the government have to prove that a victim actually suffered any damages. The statute prohibits a scheme to defraud rather than the completed fraud.[841]

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the alleged scheme actually succeeded in defrauding anyone.

What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same as the

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[833] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[834] *United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995).

[835] *United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997).

[836] *United States v. Painter*, 314 F.2d 939, 943 (4th Cir. 1963).

[837] Instructions from *United States v. Allen*, 491 F.3d 178, 187 (4th Cir. 2007). "The intent to repay eventually is irrelevant to the question of guilt for fraud." *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006) (citation omitted).

[838] *Curry*, 461 F.3d at 458.

[839] *Allen*, 491 F.3d at 187.

[840] *See United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000) (§ 1344 prosecution)

[841] *Neder v. United States*, 527 U.S. 1, 25 (1999). A pecuniary loss is not required. *United States v. Deters*, 184 F.3d 1253, 1258 (10th Cir. 1999).

one alleged in the indictment.[842]

☞ **For multiple defendants:**

In order to find the defendants responsible for participating in the fraudulent scheme as alleged in the indictment, each of you must find that the defendants participated in the same single scheme to defraud and that the scheme to defraud in which the defendants are found to have participated is substantially the same scheme as the overall fraudulent scheme alleged in the indictment. To sustain its burden of proof, however, the government is not required to prove all of the components of the scheme to defraud that are alleged in the indictment. If the government proves beyond a reasonable doubt a scheme to defraud that contains some or all of the components in the indictment, but is simply more narrow than the scheme to defraud as defined in the indictment, then the government has carried its burden of proof. You must unanimously agree, however, on the components of the scheme to defraud.[843]

_____NOTE_____

Section 1348 is analogous to § 1344. Therefore, see NOTE for § 1344.

18 U.S.C. § 1350 CERTIFYING FALSE FINANCIAL REPORTS (SARBANES-OXLEY ACT)

Title 18, United States Code, Section 1350 makes it a crime to certify false financial reports. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1350(c)(1)

- First, that the defendant was the chief executive officer, chief financial officer, or the equivalent, of an issuer of securities regulated by the Securities Exchange Act;
- Second, that the issuer filed a periodic report containing financial statements with the Securities Exchange Commission;
- Third, that the defendant certified in a written statement which accompanied the periodic report that (1) the periodic report containing the financial statements fully complied with the requirements of the Securities Exchange Act [the court may have to instruct on these requirements, found in 15 U.S.C. § 78m(a) and/or 78o(d)] and (2) information contained in the periodic report fairly presented, in all material respects, the financial condition and results of operations of the issuer; and
- Fourth, that the defendant knew that the periodic report did not comply with the requirements of the Securities Exchange Act and did not fairly present, in all material respects, the financial condition and results of operations of the issuer.

§ 1350(c)(2)

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[842] *See Pereira v. United States*, 347 U.S. 1, 8, 9 (1954).

[843] Instruction that the jury agree unanimously on the identity and extent of the scheme to defraud. *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995).

- First, that the defendant was the chief executive officer, chief financial officer, or the equivalent, of an issuer of securities regulated by the Securities Exchange Act;
- Second, that the issuer filed a periodic report containing financial statements with the Securities Exchange Commission;
- Third, that the defendant certified in a written statement which accompanied the periodic report that (1) the periodic report containing the financial statements fully complied with the requirements of the Securities Exchange Act [the court may have to instruct on these requirements, found in 15 U.S.C. § 78m(a) and/or 78o(d)] and (2) information contained in the periodic report fairly presented, in all material respects, the financial condition and results of operations of the issuer;
- Fourth, that the defendant knew that the periodic report did not comply with the requirements of the Securities Exchange Act and did not fairly present, in all material respects, the financial condition and results of operations of the issuer; and
- Fifth, that the defendant acted willfully.

18 U.S.C. § 1361 DESTRUCTION OF GOVERNMENT PROPERTY

Title 18, United States Code, Section 1361 makes it a crime to injure or destroy any property belonging to the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant injured or damaged, or attempted to injure or damage, property;
- Second, that the property belonged to the United States, or any department or agency of the United States, or was property that had been or was being manufactured or constructed for the United States, or any department or agency of the United States;
- Third, that the damage exceeded the sum of $1,000.00; and
- Fourth, that the defendant did so willfully.

The government must prove that the property belonged to the United States but the government does not have to prove that the defendant knew that the property belonged to the United States.[844]

To act willfully, the defendant must have acted intentionally, with knowledge that he was violating the law.[845]

NOTE

Consent is not a defense, and lack of consent is not an element the government must prove. *United States v. LaPorta*, 46 F.3d 152, 159 (2d Cir. 1994).

[844] *See United States v. LaPorta*, 46 F.3d 152, 158 (2d Cir. 1994) (holding § 1361 does not require defendant know that property he is damaging or destroying belongs to government). Government ownership is a jurisdictional fact.

[845] *See United States v. Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969) ("To read the term 'willfully' to require a bad purpose would be to confuse the concept of intent with that of motive.").

In *LaPorta*, the Second Circuit concluded that "where a defendant is charged with *destruction of government property* by fire, the government must proceed under § 844(f), rather than under a combination of § 844(h)(1) and the underlying felony of § 1361." *Id.* at 157.

If a disputed issue is whether the damage exceeded the sum of $1,000, the court should consider giving a lesser included offense instruction.

18 U.S.C. § 1363 DESTRUCTION OF PROPERTY WITHIN THE SPECIAL TERRITORIAL JURISDICTION OF THE UNITED STATES

Title 18, United States Code, Section 1363 makes it a crime to injure or destroy any property within the special territorial jurisdiction of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant injured or destroyed, or attempted to injure or destroy, or conspired to injure or destroy, any structure, conveyance, or other real or personal property;
- Second, that the property was within the special maritime and territorial jurisdiction of the United States; and
- Third, that the defendant did so willfully and maliciously.

ADDITIONAL ELEMENT, IF APPROPRIATE:

1. Was the building a dwelling, or was the life of any person placed in jeopardy?[846]

To act willfully, the defendant must have acted intentionally, with knowledge that he was violating the law.[847]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[848]

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[846] *See United States v. Davis*, 202 F.3d 212, 217 (4th Cir. 2000).

[847] *See Moylan*, 417 F.2d at 1004 ("To read the term 'willfully' to require a bad purpose would be to confuse the concept of intent with that of motive.").

[848] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

NOTE

For cases discussing special jurisdiction, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

Special territorial jurisdiction does not include proprietary jurisdiction. Most federal buildings, such as courthouses and office buildings, are proprietary jurisdictions, and are usually covered only by regulations of the General Services Administration published in the Code of Federal Regulations.

18 U.S.C. § 1425 PROCURING CITIZENSHIP OR NATURALIZATION UNLAWFULLY

Title 18, United States Code, Section 1425 makes it a crime to procure citizenship or naturalization unlawfully. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1425(a)

- First, that the defendant procured or attempted to procure citizenship or naturalization;
- Second, that it was contrary to law[849] for the defendant to procure citizenship or naturalization; and
- Third, that the defendant did so knowingly, that is, the defendant knew it was contrary to law to procure [or attempt to procure] citizenship or naturalization.[850]

§ 1425(b)

- First, that the defendant, for himself or for another person, issued, procured, obtained, applied for, or otherwise attempted to procure or obtain naturalization, citizenship, a declaration of intention to become a citizen, a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the above;
- Second, that the defendant or other person was not entitled to citizenship or

[849] The statute does not define the phrase "contrary to law." "Presumably the 'law' referred to is the law governing naturalization, 8 U.S.C. [§§ 1101 *et seq.*]" *United States v. Puerta*, 982 F.2d 1297, 1300-01 (9th Cir. 1992).

[850] The Fourth Circuit approved the district court's instruction in *United States v. Sadig*, 271 F. App'x 290 (4th Cir. 2007). However, in *United States v. Aladekoba*, 61 F. App'x 27 (4th Cir. 2003), the court identified the following elements:

(1) that the defendant made false statements on the application for naturalization;

(2) that the defendant made the statements knowingly;

(3) that the statements were contrary to law; and

(4) that the defendant procured or attempted to procure naturalization.

61 F. App'x at 28. The court cited *Puerta* for the proposition that the statements must be material in order to be contrary to law.

naturalization; and

- Third, that the defendant did so knowingly, that is, the defendant knew that he, or the other person, was not entitled to citizenship or naturalization.

AGGRAVATED PENALTIES:

1. Was the offense committed to facilitate an act of international terrorism (as defined in 18 U.S.C. § 2331(1))?
2. Was the offense committed to facilitate a drug trafficking crime (as defined in 18 U.S.C. § 929(a)(2))?

☞ **The court should explain why the naturalization was "contrary to law." Presumably, the defendant was not eligible. The court should explain the basis for the ineligibility.**

_____NOTE_____

The Fourth Circuit appears to have adopted the Ninth Circuit's requirement of materiality, when the prosecution is based on false statements in the application. *See United States v. Aladekoba*, 61 F. App'x 27 (4th Cir. 2003) (citing *United States v. Puerta*, 982 F.2d 1297, 1301 (9th Cir. 1992)).

There is no legal requirement that an applicant volunteer information during an interview, but the law does require an applicant to remain eligible for naturalization up until the date he is administered the oath of allegiance, and the burden is on the applicant to prove such eligibility. *See* 8 C.F.R. §§ 316.2 and 316.10. *See also United States v. Sadig*, 271 F. App'x 290 (4th Cir. 2007).

18 U.S.C. § 1461 MAILING OBSCENE MATTER

Title 18, United States Code, Section 1461 makes it a crime to mail obscene material. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant
  1. used the mails to deliver obscene material,
  2. caused obscene material to be delivered by mail according to the direction on the envelope, or
  3. took obscene material from the mails for the purpose of circulating or disposing of it, or aiding in the circulation or disposition of it; and
- Second, that the defendant did so knowingly.

☞ **Other items, involving abortion and matters tending to incite arson, murder, or assassination, are also classified by Congress as nonmailable matter in the statute.**

The test for obscenity is:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether [the average person applying contemporary community standards would

find that] the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable [federal] law [the court should identify the applicable federal law and its elements]; and

(3) whether [a reasonable person would find that][851] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[852]

To appeal to the prurient interest, the material must appeal to a shameful or morbid interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[853]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[854]

The jury can consider whether some portions of the material appeal to a prurient interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[855]

In determining whether the material in question is obscene, the jury may consider whether the materials were pandered, by looking to the manner of distribution, circumstances of production, sale, advertising, and editorial intent.[856]

"Pandering" is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers.[857]

The government must prove that the defendant knew the [envelopes or packages] containing the material in question were mailed or placed in the mail, and that he had knowledge of the character of the materials. The defendant's belief as to the obscenity or non-obscenity of the material is irrelevant.[858]

_____NOTE_____

A local statute may provide relevant evidence of the mores of the community whose legislative body enacted the law, and is therefore admissible, but it is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and

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[851] *Pope v. Illinois*, 481 U.S. 497, 501 (1987).

[852] Section 1461 incorporates the test from *Miller v. California*, 413 U.S. 15, 24 (1973), for defining obscenity. *Hamling v. United States*, 418 U.S. 87, 105 (1974). *See also United States v. Gravenhorst*, 377 F.3d 49, 51 (1st Cir. 2004).

[853] *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

[854] *Id.* at 454.

[855] This instruction was held proper in *Hamling*, 418 U.S. at 128-29, but the court emphasized that the jury should measure the prurient appeal of the materials as to all groups and that the material must be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one.

[856] *Id.* at 130. Pandering is not an element of § 1461. *Id.* at 131.

[857] *Ginzburg v. United States*, 383 U.S. 463, 467 (1966).

[858] This instruction was held proper in *Hamling v. United States*, 418 U.S. 87, 119-20 (1974). The prosecution must show that a defendant had knowledge of the contents of the materials he distributed and that he knew the character and nature of the materials; it does not have to prove the defendant's knowledge of the legal status of the materials he distributed. *Id.* at 123, 121.

patent offensiveness. *Smith v. United States*, 431 U.S. 291, 307-08 (1977).

"The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller* [*v. California*, 413 U.S. 15, 24 (1973)]." *Smith*, 431 U.S. at 301. The examples given were "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S 15, 25 (1973).

What constitutes the "community?" In *Hamling v. United States*, 418 U.S. 87, 106 (1974), the Supreme Court presumed that jurors from throughout the particular judicial district where the case was tried were available to serve on the panel. Thus, the judicial district constituted the "community" and it would be the standards of that "community" upon which the jurors would draw.

In *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Fourth Circuit found no error in the following instruction, for failing to charge on community toleration:

> Contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates and not by what some groups or persons may believe the community ought to accept or refuse to accept. Obscenity is not a matter of individual taste, and the question is not how the material impresses an individual juror; rather, the test is whether the average adult person of the community would view the material as an appeal to the prurient interest in nudity, sex, or excretion.

900 F.2d at 758-59.

18 U.S.C. § 1462 IMPORTING OR TRANSPORTING OBSCENE MATTERS

Title 18, United States Code, Section 1462 makes it a crime to import or transport obscene matters. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant brought into the United States, or any place subject to the jurisdiction of the United States, or used any express company or other common carrier or interactive computer service, for carriage in interstate or foreign commerce;
- Second, any of the following:

  (a) any obscene book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter;

  (b) any obscene phonograph recording, electrical transcription, or other article or thing capable of producing sound; and
- Third, that the defendant did so knowingly, that is, that the defendant knew of the contents of the matter at the time.[859]

¶2

[859] *See Alexander v. United States*, 271 F.2d 140, 145 (8th Cir. 1959).

- First, that the defendant took or received from any express company or other common carrier or interactive computer service in interstate or foreign commerce;
- Second, any of the following:

  (a) any obscene book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter;

  (b) any obscene phonograph recording, electrical transcription, or other article or thing capable of producing sound; and
- Third, that the defendant did so knowingly, that is, that the defendant knew of the contents of the matter at the time of receipt.[860]

"Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. [47 U.S.C. § 230(f)(2)]

The test for obscenity is:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether [the average person applying contemporary community standards would find that] the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable [federal] law [the court should identify the applicable federal law and its elements]; and

(3) whether [a reasonable person would find that][861] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[862]

To appeal to the prurient interest, the material must appeal to a shameful or morbid interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[863]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[864]

The jury can consider whether some portions of the material appeal to a prurient interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[865]

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[860] *See id.* at 145.

[861] *Pope v. Illinois*, 481 U.S. 497, 501 (1987).

[862] Because § 1461 incorporates the test from *Miller v. California*, 413 U.S. 15, 24 (1973), for defining obscenity, *Hamling v. United States*, 418 U.S. 87, 105 (1974), presumably so does § 1462.

[863] *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

[864] *Id.* at 454.

[865] This instruction was held proper in *Hamling v. United States*, 418 U.S. 87, 128-29 (1974), but the court emphasized that the jury should measure the prurient appeal of the material as to all groups and that the material must be judged by its impact on an average person, rather than a

The government must prove that the defendant had knowledge of the character of the matter being transferred. The defendant's belief as to the obscenity or non-obscenity of the material is irrelevant.[866]

_____NOTE_____

See United States v. Whorley, 550 F.3d 326 (4th Cir. 2008).

A local statute may provide relevant evidence of the mores of the community whose legislative body enacted the law, and is therefore admissible, but it is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness. *Smith v. United States*, 431 U.S. 291, 307-08 (1977).

In *Hamling v. United States*, 418 U.S. 87, 106 (1974), the Supreme Court presumed that jurors from throughout the particular judicial district where the case was tried were available to serve on the panel. Thus, the judicial district constituted the "community" and it would be the standards of that "community" upon which the jurors would draw.

In *United States v. Pryba*, 900 F.2d 748, 758-59 (4th Cir. 1990), the Fourth Circuit found no error in the following instruction, for failing to charge on community toleration:

> Contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates and not by what some groups or persons may believe the community ought to accept or refuse to accept. Obscenity is not a matter of individual taste, and the question is not how the material impresses an individual juror; rather, the test is whether the average adult person of the community would view the material as an appeal to the prurient interest in nudity, sex, or excretion.

"The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller* [*v. California*, 413 U.S. 15, 24 (1973)]." *Smith*, 431 U.S. at 301. The examples given were "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. 15, 25 (1973).

18 U.S.C. § 1464 BROADCASTING OBSCENE LANGUAGE

Title 18, United States Code, Section 1464 makes it a crime to broadcast obscene language. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant uttered any obscene language;
- Second, that the defendant did so by means of radio communication, and

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particularly susceptible or sensitive person , or indeed a totally insensitive one.

[866] *See id*. at 119-20 (Supreme Court required prosecution to show defendant had knowledge of contents of materials he distributed and that knew character and nature of materials). However, the Court did not require the government to prove the defendant's knowledge of the legal status of the materials he distributed. *Id*. at 123, 121.

- Third, that the defendant did so intentionally.[867]

The test for obscenity is:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether [the average person applying contemporary community standards would find that] the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable [federal] law [the court should identify the applicable federal law and its elements]; and

(3) whether [a reasonable person would find that][868] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[869]

To appeal to the prurient interest, the material must appeal to a shameful or morbid interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[870]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[871]

The jury can consider whether some portions of the material appeal to a prurient interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[872]

_____NOTE_____

A local statute may provide relevant evidence of the mores of the community whose legislative body enacted the law, and is therefore admissible, but it is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness. *Smith v. United States*, 431 U.S. 291, 307-08 (1977).

In *Hamling v. United States*, 418 U.S. 87, 106 (1974), the Supreme Court presumed that jurors from throughout the particular judicial district where the case was tried were available to serve on the panel. Thus, the judicial district constituted the "community" and it would be the standards of that "community" upon which the jurors would draw.

In *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Fourth Circuit found no

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[867] *United States v. Smith*, 467 F.2d 1126, 1129 (7th Cir. 1972). "Thus the common law mental element required for conviction under 18 U.S.C. § 1464, here more appropriately termed intent than *scienter*, would be satisfied if the defendant knew or reasonably should have known that uttering the words he did over the air was a public wrong." *Tallman v. United States*, 465 F.2d 282, 288 (7th Cir. 1972).

[868] *Pope v. Illinois*, 481 U.S. 497, 501 (1987).

[869] Because § 1461 incorporates the test from *Miller v. California*, 413 U.S. 15, 24 (1973), for defining obscenity, *Hamling v. United States*, 418 U.S. 87, 105 (1974), presumably so does § 1464.

[870] *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

[871] *Id.* at 454.

[872] This instruction was held proper in *Hamling v. United States*, 418 U.S. 87, 128-29 (1974), but the court emphasized that the jury should measure the prurient appeal of the material as to all groups and that the material must be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one.

error in the following instruction, for failing to charge on community toleration:

> Contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates and not by what some groups or persons may believe the community ought to accept or refuse to accept. Obscenity is not a matter of individual taste, and the question is not how the material impresses an individual juror; rather, the test is whether the average adult person of the community would view the material as an appeal to the prurient interest in nudity, sex, or excretion.

900 F.2d at 758-59.

"The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller* [*v. California*, 413 U.S. 15, 24 (1973)]." *Smith*, 431 U.S. at 301. The examples given were "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. 15, 25 (1973).

18 U.S.C. § 1465 TRANSPORTATION OF OBSCENE MATTERS FOR SALE

Title 18, United States Code, Section 1465 makes it a crime to transport any obscene matter in interstate commerce for sale or distribution. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported or traveled in, or used a facility or means of interstate or foreign commerce or an interactive computer service in or affecting interstate or foreign commerce;
- Second, that the defendant did so for the purpose of sale or distribution;
- Third, of any obscene book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound; and
- Fourth, that the defendant did so knowingly.

The test for obscenity is:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether [the average person applying contemporary community standards would find that] the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable [federal] law [the court should identify the applicable federal law and its elements]; and

(3) whether [a reasonable person would find that][873] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[874]

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[873] *Pope v. Illinois*, 481 U.S. 497, 501 (1987).

[874] Because § 1461 incorporates the test from *Miller v. California*, 413 U.S. 15, 24 (1973), for defining obscenity. *Hamling v. United States*, 418 U.S. 87, 105 (1974), presumably so does § 1465. *See also United States v. Gravenhorst*, 377 F.3d 49, 51 (1st Cir. 2004).

To appeal to the prurient interest, the material must appeal to a shameful or morbid interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[875]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[876]

The jury can consider whether some portions of the material appeal to a prurient interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[877]

In determining whether the material in question is obscene, the jury may consider whether the materials were pandered, by looking to the manner of distribution, circumstances of production, sale, advertising, and editorial intent.[878]

"Pandering" is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers.[879]

The government must prove that the defendant had knowledge of the character of the matter being transferred. The defendant's belief as to the obscenity or non-obscenity of the material is irrelevant.[880]

The transportation of two or more copies of any publication or two or more of any article of the character described, or a combined total of five such publications and articles, is ordinarily a circumstance from which the jury may reasonably draw the inference that such publications or articles were intended for sale or distribution. [§ 1465]

NOTE

In *United States v. Pryba*, 900 F.2d 748, 758-59 (4th Cir. 1990), the Fourth Circuit found no error in the following instruction, for failing to charge on community toleration:

> Contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates and not by what some groups or persons may believe the community ought to accept or refuse to accept. Obscenity is not a matter of individual taste, and the question is not how the material impresses an individual juror; rather, the test is whether the average adult person of the community would view the material as an appeal to the prurient interest in nudity, sex, or excretion.

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[875] *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

[876] *Id.* at 454.

[877] This instruction was held proper in *Hamling v. United States*, 418 U.S. 87, 128-29 (1974), but the court emphasized that the jury should measure the prurient appeal of the material as to all groups and that the material must be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one.

[878] *Id.* at 130. Pandering is not an element of § 1465. *See id.* at 131.

[879] *Ginzburg v. United States*, 383 U.S. 463, 467 (1966).

[880] *See Hamling*, 418 U.S. at 119-20 (Supreme Court required prosecution to show defendant had knowledge of contents of materials he distributed and that knew character and nature of materials). However, the Court did not require the government to prove the defendant's knowledge of the legal status of the materials he distributed. *Id.* at 123, 121.

18 U.S.C. § 1466 ENGAGING IN THE BUSINESS OF SELLING OR TRANSFERRING OBSCENE MATTER [LAST UPDATED: 7/10/14]

Title 18, United States Code, Section 1466 makes it a crime to engage in the business of selling or transferring obscene matter. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was engaged in the business of producing with intent to distribute or sell, or selling or transferring obscene matter;
- Second, that the defendant received or possessed with intent to distribute;
- Third, any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording;
- Fourth, that the book, magazine, picture, paper, film, videotape, or phonograph or other audio recording had been shipped or transported in interstate or foreign commerce, and
- Fifth, that the defendant did so knowingly.[881]

"Engaged in the business" means that the person who produces, sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the production, selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. [§ 1466(b)]

In considering whether a defendant is engaged in the business of selling or transferring obscene matter, if you find that the person sold or transferred at one time two or more obscene items or two or more copies of an obscene item, you may find that person is engaged in the business of selling obscene matter. Whether you choose to draw such an inference is strictly up to you.[882]

The test for obscenity is:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether [the average person applying contemporary community standards would find that] the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable [federal] law [the court should identify the applicable federal law and its elements]; and

(3) whether [a reasonable person would find that][883] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[884]

To appeal to the prurient interest, the material must appeal to a shameful or morbid

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[881] *See United States v. Skinner*, 25 F.3d 1314, 1319 (6th Cir. 1994).

[882] Although § 1466(b) uses the term "rebuttable presumption," at least one district court has instructed the jury as if it were a permissive inference. *Id*. at 1316 n.2.

[883] *Pope v. Illinois*, 481 U.S. 497, 501 (1987).

[884] Section 1466 adopts the definition of obscenity from *Miller v. California*, 413 U.S. 15, 24 (1973). *Skinner*, 25 F.3d at 1319.

interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[885]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[886]

The jury can consider whether some portions of those materials appeal to a prurient interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[887]

The government must prove that the defendant had knowledge of the character of the matter being transferred. The defendant's belief as to the obscenity or non-obscenity of the material is irrelevant.[888]

_____NOTE_____

A local statute may provide relevant evidence of the mores of the community whose legislative body enacted the law, and is therefore admissible, but it is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness. *Smith v. United States*, 431 U.S. 291, 307-08 (1977).

In *Hamling v. United States*, 418 U.S. 87, 106 (1974), the Supreme Court presumed that jurors from throughout the particular judicial district where the case was tried were available to serve on the panel. Thus, the judicial district constituted the "community" and it would be the standards of that "community" upon which the jurors would draw.

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900 F.2d at 758-59.

"The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller* [*v. California*, 413 U.S. 15, 24 (1973)]." *Smith*, 431 U.S. at 301. The examples given were "patently offensive representations or descriptions of ultimate

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[885] *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

[886] *Id.* at 454.

[887] This instruction was held proper in *Hamling v. United States*, 418 U.S. 87, 128-29 (1974), but the court emphasized that the jury should measure the prurient appeal of the material as to all groups and that the material must be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one.

[888] *See id.* at 119-20 (Supreme Court required prosecution to show defendant had knowledge of contents of materials he distributed and that knew character and nature of materials). However, the Court did not require the government to prove the defendant's knowledge of the legal status of the materials he distributed. *Id.* at 123, 121.

sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. 15, 25 (1973).

In *United States v. Wellman*, 663 F.3d 224 (4th Cir. 2011), the court found that the government was not required to prove beyond a reasonable doubt that a defendant knew that the images of minors engaged in sexually explicit conduct were obscene. "The term 'obscene' as used in statutes of this type, refers to an objective, legal standard, not an issue of fact." 663 F.3d at 230. The Fourth Circuit cited *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), for the proposition that "a defendant's knowledge of the law is not a relevant consideration in a prosecution involving the distribution of allegedly obscene materials." *Wellman*, 663 F.3d at 231.

18 U.S.C. § 1466A OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN [LAST UPDATED: 7/10/14]

Title 18, United States Code, Section 1466A makes it a crime to knowingly produce, distribute, receive, possess, or possess with intent to distribute obscene visual representations of the sexual abuse of children which have traveled in interstate or foreign commerce.

§1466A(a)(1) [Depicting Minor]

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

- First, that the defendant knowingly [produced, distributed, received, or possessed with intent to distribute] a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting;
- Second, that the visual depiction represents a minor engaged in sexually explicit conduct;
- Third, that the visual depiction is obscene; and
- Fourth, that the defendant knew of the sexually explicit and obscene nature of the visual depiction;
- Fifth, that the visual depiction was shipped or transported in interstate or foreign commerce by any means in one of the following circumstances:

  (a) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

  (b) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

  (c) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

  (d) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including

by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

(e) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.[889]

ADDITIONAL ELEMENT for conviction under § 1466A(a)(1):

1. For you to find defendant guilty under § 1466A(a)(1), the government must prove beyond a reasonable doubt that the material in question is obscene. To determine whether the material is obscene, you should consider the following:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the average person applying contemporary community standards would find that the work depicts or describes in a patently offensive way, sexual conduct specifically defined by [the applicable federal law; the court should identify the applicable federal law and its elements]; and

(3) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[890]

To appeal to the prurient interest, the material must appeal to a shameful or morbid interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[891]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[892]

You may consider whether some portions of those materials appeal to a prurient interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[893]

In determining whether the material in question is obscene, you may consider whether the materials were pandered, by looking to the manner of distribution, circumstances of production, sale, advertising, and editorial intent.[894]

"Pandering" is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interests of customers.[895]

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[889] *United States v. Koegel*, 777 F. Supp. 2d 1014, 1023 (E.D. Va. 2011).

[890] *Miller v. California*, 413 U.S. 15, 24 (1973).

[891] *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

[892] *Id.* at 454.

[893] In *Hamling v. United States*, 418 U.S. 87, 128-29 (1974), the Supreme Court cautioned that the jury should measure the prurient appeal of the materials to all groups and that the material must be judged by its impact on the average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one.

[894] *Id.* at 130. However, pandering itself is not an element of § 1466A. *See id.* at 131.

[895] *Ginzburg v. United States*, 383 U.S. 463, 467 (1966).

§1466A(a)(2) [Depicting Image Appearing to Be Minor]

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

- First, that the defendant knowingly [produced, distributed, received, or possessed with intent to distribute] a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting;
- Second, that the depiction is an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- Third, that the visual depiction lacks serious literary, artistic, political, or scientific value; and
- Fourth, that defendant did so in one of the following circumstances:

  (a) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

  (b) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

  (c) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

  (d) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

  (e) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

§ 1466A(b)(1) [Possession of Image Depicting Minor]

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

- First, that the defendant knowingly possessed a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting;
- Second, that the visual depiction represents a minor engaged in sexually explicit conduct;
- Third, that the visual depiction is obscene;
- Fourth, that the defendant knew of the sexually explicit and obscene nature of the visual depiction;
- Fifth, that the visual depiction was shipped or transported in interstate or foreign

commerce by any means;[896] and

- Sixth, that the defendant did so in one of the following circumstances:

  1. any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

  2. any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

  3. any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

  4. any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

  5. the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

ADDITIONAL ELEMENT for conviction under § 1466A(b)(1):

1. For you to find defendant guilty under § 1466A(b)(1), the government must prove beyond a reasonable doubt that the material in question is obscene. To determine whether the material is obscene, you should consider the following:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the average person applying contemporary community standards would find that the work depicts or describes in a patently offensive way, sexual conduct specifically defined by [the applicable federal law; the court should identify the applicable federal law and its elements]; and

(3) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[897]

To appeal to the prurient interest, the material must appeal to a shameful or morbid interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[898]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[899]

You can consider whether some portions of those materials appeal to a prurient

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[896] *Koegel*, 777 F. Supp. 2d at 1023.
[897] *Miller v. California*, 413 U.S. at 24.
[898] *Guglielmi*, 819 F.2d at 455.
[899] *Id.* at 454.

interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[900]

In determining whether the material in question is obscene, you may consider whether the materials were pandered, by looking to the manner of distribution, circumstances of production, sale, advertising, and editorial intent.[901]

"Pandering" is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interests of customers.[902]

§ 1466A(b)(2) [Possession of Image Appearing to be Minor]

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

- First, that the defendant knowingly possessed a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting;
- Second, that the depiction is an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- Third, that the visual depiction lacks serious literary, artistic, political, or scientific value; and
- Fourth, that defendant did so in one of the following circumstances:

  (a) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

  (b) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

  (c) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

  (d) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

  (e) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

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[900] In *Hamling*, 418 U.S. 87 at 128-29, the Supreme Court cautioned that the jury should measure the prurient appeal of the materials to all groups and that the material must be judged by its impact on the average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one.

[901] *Id*. at 130. However, pandering itself is not an element of § 1466A. *See id.* at 131.

[902] *Ginzburg v. United States*, 383 U.S. 463, 463 (1966).

The term "minor" is not specifically defined in §1466A. It should be given its plain, ordinary meaning. That is, a person under the age of legal competence. In mosts states, a person is no longer a minor when she or he reaches the age of 18.

"Visual depiction" includes "undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means." [18 U.S.C. §1466A(f)(1)]

"Sexually explicit conduct," as that term is used in (a)(1) and (b)(1), means actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person; or (i) graphic sexual intercourse, including genital-genital, oral- genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated: (a) bestiality; (b) masturbation; or (c) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person. [18 U.S.C. § 2256(2)(A), (2)(B)]

The term "graphic," when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

_____NOTE_____

Section 1466A covers attempts and conspiracies to violate § 1466A.

Title 18 U.S.C. § 1466A was enacted in response to the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Supreme Court struck down provisions of the Child Pornography Prevention Act of 1996 as unconstitutionally overbroad. The general obscenity statute in § 1466 was thereafter amended to prohibit the transfer of certain obscene visual representations of the sexual abuse of children.

A variety of constitutional challenges to § 1466A have been brought. Courts have routinely rejected constitutional challenges to both (a)(1) and (b)(1). *See*, *e.g.*, *United States v. Wellman*, 663 F.3d 224 (4th Cir. 2011) (scienter requirement extends to knowledge of contents of materials and character and nature of materials and not to knowledge of legal status of materials); *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008) (holding that § 1466A not unconstitutionally overbroad or vague); *United States v. Schales*, 546 F.3d 965 (9th Cir. 2008) (same).

In a facial challenge to a conviction under (a)(2), the Eleventh Circuit found that (a)(2) is not facially overbroad. *United States v. Dean*, 635 F.3d 1200 (11th Cir. 2011), *cert. denied*, __ U.S. __, 132 S. Ct. 755 (2011). *But see United States v. Handley*, 564 F.

Supp. 2d 996, 1007 (S.D. Iowa 2008) (finding (a)(2) and (b)(2) unconstitutional because they are "not subject to a limiting construction that would avoid the constitutional problem of prohibiting images that neither involve the use of actual minors or constitute obscenity.").

"[A] defendant's knowledge of the law is not a relevant consideration in a prosecution involving the distribution of allegedly obscene materials." *Wellman*, 663 F.3d at 231. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed and that he knew the character and nature of the materials." *Id*. at 230. *See also Hamling v. United States*, 418 U.S. 87, 119-20, 121, 123 (1974) (scienter requirement in obscenity prosecutions).

A local statute may provide relevant evidence of the mores of the community whose legislative body enacted the law, and is therefore admissible, but is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness. *Smith v. United States*, 431 U.S. 291, 307-08 (1977).

In *Hamling v. United States*, 418 U.S. 87, 106 (1974), the Supreme Court presumed that jurors from throughout the particular judicial district where the case was tried were available to serve on the panel. Thus, the judicial district constituted the "community" and it would be the standards of that "community" upon which the jurors would draw.

In *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Fourth Circuit found no error in the following instruction:

> Contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates and not by what some groups or persons may believe the community ought to accept or refuse to accept. Obscenity is not a matter of individual taste, and the question is not how the material impresses an individual juror; rather, the test is whether the average adult person of the community would view the material as an appeal to the prurient interest in nudity, sex, or excretion.

900 F.2d at 758-59.

"The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a [prosecution for mailing obscene material] are the 'hard core' types of conduct suggested by the examples given in *Miller* [*v. California*, 413 U.S. 15, 24 (1973)]." *Smith*, 431 U.S. at 301. The examples given were "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. 15, 25 (1973).

18 U.S.C. § 1470 TRANSFERRING OBSCENE MATERIAL TO MINORS

Title 18, United States Code, Section 1470 makes it a crime to transfer obscene material to minors. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transferred, or attempted to transfer, obscene matter to another individual who had not attained the age of 16 years;
- Second, that the defendant knew the individual had not attained the age of 16;
- Third, that the defendant used the mail or any facility or means of interstate or

foreign commerce; and

- Fourth, that the defendant did so knowingly.

The test for obscenity is:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether [the average person applying contemporary community standards would find that] the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable [federal] law [the court should identify the applicable federal law and its elements]; and

(3) whether [a reasonable person would find that][903] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[904]

To appeal to the prurient interest, the material must appeal to a shameful or morbid interest in nudity, sex, or excretion and also be patently offensive. Material that provokes only normal, healthy sexual desires is not obscene.[905]

The average person, applying contemporary community standards, determines whether or not the work appeals to the prurient interest. The average person does not have to determine that the material appeals to the prurient interest of the average person.[906]

The jury can consider whether some portions of the material appeal to a prurient interest of a specifically defined deviant group as well as whether they appeal to the prurient interest of the average person.[907]

In determining whether the material in question is obscene, the jury may consider whether the materials were pandered, by looking to the manner of distribution, circumstances of production, sale, advertising, and editorial intent.[908]

"Pandering" is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers.[909]

The government must prove that the defendant had knowledge of the character of the matter being transferred. The defendant's belief as to the obscenity or non-obscenity of the material is irrelevant.[910]

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[903] *Pope v. Illinois*, 481 U.S. 497, 501 (1987).

[904] Because § 1461 incorporates the test from *Miller v. California*, 413 U.S. 15, 24 (1973), for defining obscenity, presumably so does § 1470. *Hamling v. United States*, 418 U.S. 87, 105 (1974). *See also United States v. Gravenhorst*, 377 F.3d 49, 51 (1st Cir. 2004).

[905] *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

[906] *Id.* at 454.

[907] This instruction was held proper in *Hamling v. United States*, 418 U.S. 87, 128-29 (1974), but the court did emphasize that the jury should measure the prurient appeal of the material as to all groups and that the material must be judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or indeed a totally insensitive one.

[908] *Id.* at 130. Pandering is not an element of § 1470. *See id.* at 131.

[909] *Ginzburg v. United States,* 383 U.S. 463, 467 (1966).

[910] *See Hamling*, 418 U.S. at 119-20 (Supreme Court required prosecution to show defendant had knowledge of contents of materials he distributed and that knew character and nature of materials). However, the Court did not require the government to prove the defendant's knowledge of the legal

(continued...)

NOTE

A local statute may provide relevant evidence of the mores of the community whose legislative body enacted the law, and is therefore admissible, but it is not conclusive as to the issues of contemporary community standards for appeal to the prurient interest and patent offensiveness. *Smith v. United States*, 431 U.S. 291, 307-08 (1977).

In *Hamling v. United States*, 418 U.S. 87, 106 (1974), the Supreme Court presumed that jurors from throughout the particular judicial district where the case was tried were available to serve on the panel. Thus, the judicial district constituted the "community" and it would be the standards of that "community" upon which the jurors would draw.

In *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Fourth Circuit found no error in the following instruction, for failing to charge on community toleration:

> Contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates and not by what some groups or persons may believe the community ought to accept or refuse to accept. Obscenity is not a matter of individual taste, and the question is not how the material impresses an individual juror; rather, the test is whether the average adult person of the community would view the material as an appeal to the prurient interest in nudity, sex, or excretion.

900 F.2d 758-59.

"The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller* [*v. California*, 413 U.S. 15 (1973)]." *Smith*, 431 U.S. at 301. The examples given were "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. 15, 25 (1973).

18 U.S.C. § 1503 OBSTRUCTION OF JUSTICE [LAST UPDATED: 7/11/14]

Title 18, United States Code, Section 1503 makes it a crime to influence or injure jurors, or obstruct justice. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

First clause

- First, that the defendant endeavored to influence, intimidate, or impede;
- Second, any grand juror or trial juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge, in the discharge of his duty; and
- Third, that the defendant did so corruptly, or by threat of force, or by any threatening letter or communication.

Second clause

[910] (...continued)
status of the materials he distributed. *Id*. at 123, 121.

- First, that the defendant injured the person or property of;
- Second, any grand juror or trial juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge, or United States magistrate judge;
- Third, on account of having been a juror, on account of any verdict assented to by him as a trial juror, or any indictment assented to by him as a grand juror, or [in the case of an officer or magistrate of the court] on account of the performance of his official duties; and
- Fourth, that the defendant did so corruptly, or by threat of force, or by any threatening letter or communication.

Omnibus clause

- First, that there was a proceeding pending in any court of the United States;
- Second, that the defendant had knowledge or notice of the pending proceeding;
- Third, that the defendant influenced, obstructed, or impeded, or endeavored to influence, obstruct, or impede, the due administration of justice; and
- Fourth, that the defendant did so corruptly, that is with the intent to influence, obstruct, or impede that proceeding in its due administration of justice, or by threats or force, or by threatening letter or communication.[911]

AGGRAVATED PENALTY

1. Did the offense occur in connection with the trial of a criminal case and did the act involve physical force or the threat of physical force?

2. Did the endeavor to obstruct justice occur in the case of a killing? or

3. Did the endeavor to obstruct justice occur in the case of an attempted killing, or in a case in which the offense was committed against a trial juror in a case involving a crime where the maximum imprisonment exceeded 12 years? [Class A & B felonies, 18 U.S.C. § 3581.]

The government must prove that the defendant knew or had notice of the pending court proceeding.[912]

The defendant's "act must have a relationship in time, causation, or logic with the

[911] *See United States v. Grubb*,11 F.3d 426, 437 (4th Cir. 1993); *United States v. Brooks*, 111 F.3d 365, 372 (4th Cir. 1997).

In *United States v. Blair*, 661 F.3d 755 (4th Cir. 2011), the defendant was charged with obstructing justice by making a false statement to the district court about his professional background and standing with the West Virginia Bar. Thus, the government had to "establish a nexus between the false statement and the obstruction of the administration of justice ...." *Id*. at 767. That is, the government had to proved that the defendant's false statements "had the natural and probable effect of impeding justice." *Id*. (quotation omitted). Although Blair had been granted *pro hac vice* status in the district court, he had never appeared in court. Therefore, the Fourth Circuit reversed his conviction.

[912] *Pettibone v. United States*, 148 U.S. 197, 206 (1893).

judicial proceedings."[913]

The government does not need to prove that the endeavor to corrupt was successful,[914] but "the endeavor must have the natural and probable effect of interfering with the due administration of justice."[915]

"Corruptly" means to act knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of a proceeding.[916]

NOTE

Sections §§ 1503 and 1505 of Title 18 and 26 U.S.C. § 7212 are obstruction statutes with similarly worded omnibus provisions that are intended to serve comparable goals. The identity of purpose among these provisions makes case law interpreting any one of these provisions strongly persuasive authority in interpreting the others. *United States v. Mitchell*, 877 F.2d 294, 299 n.4 (4th Cir. 1989).

"We do not believe that uttering false statements to an investigating agent–and that seems to be all that was proved here–who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503." *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

"[A]n obstruction of justice prosecution cannot rest solely on the allegation or proof of perjury; rather, what also must additionally be proven is that the false statements given, in some way, either obstructed or were intended to obstruct." *United States v. Grubb*, 11 F.3d 426, 437 (4th Cir. 1993). In *Grubb*, the defendant "gave false information in an endeavor to get the FBI agent to give false information to the grand jury." *Id*. at 438. Thus, "perjury can constitute the *actus reus* of a § 1503 violation [provided the false statements] either obstructed or were intended to obstruct the due administration of justice." *United States v. Littleton*, 76 F.3d 614, 619 (4th Cir. 1996).

In *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), the appellant was convicted of obstruction for contacting the attorney for former Maryland Governor Marvin Mandel and telling him that an acquittal was guaranteed if the proper financial arrangements were made. Neiswender claimed that he represented a man who had been contacted by a juror on the Mandel case. However, the government never proved that Neiswender ever dealt with a juror or anyone who had contact with a juror. The Fourth Circuit affirmed, holding "that a defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired." *Id*. at 1274.

One who bribes, threatens, or coerces a witness to claim the privilege against self-incrimination or advises with corrupt motive a witness to take it is guilty under § 1503. *United States v. Baker*, 611 F.2d 964, 968 (4th Cir. 1979).

"[A] criminal action remains pending in the district court until disposition is made of

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[913] *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

[914] *Grubb*, 11 F.3d at 437 n.19 ("The operative wording of the statute is 'corruptly endeavor.' Such an endeavor need not be successful.").

[915] *Aguilar*, 515 U.S. at 599 (quotations and citations omitted).

[916] *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

any direct appeal taken by the defendant assigning error that could result in a new trial." *United States v. Johnson*, 605 F.2d 729, 731 (4th Cir. 1979).

18 U.S.C. § 1505 OBSTRUCTION OF PROCEEDINGS BEFORE DEPARTMENTS, AGENCIES, OR CONGRESS

Title 18, United States Code, Section 1505 makes it a crime to obstruct proceedings before Congress or a federal agency. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that there was a civil investigative demand duly and properly made under the Antitrust Civil Process Act;
- Second, that the defendant withheld, misrepresented, removed from any place, concealed, covered up, destroyed, mutilated, altered, or by other means falsified [or attempted to do so, or solicited another person to do so];
- Third, any documentary material, answers to written interrogatories, or oral testimony which was the subject of the demand; and
- Fourth, that the defendant did so with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with the demand.

¶ 2

- First, that there was a proceeding being conducted by any department or agency of the United States, either House, or any committee of either House or any joint committee of the Congress;
- Second, that the defendant knew of the pending proceeding;
- Third, that the defendant endeavored to influence, obstruct or impede the proceeding; and
- Fourth, that the defendant did so corruptly, or by threats or force, or by any threatening letter or communication.

"Corruptly" means to act knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of a proceeding.[917]

"Corruptly" means nothing more than an intent to obstruct the proceeding. A corrupt intent may be defined as the intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others.[918]

A proceeding before a governmental department or agency simply means proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its

[917] *Id.* at 706.

[918] *United States v. North*, 910 F.2d 843, 881-82, 884, *modified*, 920 F.2d 940 (D.C. Cir. 1990) ("'corruptly' and the other words in the statute are to be understood according to their common meanings, necessitating no specific definitional instructions from the court").

conclusion.[919]

The government does not have to prove that the defendant knew his conduct was illegal, only that he specifically intended to do something the law prohibited, whether he knew of the law or not.[920]

NOTE

This statute covers any activity which would influence or intimidate a witness who might be called to testify; it is not limited to a witness who has been called to testify under oath and to a case in which the defendant knew that particular fact. *Rice v. United States*, 356 F.2d 709, 715 (8th Cir. 1966).

See United States v. Johnson, 71 F.3d 139, 144 (4th Cir. 1995) (citing *United States v. North*, 910 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990)).

Sections 1503 and 1505 of Title 18 and 26 U.S.C. § 7212 are obstruction statutes with similarly worded omnibus provisions that are intended to serve comparable goals. The identity of purpose among these provisions makes case law interpreting any one of these provisions strongly persuasive authority in interpreting the others. *United States v. Mitchell*, 877 F.2d 294, 299 n.4 (4th Cir. 1989).

In *United States v. Grubb*, 11 F.3d 426 (4th Cir. 1993), the defendant was charged with violating § 1503. "The operative wording of the statute is 'corruptly endeavor.' Such an endeavor need not be successful." 11 F.3d at 437 n.19. The section is not directed at success but at the endeavor. In *Grubb*, the defendant "gave false information in an endeavor to get the FBI agent to give false information to the grand jury." *Id*. at 438.

In *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993), a case involving an attempt to rescue a federal prisoner, in violation of 18 U.S.C. § 752(a), the defendant was also charged with violating § 1503. He argued that the district court erred by instructing the jury that the government was not required to prove he was aware of the federal status of the intended target. The Fourth Circuit stated that neither section explicitly required that the defendant be aware of the target's status. "Because knowledge is not explicitly mentioned, it is not an essential element of either offense and, therefore, is unnecessary for the government to prove." 983 F.2d at 1310.

"The proper inquiry is whether a defendant had the requisite corrupt intent to improperly influence the investigation, not on the means the defendant employed in bringing to bear this influence." *United States v. Mitchell*, 877 F.2d 294, 299 (4th Cir. 1989) (defendants convicted of using close relationship with their uncle, a Congressman, to influence a Congressional investigation).

Section 1505 prohibits "any endeavor to influence, intimidate or impede any witness in any proceeding before any department or agency of the United States." *Rice v. United States*, 356 F.2d 709, 715 (8th Cir. 1966) (quoting *United States v. Batten*, 226 F. Supp. 492, 494 (D.D.C. 1964)). This section is broad enough to include activity "which would influence or intimidate a witness who might be called to testify; it is not limited to a witness who has been called to testify under oath and to a case in which the defendant

[919] *United States v. Mitchell*, 877 F.2d 294, 300 (4th Cir. 1989) (quoting *Rice v. United States*, 356 F.2d 709, 712 (8th Cir. 1966)).

[920] *North*, 912 F.2d at 884.

knew that particular fact." *Id.*

In *United States v. Adams*, 335 F. App'x 338 (4th Cir. 2006), the government conceded that a criminal investigation by the Drug Enforcement Administration or the Federal Bureau of Investigation was not a "pending proceeding" within the scope of § 1505.

18 U.S.C. § 1510 OBSTRUCTION OF CRIMINAL INVESTIGATIONS

Title 18, United States Code, Section 1510 makes it a crime to obstruct federal criminal investigations. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1510(a)

- First, that the defendant endeavored to obstruct, delay, or prevent the communication of information relating to a violation of any criminal law of the United States by any person to a criminal investigator;
- Second, that the defendant did so by means of bribery; and
- Third, that the defendant did so willfully.

"Criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States. [§ 1510(c)]

§ 1510(b)(1)

- First, that the defendant was an officer of a financial institution;
- Second, that the defendant directly or indirectly notified any other person about the existence or contents of a subpoena for records of that financial institution, or information that had been furnished to a grand jury in response to a subpoena; and
- Third, that the defendant did so with the intent to obstruct a judicial proceeding.

§ 1510(b)(2)

- First, that the defendant was an officer of a financial institution; and
- Second, that the defendant directly or indirectly notified a customer of the financial institution whose records were sought by a grand jury subpoena, or any other person named in the subpoena, about the existence or contents of a subpoena for records of that financial institution, or information that had been furnished to a grand jury in response to a subpoena.

"Officer of a financial institution" means an officer, director, partner, employee, agent, or attorney of or for a financial institution. [§ 1510(b)(3)(A)]

"Subpoena for records" means a Federal grand jury subpoena or a Department of Justice subpoena for customer records that has been served relating to a violation of, or a conspiracy to violate the following sections: 18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1007, 1014, 1344, 1956, 1957, 1341 affecting a financial institution, 1343 affecting a financial institution, or 31 U.S.C. chapter 53. [§ 1510(b)(3)(B)]

§ 1510(d)

- First, that the defendant

1. was or acted as an officer, director, agent, or employee of a person engaged in the business of insurance whose activities affect interstate commerce; or

2. was engaged in the business of insurance whose activities affect interstate commerce or was involved in a transaction relating to the conduct of affairs of such a business;

- Second, that the defendant directly or indirectly notified any other person about the existence or contents of a subpoena for records of that person engaged in the business of insurance whose activities affect interstate commerce, or information that had been furnished to a Federal grand jury in response to a subpoena; and
- Third, that the defendant did so with the intent to obstruct a judicial proceeding.

NOTE

See United States v. Daly, 842 F.2d 1380 (2d Cir. 1988) (unnecessary to decide whether § 1510 requires an ongoing criminal investigation because sufficient evidence of ongoing investigation and defendants sought to prevent disclosure of information to federal investigators).

"[Section] 1510 is violated whenever an individual induces or attempts to induce another person to make a material misrepresentation to a criminal investigator." *United States v. St. Clair*, 552 F.2d 57, 58 (2d Cir. 1977).

"Nothing in the statutory language requires that the misrepresentation be made by the defendant; it is enough that he may be endeavoring to obstruct justice by means of misrepresentation by a potential witness." *Id.* at 59.

"[I]t is only necessary for a defendant to have believed that a witness might give information to federal officials, and to have prevented this communication, to violate 18 U.S.C. § 1510." *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988).

In *United States v. Cameron*, 460 F.2d 1394 (5th Cir. 1972), *overruled on other grounds by United States v. Howard*, 438 F.2d 229 (5th Cir. 1973), the Fifth Circuit said § 1510 deals with the activities of three separate individuals or classes of individuals: (1) a person who has information about a federal criminal violation, (2) a criminal investigator, and (3) the person who is endeavoring to prevent (1) from communicating the information to (2). 460 F.2d at 1401.

United States v. Coiro, 922 F.2d 1008 (2d Cir. 1991), declined to follow *Cameron* "to the extent that *Cameron* purports to require that the misrepresentations be made to the one who communicates with the investigator, instead of solely to the investigator." 922 F.2d at 1014.

In *Coiro*, the defendant coached two individuals, at a single meeting, to give false information to federal investigators. The Second Circuit held that the single incident was a single violation, not two violations because there were two individuals coached. *Id.* at 1014-15.

18 U.S.C. § 1511 OBSTRUCTION OF STATE OR LOCAL LAW ENFORCEMENT

Title 18, United States Code, Section 1511 makes it a crime to conspire to obstruct the enforcement of state or local criminal laws with intent to facilitate an illegal gambling

business. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that two or more persons agreed to obstruct the enforcement of state or local criminal laws;
- Second, that it was done with the intent to facilitate an illegal gambling business;
- Third, that the defendant knew of the agreement and willfully participated in the agreement;
- Fourth, that one or more of the members of the conspiracy did any act to effect the object of the conspiracy;
- Fifth, that one or more of the conspirators was an official or employee, elected, appointed, or otherwise, of the state or local government; and
- Sixth, that one or more of the conspirators conducted, financed, managed, supervised, directed, or owned all or part of an illegal gambling business.

"Illegal gambling business" means a gambling business which

(1) is a violation of the law of a state or political subdivision in which it is conducted;

(2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. [§ 1511(b)(1)]

"Gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. [§ 1511(b)(2)]

_____NOTE_____

See 18 U.S.C. § 1955, which makes it a crime to conduct an illegal gambling business.

18 U.S.C. § 1512 TAMPERING WITH A WITNESS, VICTIM, OR INFORMANT [LAST UPDATED 7/1/14]

Title 18, United States Code, Section 1512 makes it a crime to tamper with a witness, victim, or informant. Section 1512(a) covers a killing or attempt to kill another person, or use of physical force or threat or attempt to do so against a person. Section 1512(b) covers non-physical intimidation, threats or persuasion. Section 1512(c) covers altering, destroying, mutilating, or concealing a record or document or object or otherwise obstructing, influencing, or impeding any official proceeding. Section 1512(d) covers harassment offenses. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1512(a)(1)

- First, that the defendant killed or attempted to kill another person; and

- Second, that the defendant did so with intent to do one of the following:
  - (A) prevent the attendance or testimony of any person in an official proceeding;
  - (B) prevent the production of a record, document, or other object, in an official proceeding; or
  - (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.

Under (a)(1)(C) above the Government need not show beyond a reasonable doubt or that it was more likely than not that the communication would have been to a federal officer. However, the Government must prove that "a communication [by the victim] with a federal law enforcement officer was more than a possibility but less than a probability, so long as the chance of the communication was not remote, outlandish, or simply hypothetical."[921]

§ 1512(a)(2)

- First, that the defendant used, or attempted to use, physical force or the threat of physical force against any person;[922] and
- Second, that the defendant did so with intent to
  - (A) influence, delay, or prevent the testimony of any person in an official proceeding;
  - (B) cause or induce any person to do one of the following:
    - (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
    - (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
    - (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
    - (iv) be absent from an official proceeding to which that person had been summoned by legal process; or
  - (C) hinder, delay, or prevent the communication to a federal law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.[923]

§ 1512(b)(1)

- First, that the defendant used intimidation, threatened, or corruptly persuaded, or

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[921] *Fowler v. United States*, 563 U.S. __, __, 131 S. Ct. 2045, 2049 (2011).

[922] There is a lesser included offense if the defendant only threatened physical force. 18 U.S.C. § 1512(a)(3).

[923] *See United States v. West*, 303 F. App'x 156 (4th Cir. 2008) (citing *United States v. England*, 507 F.3d 581, 588 (7th Cir. 2007)).

attempted to use intimidation, threaten, or corruptly persuade, or engaged in misleading conduct toward, another person;

- Second, that the defendant did so with intent to influence, delay, or prevent the testimony of any person in an official proceeding; and
- Third, that the defendant did so knowingly, that is, that the defendant knew or had notice of the official proceeding, and that he intended or knew that his actions were likely to affect the official proceeding.

§ 1512(b)(2)

- First, that the defendant used intimidation, threatened, or corruptly persuaded, or attempted to use intimidation, threaten, or corruptly persuade, or engaged in misleading conduct toward, another person;
- Second, that the defendant did so with intent to cause or induce any person to
  - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
  - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
  - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
  - (D) be absent from an official proceeding to which such person had been summoned by legal process; and
- Third, that the defendant did so knowingly, that is, that the defendant knew or had notice of the official proceeding, and that he intended or knew that his actions were likely to affect the official proceeding.

§ 1512(b)(3)

- First, that the defendant used intimidation, threatened, or corruptly persuaded, or attempted to use intimidation, threaten, or corruptly persuade, or engaged in misleading conduct toward, another person;
- Second, that the defendant did so with the intent to hinder, delay, or prevent the communication to a federal law enforcement officer of information relating to the commission or possible commission of a federal offense; and
- Third, that the defendant did so knowingly, that is, that the defendant knew or had notice of the official proceeding, and that he intended or knew that his actions were likely to affect the official proceeding.[924]

§ 1512(c)(1)

- First, that the defendant altered, destroyed, mutilated, or concealed, or attempted to alter, destroy, mutilate, or conceal, a record, document, or other object;
- Second, that the defendant did so with the intent to impair the object's integrity or availability for use in an official proceeding; and
- Third, that the defendant did so corruptly.

[924] *See United States v. Perry*, 335 F.3d 316, 320 (4th Cir. 2003).

§ 1512(c)(2)

- First, that there was a pending official proceeding;
- Second, that the defendant had knowledge of the pending proceeding;
- Third, that the defendant obstructed, influenced, or impeded, or attempted to obstruct, influence or impede the official proceeding; and
- Fourth, the defendant did so corruptly.[925]

§ 1512(d)

- First, that the defendant harassed, or attempted to harass, another person;
- Second, that the harassment hindered, delayed, prevented, or dissuaded any person from doing one of the following:
  (1) attending or testifying in an official proceeding;
  (2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
  (3) arresting or seeking the arrest of another person in connection with a federal offense; or
  (4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; and
- Third, that the defendant did so intentionally.

"Official proceeding" means a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury; a proceeding before the Congress; a proceeding before a Federal Government agency which is authorized by law; or a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce. [§ 1515(a)(1)][926]

An official proceeding need not be pending or about to be instituted at the time of the defendant's alleged conduct, and the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege. [§ 1512(f)]

"Physical force" means physical action against another, and includes confinement. [§ 1515(a)(2)]

"Misleading conduct" means knowingly making a false statement; intentionally omitting information from a statement and thereby causing a portion of such statement to

[925] *See United States v. Garcia*, 413 F. App'x 585 (4th Cir. 2011) (quoting *United States v. Grubb*, 11 F.3d 426, 437 (4th Cir. 1993)).

[926] "Official proceeding" includes a hearing pursuant to Article 32 of the Uniform Code of Military Justice. *United States v. Clift*, 834 F.2d 414 (4th Cir. 1987).

be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect, with intent to mislead; or knowingly using a trick, scheme, or device with intent to mislead. [§ 1515(a)(3)]

"Law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or serving as a [federal] probation or pretrial services officer. [§ 1515(a)(4)][927]

No state of mind need be proved with respect to the circumstance--

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant. [§ 1512(g)]

"Bodily injury" means a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary. [§ 1515(a)(5)]

"Corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind. [§ 1515(a)(6)]

"Corruptly" means to act knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of a proceeding.[928]

"Prevent" applies where a defendant, by anticipatory action, intended to render impractical or impossible an action or event which was likely to have otherwise occurred. Thus, the government must how, at least, a reasonable likelihood that, had the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer. The government must show that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical.[929]

"Intimidation" means a type of true threat where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[930]

The government must prove that the defendant knew or had notice of the official

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[927] In *United States v. Ashley*, 606 F.3d 135 (4th Cir. 2010), the Fourth Circuit assumed for purposes of argument "that Section 1513 requires that a defendant know that the officer with whom an informant is communicating is a federal one." 606 F.3d at 139 n.1.

[928] *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

[929] *Fowler v. United States*, 563 U.S. __, __, 131 S. Ct. 2045, 2051-52 (2011).

[930] *See United States v. White*, 670 F.3d 498, 514 (4th Cir. 2012).

proceeding, and that he intended or knew that his actions were likely to affect the official proceeding.[931]

Although the government has to prove that the official proceeding involved was a federal proceeding, the government does not have to prove that the defendant knew it was a federal proceeding.[932]

It is not necessary for the government to prove that the defendant knew he was breaking any particular criminal law, nor need the government prove that the defendant knew that the law enforcement officer was a federal law enforcement officer. What the government must prove is that "a communication [by the victim] with a federal law enforcement officer was more than a possibility but less than a probability, so long as the chance of the communication was not remote, outlandish, or simply hypothetical."[933]

To determine whether the Government has satisfied this requirement, you may consider evidence such as the federal nature of the crime the victim reported or would have reported, together with other evidence such as the level of cooperation and the focus of activity between local, state, and federal authorities on the relevant crime.[934]

AFFIRMATIVE DEFENSE [§ 1512(e)]

The defendant has the burden of proving, by a preponderance of the evidence, that his conduct consisted solely of lawful conduct and that his sole intention was to encourage, induce, or cause the other person to testify truthfully.

_____NOTE_____

In *Fowler v. United States*, 563 U.S. __, 131 S. Ct. 2045 (2011), the Supreme Court held that § 1512(a)(1)(C) applies to "a defendant who kills with intent to prevent communication with law enforcement officers generally, but only if the government makes a showing about "the likelihood of a hypothetical communication with a federal law enforcement officer." 563 U.S. at ___, 131 S. Ct. at 2050. To demonstrate the appropriate federal nexus between the victim's communication and federal law enforcement officers is whether the government has shown "a *reasonable likelihood* that had, *e.g.*, the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer." *Id.*, 563

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[931] Without knowledge of an official proceeding, the defendant would lack the requisite intent to obstruct the official proceeding. *Arthur Andersen LLP*, 544 U.S. at 708. In *United States v. Harris*, 498 F.3d 278 (4th Cir. 2007), *overruled on other grounds by Fowler v. United States*, 563 U.S. __, 131 S. Ct. 2045 (2011), the Fourth Circuit said that *Arthur Andersen* did not apply because

> the statutory language at issue here [§ 1512(a)(1)(C)] is completely different than that which the *Arthur Andersen* Court interpreted. Most elementally, § 1512(g)(2), which specifically excuses the government from proving any state of mind of the defendant with regard to whether the communication interference will be with *federal* officers, has no application to § 1512(b)(2)(A) and (B).

498 F.3d at 288.

[932] Section 1512(g). *See also Perry*, 335 F.3d at 322, 323 n.11.

[933] *United States v. Smith*, 723 F.3d 510, 518 (4th Cir. 2013). This standard is derived from the Supreme Court's decision in *Fowler v. United States*, 563 U.S. __, 131 S. Ct. 2045 (2011).

[934] *See United States v. Ramos-Cruz*, 667 F.3d 487, 497 (4th Cir. 2012) (adopting Third Circuit evidentiary standard from *United States v. Bell*, 113 F.3d 1345, 1349 (3d Cir. 1997)).

U.S. at __, 131 S. Ct. at 2052. The government is not required to make this showing beyond a reasonable doubt; however, the government must show that "the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical." *Id*.

In *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Supreme Court reversed the § 1512(b) obstruction conviction of Enron's accounting firm because of erroneous jury instructions. In doing so, the Court held that the *mens rea* element of "knowingly" applied to the *actus reus* element of "corruptly persuades" in § 1512(b). The Court pointed out that the Fifth Circuit Pattern Jury Instruction for § 1503 defined "corruptly" as "knowingly and dishonestly, with the specific intent to subvert or undermine the integrity" of a proceeding, and criticized the district court for leaving out "dishonestly."

The instructions were also infirm for leading the jury to believe that it did not have to find any nexus between the "persuasion" and any particular proceeding. The Court said it is one thing to say that a proceeding need not be pending or about to be instituted at the time of the offense and quite another to say a proceeding need not even be foreseen. The Court cited its own opinion in *United States v. Aguilar*, 515 U.S. 593 (1995), for the proposition that the defendant must know that his actions are likely to affect a proceeding. In this regard, it should be noted that the First Circuit Court of Appeals reversed a conviction and remanded with instructions to dismiss the indictment which did not identify any proceeding in which the defendant was attempting to influence testimony, *United States v. Murphy*, 762 F.2d 1151, 1154 (1st Cir. 1985), and the Fifth Circuit Court of Appeals requires "at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future ...." *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir. 1991).

Sections 1512(b)(1) and (3) are separate crimes. *United States v. Floresca*, 38 F.3d 706, 710 n.9 (4th Cir. 1994) (*en banc*).

In *United States v. Wilson*, 796 F.2d 55, 57 (4th Cir. 1986), the defendant harassed a witness who had already been excused by the court. The Court ruled that § 1512(b)'s protection of a person who has been called to testify at a trial continues throughout the duration of that trial.

Regarding official proceedings, the defendant must know that there is an official proceeding, but need not know that it is federal. "[T]he statute required the government only to 'establish that the defendants had the intent to influence an investigation that happened to be federal.'" *Harris*, 498 F.3d at 285 (quoting *United States v. Perry*, 335 F.3d 316, 321 (4th Cir. 2003)), *overruled on other grounds by Fowler v. United States*, 563 U.S. __, 131 S. Ct. 2045 (2011).

Section 1512(b)(3) does not require that communication with federal officers be imminent or that federal officials actually received the misleading information. *Perry*, 335 F.3d at 322 n.9. In other words, the government need not prove anything more than the federal nature of the offense to which the information in question pertains. *Id.* at 322 n.10.

In *United States v. Ashley*, 606 F.3d 135, 140 (4th Cir. 2010), the Fourth Circuit quoted the Second Circuit's opinion in *United States v. Brown*, 937 F.2d 32, 36 (2d Cir. 1991), for the proposition that in a case of witness retaliation in violation of § 1513, the government need not adduce direct evidence of the defendant's knowledge of a witness's informant status in order for the jury to infer his intent to retaliate.

The government need not prove the actual commission of a federal offense. *United States v. Cobb*, 905 F.2d 784, 790 (4th Cir. 1990).

A statement may qualify as a threat even if it is never communicated to the victim. Whether a threat was communicated to the victim may affect whether the threat could reasonably be perceived as an expression of genuine intent. *United States v. Spring*, 305 F.3d 276, 280, 281 (4th Cir. 2002).

See NOTES for §§ 871-76 regarding threats.

18 U.S.C. § 1513 RETALIATING AGAINST A WITNESS, VICTIM, OR INFORMANT

§ 1513(a)

Title 18, United States Code, Section 1513(a) makes it a crime to kill or attempt to kill another person with intent to retaliate against any person for being a witness or providing information to a law enforcement officer. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant killed or attempted to kill another person; and
- Second, that the defendant did so with the intent to retaliate against any person for

  (1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

  (2) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings.

§ 1513(b)

Title 18, United States Code, Section 1513(b) makes it a crime to retaliate against a witness, victim, or informant. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant engaged or attempted to engage in conduct and thereby caused bodily injury to another person or damage to the tangible property of another person, or threatened to do so;
- Second, that the defendant did so with the intent to retaliate against any person for

  (1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

  (2) any information relating to the commission or possible commission of a federal offense ... given by a person to a law enforcement officer; and
- Third, that the defendant did so knowingly.

AGGRAVATED PENALTY

1. Did the retaliation occur because of attendance at or testimony in a criminal case?

[§ 1513(c)]

"Official proceeding" means a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury; a proceeding before the Congress; a proceeding before a Federal Government agency which is authorized by law; or a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce. [§ 1515(a)(1)][935]

"Physical force" means physical action against another, and includes confinement. [§ 1515(a)(2)]

"Misleading conduct" means knowingly making a false statement; intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect, with intent to mislead; or knowingly using a trick, scheme, or device with intent to mislead. [§ 1515(a)(3)]

"Law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or serving as a [federal] probation or pretrial services officer. [§ 1515(a)(4)][936]

"Bodily injury" means a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary. [§ 1515(a)(5)]

NOTE

United States v. Cofield, 11 F.3d 413, 419 (4th Cir. 1993),which held that venue is proper in the district where the official proceeding occurred and may also be proper where the retaliatory acts occurred, has been called into doubt by *United States v. Bowens*, 224 F.3d 302, 313 (4th Cir. 2000), which held that venue is predicated solely on essential conduct elements. Thus, under *Bowens*, venue would only be proper where the retaliatory conduct occurred.

In *United States v. Ashley*, 606 F.3d 135, 140 (4th Cir. 2010), the Fourth Circuit quoted the Second Circuit's opinion in *United States v. Brown*, 937 F.2d 32, 36 (2d Cir. 1991), in support of the proposition that in a case of witness retaliation, the government need not adduce direct evidence of the defendant's knowledge of a witness's informant status in order for the jury to infer his intent to retaliate.

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[935] "Official proceeding" includes a hearing pursuant to Article 32 of the Uniform Code of Military Justice. *United States v. Clift*, 834 F.2d 414 (4th Cir. 1987).

[936] In *United States v. Ashley*, 606 F.3d 135 (4th Cir. 2010), the Fourth Circuit assumed for purposes of argument that the appellant was correct "that Section 1513 requires that a defendant know that the officer with whom an informant is communicating is a federal one." 606 F.3d at 139 n.1.

18 U.S.C. § 1516 OBSTRUCTION OF FEDERAL AUDIT

Title 18, United States Code, Section 1516 makes it a crime to obstruct a federal auditor in the performance of his duties. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant endeavored to influence, obstruct or impede a federal auditor in the performance of official duties;
- Second, that the auditor's duties related to a person, entity, or program receiving in excess of $100,000, directly or indirectly, from the United States in any one year period under a contract or subcontract, grant, or cooperative agreement, or relating to any property that is security for a mortgage note that is insured, guaranteed, acquired, or held by the Secretary of Housing and Urban Development; and
- Third, that the defendant did so with intent to deceive or defraud the United States.

NOTE

See Woldiger v. Ashcroft, 77 F. App'x 586 (3d Cir. 2003) (§ 1516 expressly incorporates fraud or deceit as an element).

18 U.S.C. § 1519 DESTRUCTION OF RECORDS [LAST UPDATED: 5/1/14]

Title 18, United States Code, Section 1519 makes it a crime to alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any record with intent to impede a Federal investigation or bankruptcy. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant altered, destroyed, mutilated, concealed, covered up, falsified, or made a false entry in any record, document, or tangible object;
- Second, that the defendant did so with intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States, or any case filed under [federal bankruptcy laws], or in relation to or contemplation of any [bankruptcy] case; and
- Third, that the defendant did so knowingly.[937]

18 U.S.C. § 1542 FALSE STATEMENT IN PASSPORT APPLICATION

Title 18, United States Code, Section 1542 makes it a crime to make a false statement in an application for a passport, or use a passport obtained with a false statement. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

[937] *United States v. Powell*, 680 F.3d 350, 356 (4th Cir. 2012). *See also United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). In *Powell*, the Fourth Circuit held "that the government need not prove the materiality of the falsification for an offense under 18 U.S.C. § 1519." *Powell*, 680 F.3d at 356.

- First, that the defendant made a false statement in an application for a passport for his own use or the use of another;
- Second, that the defendant did so with intent to induce or secure the issuance of a passport under the authority of the United States and contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; and
- Third, that the defendant did so knowingly and willfully.[938]

¶ 2

- First, that the defendant used or attempted to use, or furnished to another for use;
- Second, a passport which was secured by reason of any false statement; and
- Third, that the defendant did so knowingly and willfully.[939]

ADDITIONAL ELEMENTS, IF APPROPRIATE

1. Was the offense committed to facilitate an act of international terrorism [as defined in 18 U.S.C. § 2331]?
2. Was the offense committed to facilitate a drug trafficking crime [as defined in 18 U.S.C. § 929(a)]?

_____NOTE_____

In *United States v. George*, 386 F.3d 383 (2d Cir. 2004), the issue was the *mens rea* requirement of "willfully and knowingly" in the statute. The Second Circuit held the "*mens rea* provision requires that the defendant provide in a passport application information he or she knows to be false." 386 F.3d at 386. The government does not have to prove that the defendant acted "with a specific purpose to make false statements or to violate the law, either generally or § 1542 specifically." *Id.* at 389.

The crime is complete when one makes a statement one knows is untrue to procure a passport. Good or bad motives are irrelevant. *United States v. O'Bryant*, 775 F.2d 1528, 1535 (11th Cir. 1985).

In *United States v. Jean-Baptiste*, 166 F.3d 102, 111 (2d Cir. 1999), the Second Circuit found that

> [this] section contains no language stating that the person making the false statement 'with intent to induce or secure the issuance of a passport' ... must simultaneously have the intent to use the passport. We read the words 'for his own use or the use of another,' ... as reflecting Congress's intent simply to encompass false statements in any passport application, regardless of the name in which the passport is to be issued and regardless of the identity of the passport's prospective user.

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[938] *United States v. George*, 386 F.3d 383, 397 (2d Cir. 2004).

[939] In *Browder v. United States*, 312 U.S. 335 (1941), the Supreme Court, in construing the predecessor statute, said that fraudulent use is not an element of the crime. "The crime of 'use' is complete when the passport so obtained is used willfully and knowingly.... Once the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport in travel is punishable." 312 U.S. at 341.

166 F.3d at 111.

This statute penalizes both procuring the passport by a false statement and its use when so procured. *Id.*

Intent to violate the law is not an element of § 1542. *George*, 386 F.3d at 398.

Intent to defraud is not an element of § 1542. *Id. See also Liss v. United States*, 915 F.2d 287, 293 (7th Cir. 1990).

Entrapment by estoppel can be used as a defense to a charge under § 1542. *George*, 386 F.3d at 400.

Paragraph 1 is a point-time-offense, which can be prosecuted at the place of the false statement but not at some different place where the passport application is processed. *United States v. Salinas*, 373 F.3d 161, 169 (1st Cir. 2004).

For paragraph 2, venue would lie where the passport is used. The *Salinas* court did not have the "use" proscriptions before it. *Id*. at 165 n.2.

18 U.S.C. § 1546 FRAUD AND MISUSE OF VISA

Title 18, United States Code, Section 1546 makes it a crime to counterfeit visas or make a false statement in an application for a visa. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1546(a)

¶ 1

First clause

- First, that the defendant forged, counterfeited, altered, or falsely made;
- Second, any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States; and
- Third, that the defendant did so knowingly.

Second clause

- First that the defendant uttered, used, attempted to use, possessed, obtained, accepted, or received;
- Second, an immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States which had been forged, counterfeited, altered, or falsely made; and
- Third, that the defendant knew the immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States had been forged, counterfeited, altered, or falsely made.[940]

[940] *See United States v. Ryan-Webster*, 353 F.3d 353, 359 (4th Cir. 2003).

¶ 2

- First, that the defendant possessed a blank permit, or engraved, sold, brought into the United States, or had in his control or possession any plate in the likeness of a plate designed for the printing of permits, or made any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or had in his possession a distinctive paper which had been adopted by the Attorney General or the Bureau of Immigration and Customs Enforcement for the printing of such visas, permits, or documents; and
- Second, that the defendant did so knowingly.

¶ 3

First clause

- First, that the defendant applied for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States; and
- Second, that in doing so, the defendant impersonated another, or falsely appeared in the name of a deceased individual, or evaded or attempted to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity.

Second clause

- First, that the defendant sold or otherwise disposed of, or offered to sell or otherwise dispose of, or uttered to any person not authorized by law to receive;
- Second, an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States which had been obtained by impersonating another, or falsely appearing in the name of a deceased individual, or evading or attempting to evade the immigration laws by appearing under an assumed or fictitious name without disclosing one's true identity; and
- Third, that the defendant did so knowingly.

¶ 4

First clause

- First, that the defendant made a false statement in an immigration document;
- Second, that the false statement was made in an application required by the immigration laws or regulations of the United States;
- Third, that the false statement was made under oath;
- Fourth, that the false statement was material to the activities or decisions of the Bureau of Immigration and Customs Enforcement; and
- Fifth, that the defendant did so knowingly.[941]

There are no particular formalities required for there to be a valid oath. It is

[941] *See United States v. O'Connor*, 158 F. Supp. 2d 697, 720 (E.D. Va. 2001) (citing *United States v. Chu*, 5 F.3d 1244, 1247 (9th Cir. 1993)).

sufficient for the government to prove that, in the presence of a person authorized to administer an oath, the person taking the oath consciously took on himself the obligation of an oath by an unequivocal act, and the person undertaking the oath understood that what was done is proper for the administration of the oath and all that is necessary to complete the act of swearing.[942]

Second clause

- First, that the defendant presented an application, affidavit, or other document required by the immigration laws or regulations of the United States;
- Second, that the application, affidavit, or other document contained a false statement which was material, or which failed to contain any reasonable basis in law or fact; and
- Third, that the defendant did so knowingly.

§ 1546(b)

- First, that the defendant used one of the following:
  - (1) an identification document, knowing or having reason to know, that the document was not issued lawfully for the use of the possessor,
  - (2) an identification document, knowing or having reason to know, that the document was false, or
  - (3) a false attestation; and
- Second, that the defendant did so for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act.

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[943]

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[944]

18 U.S.C. § 1591 SEX TRAFFICKING OF CHILDREN

Title 18, United States Code, Section 1591 makes it a crime to recruit, entice, or transport a minor in interstate commerce or to benefit financially from participation in a venture which recruits, entices, or transports minors to engage in commercial sex acts. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1591(a)(1)

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[942] *Chu*, 5 F.3d 1244 at 1248 (quoting *United States v. Yoshida*, 727 F.2d 822, 823 (9th Cir. 1983)).

[943] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[944] *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978). *See also United States v. Race*, 632 F.2d 1114 (4th Cir. 1980).

- First, that the defendant recruited, enticed, harbored, transported, provided, obtained, or maintained by any means a person [or attempted to do so, § 1594]
- Second, that the defendant did so in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States; and
- Third, that the defendant knew, or recklessly disregarded the fact, that means of force, threats of force, fraud, coercion, or any combination of these, would be used to cause the person to engage in a commercial sex act;

OR

- Third, that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act.[945]

§ 1591(a)(2)

- First, that the defendant knowingly benefitted, financially or by receiving anything of value, from participating in a venture [or attempted to do so, § 1594];
- Second, that the venture recruited, enticed, harbored, transported, provided, or obtained by any means a person;
- Third, that this conduct of the venture was in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States; and
- Fourth, that the defendant knew, or recklessly disregarded the fact, that means of force, threats of force, fraud, coercion, or any combination of these, would be used to cause the person to engage in a commercial sex act;

OR

- Fourth, that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act.[946]

"Coercion" means

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process. [§ 1591(e)(2)]

"Abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action. [§ 1591(e)(1)]

"Commercial sex act" means any sex act, on account of which anything of value is

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[945] *See United States v. Wild*, 143 F. App'x 938 (10th Cir. 2005).

[946] *See id.*

given to or received by any person. [§ 1591(e)(3)]

"Serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm. [§ 1591(e)(4)]

"Venture" means any group of two or more individuals associated in fact, whether or not a legal entity. [§ 1591(e)(5)]

ADDITIONAL ELEMENTS [§ 1591(b)]

1. Was the offense effected by means of force, threats of force, fraud, or coercion, or by any combination of such means? [§ 1591(b)(1)]

2. Second, was the person recruited, enticed, harbored, transported, provided, or obtained younger than the age of 14 years at the time of the offense? [§ 1591(b)(2)]

18 U.S.C. § 1621 PERJURY

Title 18, United States Code, Section 1621 makes it a crime to commit perjury. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant testified, or subscribed any written testimony, declaration, deposition, or certificate;
- Second, that the defendant did so, having taken an oath or under penalty of perjury;
- Third, that the testimony, declaration, deposition, or certificate was false;
- Fourth, that the false testimony, declaration, deposition, or certificate was material; and
- Fifth, that the defendant knew that the testimony, declaration, deposition, or certificate was false, that is, it did not result from confusion or mistake but was intended to deceive.[947]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[948]

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[949]

There are no particular formalities required for there to be a valid oath. It is sufficient for the government to prove that, in the presence of a person authorized to

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[947] *See United States v. Dunnigan*, 507 U.S. 87 (1993); *United States v. Stotts*, 113 F.3d 493 (4th Cir. 1997); *United States v. Smith*, 62 F.3d 641 (4th Cir. 1995).

[948] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[949] *Anderson*, 579 F.2d at 460. *See also Race*, 632 F.2d 1114.

administer an oath, the person taking the oath consciously took on himself the obligation of an oath by an unequivocal act, and the person undertaking the oath understood that what was done is proper for the administration of the oath and all that is necessary to complete the act of swearing.[950]

Perjury must be proved by the direct testimony of two witnesses or one witness corroborated by independent evidence.[951]

NOTE

See generally United States v. Wilkinson, 137 F.3d 214, 226 (4th Cir. 1998) (*en banc*); *United States v. Friedhaber*, 856 F.2d 640, 642 (4th Cir. 1988) (*en banc*).

An answer, literally true but not responsive to the question asked and arguably misleading by negative implication, does not constitute perjury. *Bronston v. United States*, 409 U.S. 352 (1973). Answers under oath are not to be measured by the same standards applicable to criminally fraudulent statements, which may clearly include so-called half-truths. This statute "is not to be loosely construed, nor ... invoked simply because a wily witness succeeds in derailing the question — so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id*. at 360. Precise questioning is imperative as a predicate for the offense of perjury. *See also United States v. Earp*, 812 F.2d 917, 918 (4th Cir. 1987) (a § 1623 prosecution).

In *United States v. Carson*, 464 F.2d 424 (2d Cir. 1972), the Second Circuit found that

> [t]he "natural effect or tendency" obviously flows from an assumption on the part of the speaker that the tribunal will believe what he says. On this basis materiality refers to the connection between the words said only by the accused and the objective of the investigation; other testimony which the grand jury has heard, except as it may tend to delimit the objective of the inquiry, is therefore irrelevant to a determination of materiality. And we think it equally obvious that had appellant's false statements been believed, the natural effect would have been to impede the grand jury's investigation.

464 F.2d at 436.

Multiple false statements charged in a single count may require a special unanimity instruction. In *United States v. Holley*, 942 F.2d 916, 925-29 (5th Cir. 1991), the Fifth Circuit concluded that the indictment was duplicitous for charging in one count multiple false statements which could be proven only by showing distinct facts. The court reversed the conviction because the district court did not give a special unanimity instruction. In *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998), the trial judge instructed the jury that "each member had to agree unanimously on one of the instances of conduct." In *United States v. Adams*, 335 F. App'x 338 (4th Cir. 2009), the district court instructed the jury as follows:

The government is not required to prove that all of these statements that are

[950] *United States v. Yoshida*, 727 F.2d 822, 823 (9th Cir. 1983).

[951] The so-called "two witness" rule. *See United States v. Beach*, 296 F.2d 153, 155 (4th Cir. 1961); *Hammer v. United States*, 271 U.S. 620, 626 (1926).

> alleged in Counts Five and Six as false are in fact false. Each juror must agree, however, with each of the other jurors that the same statement or representation is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but in order to convict, must unanimously agree upon at least one such statement as false, fictitious, or fraudulent when knowingly made or used by the defendant.

335 F.App'x at 347-48.

See also O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* § 40.15 (5th ed. 2000):

> Each juror must agree with each of the other jurors that the same statement or representation, alleged to be false, fictitious, or fraudulent, is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but, in order to convict, must unanimously agree upon at least one such statement as false, fictitious or fraudulent when knowingly made or used by the defendant.

18 U.S.C. § 1622 SUBORNATION OF PERJURY

Title 18, United States Code, Section 1622 makes it a crime to procure another person to commit perjury. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that a person testified, or subscribed any written testimony, declaration, deposition, or certificate;
- Second, that this person did so, having taken an oath or under penalty of perjury;
- Third, that the testimony, declaration, deposition, or certificate was false;
- Fourth, that the false testimony, declaration, deposition, or certificate was material;
- Fifth, that the person knew that the testimony, declaration, deposition, or certificate was false, that is, it did not result from confusion or mistake but was intended to deceive;[952] and
- Sixth, that the defendant procured this person to commit perjury.

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[953]

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[954]

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[952] *See United States v. Dunnigan*, 507 U.S. 87 (1993); *United States v. Stotts*, 113 F.3d 493 (4th Cir. 1997); *United States v. Smith*, 62 F.3d 641 (4th Cir. 1995).

[953] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[954] *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978). *See also United States v. Race*, 632 F.2d 1114 (4th Cir. 1980).

There are no particular formalities required for there to be a valid oath. It is sufficient for the government to prove that, in the presence of a person authorized to administer an oath, the person taking the oath consciously took on himself the obligation of an oath by an unequivocal act, and the person undertaking the oath understood that what was done is proper for the administration of the oath and all that is necessary to complete the act of swearing.[955]

The government must prove actual perjury.[956]

NOTE

Regarding perjury, see *United States v. Wilkinson*, 137 F.3d 214, 226 (4th Cir. 1998) (*en banc*), and *United States v. Friedhaber*, 856 F.2d 640, 642 (4th Cir. 1988) (*en banc*).

Subornation of perjury does not require corroboration. *United States v. Giddins*, 273 F.2d 843, 844 (2d Cir. 1960).

18 U.S.C. § 1623 FALSE DECLARATIONS BEFORE GRAND JURY OR COURT

Title 18, United States Code, Section 1623 makes it a crime to testify falsely before a grand jury or court. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant testified under oath before a federal grand jury or in a proceeding before or ancillary to any court of the United States;
- Second, that the testimony was false;
- Third, that the defendant acted knowingly, that is to say, the defendant knew the testimony was false — it did not result from confusion or mistake but was intended to deceive the fact finder;[957] and
- Fourth, that the false testimony was material.[958]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process. The capacity to influence must be measured at the point in time that the statement was made.[959]

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[960]

There are no particular formalities required for there to be a valid oath. It is

[955] *United States v. Yoshida*, 727 F.2d 822, 823 (9th Cir. 1983).

[956] *United States v. Hairston*, 46 F.3d 361, 376 (4th Cir. 1995).

[957] *United States v. Stotts*, 113 F.3d 493 (4th Cir. 1997); *United States v. Dunnigan*, 507 U.S. 87 (1993); *United States v. Smith*, 62 F.3d 641 (4th Cir. 1995).

[958] *United States v. Wilkinson*, 137 F.3d 214, 224 (4th Cir. 1998) (*en banc*); *United States v. Friedhaber*, 856 F.2d 640, 642 (4th Cir. 1988) (*en banc*).

[959] *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998).

[960] *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978). *See also United States v. Race*, 632 F.2d 1114 (4th Cir. 1980).

sufficient for the government to prove that, in the presence of a person authorized to administer an oath, the person taking the oath consciously took on himself the obligation of an oath by an unequivocal act, and the person undertaking the oath understood that what was done is proper for the administration of the oath and all that is necessary to complete the act of swearing.[961]

"Ancillary to any court or grand jury of the United States" requires a degree of formality, such as a court order authorizing the proceeding, formal notice of the proceeding, and certifying any resulting document as accurate.[962]

NOTE

United States v. Wilkinson, 137 F.3d 214, 224-25 (4th Cir. 1998) (*en banc*); *United States v. Friedhaber*, 856 F.2d 640, 642 (4th Cir. 1988) (*en banc*).

An answer, literally true but not responsive to the question asked and arguably misleading by negative implication, does not constitute perjury. *See Bronston v. United States*, 409 U.S. 352 (1973). Answers under oath are not to be measured by the same standards applicable to criminally fraudulent statements, which may clearly include so-called half-truths. "[T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the question-so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object to the questioner's inquiry." *Id*. at 360. Precise questioning is imperative as a predicate for the offense of perjury. *See also United States v. Earp*, 812 F.2d 917, 918 (4th Cir. 1987).

Perjury entrapment occurs when a government agent coaxes a defendant to testify under oath for the sole purpose of eliciting perjury. *United States v. Sarihifard*, 155 F.3d 301, 308 (4th Cir. 1998). *See also United States v. Shuck*, 895 F.2d 962, 966 (4th Cir. 1990).

See separate instruction on Entrapment under Defenses.

Multiple false statements charged in a single count may require a special unanimity instruction. In *United States v. Holley*, 942 F.2d 916, 925-29 (5th Cir. 1991), the Fifth Circuit concluded that the indictment was duplicitous for charging in one count multiple false statements which could be proven only by showing distinct facts. The court reversed because the district court did not give a special unanimity instruction. In *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998), the trial judge did instruct the jury that "each member had to agree unanimously on one of the instances of conduct." In *United States v. Adams*, 335 F. App'x 338 (4th Cir. 2009), the district court instructed the jury as follows:

> The government is not required to prove that all of these statements that are alleged in Counts Five and Six as false are in fact false. Each juror must agree, however, with each of the other jurors that the same statement or representation is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but in order to convict, must unanimously agree

[961] *United States v. Yoshida*, 727 F.2d 822, 823 (9th Cir. 1983).

[962] In *Dunn v. United States*, 442 U.S. 100 (1979), an inconsistently false statement was given under oath in a lawyer's office. The Supreme Court held that § 1623 should not encompass "statements made in contexts less formal than a deposition." 442 U.S. at 113.

> upon at least one such statement as false, fictitious, or fraudulent when knowingly made or used by the defendant.

335 F.App'x at 347-48.

See also O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* § 40.15 (5th ed. 2000):

> Each juror must agree with each of the other jurors that the same statement or representation, alleged to be false, fictitious, or fraudulent, is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but, in order to convict, must unanimously agree upon at least one such statement as false, fictitious or fraudulent when knowingly made or used by the defendant.

In *United States v. Razo-Leora*, 961 F.2d 1140 (5th Cir. 1992), the defendant was charged in a single count with making two distinct false statements to the grand jury, one concerning a vehicle and the other concerning a weapon. The Fifth Circuit found the count was multiplicitous, but the defendant had waived the error.

See § 1623(c) concerning "two or more declarations, which are inconsistent to the degree that one of them is necessarily false."

See § 1623(d) concerning recantation defense.

Section 1623(e) removed the "two witness" rule of § 1621.

In *United States v. Wilkinson*, 137 F.3d 214 (4th Cir. 1998) (*en banc*), the Fourth Circuit observed that the normal articulation of the materiality standard did not necessarily fit a civil deposition. The court cited and discussed standards adopted by the Second Circuit and the Sixth and Ninth Circuits. However, because the statement in question was made at a deposition the court determined that "it is not necessary in this case that we decide which among these standards we would adopt for our circuit." 137 F.3d at 224.

18 U.S.C. § 1651 PIRACY [LAST UPDATED: 7/9/14]

Title 18, United States Code, Section 1651, makes it a crime to commit piracy on the high seas. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant committed an act of piracy as defined by the law of nations;
- Second, that the defendant did so on the high seas; and
- Third, that afterwards the defendant was brought into or found in the United States.[963]

Piracy includes any of the following three actions:

> (1) any illegal acts of violence or detention or any act of depredation committed for private ends on the high seas or a place outside the jurisdiction of any state by the crew or the passengers of a private ship and directed against another ship or against

[963] *United States v. Dire*, 680 F.3d 446, 451 (4th Cir. 2012).

persons or property on board such ship; or

(2) any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship; or

(3) any act of inciting or of intentionally facilitating an act described in either (1) or (2) above.[964]

The term "high seas" means "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."[965]

NOTE

In *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012), the Fourth Circuit stated that "Congress intended in § 1651 to define piracy as a universal jurisdiction crime." Thus, § 1651 "incorporates a definition of piracy that changes [or evolves] with advancements in the law of nations." *Id*.

Venue is proper for piracy offenses "in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought." 18 U.S.C. § 3238.

A defendant charged with aiding and abetting the crime of piracy does not have to commit acts on the high seas. Rather, the conduct "must incite or intentionally facilitate acts committed against ships, persons, and property on the high seas." *United States v. Shibin*, 722 F.3d 233, 241 (4th Cir. 2013).

18 U.S.C. § 1702 OBSTRUCTION OF CORRESPONDENCE

Title 18, United States Code, Section 1702 makes it a crime to obstruct correspondence. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant took a letter, postal card, or package out of any post office or authorized depository for mail matter, from any letter or mail carrier, or which had been in any post office or authorized depository, or in the custody of any letter or mail carrier;
- Second, that the letter, postal card, or package was taken before it had been delivered to the person to whom it was directed; and
- Third, that the defendant did so with design to obstruct the correspondence, or to pry into the business or secrets of another.[966]

OR

- Third, that the defendant opened, secreted, embezzled, or destroyed the letter, postal card, or package.

[964] *Id*. at 465 (quoting district court's jury instructions).

[965] *United States v. Shibin*, 722 F.3d 233, 241 (4th Cir. 2013) (quoting the United Nations Convention on the Law of the Sea art. 86, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 432 (entered into force Nov. 16, 1994)).

[966] *United States v. Ashford*, 530 F.2d 792, 798 (8th Cir. 1976).

NOTE

Protection of mailed material from obstruction and delay does not end when the material passes legitimately out of the control of the United States Postal Service, but extends until the mailed material is physically delivered to the person to whom it is directed or to his authorized agent. *United States v. Johnson*, 620 F.2d 413, 415 (4th Cir. 1980). Thus, § 1702 is broader than § 1708, which is limited to mail in the possession of the Postal Service. *United States v. Ashford*, 530 F.2d 792, 795-96 (8th Cir. 1976).

In *United States v. Brusseau*, 569 F.2d 208, 209 (4th Cir. 1977), the defendant had introduced no evidence that any specific addressees had authorized him to receive their mail. The Fourth Circuit found that in the absence of an express or implied direction, the defendant was not an authorized agent within the terms of § 1702.

18 U.S.C. § 1708 THEFT OF MAIL/POSSESSION OF STOLEN MAIL

Title 18, United States Code, Section 1708 makes it a crime to steal mail, or possess stolen mail. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant stole, took, abstracted, or obtained by fraud or deception, or attempted to obtain by fraud or deception;
- Second, any letter, postal card, package, bag, or mail; and
- Third, from or out of any mail, post office, or station, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier.

OR

- First, that the defendant abstracted or removed any article or thing from any letter, package, bag, or mail;
- Second, that the letter, package, bag, or mail had been stolen from or out of any mail, post office, or station, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier; and
- Third, that the defendant did so knowingly.

OR

- First, that the defendant secreted, embezzled, or destroyed any letter, package, bag, or mail, or any article or thing from any letter, package, bag, or mail;
- Second, that the letter, package, bag, or mail had been stolen from or out of any mail, post office, or station, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier; and
- Third, that the defendant did so knowingly.

¶ 2

- First, that the defendant stole, took, abstracted, or obtained by fraud or deception;
- Second, any letter, postal card, package, bag, or mail, or any article contained in any letter, package, bag, or mail; and

- Third, that the letter, postal card, package, bag, or mail had been left for collection upon or adjacent to a collection box or other authorized depository of mail matter.

¶ 3

- First, that the defendant bought, received, concealed, or possessed;
- Second, an item that had been stolen from the mail or a mail receptacle; and
- Third, that the defendant knew that the item was stolen.[967]

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property. The lawful possession need not be acquired through a relationship of trust.[968]

Steal means the wrongful and dishonest taking of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[969]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[970]

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[967] *United States v. Gilmore*, No. 88-5088, 1989 WL 37425 (4th Cir. Apr. 4, 1989) (citing *United States v. Douglas*, 668 F.2d 459, 461 (10th Cir. 1982)). In *Douglas*, the mail was delivered to an old address. The new occupant "clothes-pinned" the mail, unopened, to a metal rod attached to the mailbox. The Tenth Circuit held "the theft of an envelope clipped to a rod which is permanently attached to a mailbox falls within the purview of the statute." *But see United States v. Mendez*, 117 F.3d 480, 487 (11th Cir. 1997) (defendant must have specific intent to possess stolen mail unlawfully); *United States v. Osunegbu*, 822 F.2d 472, 475 (5th Cir. 1987) (same).

[968] *United States v. Smith*, 373 F.3d 561, 565 (4th Cir. 2004). Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269. "[W]here Congress has thought a particular capacity or relationship to be a necessary element of embezzlement in a given circumstance, it has specified as such." *Smith*, at 566.

[969] In *United States v. Turley*, 353 U.S. 407, 411 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings of [property] with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417. *See also Morissette v. United States*, 342 U.S. 246, 271 (1952).

[970] "When the government seeks to establish constructive possession under § 922(g)(1), it must prove that the defendant intentionally exercised dominion and control over the firearm, or had

Constructive possession can be established by evidence, either direct or circumstantial, showing control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[971]

Proof of constructive possession requires proof the defendant had knowledge of the presence of the item or property.[972]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[973]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[974] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation of such possession.][975] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained

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the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Our juries should be instructed accordingly." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). "[I]t would have been better for the district court to have repeated the intent requirement close to its definition of constructive possession." *Id*. at 436. *See also United States v. Herder*, 594 F.3d 352 (4th Cir. 2010).

[971] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[972] *Herder*, 594 F.3d at 358.

[973] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession). *See Herder*, 594 F.3d at 358, for discussion of "mere proximity" instruction.

[974] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[975] *Id*.

through other circumstances, other evidence, independent of any testimony of the defendant.[976]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[977]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[978]

If you find that the letter or its contents was stolen from the mail before delivery to the addressee, and that while recently stolen the letter or its contents was in the possession of the defendant, you may infer that such possession was with knowledge that it had been stolen, unless other facts and circumstances lead you to a contrary conclusion.[979]

The government must prove that the defendant knew the item he possessed was stolen, but the government does not have to prove that the defendant knew it was stolen from the mail.[980]

_____NOTE_____

Only one possession of stolen mail offense occurs when two packages are stolen at the same time. *United States v. Osunegbu*, 822 F.2d 472, 481 (5th Cir. 1987).

18 U.S.C. § 1709 THEFT OF MAIL BY POSTAL EMPLOYEE

Title 18, United States Code, Section 1709 makes it a crime for a postal employee to steal mail. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

First clause

- First, that the defendant was an employee of the Postal Service;
- Second, that a letter, postal card, package, bag, or mail, or thing contained in such mail came into his possession intended to be conveyed by mail, or carried or delivered by mail; and
- Third, that the defendant embezzled the letter, postal card, package, bag, or mail.[981]

Second clause

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[976] *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[977] *United States v. Gallo*, 543 F.2d 361, 368 n. 6 (D.C. Cir. 1976).

[978] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[979] This charge was upheld in *United States v. Smith*, 446 F.2d 200, 204 (4th Cir. 1971).

[980] *Barnes*, 412 U.S. at 847.

[981] *United States v. Hill*, 40 F.3d 164, 167 (7th Cir. 1994); *United States v. Rodriguez*, 613 F.2d 28, 29 (2d Cir. 1980).

- First, that the defendant was an employee of the Postal Service;
- Second, that the defendant stole, abstracted, or removed any article or thing contained in a letter, package, bag, or mail; and
- Third, that the letter, package, bag, or mail came into his possession intended to be conveyed by mail, or carried or delivered by mail.

Steal means the wrongful and dishonest taking of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[982]

"Embezzle" means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[983]

NOTE

In *United States v. Dollard*, 780 F.2d 1118 (4th Cir. 1985), the Fourth Circuit rejected the defendant's contention that he had to have prior lawful possession of the mail he took. "[Section] 1709 demonstrates that it is intended to cover a postal employee who embezzles or *steals* any mail." 780 F.2d at 1122. *But see United States v. Selwyn*, 998 F.2d 556 (8th Cir. 1993) (finding § 1709 created two distinct offenses of postal theft; *Dollard* inapplicable because Fourth Circuit ignored different requirements of embezzlement and stealing clauses of statute).

Only one possession of stolen mail offense occurs when two packages are stolen at the same time. *United States v. Osunegbu*, 822 F.2d 472, 481 (5th Cir. 1987).

In *United States v. Rodriguez*, 613 F.2d 28 (2d Cir. 1980), the Second Circuit affirmed the conviction of a postal employee who embezzled a test package, despite the Postal Inspector's testimony that it was never intended that the test package be conveyed in the mails. *See also Scott v. United States*, 172 U.S. 343, 350 (1899) (finding that makes no difference that the letter was a decoy, and addressed to a fictitious person.").

18 U.S.C. § 1711 EMBEZZLEMENT OF POSTAL FUNDS

Title 18, United States Code, Section 1711 makes it a crime for a postal employee to embezzle postal funds. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was a postal employee;

[982] In *United States v. Turley*, 353 U.S. 407 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law," *id.* at 411, and defined "stolen" to include "all felonious takings of [property] with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417. *See also Morissette v. United States*, 342 U.S. 246, 271 (1952).

[983] *See United States v. Smith*, 373 F.3d 561, 565 (4th Cir. 2004). Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269. *But see United States v. Selwyn*, 998 F.2d 556 (8th Cir. 1993) (discussion of "embezzle" where the majority distinguished between "entrusted to him" and "which comes into his possession intended to be conveyed by mail.").

- Second, that postal funds came into the defendant's possession in his capacity as a postal employee;
- Third, that the defendant converted those postal funds to his own use;[984] and
- Fourth, that the amount of funds converted exceeded $1,000.

☞ **If a disputed issue is whether the funds had a value exceeding $1,000, the court should consider giving a lesser included offense instruction.**

NOTE

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R. 3d 398.

In determining whether a series of takings are properly aggregated, the court must examine the intent of the actor at the first taking. If the actor formulated "a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004). The *Smith* majority also believed that the specific conduct at issue in that case (appropriating the Social Security checks of the defendant's deceased mother and prosecuted as a violation of 18 U.S.C. § 641) "is more properly characterized as a continuing offense rather than a series of separate acts" for statute of limitations purposes. *Id.* at 568. The court noted that not all conduct constituting embezzlement may necessarily be treated as a continuing offense as opposed to merely a series of acts that occur over a period of time.

See United States v. Powell, 413 F.2d 1037, 1038 (4th Cir. 1969) (intent and actual taking may be proved by circumstantial evidence; "where the defendant alone has access to the property, a substantial shortage is disclosed, and no explanation for the shortage is tendered by the accused, the trier of fact may reasonably infer from the circumstances that the custodian of the property has embezzled the missing funds."). In *Powell*, the defendant was a postal employee who was charged with violating 18 U.S.C. § 641.

18 U.S.C. § 1791 CONTRABAND IN PRISON

Title 18, United States Code, Section 1791 makes it a crime to provide contraband to an inmate, or for an inmate to make or possess contraband. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1791(a)(1)

- First, that the defendant provided, or attempted to provide, to an inmate of a federal correctional, detention, or penal facility;
- Second, a prohibited object;[985]
- Third, without the knowledge and consent of the warden or superintendent of the facility; and

[984] *United States v. Hodges*, No. 93-5376, 1994 WL 399169 (4th Cir. Aug. 3, 1994).

[985] The nature of the prohibited object determines the maximum possible sentence, § 1791(b). Failing to define "prohibited object" is error. *United States v. Robinson*, 337 F. App'x 368 (4th Cir. 2009).

- Fourth, that the defendant did so knowingly[986] [and intentionally[987]].

§ 1791(a)(2)

- First, that the defendant was an inmate of a federal correctional, detention, or penal facility;
- Second, that the defendant made, possessed, or obtained, or attempted to make or obtain, a prohibited object;
- Third, without the knowledge and consent of the warden or superintendent of the facility; and
- Fourth, that the defendant did so knowingly [and intentionally].

"Prohibited object" means the following:

(1) a firearm [as defined in 18 U.S.C. § 921] or destructive device [as defined in 18 U.S.C. § 921] or a controlled substance [as defined in 21 U.S.C. § 802, schedule I or II, but not including marijuana or a controlled substance referred to in (3), *infra*]; [§ 1791(d)(1)(A)]

(2) marijuana or a controlled substance [as defined in 21 U.S.C. § 802, Schedule III, other than a controlled substance referred to in (3), *infra*], ammunition [as defined in 19 U.S.C. § 921], a weapon (other than a firearm or destructive device), or an object that is designed or intended to be used[988] as a weapon or to facilitate escape from a prison; [§ 1791(d)(1)(B)]

(3) a narcotic drug [as defined in 21 U.S.C. § 802], methamphetamine, its salts, isomers, and salts of its isomers, lysergic acid diethylamide, or phencyclidine; [§ 1791(d)(1)(C)]

(4) a controlled substance (other than those specified above) or an alcoholic beverage; [§ 1791(d)(1(D)]

(5) any United States or foreign currency; [§ 1791(d)(1)(E)] and

(6) any object that threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual. [§ 1791(d)(1)(F)]

"Prison" means a Federal correctional, detention, or penal facility or any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General. [§ 1791(d)(4)]

The government must prove that the federal government managed and operated the

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[986] *United States v. Perceval*, 803 F.2d 601, 603 (10th Cir. 1986).

[987] When the government charges "an object ... intended to be used" then intent is an element. *United States v. Allen*, 190 F.3d 1208, 1211 (11th Cir. 1999). *See also United States v. Rodriguez*, 45 F.3d 302, 306 (9th Cir. 1995); *United States v. Fox*, 845 F.2d 152, 156 n.3 (7th Cir. 1988).

[988] See *United States v. Morningstar*, 456 F.2d 278, 281 (4th Cir. 1972), where, in discussing any combination of parts *designed* for use in converting any device into a destructive device and any combination of parts *intended* for use in connecting any device into a destructive device, the court said that, concerning the first group, the possessor's intent was not relevant, whereas concerning the second group, the government must prove that the defendant *intended* to convert the parts into an illegal firearm.

prison facility.[989]

A weapon is an instrument of offensive or defensive combat, something to fight with, a means of contending against another.[990]

NOTE

28 C.F.R. § 6.1 states the following: "The introduction or attempt to introduce into or upon the grounds of any Federal penal or correctional institution or the taking or attempt to take or send therefrom anything whatsoever without the knowledge and consent of the warden or superintendent of such Federal penal or correctional institution is prohibited."

"[A]bsence of knowledge and consent of the warden" is one of the elements of a violation of § 1791. *United States v. Berrigan*, 482 F.2d 171, 185 (3d Cir. 1973). *See also United States v. Adams*, 768 F.2d 1276, 1277 (11th Cir. 1985) ("That the warden may have suspected, or even known that a person would attempt to illegally bring contraband into the institution, where *that person* does not himself rely on the warden's consent or knowledge, would not defeat a conviction [for aiding and abetting] under the statute."(emphasis added)).

If the contraband is an object that is designed or intended to be used as a weapon or to facilitate escape from a prison, then the *mens rea* is increased to specific intent. *See United States v. Allen*, 190 F.3d 1208, 1211 (11th Cir. 1999); *United States v. Rodriguez*, 45 F.3d 302, 306 (9th Cir. 1995); *United States v. Fox*, 845 F.2d 152, 156 n.3 (7th Cir. 1988).

The court should consider submitting a special verdict form, if more than one class of prohibited object is involved. *See Rodriguez*, 45 F.3d at 305.

18 U.S.C. § 1792 PRISON RIOT

Title 18, United States Code, Section 1792 makes it a crime to instigate or assist in a riot at a federal correctional facility. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant instigated, connived, attempted to cause, assisted, or conspired to cause a mutiny or riot;
- Second, at any federal penal, detention, or correctional facility; and
- Third, that the defendant did so knowingly and willfully.[991]

Mutiny means resisting the warden or his subordinate officers in the free and lawful exercise of their legal authority.[992]

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[989] *United States v. Gibson*, 880 F.2d 795, 797 (4th Cir. 1989).

[990] Definition given by district court in *United States v. Rodriguez*, 45 F.3d 302, 305 (9th Cir. 1995).

[991] *See United States v. Hill*, 526 F.2d 1019, 1027 (10th Cir. 1976) ("We believe that the words of [the statute] fairly import the elements of knowledge and willfulness."). Specific intent is not an element of the crime. *Id.*

[992] *United States v. Bryson*, 423 F.2d 724 (4th Cir. 1970).

NOTE

In *United States v. Rodgers*, 419 F.2d 1315 (10th Cir. 1969), the Tenth Circuit held that § 1792 did not include participation in a riot. However, in *United States v. Farries*, 459 F.2d 1057 (3d Cir. 1972), the Third Circuit held that willful participation constituted assisting and was therefore covered by the statute. *See also United States v. Green*, 202 F.3d 869, 872 (6th Cir. 2000); *United States v. Bryant*, 563 F.2d 1227, 1229 (5th Cir. 1977).

The Fourth Circuit has not spoken on whether participating in a prison riot violates § 1792.

18 U.S.C. § 1920 FALSE STATEMENTS OR FRAUD TO OBTAIN FEDERAL EMPLOYEES' COMPENSATION [LAST UPDATED: 12/8/14]

Title 18, United States Code, Section 1920, makes it a crime to make a false statement to obtain federal employees' compensation. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant knowingly and willfully [falsified, concealed, or covered up a fact] [made a false, fictitious, or fraudulent statement or representation] [made or used a false statement or report knowing the false statement or report contained a false, fictitious, or fraudulent statement or entry];
- Second, that the [fact] [statement] [representation] [report] [entry] was material;
- Third, that the defendant did so in connection with the application for[993] or receipt of compensation or other benefit or payment under Title 5, United States Code, Section 8101 *et. seq.*; and
- Fourth, that the amount of the compensation, benefit, or payment exceeded $1,000.00.[994]

☞ **If a disputed issue is whether the compensation, benefit, or payment had a value exceeding $1,000, the court should consider giving a lesser included offense instruction.**

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[995]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at

[993] *See United States v. Deskins*, 503 F. App'x 197 (4th Cir. 2013) (citing *United States v. Harms*, 442 F.3d 367, 372 (5th Cir. 2006)).

[994] *United States v. Catone*, 769 F.3d 866 (4th Cir. 2014). "Section 1920 establishes two levels of sentencing depending on the amount of benefits that a defendant 'falsely obtained.'" *Id.* at 874. Therefore, "the amount of benefits falsely obtained is a substantive element for a felony conviction under § 1920 ...." *Id.*

[995] *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978). *See also United States v. Race*, 632 F.2d 1114 (4th Cir. 1980).

the point in time that the statement was made.[996]

The government must prove a causal link between the defendant's false statement and the application for or receipt of more than $1,000.00 in benefits [to establish a felony].[997]

NOTE

In *United States v. Mattox*, 689 F.2d 531 (5th Cir. 1982), the Fifth Circuit held that "either the insertion of N/A or the knowing failure to supply the information requested is sufficient to permit" the jury to find guilt. "Silence may be falsity when it misleads, particularly if there is a duty to speak." *Id*. at 532, 533.

In determining whether a series of takings are properly aggregated, the court must examine the intent of the actor at the first taking. If the actor formulated "a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004).

18 U.S.C. § 1951 INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE (HOBBS ACT)[LAST UPDATED: 8/15/2016]

Title 18, United States Code, Section 1951 makes it a crime to obstruct commerce by robbery or extortion. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant committed, or attempted or conspired[944] to commit, robbery or extortion; and
- Second, that the robbery or extortion obstructed, delayed, or affected commerce or the movement of any article or commodity in commerce.[945]

OR

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[996] *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998).

[997] *See Catone*, 769 F.3d at 875 (citing *United States v. Hurn*, 368 F.3d 1359, 1362 (11th Cir. 2004) (benefits received case)).

[944] To prove a conspiracy, the government must establish the following beyond a reasonable doubt: (1) an agreement between two or more persons to do something the law prohibits; (2) that the defendant knew of the agreement or conspiracy; and (3) that the defendant knowingly and intentionally joined the agreement or conspiracy. *See United States v. Yearwood*, 518 F.3d 220, 225-26 (4th Cir. 2008). Only 18 U.S.C. § 371 requires an overt act as an additional element.

[945] "A Hobbs Act violation requires proof of two elements: (1) the underlying robbery or extortion crime, and (2) an effect on interstate commerce." *United States v. Williams*, 342 F.3d 350, 353 (4th Cir. 2003) (citing *Stirone v. United States*, 361 U.S. 212, 218 (1960)). Put another way,

> the government must prove (1) that the defendant coerced the victim to part with property; (2) that the coercion occurred through the wrongful use of actual or threatened force, violence or fear or under color of official right, and (3) that the coercion occurred in such a way as to affect adversely interstate commerce.

United States v. Buffey, 899 F.2d 1402, 1403 (4th Cir. 1990).

- First, that the defendant committed or threatened physical violence to any person or property; and
- Second, that the physical violence was in furtherance of a plan or purpose to obstruct commerce by robbery or extortion.[946]

"Commerce" means commerce within the District of Columbia, or any territory or possession of the United States; all commerce between any point in a state, territory, possession, or the District of Columbia and any point outside thereof; all commerce between points within the same state through any place outside such State; and all other commerce over which the United States has jurisdiction. [§ 1951(b)(3)]

The government must prove an effect on commerce, but the effect need to only minimal. The government need not prove that the defendant intended to affect commerce or that the effect on commerce was certain. It is enough that such an effect was the natural, probable consequence of the defendant's actions.[947]

The effect on commerce need not be adverse. [948]

The effect on commerce may be shown by proof of probabilities without evidence that any particular commercial movements were affected.[949]

It is sufficient if the government proves that interstate commerce was affected by a result of the robbery or extortion.[950]

"Robbery" is defined as the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [§ 1951(b)(1)]

"Extortion" is defined as the obtaining of property from another person, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. [§ 1951(b)(2)]

Extortion does not require a direct benefit to the defendant. The essence of the

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[946] "A person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce by *extortion or robbery*." *United States v. Yankowski*, 184 F.3d 1071, 1073 (9th Cir. 1999). In *Yankowski*, the court rejected the government's argument that the defendant violated the Hobbs Act by "commission or threat of a violent act to person or property, with or without any connection to robbery or extortion." *Id*.

[947] *Williams*, 342 F.3d at 354 (citing *United States v. Spagnola*, 546 F.2d 1117, 1118-19 (4th Cir. 1976) (the government must prove "a reasonably probable effect on commerce")).

[948] *United States v. Bailey*, 990 F.2d 119, 126 (4th Cir. 1993).

[949] *United States v. Brantley*, 777 F.2d 159, 162 (4th Cir. 1985).

[950] *See United States v. Taylor*, 966 F.2d 830, 836 (4th Cir. 1992); *United States v. Bengali*, 11 F.3d 1207, 1212 (4th Cir. 1993) (money used to pay extortioners came from a bank account used by a business engaged in interstate commerce). In *Taylor v. United States*, the United States Supreme Court held that stealing from a marijuana dealer satisfies the commerce requirement because the market for illegal drugs is part of commerce. 136 S. Ct. 2074, 2081 (2016).

offense is loss to the victim.[951]

There are two types of extortion. The first requires proof that the defendant induced payment by use of threats or fear. To prove extortion by fear of economic harm, the government must establish that the threat of such harm generated a reasonable fear in the victim.[952] The government may establish the victim's state of mind by showing not only what a defendant said but also what a victim believed about the situation. The threat need not be express. A defendant who threatens a victim in esoteric, veiled, or elliptical language need not offer a simultaneous translation or define his terms, as long as he thinks or should think the victim understands what has been said.[953]

"The absence or presence of fear of economic loss must be considered from the perspective of the victim, not the extortionist; the proof need establish that the victim *reasonably* believed: first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment."[954] The defendant need not create the fear, so long as the defendant uses the fear to extort property. The fear must be of a loss. "Fear of losing a potential benefit does not suffice."[955]

"The use of actual or threatened fear is 'wrongful' if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property."[956]

The second type of extortion involves obtaining property from another under color of official right. To prove this type of extortion, "the Government must prove beyond a reasonable doubt that the defendant (1) was a public official; (2) 'obtained a thing of value not due him or his [office]'; (3) 'did so knowing that the thing of value was given in return for official action'; and (4) 'did or attempted in any way or degree to delay, obstruct, or affect interstate commerce, or an item moving in interstate commerce.'"[957]

The government need not show that the defendant demanded or induced the payment,[958] but the government must prove a *quid pro quo*. Stated another way, the government must prove that the public official obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts. The official and the payor need not state the *quid pro quo* in express terms, and the official need not

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[951] *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995).

[952] *United States v. Iozzi*, 420 F.2d 512, 515 (4th Cir. 1970). *See also United States v. Billups*, 692 F.2d 320, 330 (4th Cir. 1982).

[953] *Hairston*, 46 F.3d at 365.

[954] *United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987).

[955] *United States v. Tomblin*, 46 F.3d 1369, 1384 (5th Cir. 1995).

[956] *Id.* at 1384 n.35.

[957] *United States v. McDonnell*, 792 F.3d 478, 505 (4th Cir. 2015) (citing district court's instruction), *rev'd on other grounds in* 136 S. Ct. 2355 (2016).

[958] The under color of official right element does not require an affirmative act of inducement by the official, and the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts. *Evans v. United States*, 504 U.S. 255, 265-68 (1992). Bribery and extortion are not mutually exclusive. *Id.* at 268.

actually fulfill the *quid pro quo.*[959]

The Government must show that the public official undertook an official act. To prove an "official act" the Government must prove two things.[960] First, the Government must identify a question, matter, cause, suit, proceeding, or controversy that may at any time be pending or may by law be brought before a public official.[961] This requires a showing of a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.[962] It must also be something specific and focused that is pending or may by law be brought before a public official.[963]

Second, the Government must prove that the public official made a decision or took an action on that question, matter, cause, suit, proceeding, or controversy, or that he agreed to do so.[964] That decision or action may include using his official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. Setting up a meeting, talking to another official, or organizing an event or agreeing to do so—without more—does not count as a decision or action on that matter.[965]

The issue is not whether the defendant had the power to perform the official act, but whether it was reasonable for the victim to believe that the defendant had such power.[966]

"From another" refers to a person or entity other than the public official. Thus, a public official cannot extort himself.[967]

To be a coconspirator in an extortion scheme requires more than mere acquiescence in the extortion scheme.[968]

Extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution,[969] even though the donor has business pending before

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[959] *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995).

[960] *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016).

[961] *Id.*

[962] *Id.* at 2369, 2372.

[963] *Id.* at 2372.

[964] *Id.* at 2368.

[965] *Id.* at 2372, 2375.

[966] *See United States v. Price*, 507 F.2d 1349, 1350 (4th Cir. 1974).

[967] *United States v. Ocasio*, 750 F.3d 399, 411 (4th Cir. 2014). However, as *Ocasio* makes clear, "a person ... who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme, can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." *Id.* at 410. Thus, "[n]othing in the Hobbs Act forecloses the possibility that the 'another' can also be a coconspirator of the public official." *Id.* at 411. The United States Supreme Court affirmed the ruling that "another" can be a coconspirator of the public official in *Ocasio v. United States*, 136 S. Ct. 1423 (2016).

[968] *Id.* at 411.

[969] The district court charge, which the Supreme Court said was "not a model of clarity" is quoted at length in *McCormick v. United States*, 500 U.S. 257, 261 n.4 (1991). The Fourth Circuit had affirmed the conviction, but the Supreme Court reversed, holding that a *quid pro quo* is necessary for

the official.[970] Moreover, "attempting to compel a person to recommend that his employer approve an investment" does not constitute "the obtaining of property from another" under § 1951(b)(2).[971]

Property includes both tangible and intangible property.[972]

NOTE

The Hobbs Act does not reach "the use of violence to achieve legitimate union objectives, such as higher wages in return for genuine services, which the employer seeks." *United States v. Emmons*, 410 U.S. 396, 400 (1973).

The question of whether a defendant's conduct satisfies the jurisdictional predicate of the Hobbs Act is one of law. *United States v. Bengali*, 11 F.3d 1207, 1211 (4th Cir. 1993).

"Upon a charge of a conspiracy or an attempt to violate the Hobbs Act, it is simply irrelevant that, because of facts unknown to the conspirators or to the actor, an actual effect upon commerce was impossible." *United States v. Brantley*, 777 F.2d 159, 164 (4th Cir. 1985).

"Commerce is sufficiently affected under the Hobbs Act where a robbery depletes the assets of a business that is engaged in interstate commerce." *United States v. Williams*, 342 F.3d 350, 354-55 (4th Cir. 2003).

Under the "depletion of assets theory," the government may satisfy "the jurisdictional predicate indirectly if it can show a reasonable probability that the defendant's actions would have the effect of depleting the assets of an entity engaged in interstate commerce." *United States v. Buffey*, 899 F.2d 1402, 1404 (4th Cir. 1990). "[T]he jurisdictional predicate may be satisfied though the impact upon commerce is small, and it may be shown by proof of probabilities without evidence that any particular commercial movements were affected." *Id.* (quotation and citation omitted). Thus, this element is satisfied even where the effect on commerce is indirect, minimal, and less than certain. Nevertheless, the government must show that an effect on interstate commerce was reasonably probable. *Id.* In *Buffey,* the court reversed, because extorting money to be devoted to personal use from an individual does not affect interstate commerce.

Drug dealing is an inherently economic enterprise that affects interstate commerce. *Taylor*, 136 S. Ct. at 2080-81; *Williams*, 342 F.3d at 355.

Concerning "color of official right" extortion and campaign contributions, see *Evans v. United States*, 504 U.S. 255 (1992); *McCormick v. United States*, 500 U.S. 257, 273 (1991); *United States v. Hairston*, 46 F.3d 361 (4th Cir. 1995); *United States v. Taylor*, 993 F.2d 382 (4th Cir. 1993); and *United States v. Torcasio*, 959 F.2d 503 (4th Cir. 1991).

An elected official may commit extortion in the course of financing an election campaign. Political contributions induced by the use of force, violence, or fear would qualify, or if taken under color of official right, "but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform

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conviction under the Hobbs Act when an official receives a campaign contribution. *Id*. at 274.

[970] *Evans v. United States*, 504 U.S. 255, 258 (1992).

[971] *United States v. Sekhar*, 570 U.S. __, __, 133 S. Ct. 2720, 2725 (2013).

[972] *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978).

an official act." *McCormick v. United States*, 500 U.S. 257, 273 (1991). Thus, a *quid pro quo* is necessary for conviction under the Hobbs Act when an official receives a campaign contribution. The transaction need not be initiated by the public official. *Evans*, 504 U.S. at 266. "We also reject petitioner's contention that an affirmative step is an element of the offense of extortion 'under color of official right' and need be included in the instruction." *Id*. at 268. Services for which the fee is paid (1) must be official, and (2) the official must not be entitled to the fee that he collected. *Id.* at 270.

Regarding venue, in *United States v. Billups*, 692 F.2d 320, 333 (4th Cir. 1982), the court cited the Seventh Circuit's holding in *United States v. Floyd*, 228 F.2d 913, 919 (7th Cir. 1956), for the proposition that venue lies either where the coercion is perpetrated or where the commerce is affected. That holding may be in doubt if robbery or extortion is deemed the essential conduct element. *See United States v. Bowens*, 224 F.3d 302, 309 (4th Cir. 2000). However, "[w]hen Congress defines the essential conduct elements in terms of their particular effects [such as affecting interstate commerce], venue will be proper where those proscribed effects are felt." *Id.* at 313.

See United States v. Spitler, 800 F.2d 1267, 1275-78 (4th Cir. 1986) (victim can be an aider and abettor or co-conspirator if the victim's conduct exhibits "more than mere acquiescence.").

The unit of prosecution in an extortion case is the wrongful demand, rather than the payment. *Hairston*, 46 F.3d at 367, 372. In *Hairston*, the Fourth Circuit vacated convictions on counts which represented multiple payments, and on the count charging the payment when the demand was charged in a separate count.

18 U.S.C. § 1952 INTERSTATE TRAVEL IN AID OF RACKETEERING

Title 18, United States Code, Section 1952 makes it a crime to travel in interstate commerce with intent to commit or promote certain unlawful activities. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant traveled in interstate or foreign commerce, or used the mail or any facility in interstate or foreign commerce;
- Second, that the defendant did so with intent to
  1. distribute the proceeds of an unlawful activity [as defined in § 1952(b)(i)], or
  2. commit any crime of violence to further any unlawful activity, or
  3. promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of an unlawful activity; and
- Third, after such travel or use of a facility in interstate commerce, the defendant
  1. distributed, or attempted to distribute, the proceeds of an unlawful activity;
  2. promoted, managed, established, carried on, or attempted to promote, manage, establish, or carry on, an unlawful activity; or
  3. committed, or attempted to commit, a crime of violence to further the

unlawful activity.[973]

"Unlawful activity" means [here, the jury should be charged on the elements of the appropriate unlawful activity].[974]

"Interstate commerce" includes commerce between one state, territory, possession, of the District of Columbia and another state, territory, possession, of the District of Columbia. [18 U.S.C. § 10]

"Crime of violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. [18 U.S.C. § 16]

The interstate travel or use of an interstate facility can be minimal or merely incidental, as long as the government proves beyond a reasonable doubt that the interstate travel or use of an interstate facility was connected to the unlawful activity, and that it facilitated the promotion, management, establishment, or carrying on of the unlawful activity, but the government does not have to prove that the interstate travel or use of an interstate facility was essential to the unlawful activity.[975]

The government does not have to prove that the defendant knew or intended that an interstate facility would be used.[976]

The government does not have to prove that the unlawful objective was accomplished or that another law [concerning the crime of violence or unlawful activity] was actually violated.[977]

NOTE

United States v. Gallo, 782 F.2d 1191, 1194 (4th Cir. 1986); *United States v. Hayes*, 775 F.2d 1279 (4th Cir. 1985); *United States v. Schocket*, 753 F.2d 336, 340-41 (4th Cir.

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[973] *United States v. Monu*, 782 F.2d 1209, 1211 (4th Cir. 1986).

[974] Section 1952(b)(i)(1) includes in "unlawful activity" any business enterprise involving gambling, liquor, drugs, or prostitution. "Business enterprise" means a continuous course of conduct rather than a sporadic, casual, individual or isolated violation. *United States v. Gallo*, 782 F.2d 1191, 1194-95 (4th Cir. 1986). "If the existence of a business enterprise is proven, it may be that only one instance of interstate travel is necessary to convict a particular defendant." *United States v. Corbin*, 662 F.2d 1066, 1073 n.16 (4th Cir. 1981) (defendant's § 1952 conviction reversed, because the evidence was insufficient to establish the existence of a business enterprise — the defendant was arrested at an airport with 4,700 quaalude tablets).

[975] *United States v. Lozano*, 839 F.2d 1020, 1022 (4th Cir. 1988); *United States v. LeFaivre*, 507 F.2d 1288, 1290 n.2 (4th Cir. 1974). "[W]e will not read into the Act any requirement that travel in interstate commerce or use of facilities in interstate commerce be a 'substantial' or an 'integral' part of the activity." *Id*. at 1296-97.

[976] In *LeFaivre*, 507 F.2d 1288, the jury was instructed that a guilty verdict required neither a finding that the defendants intended to use facilities in interstate commerce, nor a finding that they knew they were using such facilities. The Fourth Circuit said "[t]here is sufficient *mens rea* if there is 'intent to ... promote [etc.].' The statute speaks only to the purpose for which one uses interstate facilities, not the knowledge with which one does so." *Id*. at 1297 (quoting statute). The use of interstate facilities is nothing more than the jurisdictional peg.

[977] *See United States v. Pomponio*, 511 F.2d 953, 957 (4th Cir. 1975).

1985).

In *Rewis v. United States*, 401 U.S. 808 (1971), the Supreme Court held that "Congress did not intend that the Travel Act should apply to criminal activity solely because the activity is at times patronized by persons from another State." 401 U.S. at 812. The Act is not violated when the operator of an illegal establishment can *reasonably foresee* that customers would cross state lines for the purpose of patronizing the illegal operation. In *Rewis*, the defendants were not prosecuted on the theory that they actively encouraged interstate patronage.

Nevertheless, the Fourth Circuit, in *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), affirmed the convictions of the operators of a large gambling operation mostly within the city of Baltimore, based on 14 out-of-state checks and other negotiable instruments offered in settlement of bets. In affirming, the court stated that the use of an interstate facility need not be more than minimal or merely incidental, and that knowledge or intent regarding the use of an interstate facility is not required. *Id*. at 1290 n.2.

One definition of "unlawful activity" is extortion in violation of the laws of the state in which it was committed. In *United States v. Nardello*, 393 U.S. 286, 295 (1969), the Supreme Court held that "the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular state involved prohibits the extortionate activity charged." At common law, a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion, but the Supreme Court declined to give the term extortion an unnaturally narrow reading, and therefore included what Pennsylvania classified as blackmail rather than extortion.

It is not the violation of state law which constitutes an offense under this section, but rather the use of interstate means for that purpose. *United States v. Hines*, 696 F.2d 722, 725 (10th Cir. 1982).

In *United States v. Teplin*, 775 F.2d 1261 (4th Cir. 1985), the Fourth Circuit found that

> While the Travel Act requires a determination that the underlying state law has been or could have been violated, accomplishment of the state substantive offense is not a prerequisite to a § 1952 conviction. The unlawful activity specified in the Travel Act may be an offense under state or federal law and reference to such law is necessary only to identify the type of unlawful activity in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in § 1952.

775 F.2d at 1265 n.4.

"The Travel Act is aimed primarily at organized crime and particularly at persons who reside in one state while operating or managing illegal activities located in another state." *United States v. Loucas*, 629 F.2d 989, 991 (4th Cir. 1980). "The use of interstate commerce to violate or attempt to violate a state statute constitutes a federal crime, and the underlying state law merely serves a definitional purpose in characterizing the proscribed conduct." *Id.* Generally, the violation of a state law offense is an element of violation of the Travel Act and the [factfinder] must make a determination whether the underlying state law has been or could have been violated. "Thus, accomplishment of the State substantive offense is not a prerequisite to a § 1952 conviction." *Id.* (quotation and citation omitted).

A defendant may be convicted of causing interstate travel by another for the purpose of carrying on an unlawful activity. But "mere operation of an illegal activity which attracts out-of-state customers is insufficient to support a conviction for causing a violation of the Travel Act." *United States v. West*, 877 F.2d 281, 289 n.3 (4th Cir. 1989).

In *United States v. Salsbury*, 430 F.2d 1045 (4th Cir. 1979), the court approved an instruction that the defendant could be convicted if "he knew, or could reasonably have been expected to know, that some of those checks or instruments were drawn on banks or institutions not located in the State of Maryland." 430 F.2d at 1048. The defendant was not a peripheral figure but at the center of a far-flung illegal gambling operation.

Venue lies in any district in which the travel occurred, including the district in which it originated, even if intermediate destinations were involved. *United States v. Burns*, 990 F.2d 1426, 1437 (4th Cir. 1993).

18 U.S.C. § 1955 ILLEGAL GAMBLING BUSINESS [LAST UPDATED 5/5/14]

Title 18, United States Code, Section 1955 makes it a crime to conduct an illegal gambling business. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that there was an illegal gambling business, as described in the indictment;
- Second, that the defendant conducted, financed, managed, supervised, directed, or owned all or part of the illegal gambling business; and
- Third, that the defendant did so knowingly and intentionally.

"Illegal gambling business" means a gambling business which

(1) is a violation of the law of the state or political subdivision in which it is conducted;

(2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. [§ 1955(b)(1)]

"Gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. [§ 1055(b)(2)]

The government must prove that the gambling operation involved at least five persons who conducted, financed, managed, supervised, directed, or owned the gambling operation at all times during some thirty day period,[978] or that the gambling operation

[978] *United States v. Gresko*, 632 F.2d 1128, 1132-33 (4th Cir. 1980). In other words, the five-person requirement must be satisfied in conjunction with the 30-day or gross revenue requirement. In *Gresko*, the Fourth Circuit reversed a conviction where the district court instructed that the gambling business involved five people *at one time or another* and operated for more than thirty days. "Although these instructions would seem perfectly consistent with the plain text of the section, which includes no evident conjunctive requirement, we are bound by the earlier panel's conclusion to the contrary." *United States v. Nicolaou*, 180 F.3d 565, 569 (4th Cir. 1999). However, the jury need not

involved at least five persons on any single day on which it had gross revenues of $2,000.[979]

The government does not have to prove that the same five people were involved for the entire thirty day period.[980]

The government is not required to prove that the defendant knew that his or her conduct constituted illegal gambling under state law.[981]

A minimum of five persons must be involved in the gambling business, but the government does not have to prove that there was any agreement among the five. These persons may conduct their activities at great distances from each other and still be part of an overall organization, that organization being a business directed toward some business or end. You, the jury, should consider whether the defendant had a common purpose in his dealings with the other persons.[982]

To conduct means any participation in the operation of a gambling business, regardless of how minor the role. Customers and individual bettors are excluded.[983]

NOTE

In *United States v. George*, 568 F.2d 1064 (4th Cir. 1978), the court found that:

> A bookmaker is one who accepts wagers, most commonly on sporting events.
>
> A bettor, in addition to the total bet, pays the bookmaker ten percent, which is the bookmaker's commission, the "vigorish" or "vig" or sometimes, "juice." Ideally, a bookmaker has an equal amount wagered on both sides of each event with the result that he has a ten percent profit, less expenses, and ideally, loses nothing. In truth, betting is rarely equal on both sides and bookmakers may lose money, even to the point of their businesses being destroyed.
>
> To protect against losses, a bookmaker normally engages in lay off betting whereby he passes on to another bookmaker the amount of bets by which his own book is unbalanced; thus, to the extent he loses to his own customers, he wins back from the other bookmaker, or vice versa. The lay off bet is therefore, in effect, bookmaker's insurance or reinsurance. Bookmakers, however, can place personal wagers with one another which are not lay off bets.
>
> The line constitutes the odds or handicaps or point spreads on the wagered contests. This is a list of the teams and events with a certain number of points attributed to the nonfavored team. To win a bet on the favored team, therefore,

be unanimous as to which five persons were involved at a particular time. *Id*. at 571.

[979] *Nicolaou*, 180 F.3d at 568.

[980] *Gresko*, 632 F.2d 1128.

[981] *United States v. Lawson*, 677 F.3d 629, 652-53 (4th Cir. 2012). "Section 1955 is a general intent crime." *Id*. at 653. Thus, a good faith instruction is not available.

[982] In other words, the government does not have to prove a conspiracy. Instruction approved in *United States v. Bobo*, 477 F.2d 974, 987 (4th Cir. 1973).

[983] *United States v. George*, 568 F.2d 1064, 1069 n.6, 1071 (4th Cir. 1978); *United States v. Box*, 530 F.2d 1258, 1267 (5th Cir. 1976) (quoting *United States v. Jones*, 491 F.2d 1382, 1384 (9th Cir. 1974)).

> that team must win by a score exceeding the point spread given to the nonfavored team. The line is subject to change as a given event approaches and a bookmaker may alter the line on a particular event in order to try to even out the money wagered on each side.
>
> Bookmakers may cooperate with one another by keeping their lines consistent in order to avoid middling, whereby a bettor, because there are two different point spreads on a single event, may bet and win on both competing teams.

568 F.2d at 1067.

In *United States v. Jenkins*, 649 F.2d 273 (4th Cir. 1981), the Fourth Circuit reiterated that

> a lay-off man may be included as one of the five people required by § 1955.... In our view a lay-off man is not a bettor, but a bet receiver who takes the place of the bookmaker insofar as that particular bet is concerned. For all practical purposes, he becomes a bookmaker during the life of that bet. Furthermore, by accepting overbets, the lay-off man becomes not only a bookmaker but the bookie's insurer. As an insurer, he is infinitely more important to a gambling operation than runners, watchmen, waitresses, or any of the other minor gambling functionaries ensnared by § 1955.

649 F.2d at 276. There is no requirement that the activity between the bookmaker and the lay-off man be regular.

"[W]hen a bookmaker lays off his own bets with another bookmaker, he comes within the scope of § 1955." *George*, 568 F.2d at 1071.

In *United States v. Box*, 530 F.2d 1258, 1266 (5th Cir. 1976), the Fifth Circuit found that

> one who accepts lay off bets can be convicted if any of the following factors is also present: evidence that the individual provided a regular market for a high volume of such bets, or held himself out to be available for such bets whenever bookmakers needed to make them; evidence that the individual performed any other substantial service for the bookmaker's operation, as, for example, in the supply of line information; or evidence that the individual was conducting his own illegal gambling operation and was regularly exchanging lay off bets with the other bookmakers.

530 F.2d at 1266.

Occasional acquisition of line information by one bookmaker from another, standing alone, does not constitute a violation of § 1955. *George*, 568 F.2d at 1072.

18 U.S.C. § 1956 LAUNDERING OF MONETARY INSTRUMENTS [LAST UPDATED: 7/1/14]

§ 1956(a)(1)(A)(i) Promotion

Title 18, United States Code, Section 1956(a)(1)(A)(i), makes it a crime to conduct financial transactions with the intent to promote the carrying on of an unlawful activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant conducted or attempted to conduct a financial transaction having at least a minimal effect on interstate commerce or involving the use of a financial institution which is engaged in, or the activities of which have at least a minimal effect on, interstate or foreign commerce;[984]
- Second, that the property that was the subject of the transaction involved the proceeds of specified unlawful activity;
- Third, that the defendant knew that the property involved represented the proceeds of some form of unlawful activity; and
- Fourth, that the defendant engaged in the financial transaction with the intent to promote the carrying on of specified unlawful activity [or with intent to engage in conduct constituting certain tax offenses, violations of 26 U.S.C. §§ 7201 or 7206, and the court should instruct on the elements of the alleged tax offenses, [§ 1956(a)(1)(A)(ii)].[985]

☞ **Re: § 1956(a)(1)(A)(i)**

The government must prove that the illegal proceeds were spent in furtherance of the specified unlawful activity. However, the government is not required to trace the proceeds to a particular illegal transaction.[986]

§ 1956(a)(1)(B)(i) Concealment

Title 18, United States Code, Section 1956(a)(1)(B)(i), makes it a crime to conduct financial transactions with the intent to conceal the proceeds of an unlawful activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant conducted or attempted to conduct a financial transaction having at least a minimal effect on interstate commerce or involving the use of a financial institution which is engaged in, or the activities of which have at least a minimal effect on, interstate or foreign commerce;[987]
- Second, that the property that was the subject of the transaction involved the proceeds of specified unlawful activity;
- Third, that the defendant knew that the property involved represented the proceeds of some form of unlawful activity; and
- Fourth, that the defendant knew that the transaction was designed in whole or in part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity or to avoid a transaction reporting requirement [the court should instruct on the elements of the reporting

[984] *United States v. Peay*, 972 F.2d 71, 75 (4th Cir. 1992) ("[B]ecause transactions involving financial institutions insured by the FDIC affect interstate commerce, we find no error in the district court's instructions to the jury that it could infer an effect on interstate commerce by the banks' status as FDIC-insured institutions.").

[985] *United States v. Wilkinson*, 137 F.3d 214, 220 (4th Cir. 1998) (*en banc*).

[986] *United States v. Stewart*, 256 F.3d 231, 249 (4th Cir. 2001).

[987] *See Peay*, 972 F.2d at 75 ("[B]ecause transactions involving financial institutions insured by the FDIC affect interstate commerce, we find no error in the district court's instructions to the jury that it could infer an effect on interstate commerce by the banks' status as FDIC-insured institutions.").

requirement [§ 1956(a)(1)(B)(ii)].[988]

The Government does not have to prove that the defendant had the purpose of concealing or disguising the proceeds.[989]

☞ **Re: concealment:**

The government must prove a specific intent to structure a transaction so as to conceal the true nature of the proceeds.[990]

§ 1956(a)(2)(A) International Money Laundering, Promotion

Title 18, United States Code, Section 1956(a)(2)(A), makes it a crime to transmit funds outside the United States to promote a specified unlawful activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported, transmitted, or transferred, or attempted to transport, transmit, or transfer, a monetary instrument or funds;
- Second, from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States; and
- Third, that the defendant did so with the intent to promote the carrying on of specified unlawful activity.[991]

§ 1956(a)(2)(B) International Money Laundering, Concealment

Title 18, United States Code, Section 1956(a)(2)(B)(i), makes it a crime to transmit funds outside the United States to conceal the proceeds of an unlawful activity or to avoid a reporting requirement. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported, transmitted, or transferred, or attempted to transport, transmit, or transfer, a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States;
- Second, that the monetary instrument or funds involved represented the proceeds of some form of specified unlawful activity;
- Third, that the defendant knew that the monetary instrument or funds involved represented the proceeds of some form of specified unlawful activity;
- Fourth, that the defendant's transportation of the monetary instrument or funds

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[988] *Wilkinson*, 137 F.3d 214 at 221.

[989] *United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992). The court explained that the distinction is critical in a case in which the defendant is a person other than the individual who is the source of the tainted money. The relevant question is not the defendant's purpose, but rather the defendant's knowledge of the actor's purpose.

[990] *United States v. Gilliam*, 975 F.2d 1050, 1056 (4th Cir. 1992). *See also United States v. Villarini*, 238 F.3d 530, 533 (4th Cir. 2001) ("To establish the fourth element, the Government must prove a specific intent to conceal."); *United States v. Hairston*, 46 F.3d 361, 374 (4th Cir. 1995).

[991] *See United States v. Caplinger*, 339 F.3d 226, 232 (4th Cir. 2003). *See also United States v. O'Connor*, 158 F. Supp. 2d 697, 725-26 (E.D. Va. 2001).

was designed in whole or in part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds or to avoid a transaction reporting requirement [the court should instruct on the elements of the reporting requirement [§ 1956(a)(1) (B)(ii)]; and

- Fifth, that the defendant knew that the transportation, transmission, or transfer was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds.[992]

§ 1956(a)(3)

- First, the defendant conducted or attempted to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity; and
- Second, the defendant did so with intent to:
  - (1) promote the carrying on of specified unlawful activity;
  - (2) conceal or disguise the nature, the location, the source, the ownership, or the control of property believed to be the proceeds of the unlawful activity; or
  - (3) avoid a transaction reporting requirement. [The court should instruct on the elements of the reporting requirement].

§ 1956(h) Conspiracy [993]

Title 18, United States Code, Section 1956(h), makes it a crime to conspire to commit [the offenses described above, so if not charged as separate substantive offenses, the court should instruct on the elements of the appropriate above offenses]. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that a conspiracy, agreement, or understanding to commit money laundering was formed or entered into by two or more persons at or about the time alleged;
- Second, that at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew that the property involved represented the proceeds of some form of specified unlawful activity, and
- Third, that the defendant knowingly and voluntarily joined the conspiracy, agreement, or understanding.[994]

☞ **In addition, the court should charge on the elements of the appropriate section(s) of**

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[992] *See United States v. Cuellar*, 553 U.S.550 (2008). In *Cuellar*, the defendant concealed $81,000 he was attempting to transport to Mexico, but the government failed to prove *why* he was transporting it, i.e., that it was being transported to conceal or disguise the nature, location, source, ownership, or control of the $81,000.

[993] Refer to 18 U.S.C. § 371 for additional instructions, except regarding overt act.

[994] *See United States v. Alerre*, 430 F.3d 681, 693-94 (4th Cir. 2005). *See also United States v. Singh*, 518 F.3d 236, 248 (4th Cir. 2008). In *United States v. Pace*, 313 F. App'x 603, 607 n.3 (4th Cir. 2009), the government argued that § 1956(h) does not require specific intent but only knowledge of the conspiracy. The Fourth Circuit did not reach this issue.

1956.

☞ **§ 1956(h) does not require an overt act.**[995]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constituted a felony under State, Federal, or foreign law. [§ 1956(c)(1)]

Thus, the government need not prove that the property involved in the financial transaction represented the proceeds of [here, specify the criminal activity], it need only prove that the defendant knew it represented the proceeds of some form, though not necessarily which form, of felony under state or federal law.[996]

"Conducts" includes initiating, concluding, or participating in initiating or concluding a transaction. [§ 1956(c)(2)]

"Transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected. [§ 1956(c)(3)]

"Financial transaction" means a transaction which in any way or degree affects interstate or foreign commerce involving the movement of funds by wire or other means or involving one or more monetary instruments or involving the transfer of title to any real property, vehicle, vessel, or aircraft, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. [§ 1956(c)(4)]

"Monetary instruments" means (1) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (2) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery. [§ 1956(c)(5)]

"Financial institution" includes any financial institution [as defined in 31 U.S.C. § 5312(a)(2)] and any foreign bank [as defined in 12 U.S.C. § 3101]. [§ 1956(c)(6)]

"Specified unlawful activity" [is defined in § 1956(c)(7), and the elements of the specified unlawful activity should be identified for the jury].

"Proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such

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[995] *Whitfield v. United States*, 543 U.S. 209 (2005); *United States v. Bolden*, 325 F.3d 471, 489 (4th Cir. 2003); *Alerre*, 430 F.3d 681.

[996] *United States v. Evans*, 272 F.3d 1069, 1086 (8th Cir. 2001).

activity. [§ 1956(c)(9)].[997]

The property involved in the transaction must represent the proceeds of an already completed offense, or a completed phase of an ongoing offense.[998] That is, the government must prove that the specified unlawful activity generated proceeds prior to the alleged money laundering, and whether the alleged money laundering actually involved those criminally-derived proceeds.[999]

The government need not prove that all of the money involved in the transaction constituted the proceeds of the criminal activity; it is sufficient if the government proves that at least part of the money represented such proceeds.[1000]

The government must prove that the defendant had actual subjective knowledge that the money used in a money laundering transaction was derived from an unlawful source. The defendant may not be convicted on just what he should have known. However, both direct and circumstantial evidence can be used to establish knowledge and are given the same weight.[1001]

NOTE

Section 1956 contains no appearance of legitimate wealth requirement. *United States v. Cuellar*, 553 U.S. 550 (2008).

Section 1956(a)(1)(A) and (B) set forth a single offense with two different types of *mens rea*. Thus, a financial transaction conducted "to promote" and "to conceal" is only one offense, not two, and charging the financial transaction in two counts is multiplicitous. *United States v. Stewart*, 256 F.3d 231, 246 (4th Cir. 2001).

The promotion element was satisfied when a defendant paid his subordinate employee for being involved in an unlawful scheme, because such payments compensated the employee for his illegal activities and encouraged his continued participation). *United*

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[997] On May 20, 2009, Congress amended the statute, adding this definition of "proceeds." In *United States v. Santos*, 553 U.S. 507 (2008), the Supreme Court held in a plurality opinion that the term "proceeds" referred to "profits," not "gross receipts." 553 U.S. at 514. Prior to *Santos*, the Fourth Circuit held that "proceeds" referred to gross receipts of a criminal enterprise. *United States v. Singh*, 518 F.3d 236, 247 (4th Cir. 2008); *United States v. Caplinger*, 339 F.3d 226, 233 (4th Cir. 2003); *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001). In *United States v. Johnson*, 405 F. App'x 746 (4th Cir. 2010), the court noted:

> As the plurality opinion in *Santos* does not appear to extend beyond illegal gambling operations, we are bound by this Court's precedent holding that "proceeds" means gross receipts. *** [H]ere, the financial transactions that supported the money laundering convictions involved criminally derived proceeds of a completed offense, or at a minimum, a completed stage of an offense....

405 F. App'x at 750, 751.

[998] *Singh*, 518 F.3d at 247.

[999] *Bolden*, 325 F.3d at 488.

[1000] *United States v. Wilkinson*, 137 F.3d 214, 222 (4th Cir. 1998) (*en banc*) ("[W]hen the funds used in a particular transaction originated from a single source of commingled, legally-and illegally-acquired funds, it may be presumed that the transacted funds, at least up to the full amount originally derived from crime, were the proceeds of the criminal activity.").

[1001] *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994) (citing *United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1993)), *abrogated by United States v. Cabrales*, 524 U.S. 1 (1998).

States v. Bolden, 325 F.3d 471, 489 (4th Cir. 2003). In *Bolden*, the defendant was charged with both promotion and concealment money laundering. "When an indictment alleges both promotion and concealment money laundering, a conviction can be premised on proof of *either*." *Id*. at 487 n.20.

The laundering of funds cannot occur in the same transaction through which those funds first become tainted by crime. *United States v. Butler*, 211 F.3d 826, 830 (4th Cir. 2000).

"By its terms, the promotion money laundering provision ... requires the prosecution to (1) trace the money at issue to an underlying unlawful activity, and (2) prove that the money was transferred in order to promote a specified unlawful activity." *United States v. Alerre*, 430 F.3d 681, 693 (4th Cir. 2005).

The expenditure of proceeds from the criminal conduct on items used solely to maintain personal lifestyle does not promote the specified criminal activity. These same expenditures may constitute violations of (B)(i), if done with intent to conceal. *United States v. Jackson*, 935 F.2d 832, 841-42 (7th Cir. 1991).

The receipt of the proceeds of the criminal activity cannot also serve as the predicate of a charge for promotion. Money laundering is a separate crime distinct from the underlying offense that generated the money to be laundered. Thus, § 1956 should not be interpreted to make any drug transaction a money laundering crime. *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994), *abrogated on other grounds by United States v. Cabrales*, 524 U.S. 1 (1998).

Typically, a scheme to deposit a large amount of cash in relatively small increments would be prosecuted pursuant to § 1956(a)(1)(B)(ii) as designed to avoid a transaction reporting requirement. In *United States v. Villarini*, 238 F.3d 530, 533 (4th Cir. 2001), the government's theory was that the defendant had embezzled $83,000. Subsequently, she purchased a cashiers check for $2,950, and made deposits of $2,200, $1,000, and $2,000 over a two-month period. This conduct gave rise to a reasonable inference that the transactions were designed to avoid suspicion or to give the appearance that she had a legitimate cash income stream.

Venue for money laundering is the district where the money was laundered, not the district where the funds were unlawfully generated. *United States v. Cabrales*, 524 U.S. 1 (1998). However, money laundering might be a continuing offense, triable in the district where the offense began, continued, or was completed, if the launderer acquired the funds in one district and transported them into another. *Id*. at 8. In *United States v. Stewart*, 256 F.3d 231 (4th Cir. 2001), the court vacated money laundering convictions for improper venue. The court relied on the definition of "transaction" as a deposit *or* withdrawal, so that a deposit and withdrawal are two separate transactions for purposes of this statute. Also, a Western Union transfer, which necessitates two or more separate transactions, is not a single financial transaction for purposes of determining venue.

Because of the knowledge burden imposed by *Heaps*, a willful blindness charge might be appropriate. *See United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992).

Details about the nature of the unlawful activity underlying the character of the proceeds need not be alleged. *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995).

"[T]he mere receipt of funds can constitute a transaction under this statute." *United States v. Blair*, 661 F.3d 755, 764 (4th Cir. 2011) (citing *United States v. Gotti*, 459 F.3d

296, 335-36 (2d Cir. 2006)).

Withdrawal of funds from an account qualifies as a "transaction." "The deposit of money in a bank and the subsequent use of that money ... are two transactions within the scope of the statute." *Id*. at 756 (quoting *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990)).

In *United States v. Santos*, 553 U.S. 507 (2008), the Supreme Court held in a plurality decision that the money laundering term "proceeds" (which was not then defined in the federal money laundering statute) means "net profits" when the proceeds are derived from an illegal gambling operation.

Circuit Courts have been divided on the application of *Santos*. The Fourth Circuit has taken the position that "when the illegal activity includes money transactions to pay for the costs of the illegal activity, a merger problem can occur if the government uses those transactions also to prosecute the defendant for money laundering." *United States v. Halstead*, 634 F.3d 270, 279 (4th Cir. 2011).

In *United States v. Cloud*, 680 F.3d 270, 279 (4th Cir. 2011), the Fourth Circuit reversed the defendant's money laundering convictions because they were based on paying the "essential expenses" of the underlying fraud, resulting in a merger problem.

In 2009, Congress amended the statute to specifically define "proceeds" as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9). So defined, the Fourth Circuit has noted that this merger issue "is not likely to arise in many more cases." *Cloud*, 680 F.3d at 409 n.6.

18 U.S.C. § 1957 ENGAGING IN MONETARY TRANSACTIONS [LAST UPDATED: 7/1/14]

Title 18, United States Code, Section 1957 makes it a crime to engage in money laundering. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant engaged in a monetary transaction which had some effect on interstate or foreign commerce;
- Second, that the monetary transaction involved criminally derived property with a value greater than $10,000 [here, the jury should be charged on the elements of the crime or specified unlawful activity from which the property was derived];[1002] and
- Third, that the defendant did so knowingly.

"Knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal or foreign law, regardless of whether or not such activity is specified in [the definition of "specified unlawful activity"]. [§ 1956(c)(1)]

[1002] *See United States v. Cherry*, 330 F.3d 658, 668 (4th Cir. 2003).

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

The government must show some effect on interstate or foreign commerce.[1003]

"Specified unlawful activity" [is defined in § 1956(c)(7), and the elements of the specified unlawful activity should be identified for the jury].[1004]

"Monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution, including any transaction that would be a financial transaction which in any way or degree affects interstate or foreign commerce involving the movement of funds by wire or other means or involving one or more monetary instruments, or involving the transfer of title to any real property, vehicle, vessel, or aircraft, or a transaction involving the use of a financial institution which is engaged in, or the activities affect, interstate or foreign commerce in any way or degree. [§ 1957(f)(1) and § 1956(c)(4)][1005]

"Financial institution" includes any financial institution [as defined in 31 U.S.C. § 5312(a)(2)], any foreign bank [as defined in 12 U.S.C. § 3101]. [§ 1956(c)(6)]

"Monetary instruments" means (1) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (2) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery. [§ 1956(c)(5)]

"Criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense. [§ 1957(f)(2)]

"Proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity. [§ 1956(c)(9)].[1006]

[1003] *United States v. Aramony*, 88 F.3d 1369, 1386 (4th Cir. 1996) ("a *de minimis* effect on interstate commerce is an essential element of a § 1957 violation").

[1004] *Cherry*, 330 F.3d at 668.

[1005] "Monetary transaction"does not include payments to the defendant's criminal attorney. 18 U.S.C. § 1957(f)(1).

[1006] On May 20, 2009, Congress amended the statute, adding this definition of "proceeds." In *United States v. Santos*, 553 U.S. 507 (2008), the Supreme Court held in a plurality opinion, that the term "proceeds" referred to "profits," not "gross receipts." 553 U.S. at 514. Prior to *Santos*, the Fourth Circuit held that the word "proceeds" referred to gross receipts of a criminal enterprise. *See United States v. Singh*, 518 F.3d 236, 247 (4th Cir. 2008); *United States v. Caplinger*, 339 F.3d 226, 233 (4th Cir. 2003); *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001). In *United States v. Johnson*, 405 F. App'x 746 (4th Cir. 2010), the Court stated the following:

> As the plurality opinion in *Santos* does not appear to extend beyond illegal gambling operations, we are bound by this Court's precedent holding that "proceeds" means gross receipts. *** [H]ere, the financial transactions that supported the money laundering convictions involved criminally derived proceeds of a completed offense, or at a minimum, a completed stage of an offense....

(continued...)

There is no requirement that the defendant must have committed the criminal offense from which the property was derived.[1007]

The government need not prove that all of the money involved in the transaction constituted the proceeds of the criminal activity; it is sufficient if the government proves that at least part of the money represented such proceeds. Nor does the government have to trace the origin of the funds from the sale of assets that were purchased with commingled illegally-acquired and legally-acquired funds.[1008]

NOTE

United States v. Najjar, 300 F.3d 466, 481 (4th Cir. 2002); *United States v. Aramony*, 88 F.3d 1369, 1385-87 (4th Cir. 1996); *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995).

Section 1957(f)(1) contains a safe harbor provision which exempts a transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution. In *United States v. Blair*, 661 F.3d 755 (4th Cir. 2011), the defendant, an attorney, was prosecuted for using drug proceeds to retain attorneys for two accused drug dealers. The Fourth Circuit held that the provision did not apply on the facts of the case, as "anyone seeking to benefit from § 1957(f) must tie his conduct to the Sixth Amendment right to counsel." *Id*. at 771. However, there is no Sixth Amendment right to use another person's money to hire an attorney. The drug proceeds were not rightfully Blair's, and therefore he did not meet a basic requirement under § 1957(f). In addition, Sixth Amendment rights are personal to the accused.

18 U.S.C. § 1958 USE OF INTERSTATE FACILITIES IN MURDER-FOR-HIRE [LAST UPDATED: 8/15/2016]

Title 18, United States Code, Section 1958 makes it a crime [to travel or use certain interstate facilities] in the commission of a murder-for-hire. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant traveled or caused another person to travel in interstate or foreign commerce, or used or caused another person to use the mail or any facility of interstate or foreign commerce;[1009]
- Second, that the defendant did so with the intent that a murder be committed (in violation of the laws of any state or the United States)[the law should be specified, and the elements identified for the jury]; and

[1006] (...continued)
405 F. App'x at 750, 751.

[1007] *United States v. Cherry*, 330 F.3d 658, 667 (4th Cir. 2003).

[1008] *See United States v. Wilkinson*, 137 F.3d 214, 222 (4th Cir. 1998) (*en banc*) ("[W]hen the funds used in a particular transaction originated from a single source of commingled, legally- and illegally-acquired funds, it may be presumed that the transacted funds, at least up to the full amount originally derived from crime, were the proceeds of the criminal activity.").

[1009] The "travel" prong and the "use of facilities" prong are "distinct and alternative jurisdictional elements," and a jury should only be instructed on the jurisdictional element charged in the indictment. *United States v. Moore*, 810 F.3d 932, 936-38 (4th Cir. 2016).

- Third, as consideration for the receipt of or promise or agreement to pay anything of pecuniary value.[1010]

OR

- First, that two or more persons conspired and agreed to achieve the unlawful purpose of murder-for-hire [here, the court should explain the elements of the substantive crime, if it is not charged in the indictment];
- Second, that the defendant knew of the agreement; and
- Third, that the defendant intentionally joined the conspiracy.[1011]

The government must prove that the defendant had the specific intent to join the conspiracy.[1012]

ADDITIONAL ELEMENTS, IF APPROPRIATE:

1. Did personal injury result?

2. Did death result?

"Anything of pecuniary value" means anything of value in the form of money, negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage. [§ 1958(b)(1)]

"Facility of interstate commerce" includes means of transportation and communication. [§ 1958(b)(2)]

The defendant's use of the facility need not be in interstate or foreign commerce.[1013]

"Interstate commerce" includes commerce between one state, territory, possession, of the District of Columbia and another state, territory, possession or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

The government must prove a *quid pro quo* between the person who solicits the murder and the person who would commit the murder. However, "as consideration for" simply means "in return for." The "in return for" may be a "promise or agreement to pay anything of pecuniary value."[1014]

[1010] *United States v. Morin*, 80 F.3d 124, 127 n.2 (4th Cir. 1996).

[1011] *United States v. Hyles*, 521 F.3d 946, 954 (8th Cir. 2008). *But cf. United States v. Hernandez*, 141 F.3d 1042, 1053 (11th Cir. 1998) (requiring overt act).

[1012] *Hernandez*, 141 F.3d at 1053.

[1013] *See United States v. Thomas*, 282 F. App'x 244 (4th Cir. 2008) (following other circuits holding use of interstate commerce facility satisfies jurisdictional element, regardless of whether particular transaction in question interstate or wholly intrastate).

[1014] *United States v. Hernandez*, 141 F.3d 1042, 1057 (11th Cir. 1998). In *United States v. Wicklund*, 114 F.3d 151 (10th Cir. 1997), the Tenth Circuit held that

> "in consideration for," as used in both prongs of § 1958(a) means consideration in the traditional sense of bargained for exchange. The two uses of "as consideration for" in the statute cover the two murder-for-hire situations: payment now or a

(continued...)

NOTE

Section 1958 contains its own conspiracy provision.

"The intent to pay someone to commit murder is therefore a critical element of 'murder-for-hire.'" *United States v. Ritter*, 989 F.2d 318, 321 (9th Cir. 1993).

Both the actual murderer and the one who solicits the murder are criminally liable under the statute. *United States v. Hernandez*, 141 F.3d 1042, 1056 (11th Cir. 1998).

In the context of this statute, it is the motive of the murderers that is relevant to whether the murder occurred in return for a promise to pay. The solicitor will usually have a different motive for the killing than the murderer does. The solicitor pays to have someone killed, while the murderer kills to have someone pay him. *Hernandez*, 141 F.3d at 1058-59.

United States v. Thomas, 282 F. App'x 244 (4th Cir. 2008) (citing United States v. Marek, 238 F.3d 310, 318-19 (5th Cir. 2001) (*en banc*)).

For elements of murder in South Carolina, see Ralph King Anderson, Jr., *South Carolina Requests to Charge - Criminal* (2007), and Miller W. Shealy Jr., & Margaret M. Lawton, *South Carolina Crimes: Elements and Defenses* (2009).

18 U.S.C. § 1959 VIOLENT CRIMES IN AID OF RACKETEERING

Title 18, United States Code, Section 1959 makes it a crime to commit certain violent crimes in connection with an enterprise engaged in racketeering activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

Status crime:

- First, that there was an enterprise;
- Second, that the enterprise engaged in racketeering activity [here the court should identify the elements of the appropriate defined racketeering activity from § 1961];
- Third, that the defendant [had a position in the enterprise] [sought to gain entrance into the enterprise];
- Fourth, that the defendant did [or attempted or conspired to] [murder, kidnap, maim, assault with a dangerous weapon, assault resulting in serious bodily injury, threaten to commit a crime of violence against any individual] [the elements of attempt, conspiracy, and the crime of violence should be identified for the jury];[1015] and
- Fifth, that the defendant's general purpose in committing the alleged crime of

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[1014] (...continued)

> promise or agreement to pay in the future. They describe separate situations and impose criminal liability regardless of whether the payment has occurred or is to occur later.

114 F.3d at 154.

[1015] If a state crime of violence, refer to Anderson, *supra* note 17, and Shealy & Lawton, *supra* note 17.

violence was to gain entrance to or maintain or increase his position in the enterprise.[1016]

The defendant's purpose can be shown by proof that the defendant, who held a position in the enterprise, committed an underlying crime of violence with a motive of retaining or enhancing that position. This need not be the defendant's only or primary concern, and the jury may infer that the defendant committed the violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.[1017]

Quid pro quo crime

- First, that there was an enterprise;
- Second, that the enterprise engaged in racketeering activity [here the court should identify the elements of the appropriate racketeering activity from § 1961];
- Third, that the defendant was paid or promised payment for committing, [attempting to commit, or conspiring to commit] [murder, kidnap, maim, assault with a dangerous weapon, assault resulting in serious bodily injury, threaten to commit a crime of violence against any individual] [the elements of attempt, conspiracy, and the crime of violence should be identified for the jury];[1018] and
- Fourth, that the payment or promise of payment was received from an enterprise engaged in racketeering activity. In other words, the payment must have been made by an agent of the enterprise, not by a person acting in his personal capacity.[1019]

"Enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and the government must prove beyond a reasonable doubt that the enterprise was engaged in, or the activities of the enterprise affected, interstate or foreign commerce. [§ 1959(b)(2)].

An enterprise is an entity, and would include a group of persons associated together for a common purpose of engaging in a course of conduct. An enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. An enterprise is characterized by continuity, unity, shared purpose and identifiable structure.[1020]

"Indeed, an enterprise need not have a name. Thus, an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals. A group or association of people can be an 'enterprise' if, among other requirements, these individuals associate together for a purpose of engaging in a course of conduct. Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.

[1016] *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994).

[1017] *United States v. Tipton*, 90 F.3d 861, 891 (4th Cir. 1996).

[1018] If a state crime of violence, refer to Anderson, *supra* note 17, and Shealy & Lawton, *supra* note 17.

[1019] *See United States v. Fernandez*, 388 F.3d 1199, 1233 (9th Cir. 2004); *United States v. Gray*, 137 F.3d 765, 772 (4th Cir. 1998).

[1020] *Fiel*, 35 F.3d at 1003.

Moreover, you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and ... by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the existence of such an enterprise, the government must prove that: (1) there is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.

Regarding 'organization,' it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise."[1021]

The hallmark of an enterprise is structure; there must be some structure that is amenable to consensual or hierarchical decision-making, though there need not be much. A group may continue to be an enterprise even if it changes membership by gaining or losing members over time. The government must prove that the group described in the indictment was the enterprise charged, but need not prove each and every allegation in the indictment about the enterprise or the manner in which the enterprise operated. [1022]

The government does not have to prove that the enterprise was motivated by an economic purpose.[1023]

However, the government must prove that the enterprise, or the activities of the enterprise, had some effect upon interstate commerce. This effect on interstate commerce can occur in any way and it need only be minimal.[1024]

"Interstate commerce" includes commerce between one state, territory, possession, of the District of Columbia and another state, territory, possession or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Racketeering activity" means [see definition in 18 U.S.C. § 1961(1) and the elements of the racketeering activity should be identified for the jury].

The government does not need to show a connection between interstate or foreign commerce and the specific crime of violence.[1025]

The government does not need to prove overt acts or specific acts of racketeering that the defendant agreed personally to commit.[1026]

[1021] *Boyle v. United States*, 556 U.S. 938, 942 n.1 (2009) (quoting district court jury instruction).

[1022] Instruction approved in *United States v. Phillips*, 239 F.3d 829, 843-44 (7th Cir. 2001).

[1023] *NOW v. Scheidler*, 510 U.S. 249, 252 (1994).

[1024] Gist of instruction approved in *United States v. Fernandez*, 388 F.3d 1199, 1249 (9th Cir. 2004).

[1025] *Fernandez*, 388 F.3d at 1250; *United States v. Feliciano*, 223 F.3d 102, 117 (2d Cir. 2000).

[1026] *United States v. Le*, 310 F. Supp. 2d 763, 780 n.24 (E.D. Va. 2004).

Nor does the government have to prove a connection between the act of violence and the racketeering activity.[1027]

However, the government must prove that the enterprise was separate and apart from the association of the defendant with the enterprise to commit the act of violence.[1028]

NOTE

Unlike § 1962, § 1959 contains no required pattern of racketeering activity. *United States v. Fiel*, 35 F.3d 997, 1005 (4th Cir. 1994).

According to the Ninth Circuit, the statute clearly contemplates two alternative theories of motive for the commission of § 1959 offenses: either the defendant received something of pecuniary value from the racketeering enterprise to commit the crime (*quid pro quo* crime) or the crime was committed to achieve, maintain or increase the defendant's status in the enterprise (status crime). *United States v. Fernandez*, 388 F.3d 1199, 1232 (9th Cir. 2004).

The government need not prove that the status-crime was committed on behalf of the organization itself, rather than to benefit the individual conspirators. That requirement is relevant only to allegations of *quid pro quo* crimes. *Id.* at 1233.

Cases decided under § 1961(4) may also be used to determine what constitutes an enterprise under § 1959. *United States v. Phillips*, 239 F.3d 829, 843 (7th Cir. 2001).

The existence of an internal dispute does not signal the end of an enterprise, particularly if the objective of, and reason for, the dispute is control of the enterprise *Fernandez*, 388 F.3d at 1222 (citing *United States v. Orena*, 32 F.3d. 704, 710 (2d Cir. 1994)).

In *Boyle v. United States*, 556 U.S. 938 (2009), the Supreme Court held that

> an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

556 U.S. at 948.

[1027] *United States v. Fiel*, 35 F.3d 997, 1005 (4th Cir. 1994).

[1028] *See United States v. Gray*, 137 F.3d 765, 772 (4th Cir. 1998). *See also United States v. Griffin*, 660 F.2d 996, 999 (4th Cir. 1981).

In *United States v. Tipton*, 90 F.3d 861, 891 (4th Cir. 1996), the Fourth Circuit, concerning "status crime" or "self-promotion," found that maintaining or increasing his position in the enterprise need not be the defendant's only or primary concern. If there is evidence, the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.

"An 'enterprise' is an entity distinct from the 'racketeering activity' in which it engages." *Id.* at 888.

The elements of the predicate racketeering offenses are not essential elements of a § 1959 charge. *United States v. Le*, 310 F. Supp. 2d 763, 779 (E.D. Va. 2004). Nevertheless, the jury must be instructed that it cannot find a defendant guilty of violating § 1959 unless it finds that members of the enterprise committed predicate racketeering acts. *Id.* at 779 n.22.

Section 1959 incorporates state law with respect to conspiracies and attempts. *Id.* at 783.

18 U.S.C. § 1960 UNLICENSED MONEY TRANSMITTING BUSINESS

Title 18, United States Code, Section 1960 makes it a crime to conduct an unlicensed money transmitting business. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant conducted, controlled, managed, supervised, directed, or owned;
- Second, all or part of an "unlicensed money transmitting business"; and
- Third, that the defendant did so knowingly.

"Unlicensed money transmitting business" means a money transmitting business which affects interstate or foreign commerce in any manner or degree and

1. is operated without an appropriate license in a state where such operation is punishable as a misdemeanor or felony under state law, whether or not the defendant knew a license was required or was punishable by state law; or
2. fails to comply with the requirements of [31 U.S.C. § 5330]; or
3. involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity. [§ 1960(b)(1)]

"Money transmitting" includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier. [§ 1960(b)(2)]

NOTE

Sections 1960(b)(1)(A) and (B) set forth constitutionally valid general intent crimes. *United States v. Talebnejad*, 460 F.3d 563 (4th Cir. 2006).

"For purposes of this appeal, we accept the Government's contention that § 1960 sets forth one offense — conducting an unlicensed money transmitting business — that may be committed in multiple ways. For ease of reference, however, we will refer to the

definitions of 'unlicensed' in § 1960(b)(1)(A) and (B) as independent violations of § 1960." *Id.* at n.2.

In *Talebnejad*, the Fourth Circuit identified the elements of § 1960(b)(1)(A) as follows: 1. operate a money transmitting business; 2. that affects interstate commerce, and 3. that is unlicensed under state law, when 4. state law requires a license, and 5. state law punishes lack of a license as a felony or misdemeanor." *Id*. at 568. The parties agreed that the government had to prove the defendant's knowledge with respect to the first three elements and that Congress explicitly excluded any *mens rea* requirement from the last two elements.

"Mistake of law" defense does not apply to the licensing requirement of § 1960(b)(1)(A). *Id.* at 570.

"[T]he statute does not reach mere employees. We therefore reject the conclusion of the district court that the Government is required to allege and prove a state-law duty to acquire a license in order to obtain a conviction under § 1960(b)(1)(A)." *Id.* at 572.

A person cannot be prosecuted for a single, isolated transmission of money because the statute requires that the entity be a *business*. *United States v. Velastegui*, 199 F.3d 590, 595 n.4 (2d Cir. 1999).

In 2001, the Patriot Act amended § 1960 to clarify that it is a general intent crime. *See United States v. Rahman*, 417 F. Supp. 2d 725, 728 (E.D.N.C. 2006).

As of 2010, South Carolina does not regulate money transmitting businesses, according to State Attorney General's Office and State Board of Financial Institutions, Banking Division.

18 U.S.C. § 1962 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS [LAST UPDATED: 1/20/2016]

§ 1962(a)

Title 18, United States Code, Section 1962(a) makes it a crime for a person who has received income from a pattern of racketeering to invest that income in any enterprise which affects interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received income from a pattern of racketeering activity or through the collection of an unlawful debt;
- Second, that the defendant used or invested, directly or indirectly, any of that income, or the proceeds of that income, in acquiring any interest in, or establishing or operating an enterprise; and
- Third, that the enterprise was engaged in, or the activities of the enterprise affected, interstate or foreign commerce.[1029]

The government does not need to prove that the income from the pattern of racketeering activity [or through the collection of an unlawful debt] must be specifically

[1029] *See United States v. Cornell*, 780 F.3d 616, 622 (4th Cir. 2015) (finding that "the district court did not err by applying the minimal effects standard in this case"); *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir. 1990).

and directly traced from its original receipt to its ultimate use or investment by the defendant.[1030]

§ 1962(b)

Title 18, United States Code, Section 1962(b) makes it a crime for any person to control any enterprise engaged in interstate commerce through a pattern of racketeering activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant engaged in a pattern of racketeering activity or the collection of an unlawful debt [the court should identify the elements of the racketeering acts];
- Second, that through that conduct the defendant acquired or maintained, directly or indirectly, any interest in or control of an enterprise; and
- Third, that the enterprise was engaged in, or the activities of the enterprise affected, interstate or foreign commerce.

§ 1962(c) (substantive RICO offense)

Title 18, United States Code, Section 1962(c) makes it a crime for any person employed by or associated with any enterprise engaged in interstate commerce to conduct the affairs of the enterprise through a pattern of racketeering activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that an enterprise affecting interstate or foreign commerce existed;
- Second, that the defendant was associated with the enterprise;
- Third, that the defendant conducted, or participated, either directly or indirectly, in the operation or management of the enterprise; and
- Fifth, that the defendant did so through a pattern of racketeering activity or the collection of an unlawful debt.[1031]

☞ **The court should identify the elements of the racketeering acts.**

§ 1962(d) (Conspiracy)

Title 18, United States Code, Section 1962(d) makes it a crime for any person to conspire to conduct such enterprises's affairs through a pattern of racketeering activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that an enterprise affecting interstate or foreign commerce existed;
- Second, that the defendant knowingly and intentionally agreed with another person to conduct or participate in the affairs of the enterprise; and
- Third, that the defendant knowingly and willfully agreed that he or some

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[1030] *Id.*

[1031] *Reves v. Ernst & Young*, 507 U.S. 170 (1993); *United States v. Hooker*, 841 F.2d 1225, 1227 (4th Cir. 1988). "The elements predominant in a subsection (c) violation are: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas v. United States*, 522 U.S. 52, 62 (1997).

member of the conspiracy would commit at least two racketeering acts.[1032]

☞ **The court should identify the elements of the racketeering acts.**[1033]

As to § 1962(c) only, "conduct or participate" means some involvement in the operation or management of the enterprise,[1034] involving repeated carrying on of affairs.[1035] As to § 1962(d), "liability does not require that a defendant have a role in directing an enterprise."[1036]

"Through" means by means of, in consequence of, by reason of.[1037]

"Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. [§ 1961(4)]

"Indeed, an enterprise need not have a name. Thus, an enterprise need not be a form[al] business entity such as a corporation, but may be merely an informal association of individuals. A group or association of people can be an 'enterprise' if, among other requirements, these individuals 'associate' together for a purpose of engaging in a course of conduct. Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.

Moreover, you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and ... by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the existence of such an enterprise, the government must prove that: (1) There is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.

Regarding 'organization,' it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise."[1038]

"'[S]tructure' means '[th]e way in which parts are arranged or put together to form a

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[1032] *United States v. Cornell*, 780 F.3d 616, 621 (4th Cir. 2015); *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012).

[1033] The government does not have to prove that each conspirator agreed that he would be the one to commit two predicate acts, and there is no requirement of an overt act in furtherance of the conspiracy. *Salinas*, 522 U.S. at 63-64. *See also United States v. Le*, 310 F. Supp. 2d 763, 774 (E.D. Va. 2004).

[1034] *Reves*, 507 U.S. 170 (1993).

[1035] *United States v. Webster*, 669 F.2d 185, 187 (4th Cir. 1982) ("It may be doubted that an isolated incident amounts to 'conduct.'").

[1036] *Mouzone*, 687 F.3d at 218.

[1037] *United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir. 1979).

[1038] *Boyle v. United States*, 556 U.S. 938, 942 n.1 (2009) (quoting district court jury instruction) (emphasis omitted).

whole and [t]he interrelation or arrangement of parts in a complex entity."[1039]

An "association-in-fact" enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit those associates to pursue the enterprise's purpose.[1040]

The enterprise may be a public entity [such as the office of a State Senator, a state prosecutor's office, or a sheriff's department].[1041]

"Racketeering activity" means [see definition in § 1961(1)].

"Person" includes any individual or entity capable of holding a legal or beneficial interest in property. [§ 1961(3)]

"Pattern of racketeering activity" requires at least two acts of racketeering activity within ten years of each other. [§ 1961(5)]. However, proof of two acts of racketeering activity, without more, does not establish a pattern. A pattern is an arrangement or order of things or activity. Thus, it is not the number of acts of racketeering but the relationship that they bear to each other or to some external organizing principle that makes them ordered or arranged. A pattern is not formed by sporadic activity. Continuity plus relationship combine to produce a pattern. Thus, the government must show that the acts of racketeering were related and that they amounted to or posed a threat of continued criminal activity.

Relationship can be shown if the acts of racketeering had the same or similar purposes, results, participants, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics and were not isolated events. The acts must be related to the affairs of the enterprise, even if they are not directly related to each other.

Continuity refers either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. Acts of racketeering extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. Continuity can be shown if the related acts of racketeering themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Continuity may also be established by showing that the acts of racketeering were part of an ongoing entity's regular way of doing business or that they were a regular way of conducting the defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing RICO enterprise.[1042]

The government must prove that the association existed separate and apart from the pattern of racketeering activity in which it engaged.[1043]

[1039] *Id.* at 945-46 (quoting *American Heritage Dictionary* 1718 (4th ed. 2000)). "Although an association-in-fact enterprise must have these structural features, it does not follow that a district court must use the term "structure" in its jury instructions." *Id.* at 946.

[1040] *Id.* at 946.

[1041] *United States v. Long*, 651 F.2d 239, 241 (4th Cir. 1981).

[1042] *H.J., Inc. v. Nw. Bell Tel.*, 492 U.S. 229, 238-43 (1989). *See also United States v. Grubb*, 11 F.3d 426, 440 (4th Cir. 1993); *United States v. Abed*, No. 98-4637, 2000 WL 14190 (4th Cir. Jan. 10, 2000).

[1043] *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985). In *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), the Fourth Circuit found that [u]nlike subsection (c), which

There must be a connection between the enterprise and the racketeering activity, but there is no requirement that the racketeering activity benefit the enterprise.[1044]

"Unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is a least twice the enforceable rate. [§ 1961(6)]

"Documentary material" includes any book, paper, document, record, recording, or other material. [§ 1961(9)]

The government must show that the enterprise affects interstate commerce. The government need not demonstrate that the acts of racketeering themselves directly involved interstate commerce. [Examples: interstate telephone calls, supplies and materials purchased and used came from out of state, persons who were not citizens or residents of the state were serviced by the public entity.][1045] The effect upon interstate commerce can occur in any way and it need only be minimal. The government does not need to show a connection to interstate commerce for each predicate act. It is the activity of the enterprise, not each predicate act, that must affect interstate commerce.[1046]

The government must prove that each defendant agreed to personally commit or aid and abet two or more acts of racketeering or that each defendant agreed that another co-conspirator would commit two or more acts of racketeering.[1047]

☞ **for § 1962(d)**

The government must show that the defendant, by either words or action, objectively manifested an agreement to participate directly or indirectly in the affairs of the enterprise through the commission of at least two acts of racketeering activity. The government does not need to establish that each conspirator had knowledge of all of the details of the

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requires a *relationship* between the 'person' and the 'enterprise' (i.e., employer-employee), subsection (a) requires only the *use* of an 'enterprise' by a 'person.' Thus, we are now persuaded that for a violation of § 1962(a), the offender and the enterprise need not be separate. They may be identical. We therefore overrule this aspect of [*United States v.*] *Computer Sciences* [*Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982)] and its progeny.

896 F.2d at 841.

"An 'enterprise' is an entity distinct from the 'racketeering activity' in which it engages." *United States v. Tipton*, 90 F.3d 861, 888 (4th Cir. 1996).

[1044] *United States v. Grubb*, 11 F.3d 426, 439 (4th Cir. 1993) ("Such a requirement would be problematic in cases where the enterprise is governmental in nature, and almost universally not organized for profit.").

[1045] *Long*, 651 F.2d at 241-42.

[1046] *United States v. Fernandez*, 388 F.3d 1199, 1223, 1248 n.35, 1250 (9th Cir. 2004).

[1047] Instruction approved in *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir. 1990). *See also Salinas v. United States*, 522 U.S. 52 (1997); *Cornell*, 780 F.3d at 623-25 (stating that the court is not required to charge the jury that it had to unanimously agree on specific racketeering acts conspirators engaged in; unanimity as to types of racketeering acts members of conspiracy agreed to commit was sufficient).

conspiracy but, rather, only that the defendant participated in the conspiracy with knowledge of the essential nature of the plan.[1048]

The government must prove that the defendant knowingly adopted the goal of furthering or facilitating the criminal endeavor. In other words, the defendant knew about the pattern of racketeering activity and agreed to facilitate the racketeering scheme. However, the government is not required to prove that the defendant himself committed or agreed to commit two or more acts of racketeering.[1049]

_____NOTE_____

The term "enterprise" encompasses both legitimate and illegitimate enterprises. *See United States v. Turkette*, 452 U.S. 576 (1981); *United States v. Whitehead*, 618 F.2d 523, 525 n.1 (4th Cir. 1980).

Salinas v. United States, 522 U.S. 52, 63 (1997) (there is no requirement of some overt act or specific act in § 1962(d) unlike § 371).

The existence of an internal dispute does not signal the end of an enterprise, particularly if the objective of, and reason for, the dispute is control of the enterprise. *United States v. Fernandez*, 388 F.3d 1199, 1222 (9th Cir. 2004).

In *Boyle v. United States*, 556 U.S. 938 (2009), the Supreme Court held that

> an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

556 U.S. at 948.

In *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985), the evidence was "sufficient to show that the associates functioned as a continuing unit. There was both a continuity of structure and personality within the organization despite the change in financiers."

Section 1961 does not define "pattern of racketeering activity." In *H.J., Inc. v. Nw. Bell Tel., Inc.*, 492 U.S. 229 (1989), the Court stated that a pattern of racketeering activity

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[1048] *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985).

[1049] Jury instruction approved in *United States v. Abed*, No. 98-4637, 2000 WL 14190 (4th Cir. Jan. 10, 2000).

can be established by showing that "the racketeering predicate acts are related, and that they amount to or pose a threat of continuing criminal activity." 492 U.S. at 239. There are essentially two elements of a pattern of racketeering activity, which have come to be known as "relatedness" and "continuity." "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept, and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements." *Id*. at 241-42. Continuity over a closed period may be proven by a series of related predicates extending over a substantial period of time. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* at 242. If a RICO prosecution is brought before continuity can be established, "liability will depend on whether the *threat* of continuity is demonstrated." *Id*. Continued criminal activity may be established in any number of possibilities, such as by showing that "the related predicates themselves involve a distinct threat of long term racketeering activity, either implicit or explicit[,]" *id.*, or by showing that "the predicate acts or offenses are a part of an ongoing entity's regular way of doing business." *Id.*

For § 1962(c), the statute of limitations begins to run from the date of the last predicate act of racketeering charged. For subsections (a) and (b), it is different, and runs from using the funds or acquiring or maintaining control. *See United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir. 1990).

Every time tainted funds or assets purchased with tainted funds are run into or out of an enterprise constitutes a use of those funds or their proceeds in the operation of the enterprise in its intended function. *Id.* at 1199.

18 U.S.C. § 2071 DESTRUCTION OF RECORDS

Title 18, United States Code, Section 2071 makes it a crime to destroy records of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2071(a)

- First, that the defendant did, or attempted to, conceal, remove, mutilate, obliterate, or destroy, or take and carry away with intent to conceal, remove, mutilate, obliterate, or destroy;
- Second, any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States; and
- Third, that the defendant did so willfully and unlawfully.

To act willfully, the defendant must have acted intentionally, with knowledge that he

was violating the law.[1050]

§ 2071(b)

- First, that the defendant had custody of any record, proceeding, map, book, paper, document, or other thing, in any public office of the United States;
- Second, that the defendant concealed, removed, mutilated, obliterated, falsified, or destroyed the record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States; and
- Third, that the defendant did so knowing that his conduct was unlawful.[1051]

Custody simply means that a record or document came into the person's possession or control as a government official. Someone with custody does not have to be employed as a librarian or as an official record keeper.[1052]

_____NOTE_____

"When [knowledge that his conduct was unlawful] is the nature of the intent required for conviction, the jury by definition must measure the defendant's intent by a subjective standard." *United States v. North*, 910 F.2d 843, 886 (D.C. Cir. 1990), *modified*, 920 F.2d 940 (D.C. Cir. 1990).

18 U.S.C. § 2073 FALSE ENTRY IN GOVERNMENT RECORDS

Title 18, United States Code, Section 2073 makes it a crime to make false entries in records of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant was an officer, clerk, agent, or other employee of the United States;
- Second, that the defendant was charged with keeping accounts or records of any kind;
- Third, that the defendant made a false or fictitious entry or report in an account or record relating to or connected with his duties; and
- Fourth, that the defendant did so with intent to deceive, mislead, injure, or defraud.[1053]

[1050] *See United States v. Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969). "To read the term 'willfully' to require a bad purpose would be to confuse the concept of intent with that of motive." (This case was all about motive, because the defendants were protesting the Vietnam war as immoral.).

[1051] *United States v. North*, 910 F.2d 843, 884 (D.C. Cir. 1990), *modified*, 920 F.2d 940 (D.C. Cir. 1990). The government initially conceded this element, and was therefore barred from arguing, on reargument, that the D.C. Circuit erred in construing § 2071(b) to require that a defendant possess knowledge of unlawfulness. 920 F.2d at 949-50.

[1052] *Id.* at 876 n.6.

[1053] *United States v. Franklin*, 227 F. App'x 267 (4th Cir. 2007).

¶ 2

- First, that the defendant was an officer, clerk, agent, or other employee of the United States;
- Second, that the defendant was charged with receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or receiving or holding in trust for any person any moneys or securities;
- Third, that the defendant made a false report concerning those moneys or securities; and
- Fourth, that the defendant did so with intent to deceive, mislead, injure, or defraud.

18 U.S.C. § 2101 INCITING A RIOT

Title 18, United States Code, Section 2101 makes it a crime to incite a riot. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant traveled in interstate or foreign commerce, or used the mail or any facility in interstate or foreign commerce;
- Second, that the defendant did so with intent to:
  1. incite a riot, or
  2. organize, promote, encourage, participate in, or carry on a riot, or
  3. commit any act of violence in furtherance of a riot, or
  4. aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and
- Third, either during the course of such travel or use of a facility in interstate commerce, or after such travel or use of a facility in interstate commerce, the defendant did or attempted to do an overt act for the purpose of:
  1. inciting a riot, or
  2. organizing, promoting, encouraging, participating in, or carrying on a riot, or
  3. committing any act of violence in furtherance of a riot, or
  4. aiding or abetting any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot.

"Riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual. [§ 2102(a)]

"To incite a riot" or "to organize, promote, encourage, participate in, or carry on a riot," includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts. [§ 2102(b)]

The government does not have to prove that the situation, nature, and details of the riot contemplated at the time of travel remained exactly identical until the time of the overt act, but the government does have to prove that the nature of the contemplated riot was sufficiently similar so that it is reasonable to say the riot is the same as or the evolving product of the one intended earlier.[1054]

NOTE

The use of a facility of interstate commerce is an essential element of an anti-riot act offense. The statute requires the government to prove a defendant's intent at two points in time — when the defendant uses a facility of interstate commerce with the intent to incite a riot, and when the defendant commits an overt act to further any of the purposes articulated in the statute. *United States v. Markiewicz*, 978 F.2d 786, 813 (2d Cir. 1992).

This statute is analogous to the Travel Act, 18 U.S.C. § 1952.

In *United States v. Sigalow*, 812 F.2d 783 (2d Cir. 1987), the defendant was convicted of aiding and abetting a Travel Act violation. The Second Circuit concluded that the defendant need not have assisted in the use of interstate facilities so long as the scheme had substantial interstate connections. Thus, the government did not have to prove that the defendant had knowledge of the violation of the Travel Act's jurisdictional element, and the use of a facility of interstate commerce was sufficient to prove the interstate element of the crime as to all the defendants. *Markiewicz*, 978 F.2d at 814.

This statute can have First Amendment implications. The prosecution of the Chicago Seven for rioting at the 1968 Democratic Convention is reported in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1973). In that case, the Court of Appeals stated that the "most fundamental principle guarding against removal from First Amendment protection is that the removed expression must have a very substantial capacity to propel action, or some similarly entwining relationship with it." 472 F.2d at 359. Before advocacy of the use of force of law violation can be proscribed, it must be shown: (1) that such advocacy is directed to inciting or producing imminent lawless action and (2) that such advocacy is likely to incite or produce such action. *Id*. at 360.

The Seventh Circuit also advised setting out in the indictment the substance of the statement and the circumstances giving reason to believe the statement had the capacity to propel unlawful action. *Id.* at 364.

In weighing the evidence, the Seventh Circuit applied the doctrine of *strictissimi juris*, and adopted the First Circuit's test set forth in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969):

When the alleged agreement is both bifarious and political within the shadow of

[1054] *See United States v. Markiewicz*, 978 F.2d 786, 813 (2d Cir. 1992). In other words, "substantially the same unlawful intent must be found to exist at two points in time." *United States v. Dellinger*, 472 F.2d 340, 394 (7th Cir. 1973).

> the First Amendment, we hold that an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.

Dellinger, 472 F.2d at 393.

18 U.S.C. § 2111 ROBBERY WITHIN THE SPECIAL TERRITORIAL JURISDICTION

Title 18, United States Code, Section 2111 makes it a crime to take or attempt to take from the person or presence of another anything of value by force and violence or by intimidation, within the special territorial jurisdiction of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did take or attempt to take from the person or presence of another anything of value;
- Second, that the defendant did so by force and violence, or by intimidation; and
- Third, that the defendant did so within the special territorial jurisdiction of the United States.

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building. [1055]

For intimidation to occur under this statute, the defendant's conduct must be reasonably calculated to produce fear. Intimidation occurs when an ordinary person in the victim's position reasonably could infer a threat of bodily harm from the defendant's acts. Thus, the subjective courageousness or timidity of the victim is not relevant; the acts of the defendant must constitute intimidation to an ordinary, reasonable person.[1056] The

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[1055] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[1056] *United States v. Wagstaff*, 865 F.2d 626, 627-28 (4th Cir. 1989). The Fourth Circuit held that, as a matter of law, where the thief was neither wearing nor carrying a weapon, produced no note and said nothing, and made no threatening gestures, the evidence was insufficient to show a taking by intimidation.

In *United States v. Ketchum*, 550 F.3d 363, 367 (4th Cir. 2008), the Fourth Circuit found that the

government does not have to prove that the defendant intended to intimidate.[1057]

NOTE

In an attempt to commit robbery, force and violence or intimidation do not need to accompany the attempt, because the attempt relates to the taking, not to the force and violence or intimidation. *United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984).

Larceny, 18 U.S.C. § 661, is a lesser included offense. *United States v. Belt*, 516 F.2d 873 (8th Cir. 1995).

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

18 U.S.C. § 2113 BANK ROBBERY AND LARCENY

§ 2113(a) Bank Robbery

Title 18, United States Code, Section 2113(a) makes it a crime to rob a federally insured bank. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did take or attempt to take from the person or presence of another [or obtained or attempted to obtain] any property, money, or other thing of value belonging to, or in the care, custody, control, management, or possession of a bank, credit union, or savings and loan association;
- Second, that the taking was by force and violence or by intimidation [or the obtaining was by extortion]; and
- Third, that the institution from which the money or property was taken was a bank, credit union, or savings and loan association as defined in the statute [here, the court should give the appropriate definition: § 2113(f) for bank, § 2113(g) for credit union, and § 2113(h) for savings and loan association].[1058]

For intimidation to occur under this statute, the defendant's conduct must be reasonably calculated to produce fear. Intimidation occurs when an ordinary person in the

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> display of a weapon, a threat to use a weapon, or even a verbal or non-verbal hint of a weapon is not a necessary ingredient of intimidation under § 2113(a). Moreover, intimidation does not require proof of express threats of bodily harm, threatening body motions, or the physical possibility of a concealed weapon. Indeed, intimidation generally may be established based on nothing more than a defendant's written or verbal demands to a teller. A review of the case law reveals that making a written or verbal demand for money to a teller is a common means of successfully robbing banks. Demands for money amount to intimidation because they carry with them an implicit threat: if the money is not produced, harm to the teller or other bank employee may result. Bank tellers who receive demand notes are not in a position to evaluate fully the actual risk they face.

550 F.3d at 367 (internal quotations and citations omitted).

[1057] *United States v. Woodrup*, 86 F.3d 359, 363-64 (4th Cir. 1996).

[1058] *United States v. Coltrane*, 337 F. App'x 283 (4th Cir. 2009). *See also United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995) (§ 2113(a) is a general intent crime).

teller's position reasonably could infer a threat of bodily harm from the defendant's acts. Thus, the subjective courageousness or timidity of the victim is not relevant; the acts of the defendant must constitute intimidation to an ordinary, reasonable person.[1059] The government does not have to prove that the defendant intended to intimidate.[1060]

In an attempt to commit bank robbery, force and violence or intimidation do not need to accompany the attempt, because the attempt relates to the taking, not to the force and violence or intimidation.[1061]

§ 2113(a) Bank Burglary

Title 18, United States Code, Section 2113(a) makes it a crime to enter a federally insured bank with intent to commit a felony affecting the bank. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did enter, or attempt to enter;
- Second, a bank, credit union, or savings and loan association as defined in the statute [here, the court would give the appropriate definition: § 2113(f) for bank, § 2113(g) for credit union, and § 2113(h) for savings and loan association];[1062] and
- Third, that the defendant did so with intent to commit in the bank a felony affecting the bank in violation of federal law or any larceny [here, identify the elements of the federal felony, or larceny, see § 2113(b) below].

§ 2113(b) Bank Larceny[1063]

Title 18, United States Code, Section 2113(b) makes it a crime to take money or property from a federally insured bank. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did take and carry away property, money, or any other

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[1059] *Wagstaff*, 865 F.2d at 627-28. The Fourth Circuit held that, as a matter of law, where the thief was neither wearing nor carrying a weapon, produced no note and said nothing, and made no threatening gestures, the evidence was insufficient to show a taking by intimidation.

In *Ketchum*, 550 F.3d at 367, the Fourth Circuit found that the

> display of a weapon, a threat to use a weapon, or even a verbal or non-verbal hint of a weapon is not a necessary ingredient of intimidation under § 2113(a). Moreover, intimidation does not require proof of express threats of bodily harm, threatening body motions, or the physical possibility of a concealed weapon. Indeed, intimidation generally may be established based on nothing more than a defendant's written or verbal demands to a teller. A review of the case law reveals that making a written or verbal demand for money to a teller is a common means of successfully robbing banks. Demands for money amount to intimidation because they carry with them an implicit threat: if the money is not produced, harm to the teller or other bank employee may result. Bank tellers who receive demand notes are not in a position to evaluate fully the actual risk they face.

550 F.3d at 367 (internal quotations and citations omitted).

[1060] *Woodrup*, 86 F.3d at 363-64.

[1061] *United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984).

[1062] The status of the financial institution is an essential element. *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995).

[1063] Section 2113(b) is not limited to common-law larceny, which includes the intent to deprive. *Bell v. United States*, 462 U.S. 356, 362 (1983).

thing of value;

- Second, that the property, money, or other thing of value belonged to, or was in the care, custody, control, management, or possession of a bank, credit union, or savings and loan association, as defined in the statute [here, the court should give the appropriate definition: § 2113(f) for bank, § 2113(g) for credit union, and § 2113(h) for savings and loan association];[1064]
- Third, that the value of the property, money or other thing of value exceeded $1,000; and
- Fourth, that the defendant acted with intent to steal or purloin.

☞ **If the value did not exceed $1,000, the crime is a misdemeanor, and defendant is entitled to a lesser-included offense instruction.**

§ 2113(c) Receiving Stolen Bank Property

Title 18, United States Code, Section 2113(c) makes it a crime to receive property stolen from a federally insured bank. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that a person, acting with intent to steal or purloin,[1065] took and carried away property, money, or any other thing of value [exceeding $1,000.00][1066] that belonged to, or was in the care, custody, control, management, or possession of a bank, credit union, or savings and loan association as defined in the statute [here, the court should give the appropriate definition: § 2113(f) for bank, § 2113(g) for credit union, and § 2113(h) for savings and loan association];[1067]
- Second, that the defendant did receive, possess, conceal, store, barter, sell, or dispose of any of the property, money or other thing of value which had been taken or stolen; and
- Third, that the defendant knew that the property, money, or other thing of value was stolen at the time he received, possessed, concealed, stored, bartered, sold, or disposed of the property, money or other thing of value.[1068]

☞ **Defendant would be entitled to a lesser-included offense instruction if there is issue about value of the property stolen, not the value of the property received.**

[1064] The status of the financial institution is an essential element. *Johnson*, 71 F.3d 139.

[1065] *United States v. Harris*, 346 F.2d 182, 184 (4th Cir. 1965) (§ 2113(c) incorporates the requirements of § 2113(b), "[t]hus only possession and concealment of money taken with [intent to steal or purloin] is criminal.").

[1066] In *United States v. Wright*, 540 F.2d 1247 (4th Cir. 1976), the Fourth Circuit accepted the defendant's position that there was a failure of proof that he received more than the misdemeanor amount of stolen property, but rejected his argument, ruling that "the monetary requirement is satisfied by proof of the amount taken from bank." 540 F.2d at 1247. Thus, the amount actually received by the defendant is not relevant.

[1067] The status of the financial institution is an essential element. *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995).

[1068] *United States v. Scruggs*, 549 F.2d 1097, 1103 (6th Cir. 1977). The government must prove that the defendant knew of the stolen character of the property, however the courts are not clear that the government must also prove that the defendant knew it was stolen from an insured bank. Moreover, as *Scruggs* pointed out, a defendant could innocently receive stolen property, thereafter learn of its character, and then continue to possess it or dispose of it. In the latter case, the defendant's continued possession or disposing of the property would be criminal. *Id*. at 1105.

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[1069] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation of such possession.][1070] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[1071]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[1072]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[1073]

§ 2113(d) Armed Bank Robbery (or Larceny)

☞ **After giving the charge for either § 2113(a) or (b):**

- Lastly, that in committing the offense just described, the defendant assaulted any person or put in jeopardy the life of any person by the use of a dangerous weapon or device.[1074]

☞ **For instructions concerning assault, see 18 U.S.C. §§ 111 and 113.**

[1069] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[1070] *Id.*

[1071] *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[1072] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[1073] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[1074] *United States v. Jones*, 533 F. App'x 291, 297 (4th Cir. 2013) (quoting *United States v. Davis*, 437 F.3d 989, 993 (10th Cir. 2006)).

"In jeopardy" means putting the life of a person in an objective state of danger.[1075] Therefore, "to put in jeopardy" means to expose a person to a risk of death.[1076]

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict serious physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. Thus, an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use.[1077]

§ 2113(e) Kidnapping or Homicide

☞ **After giving the charge for the appropriate offense**

- Lastly, that in committing the offense just described, [or in avoiding or attempting to avoid apprehension for the commission of the offense, or in freeing himself or attempting to free himself from arrest or confinement for the offense] the defendant forced any person to accompany him without that person's consent [or killed any person].

There is no requirement that the government prove that the victim be moved a particular number of feet, or even leave the bank, that the victim be held for a particular period of time, or that the victim be placed in a certain amount of danger.[1078]

NOTE

The status of the financial institution is an essential element. *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995); *United States v. Gallop*, 838 F.2d 105, 111 (4th Cir. 1988). However, the defendant need not actually be aware of the bank's § 2113(f) status. *United States v. Trevino*, 720 F.2d 395, 400 n.4 (5th Cir. 1983).

Relating to § 2113(a), see *United States v. Walker*, 75 F.3d 178 (4th Cir. 1996).

Regarding § 2113(b), see *Carter v. United States*, 530 U.S. 255, 262 (2000).

The "dangerous weapon" language of § 2113(d) is the same language used in § 111(b). *United States v. Hamrick*, 43 F.3d 877, 881 (4th Cir. 1995) (*en banc*). Hamrick was prosecuted for mailing a bomb which did not detonate to the United States Attorney for the Northern District of West Virginia. The Fourth Circuit held that a dysfunctional or

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[1075] In *United States v. Newkirk*, 481 F.2d 881 (4th Cir. 1973), the Fourth Circuit held the following instruction did not constitute plain error: "To put in jeopardy the life of a person by the use of a dangerous weapon or device means, then, to expose such person to a risk of death or to the fear of death, by the use of such dangerous weapon or device." 481 F.2d at 883 n.1.

However, because jeopardy "is commonly defined as referring to an objective state of danger, not to a subjective feeling of fear," *United States v. Donovan*, 242 F.2d 61, 63 (2d Cir. 1957) and *Wagner v. United States*, 264 F.2d 524, 530 (9th Cir. 1959), both § 2114 cases, "fear of death" language is not included.

[1076] *Newkirk*, 481 F.2d 883 n.1.

[1077] In *United States v. Sturgis*, 48 F.3d 784 (4th Cir. 1995), an HIV-positive inmate bit two correctional officers. The Fourth Circuit concluded that "test of whether a particular object was used as a dangerous weapon ... must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury." *Id.* at 788 (citations omitted).

[1078] *United States v. Turner*, 389 F.3d 111, 119 (4th Cir. 2004).

inoperable bomb "could be considered by the jury to constitute a 'dangerous weapon'" under § 111. *Id*. at 884.

A BB gun is a dangerous weapon. *United States v. Best*, No. 94-5080, 1995 WL 361167 (4th Cir. June 16, 1995); *United States v. Black*, No. 04-4512, 2005 WL 1992527 (4th Cir. Aug. 18, 2005).

Brandishing weapons during a robbery threatens victims and bystanders alike. The same danger, apprehension, and tension are created whether the gun is loaded or unloaded. A weapon openly exhibited violates § 2113(d). *United States v. Bennett*, 675 F.2d 596 (4th Cir. 1982); *McLaughlin v. United States*, 476 U.S. 16, 17 (1986).

One charged as an aider and abettor under § 2113(d) should be entitled to an instruction that the government must prove that the defendant knew that his co-defendant who perpetrated the actual robbery was armed. The government must show that the defendant was on notice of the likelihood that a gun or other dangerous weapon would be used in the robbery. *United States v. McCaskill*, 676 F.2d 995, 998 (4th Cir. 1982). *See also United States v. Sanborn*, 563 F.2d 488, 491 (1st Cir. 1977) (the government must prove that the accomplice "knew a dangerous weapon would be used ... or at least ... was on notice of the likelihood of its use.").[1079]

In *United States v. Hinton*, 719 F.2d 711 (4th Cir. 1983), the court affirmed the defendant's conviction for § 2113(d) where "one of the three bank robbers, brandishing and waving a large revolver toward the employees and customers in the bank, threatened them while his confederate gobbled up the money from the tellers' boxes." 712 F.2d at 712.

A defendant cannot be convicted of entry with intent to rob and robbery, both paragraphs of § 2113(a). *Prince v. United States*, 352 U.S. 322 (1957).

A defendant cannot be convicted of robbery, §§ 2113(a) and (d), and receiving stolen bank money, § 2113(c). *Heflin v. United States*, 358 U.S. 415 (1959); *United States v. Harris*, 346 F.2d 182, 184 (4th Cir. 1965).

"Force and violence is the traditional language of assault." *Simpson v. United States*, 435 U.S. 6, 13 (1978).

The escape phase is part of the robbery. *United States v. McCaskill*, 676 F.2d 995, 1000 (4th Cir. 1982).

LESSER INCLUDED OFFENSES

1. "[Section] 2113(d) creates a lesser included offense of the crime defined in § 2113(e)." *United States v. Whitley*, 759 F.2d 327, 331 (4th Cir. 1985) (*en banc*).
2. Section 2113(b) is not a lesser-included offense of bank robbery § 2113(a). *Carter v. United States*, 530 U.S. 255, 262 (2000).
3. Section 2113(c), receiving stolen bank money, is not a lesser included offense within the total framework of the bank robbery provisions of § 2113. *United*

[1079] The standard is higher for proving knowledge by an accomplice to a § 924(c) violation: "to a practical certainty that the principal would be [using] a gun." *United States v. Spinney*, 65 F.3d 231, 238 (1st Cir. 1995). See NOTE under 18 U.S.C. § 924(c). But see *United States v. Chorman*, 910 F.2d 102, 110-11 (4th Cir. 1990) and *United States v. Wilson*, 135 F.3d 291, 305 (4th Cir. 1998) (defendant may be convicted of § 924(c) violation on basis of co-conspirator's use of gun if use was in furtherance of the conspiracy and reasonably foreseeable to defendant).

States v. Gaddis, 424 U.S. 544, 548 (1976).

18 U.S.C. § 2114 ASSAULT OR ROBBERY OF FEDERAL EMPLOYEE

§ 2114(a) Assault

Title 18, United States Code, Section 2114 makes it a crime to assault a person having custody of mail matter or other property of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant assaulted a person having lawful custody or control of any mail matter or other property, including money, belonging to the United States; and
- Second, that the defendant did so with intent to rob, steal, or purloin that property.

"Assault" has three meanings. First, a battery; second, an attempt to commit a battery; and third, an act that puts another in reasonable apprehension of receiving immediate bodily harm.[1080]

An assault is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.[1081]

Battery is defined as inflicting injury upon the person of another.[1082]

Battery may also be defined as the slightest willful offensive touching of another, regardless of whether the defendant had an intent to do physical harm.[1083]

In the case of an attempted battery, the victim need not have experienced reasonable apprehension of immediate bodily harm.[1084]

Attempt requires two elements:

- First, that the defendant intended to commit a battery; and
- Second, that the defendant committed an act which constituted a substantial step toward the commission of the battery.[1085]

A substantial step is more than mere preparation, yet may be less than the last act necessary before the actual commission of the battery.[1086]

The government need not prove that the defendant intended to injure the victim. The

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[1080] *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999).

[1081] *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (citation omitted).

[1082] See *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991), for a full definition of common law assault.

[1083] *Williams*, 197 F.3d at 1096 ("Intention to do bodily harm is not a necessary element of battery.").

[1084] *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982).

[1085] *See United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003).

[1086] *United States v. Sutton*, 961 F.2d 476, 478 (4th Cir. 1992). "But if preparation comes so near to the accomplishment of the crime that it becomes *probable* that the crime will be committed absent an outside intervening circumstance, the preparation may become an attempt." *Id.* at 136.

government need only prove that the defendant was criminally negligent or reckless.[1087]

§ 2114(a) Robbery

Title 18, United States Code, Section 2114 makes it a crime to rob a postal official of mail matter or property of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant took mail matter, money, or other property belonging to the United States;
- Second, that the property was taken from a postal official, under whose care and custody the property was committed; and
- Third, that the defendant did so with intent to commit a robbery.[1088]

Robbery involves taking, with intent to steal, and carrying away property from another person against his will by violence or by putting him in fear.[1089]

ADDITIONAL ELEMENT, IF APPROPRIATE

1. Did the defendant, in committing the offense just described, or attempting to do so, wound the person having custody of the mail or property, or put his life in jeopardy by the use of a dangerous weapon?

"In jeopardy" means putting the life of a person in an objective state of danger.[1090] Therefore, "to put in jeopardy" means to expose a person to a risk of death.[1091]

§ 2114(b) Receiving Stolen Postal Property

Title 18, United States Code, Section 2114(b) makes it a crime to receive property stolen from a postal official. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did receive, possess, conceal, or dispose of any property or money or other thing of value which had been taken from a postal official against his will by violence or by putting him in fear;[1092] and
- Second, that the defendant knew the money or property had been unlawfully obtained.

"Steal" means the wrongful and dishonest taking of property with the intent to

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[1087] *United States v. Juvenile Male*, 930 F.2d 727, 728-29 (9th Cir. 1991) ("a battery need not be intentional to constitute a violation of [§ 113(a)(6)]").

[1088] *United States v. Merchant*, 731 F.2d 186, 190 (4th Cir. 1984).

[1089] *Costner v. United States*, 139 F.2d 429, 431 (4th Cir. 1943).

[1090] In *United States v. Newkirk*, 481 F.2d 881 (4th Cir. 1973), the Fourth Circuit held the following instruction did not constitute plain error: "To put in jeopardy the life of a person by the use of a dangerous weapon or device means, then, to expose such person to a risk of death or to the fear of death, by the use of such dangerous weapon or device." 481 F.2d at 883 n.1

However, because jeopardy "is commonly defined as referring to an objective state of danger, not to a subjective feeling of fear," *United States v. Donovan*, 242 F.2d 61, 63 (2d Cir. 1957), "fear of death" language is not included.

[1091] *Newkirk*, 481 F.2d at 881.

[1092] *See Costner*, 139 F.2d at 431.

deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[1093]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[1094] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation of such possession.][1095] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[1096]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[1097]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[1098]

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict serious physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. Thus, an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use.[1099]

[1093] In *United States v. Turley*, 353 U.S. 407, 411 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417.

[1094] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[1095] *Id.*

[1096] *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[1097] *United States v. Gallo*, 543 F.2d 361, 368 n. 6 (D.C. Cir. 1976).

[1098] *See United States v. Chorman*, 910 F.2d l02, 108 (4th Cir. 1990).

[1099] In *United States v. Sturgis*, 48 F.3d 784 (4th Cir. 1995), an inmate who was HIV positive bit two correctional officers. The Fourth Circuit surveyed "dangerous weapon" cases, and concluded

NOTE

United States v. Merchant, 731 F.2d 186 (4th Cir. 1984).

"Force and violence is the traditional language of assault." *Simpson v. United States*, 435 U.S. 6, 13 (1978).

Because § 2114 uses the same "dangerous weapon" language as § 2113(d), see NOTE under § 2113.

A defendant cannot be convicted of both robbing a post office and possessing property stolen in the robbery. *United States v. Wright*, 661 F.2d 60, 62 (5th Cir. 1981).

18 U.S.C. § 2117 BREAKING INTO INTERSTATE FACILITIES

Title 18, United States Code, Section 2117 makes it a crime to break into any vehicle containing an interstate shipment. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant broke the seal or lock of, or entered, any railroad car, vessel, aircraft, motortruck, wagon or other vehicle or of any pipeline system;
- Second, which contained an interstate or foreign shipment of freight; and
- Third, that the defendant did so with intent to commit larceny.

An interstate or foreign shipment of goods or property begins when the property is segregated for interstate shipment and comes into the possession of those who are assisting its course in interstate transportation and continues until the property arrives at its destination and is there delivered.[1100]

It is not necessary that the goods be actually moving in interstate commerce at the time of the theft. It is sufficient if they are a part of an interstate shipment.[1101]

Larceny means taking and carrying away with intent to steal and purloin property of another without the consent of the owner.[1102]

NOTE

The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property. 18 U.S.C. § 659 ¶ 8 and *United States v. Williams*, 559 F.2d 1243, 1246 (4th Cir. 1977).

See United States v. Kiff, 377 F. Supp. 2d 586 (E.D. La. 2005) (someone who enters a rail car without intent to steal, but who then decides to steal something from the rail car, would violate § 659 but not § 2117).

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that "test of whether a particular object was used as a dangerous weapon ... must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury." *Id.* at 788 (citations omitted).

[1100] This charge was approved in *United States v. Williams*, 559 F.2d 1243, 1246 (4th Cir. 1977).

[1101] *Id.* at 1247.

[1102] *See United States v. Williams*, No. 90-5731, 1991 WL 199870 (4th Cir. Oct. 23, 1991).

18 U.S.C. § 2118 ROBBERY AND BURGLARY INVOLVING CONTROLLED SUBSTANCES

§ 2118(a) Robbery

Title 18, United States Code, Section 2118(a) makes it a crime to rob a person registered with the Drug Enforcement Administration of controlled substances. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did take or attempt to take from the person or presence of another any material or compound containing any quantity of a controlled substance;
- Second, that the material or compound belonged to, or was in the care, custody, control, or possession of a person registered with the Drug Enforcement Administration under 21 U.S.C. § 822;
- Third, that the taking was by force and violence or by intimidation;
- Fourth,

  (a) that the replacement cost of the material or compound to the registrant was not less than $500;

  (b) that the defendant traveled in interstate or foreign commerce or used any facility in interstate or foreign commerce to facilitate the taking or attempt; or

  (c) another person was killed or suffered significant bodily injury as a result of the taking or attempt; and
- Fifth, that the defendant did so willfully.[1103]

For intimidation to occur, the defendant's conduct must be reasonably calculated to produce fear. Intimidation occurs when an ordinary person in the victim's position reasonably could infer a threat of bodily harm from the defendant's acts. Thus, the subjective courageousness or timidity of the victim is not relevant; the acts of the defendant must constitute intimidation to an ordinary, reasonable person.[1104] The government does not have to prove that the defendant intended to intimidate.[1105]

§ 2118(b) Burglary

Title 18, United States Code, Section 2118(b) makes it a crime to enter the premises of a person registered with the Drug Enforcement Administration with the intent to steal

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[1103] *See United States v. Kaylor*, 877 F.2d 658, 661 (8th Cir. 1989).

[1104] *See United States v. Wagstaff*, 865 F.2d 626 (4th Cir. 1989). The Fourth Circuit held that, as a matter of law, where the thief was neither wearing nor carrying a weapon, produced no note, said nothing, and made no threatening gestures, the evidence was insufficient to show a taking by intimidation. 865 F.2d at 627-28. In *United v. Ketchum*, 550 F.3d 363 (4th Cir. 2008), the Fourth Circuit found that

> [a] review of the case law reveals that making a written or verbal demand for money to a teller is a common means of successfully robbing banks. Demands for money amount to intimidation because they carry with them an implicit threat: if the money is not produced, harm to the teller, or other bank employee may result. Bank tellers who receive demand notes are not in a position to evaluate fully the actual risk they face.

550 F.3d at 367 (quotation omitted).

[1105] *See United States v. Woodrup*, 86 F.3d 359, 363-64 (4th Cir. 1996).

controlled substances. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant did enter, attempt to enter, or remain in;
- Second, the business premises or property of a person registered with the Drug Enforcement Administration under 21 U.S.C. § 822;
- Third, that the defendant did so without authority[1106] and with the intent to steal any material or compound containing any quantity of a controlled substance; and
- Fourth,

  (a) that the replacement cost of the material or compound to the registrant was not less than $500;

  (b) that the defendant traveled in interstate or foreign commerce or used any facility in interstate or foreign commerce to facilitate the taking or attempt; or

  (c) another person was killed or suffered significant bodily injury as a result of the taking or attempt.

§ 2118(c)(1) Armed Robbery or Burglary

☞ **After giving the charge for either § 2118(a) or (b):**

- Lastly, that in committing the offense just described, the defendant assaulted any person or put in jeopardy the life of any person by the use of a dangerous weapon or device.[1107]

☞ **For instructions concerning assault, see 18 U.S.C. §§ 111 and 113.**

"In jeopardy" means putting the life of a person in an objective state of danger.[1108] Therefore, "to put in jeopardy" means to expose a person to a risk of death.[1109]

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm, as such, in appropriate circumstances, it may be a dangerous and deadly weapon. An object need not be inherently dangerous to be a dangerous weapon. Innocuous objects or instruments may become capable of inflicting injury when put to assaultive use. Tennis shoes can be dangerous weapons when used to stomp on a victim's head, and a stapler can

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[1106] In *United States v. Wise*, 221 F.3d 140, 150 (5th Cir. 2000), the Fifth Circuit held that the phrase "without lawful authority" in 18 U.S.C. § 2332a constituted an affirmative defense rather than an essential element. *But see United States v. Yokum*, 417 F.2d 253, 255 (4th Cir. 1969), a § 641 case.

[1107] "Dangerous weapon" includes a weapon intended to cause death or danger. Arguably this raises the *mens rea* level from general intent to specific intent. *See United States v. Hamrick*, 43 F.3d 877, 884-85 (4th Cir. 1995) (*en banc*) (holding "a reasonable jury could easily have found that Hamrick mailed the bomb he had built with the intent that it would explode and kill United States Attorney Kolibash.").

[1108] In *United States v. Newkirk*, 481 F.2d 881 (4th Cir. 1973), the Fourth Circuit held the following instruction did not constitute plain error: "To put in jeopardy the life of a person by the use of a dangerous weapon or device means, then, to expose such person to a risk of death or to the fear of death, by the use of such dangerous weapon or device." 481 F.2d at 883 n.1.

However, because jeopardy "is commonly defined as referring to an objective state of danger, not to a subjective feeling of fear," *United States v. Donovan*, 242 F.2d 61, 63 (2d Cir. 1957), "fear of death" language is not included.

[1109] *Newkirk*, 481 F.2d at 881.

be a dangerous weapon when used as a bludgeon. Teeth may also be a dangerous weapon if they are employed as such.[1110]

§ 2118(c)(2) Homicide

☞ **After giving the charge for the appropriate offense:**

- Lastly, that in committing the offense just described, the defendant killed any person.

"Controlled substance" means [see definition in 21 U.S.C. § 801]. [§ 2118(e)(1)]

"Business premises or property" includes conveyances and storage facilities. [§ 2118(e)(2)]

"Significant bodily injury" means bodily injury which involves a risk of death, significant physical pain, protracted and obvious disfigurement, or a protracted loss or impairment of the function of a bodily member, organ, or mental or sensory faculty. [§ 2118(e)(3)]

"Person" includes enterprises which dispense controlled substances.[1111]

IF APPROPRIATE:

The replacement cost of the materials or compounds containing controlled substances is the amount of money necessary to replace the materials or compounds stolen. If the replacement cost to the registrant is less than $500, you must find the defendant not guilty.[1112]

_____NOTE_____

In an attempt to commit robbery, force and violence or intimidation do not need to accompany the attempt, because the attempt relates to the taking, not to the force and violence or intimidation. *United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984).

Because § 2118 is analogous to § 2113, see NOTE for that section.

AFFIRMATIVE DEFENSE

Authority to enter the premises in question might constitute an affirmative defense. *See United States v. Wise*, 221 F.3d 140, 150 (5th Cir. 2000), where the Fifth Circuit held that the phrase "without lawful authority" in 18 U.S.C. § 2332a constituted an affirmative defense rather than an essential element. *But see United States v. Yokum*, 417 F.2d 253, 255 (4th Cir. 1969) (§ 641 case).

18 U.S.C. § 2119 CARJACKING [LAST UPDATED: 8/15/2016]

Title 18, United States Code, Section 2119 makes carjacking a crime. For you to find

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[1110] *See United States v. Sturgis*, 48 F.3d 784, 787-88 (4th Cir. 1995).

[1111] *United States v. Martin*, 866 F.2d 972, 978 (8th Cir. 1989).

[1112] *United States v. Kaylor*, 877 F.2d 658, 662 (8th Cir. 1989) ("When replacement occurs within a reasonable time after the robbery, the government must prove that the registrant incurred an actual cost of at least $500 in replacing the stolen items. On the other hand, when replacement does not occur within a reasonable time, the proof should establish the amount of money, not less than $500, necessary for the registrant to replace the stolen items. In such cases, the average wholesale price for those items at or near the time of the robbery may establish the replacement cost to the registrant.").

the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2119(1) [simple carjacking][1113]

- First, that the defendant took, or attempted to take, a motor vehicle;
- Second, from the person or presence of another;
- Third, that the motor vehicle had been transported, shipped, or received in interstate or foreign commerce;
- Fourth, that the defendant did so by force and violence or by intimidation;[1114] and
- Fifth, that the defendant unconditionally intended to kill or seriously injure or that the defendant possessed a conditional intent to kill or seriously injure should such violence become necessary.[1115]

§ 2119(2) [carjacking resulting in serious bodily injury]

- Sixth, that serious bodily injury resulted from the taking or attempted taking.

"Serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [§ 1365(h)(3)]["Serious bodily injury" also includes any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate 18 U.S.C. §§ 2241 or 2242.]

§ 2119(3) [carjacking resulting in death]

- Sixth, that death resulted from the taking or attempted taking.

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

The motor vehicle need not be moving in interstate commerce at the time of the taking. The government need only prove a minimal connection with interstate commerce, such as the vehicle traveled through another state when it was shipped from the manufacturer to the dealer.[1116]

The government does not have to prove that the death occurred during the actual carjacking. It is sufficient if the government proves the defendant caused the death of [_____] during the carjacking or the defendant's retention of the vehicle.[1117]

"To take" means to get into one's hands or into one's possession, power, or control by force or stratagem. The government is not required to prove the defendant's motive, because motive is not relevant. And the government is not required to prove that the defendant intended to deprive the victim of the vehicle permanently. "Taking" under this

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[1113] In *Jones v. United States*, 526 U.S. 227 (1999), the Supreme Court held that § 2119 has three distinct offenses. Thus, serious bodily harm and death are elements.

[1114] See text and NOTE for § 2113.

[1115] *United States v. Bailey*, 819 F.3d 92, 95 (4th Cir. 2016). "[A]n empty threat, or intimidating bluff, . . . standing on its own, is not enough to satisfy § 2119's specific intent element." *Id.* at 97 (quoting *Holloway v. United States*, 526 U.S. 1,11 (1999)).

[1116] *United States v. Johnson*, 22 F.3d 106, 108-09 (6th Cir. 1994).

[1117] *United States v. Blake*, 571 F.3d 331, 352 (4th Cir. 2009).

statute means for some period of time.[1118]

"Taking" is when the defendant takes control of the victim's vehicle, even if the defendant does not force the victim to relinquish it.[1119]

For example, forcibly removing a victim from a vehicle and placing him in the trunk would constitute taking the vehicle.[1120]

To prove that the vehicle was taken "from the presence of another," the government must show both a degree of physical proximity to the vehicle and an ability to control or immediately obtain access to the vehicle.[1121]

The government must prove beyond a reasonable doubt that the defendant possessed the intent to seriously harm or kill the driver [or other person who was with the vehicle] if that action had been necessary to complete the taking of the vehicle. However, the government need not prove that the defendant actually intended to cause the harm; it is sufficient that the defendant was conditionally prepared to act if the person failed to relinquish the vehicle.[1122]

_____NOTE_____

In *Holloway v. United States*, 526 U.S. 1, 4 (1999), the Supreme Court approved the following instruction:

> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs. In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

See United States v. Wilson, 198 F.3d 467 (4th Cir. 1999).

18 U.S.C. § 2231 ASSAULTING PERSON AUTHORIZED TO EXECUTE SEARCH WARRANTS

Title 18, United States Code, Section 2231 makes it a crime to assault a person authorized to execute search warrants. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant forcibly assaulted, resisted, opposed, prevented, impeded, intimidated, or interfered with;
- Second, a person who was authorized to serve or execute search warrants or to makie searches and seizures; and
- Third, that the defendant did so while the person was engaged in the

[1118] *United States v. Moore*, 73 F.3d 666, 668-69 (4th Cir. 1996).

[1119] *Foster*, 507 F.3d at 247.

[1120] *Moore*, 73 F.3d at 669.

[1121] *United States v. Davis*, 233 F. App'x 292 (4th Cir. 2007) (citing *United States v. Savarese*, 385 F.3d 15, 20 (1st Cir. 2004)). The presence requirement can be satisfied when the victim is inside a building and the car is outside.

[1122] *United States v. Foster*, 507 F.3d 233, 233 (4th Cir. 2007).

performance of his duties or on account of the performance of such duties.[1123]

ADDITIONAL ELEMENT

1. In doing so, did the defendant use any deadly or dangerous weapon?

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict serious physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. Thus, an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use.[1124]

_____NOTE_____

See generally 18 U.S.C. § 111.

In *United States v. Gore*, 592 F.3d 489 (4th Cir. 2010), the Fourth Circuit held that "a prisoner charged with a violation of 18 U.S.C. § 111 must, to succeed on the affirmative defense of self-defense, demonstrate that he responded to an unlawful and present threat of death or serious bodily injury." 592 F.3d at 495. In that case, the district court had properly instructed the jury that the defendant "could rely on justification based on self-defense only when he was under an unlawful present or imminent threat of serious bodily injury or death." *Id.* at 490 (quotation omitted).The district court elaborated as follows:

> A present or imminent threat of serious bodily injury or death must be based on a reasonable fear that a real and specific threat existed at the time of the defendant's assault, resistance, opposition, or impediment. this is an objective test that does not depend on the defendant's perception. If the defendant unlawfully assaulted, resist, or impeded a correctional officer when no reasonable fear of a present or imminent threat of serious bodily injury or death actually existed, his self-defense justification must fail.

Id. at 490.

In *United States v. Stotts*, 113 F.3d 493 (4th Cir. 1997), the defendant was prosecuted under D.C. Code § 22-505, which punishes assaults on correctional officers "*without justifiable and excusable cause*." The Fourth Circuit held that a defendant generally cannot invoke self-defense to justify an assault on a police or correctional officer, and therefore a standard self-defense instruction would not apply. However, a defendant has a limited right of self-defense if the defendant presents evidence that the officer used excessive force in carrying out his official duties. "A defendant who responds to an officer's use of excessive force with force reasonably necessary for self-protection under the circumstances has acted with 'justifiable and excusable cause' and therefore does not violate § 22-505." *Id*. at 496. The Court added that the jury must be instructed

[1123] *See United States v. Ranaldson*, 386 F. App'x 419 (4th Cir. 2010).

[1124] In *United States v. Sturgis*, 48 F.3d 784 (4th Cir. 1995), an HIV-positive inmate bit two correctional officers. The Fourth Circuit surveyed "dangerous weapon" cases, and concluded that "test of whether a particular object was used as a dangerous weapon ... must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury." *Id.* at 788 (citations omitted).

that the government bears the burden of disproving the defendant's limited claim of self-defense or justification beyond a reasonable doubt.

18 U.S.C. § 2232(d) GIVING NOTICE OF ELECTRONIC SURVEILLANCE

Title 18, United States Code, Section 2232(d) makes it a crime to give notice of possible court-ordered electronic surveillance. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant knew that a federal law enforcement officer had been authorized or had applied to intercept a communication;
- Second, that the defendant gave notice or attempted to give notice of the possible interception to any person; and
- Third, that the defendant did so in order to obstruct, impede, or prevent the interception.

_____NOTE_____

The wiretap application need not be pending at the time of the disclosure. *United States v. Aguilar*, 515 U.S. 593, 602-03 (1995).

18 U.S.C. § 2233 RESCUE OF SEIZED PROPERTY

Title 18, United States Code, Section 2233 makes it a crime to rescue property seized by the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that property, articles, or objects had been taken, detained, or seized by an officer of other person under the authority of any revenue law of the United States or by a person authorized to make searches and seizures;
- Second, that the defendant was aware of the seizure and that removal of the property, articles, or objects from government custody was unlawful;
- Third, that the defendant forcibly removed the property, articles, or objects from custody, that is, the defendant dispossessed the appropriate authorities of dominion and control over the property, articles, or objects; and
- Fourth, that the defendant did so willfully.[1125]

"Forcible rescue" is taking an item in a way that defies and frustrates the original seizure. Thus, rescue is forcible when it disrupts the government's possession in a situation where the government has lawfully asserted dominion and lawfully maintained custody.[1126]

Forcible rescue is not restricted to force exerted against a person.[1127]

18 U.S.C. § 2241 AGGRAVATED SEXUAL ABUSE

Title 18, United States Code, Section 2241 makes it a crime to commit aggravated sexual abuse. For you to find the defendant guilty, the government must prove each of the

[1125] *United States v. Sanders*, 862 F.2d 79, 82 (4th Cir. 1988).
[1126] *Id.* at 83.
[1127] *Id.*

following beyond a reasonable doubt:

§ 2241(a)

- First, that the defendant caused, or attempted to cause, another person to engage in a sexual act;
- Second, that the defendant did so either by using force against that other person, or by threatening or placing that other person in fear that any person would be subjected to death, serious bodily injury, or kidnapping;
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.

§ 2241(b)(1)

- First, that the defendant rendered another person unconscious and thereby engaged in a sexual act with that other person, or attempted to do so;
- Second, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Third, that the defendant did so knowingly.

§ 2241(b)(2)

- First, that the defendant administered to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impaired the ability of that other person to appraise or control conduct and engaged in a sexual act with that other person;
- Second, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Third, that the defendant did so knowingly.

§ 2241(c)

First clause

- First, that the defendant crossed a state line; and
- Second, that the defendant did so with the intent to engage in a sexual act with a person who had not attained the age of 12 years.

Second clause

- First, that the defendant engaged in a sexual act with another person who had not attained the age of 12 years;
- Second, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Third, that the defendant did so knowingly.

Third clause

- First, that the defendant engaged, or attempted to engage, in a sexual act with another person who had attained the age of 12 years but had not attained the age of 16 years (and was at least 4 years younger than the defendant);
- Second, that the defendant did so under one of the following circumstances:

  (a) by using force against that other person;

  (b) by threatening or placing that other person in fear that any person would be subjected to death, serious bodily injury, or kidnapping;

  (c) by rendering that other person unconscious; or

  (d) by administering to that other person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impaired the ability of that other person to appraise or control conduct;
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.

ADDITIONAL ELEMENT, IF APPROPRIATE

1. Did the conduct result in the death of the person?

☞ **Re: § 2241(c) The government does not have to prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years. [§ 2241(d)]**

"Force," as used in the statute, must be sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim. The government need not show evidence of physical restraint. The government may prove force by inference when the accused has disproportionately greater strength than, or coercive power over, the victim.[1128]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1129]

[1128] *United States v. Johnson*, 492 F.3d 254, 257-58 (4th Cir. 2007).

[1129] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

"Prison" means a correctional, detention, or penal facility. [§ 2246(1)]

"Sexual act" means

(a) contact, which means penetration, however slight, between the penis and vulva or the penis and the anus;

(b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;[1130]

(c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by an object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;[1131] or

(d) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. [§ 2246(2)]

"Serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [§ 2246(4)]

_____NOTE_____

Unlawful restraint is not an element of § 2241(a)(1). *United States v. Johnson*, 492 F.3d 254, 259 (4th Cir. 2007).

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

LESSER-INCLUDED OFFENSES:

Because the fear involved in the sexual abuse statute is not the same as that required by the aggravated sexual abuse statute, § 2242(1) is not a lesser included offense of § 2241(a). *United States v. Nasiruddin*, No. 98-4020, 1998 WL 539468 (4th Cir. Aug. 25, 1998).

In *United States v. Demarrias*, 876 F.2d 674 (8th Cir. 1989), the Eighth Circuit concluded that abusive sexual contact (§ 2244) is a lesser included offense of aggravated sexual abuse (§ 2241). "The clear intent of Congress seems to have been to make [§ 2244] the general 'lesser included offenses' provision for chapter 109A, expanding the range of prohibited conduct." 876 F.2d at 676-77.

[1130] Subsections (a) and (b) describe conduct which needs no explicit intent element, because one who engages in such contact inherently intends to do so for sexual purposes. *United States v. Demarrias*, 876 F.2d 674, 676 (8th Cir. 1989).

[1131] "The elements of this kind of "sexual act," therefore, are (a) penetration, (b) of the anal or genital opening of another, (c) by a hand, finger or any object, (d) with a specific intent." *United States v. Torres*, 937 F.2d 1469, 1476 (9th Cir. 1991). Subsection (c) covers conduct that is not inherently sexual, but that may be for a sexual purpose, depending upon the intent of the actor. *Demarrias*, 876 F.2d at 676.

The Ninth Circuit has held that sometimes abusive sexual contact (§ 2244) is not a lesser-included offense of attempted aggravated sexual abuse (§ 2241) because abusive sexual contact requires a specific intent not required for attempted aggravated sexual abuse. *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990). However, in *United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991), the Ninth Circuit concluded "that abusive sexual contact is a lesser-included offense of aggravated sexual abuse where the "sexual act" of the greater charge falls under section 2245(2)(C)(digital penetration) ...." 937 F.2d 1477. On the other hand, abusive sexual contact is not a lesser-included offense of aggravated sexual abuse where the sexual act involves penile penetration, § 2246(2)(A). *Id.* at 1478. Abusive sexual contact (§ 2244) is not a lesser-included offense of aggravated sexual abuse (§ 2241) when the abuse charged is penile as opposed to digital penetration, because specific intent is not an element of aggravated sexual abuse when the abuse charged is penile as opposed to digital penetration. *United States v. Garcia*, 7 F.3d 885, 891 (9th Cir. 1993).

18 U.S.C. § 2242 SEXUAL ABUSE

Title 18, United States Code, Section 2242 makes it a crime to commit sexual abuse. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2242(1)

- First, that the defendant caused, or attempt to cause, another person to engage in a sexual act;
- Second, that the defendant did so by threatening or placing that other person in fear;[1132]
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a federal prison; and
- Fourth, that the defendant did so knowingly.[1133]

§ 2242(2)

- First, that the defendant engaged in a sexual act with another person;
- Second, that the other person was either incapable of appraising the nature of the conduct or was physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act;
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a federal prison; and
- Fourth, that the defendant did so knowingly.

ADDITIONAL ELEMENT, IF APPROPRIATE

1. Did the conduct result in the death of the person?

"Sexual act" means:

(a) contact, which means penetration, however slight, between the penis and vulva

[1132] "Sexual abuse does not require the same type of fear required for aggravated sexual abuse [which is fear of death, serious bodily injury, or kidnapping]." *United States v. Nasiruddin*, 162 F.3d 1157, 1998 WL 539468 (4th Cir. 1998) (Table).

[1133] *See United States v. Tail*, 459 F.3d 854, 861 (8th Cir. 2006).

or the penis and the anus;

(b) contact between the mouth andthe penis, the mouth and the vulva, or the mouth and the anus;[1134]

(c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by an object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;[1135] or

(d) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. [§ 2246(2)]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1136]

"Prison" means a correctional, detention, or penal facility. [§ 2246(1)]

_____NOTE_____

The crime of sexual abuse does not appear to include any element of specific intent. *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990).

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

LESSER-INCLUDED OFFENSES:

In *United States v. Demarrias*, 876 F.2d 674 (8th Cir. 1989), the Eighth Circuit concluded that abusive sexual contact (§ 2244) is a lesser included offense of sexual abuse (§ 2242). "The clear intent of Congress seems to have been to make [§ 2244] the

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[1134] Subsections (a) and (b) describe conduct which needs no explicit intent element, because one who engages in such contact inherently intends to do so for sexual purposes. *Demarrias*, 876 F.2d at 676.

[1135] "The elements of this kind of "sexual act," therefore, are (a) penetration, (b) of the anal or genital opening of another, (c) by a hand, finger or any object, (d) with a specific intent." *United States v. Torres*, 937 F.2d 1469, 1476 (9th Cir. 1991). Subsection (c) covers conduct that is not inherently sexual, but that may be for a sexual purpose, depending upon the intent of the actor. *Demarrias*, 876 F.2d at 676.

[1136] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

general 'lesser included offenses' provision for chapter 109A, expanding the range of prohibited conduct." 876 F.2d at 676-77.

However, the Ninth Circuit has said that abusive sexual contact (§ 2244) is not a lesser-included offense of attempted sexual abuse (§ 2242) because abusive sexual contact requires a specific intent not required for attempted sexual abuse. *Sneezer*, 900 F.2d at 179.

18 U.S.C. § 2243 SEXUAL ABUSE OF A MINOR OR WARD

Title 18, United States Code, Section 2243 makes it a crime to commit sexual abuse with a minor or a ward. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2243(a)

- First, that the defendant engaged, or attempted to engage, in a sexual act with another person;
- Second, that the other person had attained the age of 12 years but not the age of 16 years and was at least 4 years younger than the defendant ["than the person so engaging"];
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.[1137]

The government does not have to prove that the defendant knew that the victim had reached the age of 12, but had not yet reached the age of 16, or that the defendant knew that the victim was at least four years younger than the defendant.[1138]

§ 2243(b)

- First, that the defendant engaged, or attempted to engage, in a sexual act with another person who was in official detention and was under the custodial, supervisory, or disciplinary authority of the defendant ["the person so engaging"];
- Second, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Third, that the defendant did so knowingly.

ADDITIONAL ELEMENT

1. Did the conduct result in the death of the person?

"Sexual act" means

[1137] *See United States v. Tail*, 459 F.3d 854, 861 (8th Cir. 2006).

[1138] *United States v. Jennings*, 496 F.3d 344 (4th Cir. 2007). The *Jennings* court relied on *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006), an 18 U.S.C. § 2423 prosecution, where the court said that "knowingly" modified the verb which constituted the crime, rather than the noun which identified the victim.

(a) contact, which means penetration, however slight, between the penis and vulva or the penis and the anus;

(b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;[1139]

(c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by an object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;[1140] or

(d) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. [§ 2246(2)]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1141]

"Prison" means a correctional, detention, or penal facility. [§ 2246(1)]

"Official detention" means detention by a federal officer or employee, or under the direction of a federal officer or employee following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or for purposes incident to any detention described above including transportation, medical diagnosis or treatment, court appearance, work, and recreation; but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency [See § 2246(5)]

AFFIRMATIVE DEFENSES

The defendant must establish, by a preponderance of the evidence, that the defendant and the person engaging in the sexual act were married to each other at the time.

[1139] Subsections (a) and (b) describe conduct which needs no explicit intent element, because one who engages in such contact inherently intends to do so for sexual purposes. *Demarrias*, 876 F.2d at 676.

[1140] "The elements of this kind of "sexual act," therefore, are (a) penetration, (b) of the anal or genital opening of another, (c) by a hand, finger or any object, (d) with a specific intent." *United States v. Torres*, 937 F.2d 1469, 1476 (9th Cir. 1991). Subsection (c) covers conduct that is not inherently sexual, but that may be for a sexual purpose, depending upon the intent of the actor. *United States v. Demarrias*, 876 F.2d 674, 676 (8th Cir. 1989).

[1141] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that a base in Afghanistan came within the statutory definition, such that the defendant could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[§ 2243(c)(2)]

The defendant must establish, by a preponderance of the evidence, that he reasonably believed that the other person had attained the age of 16 years. [§ 2243(c)(1)] [1142]

_____NOTE_____

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

LESSER-INCLUDED OFFENSES:

In *United States v. Demarrias*, 876 F.2d 674 (8th Cir. 1989), the Eighth Circuit concluded that abusive sexual contact (§ 2244) is a lesser included offense of sexual abuse (§ 2243). "The clear intent of Congress seems to have been to make [§ 2244] the general 'lesser included offenses' provision for chapter 109A, expanding the range of prohibited conduct." 876 F.2d at 676-77.

18 U.S.C. § 2244 ABUSIVE SEXUAL CONTACT[1143]

Title 18, United States Code, Section 2244 makes it a crime to commit abusive sexual contact. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2244(a)(1)

- First, that the defendant engaged in or caused sexual contact with or by another person;
- Second, that the defendant did so either by using force against that other person, or by threatening or placing that other person in fear that any person would be subjected to death, serious bodily injury, or kidnapping;
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.

OR

- First, that the defendant engaged in or caused sexual contact with or by another person;
- Second, that the defendant did so either by rendering the other person unconscious, or by administering to the other person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or

[1142] *United States v. Jennings*, 496 F.3d 344 (4th Cir. 2007).

[1143] "Instead of creating a separate scheme for abusive sexual *contact* in § 2244, Congress simply repeated the scheme it had laid out for abusive sexual *acts* in §§ 2241 through 2243 by incorporating those provisions into § 2244." *Id.* at 353. *See also United States v. John*, 309 F.3d 298, 301 (5th Cir. 2002). Therefore, the government does not have to prove a sexual act to convict under § 2244(a)(1).

other similar substance and thereby substantially impaired the ability of that other person to appraise or control conduct;

- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.

§ 2244(a)(2)

- First, that the defendant engaged in or caused sexual contact with or by another person;
- Second, that the defendant did so by threatening or placing that other person in fear,[1144] or, the other person was either incapable of appraising the nature of the conduct or was physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual contact;
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.[1145]

ADDITIONAL ELEMENT

1. Was the sexual contact with a child who had not attained the age of 12 years?

§ 2244(a)(3)

- First, that the defendant engaged in or caused sexual contact with or by another person;
- Second, that the other person had attained the age of 12 years but not the age of 16 years and was at least 4 years younger than the defendant ["than the person so engaging"];
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.[1146]

It is not necessary that the government prove that the defendant knew that the victim had reached the age of 12, but had not yet reached the age of 16, or that the defendant knew that the victim was at least four years younger than the defendant.[1147]

ADDITIONAL ELEMENT

1. Was the sexual contact with a child who had not attained the age of 12 years?

[1144] "Sexual abuse does not require the same type of fear required for aggravated sexual abuse [which is fear of death, serious bodily injury, or kidnapping]." *United States v. Nasiruddin*, No. 98-4020, 1998 WL 539468 (4th Cir. Aug. 25, 1998).

[1145] *See United States v. Tail*, 459 F.3d 854, 861 (8th Cir. 2006).

[1146] *See id.* at 861.

[1147] *United States v. Jennings*, 496 F.3d 344 (4th Cir. 2007).

§ 2244(a)(4)

- First, that the defendant engaged in or caused sexual contact with or by another person;
- Second, that the other person was in official detention and was under the custodial supervisory, or disciplinary authority of the defendant ["the person so engaging"];
- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.

ADDITIONAL ELEMENT

Was the sexual contact with a child who had not attained the age of 12 years?

§ 2244(a)(5)

First clause

- First, that the defendant crossed a state line; and
- Second, that the defendant did so with the intent to engage in sexual contact with a person who had not attained the age of 12 years.

Second clause

- First, that the defendant engaged in sexual contact with another person who had not attained the age of 12 years;
- Second, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Third, that the defendant did so knowingly.[1148]

Third clause

- First, that the defendant did one of the following:
  1. caused, or attempt to cause, another person to engage in sexual contact either by using force against that other person, or by threatening or placing that other person in fear that any person would be subjected to death, serious bodily injury, or kidnapping;
  2. rendered another person unconscious and thereby engaged in sexual contact with that other person, or attempted to do so; or
  3. administered to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impaired the ability of that other person to appraise or control conduct and engaged in sexual contact with that other person;
- Second, that the other person had attained the age of 12 years but not the age of 16 years and was at least 4 years younger than the defendant ["than the person so engaging"];

[1148] *See United States v. Williams*, 197 F.3d 1091, 1095-96 (11th Cir. 1999).

- Third, that the act occurred in the special maritime or territorial jurisdiction of the United States, or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency; and
- Fourth, that the defendant did so knowingly.

The government does not have to prove that the defendant knew that the other person engaging in the sexual contact had not attained the age of 12 years. [§ 2241(d)]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1149]

"Prison" means a correctional, detention, or penal facility. [§ 2246(1)]

"Official detention" means detention by a federal officer or employee, or under the direction of a federal officer or employee following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or for purposes incident to any detention described above including transportation, medical diagnosis or treatment, court appearance, work, and recreation; but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency [See § 2246(5)]

"Force," as used in the statute, must be sufficient to overcome, restrain, or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim. The government need not show evidence of physical restraint. The government may prove force by inference when the accused has disproportionately greater strength than, or coercive power over, the victim.[1150]

"Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.[1151] [§ 2246(3)]

"Serious bodily injury" means bodily injury that involves a substantial risk of death,

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[1149] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[1150] *United States v. Johnson*, 492 F.3d 254, 257(4th Cir. 2007).

[1151] "[T]he essential elements of "sexual contact" are (a) the intentional touching, (b) of the genitalia, anus, groin, breast, inner thigh, or buttocks of any other person, (c) with the specific intent." *United States v. Torres*, 937 F.2d 1469, 1476 (9th Cir. 1991).

unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [§ 2245(4)]

AFFIRMATIVE DEFENSES

The defendant must establish, by a preponderance of the evidence, that the defendant and the person engaging in the sexual act were married to each other at the time. [§ 2243(c)(2)]

The defendant must establish, by a preponderance of the evidence, that he reasonably believed that the other person had attained the age of 16 years. [§ 2243(c)(1)] [1152]

_____NOTE_____

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

LESSER-INCLUDED OFFENSES:

The Eleventh Circuit has concluded that simple assault under 18 U.S.C. § 113(a)(5) is a lesser included offense of abusive sexual contact under § 2244(a)(1). *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999) (citing *United States v. Eades*, 633 F.2d 1075, 1077 (4th Cir. 1980)).

18 U.S.C. § 2250 SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) [LAST UPDATED: 7/11/14]

Title 18, United States Code, Section 2250 makes it a crime for a sex offender to fail to register as required. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2250(a)(2)(A)

- First, that the defendant is a sex offender by reason of a conviction under Federal law, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States;
- Second, that the defendant was required to register under the Sex Offender Registration and Notification Act;
- Third, that the defendant failed to register or update a registration as required by the Sex Offender Registration and Notification Act; and
- Fourth, that the defendant did so knowingly.

§ 2250(a)(2)(B)

- First, that the defendant was required to register under the Sex Offender Registration and Notification Act;
- Second, that the defendant traveled in interstate or foreign commerce, or entered or left, or resided in, Indian country;[1153]

[1152] *United States v. Jennings*, 496 F.3d 344 (4th Cir. 2007).

[1153] In *United States v. Husted*, 545 F.3d 1240, 1243 n.3 (10th Cir. 2008), the government (continued...)

- Third, that the defendant failed to register or update a registration as required by the Sex Offender Registration and Notification Act; and
- Fourth, that the defendant did so knowingly.[1154]

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives. [42 U.S.C. § 16911 (13)]

AFFIRMATIVE DEFENSE

It is an affirmative defense that:

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist. [§ 2250(b)]

_____NOTE_____

The Sex Offender Registration and Notification Act (SORNA) is codified at 42 U.S.C. §§ 16901 *et seq.*

SORNA's criminal provision is not a specific intent law. "Knowingly" modifies "fails to register." "There is no language requiring specific intent or a willful failure to register such that the defendant must know his failure to register violated federal law." *United States v. Gould*, 568 F.3d 459, 463 (4th Cir. 2009) (citation omitted). The term "knowingly" merely requires proof of knowledge of the facts that constitute the offense. *Id*.

Because Congress established a jurisdictional predicate of interstate or foreign travel, the government need only establish a *de minimis* effect on interstate commerce. *United States v. Hinen*, 487 F. Supp. 2d 747, 758 (W.D. Va. 2007), *rev'd on other grounds by United States v. Hatcher*, 560 F.3d 222 (4th Cir. 2009).

In *United States v. Stewart*, 461 F. App'x 349 (4th Cir. 2012), the court indicated the following regarding venue:

> Stewart's violation of § 2250(a) necessarily involved more than one district because the traveled interstate from Virginia to Kentucky, where he failed to register. In such a situation, venue is governed by 18 U.S.C. § 3237(a). . . . Stewart's offense began in Virginia because his move from that state gave rise to his duty to register in Kentucky, where his offense was completed when he failed to register. 42 U.S.C. § 16913(c). Because Stewart's offense began when he moved from the Western District of Virginia, thereafter failing to register in Kentucky, venue was proper in the Western District of Virginia. *See*, *e.g.*, *United States v. Howell*, 552 F.3d 209, 717-18 (8th Cir. 2009) (holding that venue for a failure-to-register prosecution was proper in the Northern District of Iowa, from which the defendant moved to Texas where he failed to register.").

461 F. App'x at 351-52. *See also United States v. Burns*, 418 F. App'x 209 (4th Cir. 2011) (defendant argued venue improper in Western District of Virginia because offense

[1153] (...continued)
conceded that § 2250(a)(2)(B) is an express jurisdictional element of the offense.

[1154] *See United States v. Gould*, 568 F.3d 459, 463 (4th Cir. 2009); *Husted*, 545 F.3d at 1243.

occurred in California, where SORNA required him to register; court found venue was governed by 18 U.S.C. § 3237(a)). *But see United States v. Stinson*, 507 F. Supp. 2d 560, 570 (S.D. W.Va. 2007) (district court rejected the Government's continuing offense argument).

SORNA creates a continuing offense in the sense of an offense that can be committed over a length of time. *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008).

In *United States v. Bruffy*, 466 F. App'x 239 (4th Cir. 2012), the court dealt with the issue of a defendant who did not have a fixed address and who thereby could have defeated the purpose of the statute by continuously moving. SORNA defines the term "resides" as "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). SORNA guidelines define "habitually lives" as "any place in which the sex offender lives for at least 30 days." National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,062 (July 2, 2008). In *Bruffy*, the defendant lived in a particular apartment almost every day between January 13 and February 5, 2009. "[W]hile Bruffy did not live in the Belle Haven apartment between February 5, 2009 and February 15, 2009, he returned there on a daily basis and occasionally lived in his car in a parking lot behind the apartment. Thus, while Bruffy may have been 'transient' during the period between January 13, 2009 and February 5, 2009, Bruffy was not 'in transit' during this time." 466 F. App'x at 244. The court affirmed Bruffy's conviction.

18 U.S.C. § 2251 SEXUAL EXPLOITATION OF CHILDREN [LAST UPDATED: 01/20/2016]

Title 18, United States Code, Section 2251 makes it a crime to use any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2251(a)

- First, that the defendant did one of the following:

(1) employed, used, persuaded, induced, enticed, or coerced any minor to engage in any sexually explicit conduct;

(2) had a minor assist any other person to engage in any sexually explicit conduct; or

(3) transported any minor in interstate or foreign commerce, or in any territory or possession of the United States, with the intent that such minor engage in sexually explicit conduct;

- Second, that the defendant did so for the purpose of either producing any visual depiction of such sexually explicit conduct or transmitting a live visual depiction of such sexually explicit conduct;[1155] and

[1155] In *United States v. Palomino-Coronado*, 805 F.3d 127, 130 (4th Cir. 2015), the Fourth Circuit stated that "§2251(a) contains a specific intent element: the government was required to prove that production of a visual depiction was a purpose of engaging in the sexually explicit conduct." The Fourth Circuit found that it is not "sufficient simply to prove that the defendant purposefully took a picture." *Id.* at 131. Instead, the "defendant must engage in the sexual activity with the specific intent to produce a visual depiction." *Id.*

(continued...)

- Third, [one of the following]:

(1) that the defendant knew or had reason to know that such visual depiction would be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed;

(2) that the visual depiction was produced or transmitted using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(3) that the visual depiction had actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.[1156]

§ 2251(b)

- First, that the defendant was, at the time alleged in the indictment, the parent, legal guardian, or person having custody and control of a minor;
- Second, that the defendant permitted such minor to engage in, or to assist any other person to engage in, sexually explicit conduct;
- Third, that the defendant acted knowingly;
- Fourth, that the defendant did so for the purpose of either producing any visual depiction of such sexually explicit conduct or transmitting a live visual depiction of such sexually explicit conduct; and
- Fifth, [one of the following]:

(1) that the defendant knew or had reason to know that such visual depiction would be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed;

(2) that the visual depiction was produced or transmitted using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(3) that the visual depiction had actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.[1157]

§ 2251(c)

- First, that the defendant employed, used, persuaded, induced, enticed, or coerced any minor to engage in, or had a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions;
- Second, that the defendant did so for the purpose of producing any visual depiction of such sexually explicit conduct; and
- Third, that the defendant either intended to be transported, or did transport, such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or

[1155] (...continued)

[1156] *See United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012); United *States v. Malloy*, 568 F.3d 166, 169 (4th Cir. 2009). The statute was amended October 13, 2008, to add language regarding transmitting a live visual depiction.

[1157] *See Malloy*, 568 F.3d 166.

mail.

§ 2251(d)

- First, that the defendant made, printed, or published, or caused to be made, printed, or published, a notice or advertisement seeking or offering either

(1) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction involving the use of a minor engaging in sexually explicit conduct and such visual depiction was of such conduct; or

(2) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such sexually explicit conduct;

- Second, that the defendant acted knowingly; and
- Third, [one of the following]:

(1) that the defendant knew or had reason to know that the notice or advertisement would be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(2) that notice or advertisement was transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

To act knowingly means to do an act voluntarily and intentionally and not because of mistake or accident or other innocent reason.[1158]

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. [18 U.S.C. § 1030(e)(1)]

"Custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained. [§ 2256(7)]

"Child pornography" means any visual depiction, including any photograph, film video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where —

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. [§ 2256(8)]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Graphic" means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit

[1158] *United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988). *But c.f. United States v. Matthews*, 209 F.3d 338, 351-52 (4th Cir. 2000) ("to act knowingly is to act with knowledge of the facts that constitute the offense, but not necessarily with knowledge that the facts amount to illegal conduct unless the statute indicates otherwise.").

conduct is being depicted. [§ 2256(10)]

"Identifiable minor" means a person

(i) who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

shall not be construed to require proof of the actual identity of the identifiable minor. [§ 2256(9)]

"Indistinguishable" means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This does not apply to depictions that are drawings, cartoons, sculptures, or paintings. [§ 2256(11)]

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession, or the District of Columbia. [18 U.S.C. § 10]

"Minor" means any person under the age of 18 years. [§ 2256(1)]

"Producing" means producing, directing, manufacturing, issuing, publishing, or advertising. [§ 2256(3)]

"Visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image. [§ 2256(5)]

"Sexually explicit conduct"[1159] means actual or simulated

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person. [§ 2256(2)(A)]

"Visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image. [§ 2256(5)]

"Persuade," "induce," and "entice" convey the idea of one person leading or moving another by persuasion or influence, as to some action or state of mind.[1160]

The government does not have to prove that the visual depictions were transported in

[1159] "Sexually explicit conduct" has a different meaning for purposes of "child pornography" when the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256(2)(B).

[1160] *United States v. Engle*, 676 F.3d 405, 411 n.3 (4th Cir. 2012).

interstate commerce. It is sufficient if they were mailed.[1139]

NOTE

In *United States v. Malloy*, 568 F.3d 166, 171, 173 (4th Cir. 2009), the Fourth Circuit concluded that knowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense, and that no reasonable mistake of age defense is constitutionally required.

There is no element of direct or implied commercial purpose in § 2251. *United States v. Matthews*, 209 F.3d 338, 343 n.2 (4th Cir. 2000); *United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993).

"A defendant can violate § 2251(a) in multiple ways," including "using" and "enticing." A defendant "uses" a minor for purposes of § 2251(a) if he photographs the minor engaging in sexually explicit conduct to create a visual depiction of such conduct." *United States v. McCloud*, 590 F.3d 560, 566 (8th Cir. 2009). Evidence that a female traveled across state lines to engage in prostitution in response to the defendant's call asking her to do so is sufficient to sustain the finding that the defendant "induced or persuaded" her to make the trip in violation of § 2422. *Harms v. United States*, 272 F.2d 478, 480 (4th Cir. 1959).

In *Matthews*, a § 2252 prosecution, the Fourth Circuit rejected the appellant's First Amendment defense that he was doing research for a valid journalistic purpose. *See also United States v. Bausch*, 140 F.3d 739, 741-42 (8th Cir. 1998) (district court's failure to address Bausch's First Amendment issue, which he raised for first time on appeal, not plain error).

"Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997).

In *Malloy*, the Fourth Circuit upheld the conviction which involved "local" production of child pornography with a video camera and videotape that had traveled in foreign commerce. Such production was "part of an economic class of activities that have a substantial effect on interstate commerce." 568 F.3d at 180 (quotations and citations omitted).

Section 2251(a) is a continuing offense, and therefore venue was proper in the Eastern District of Virginia under both paragraphs of 18 U.S.C. § 3237(a), even though the defendant produced the visual depiction of the minor in Pennsylvania, because he transported the depiction back to his home in Virginia. *United States v. Engle*, 676 F.3d 405, 416 (4th Cir. 2012).

"Sexual abuse of minors can be accomplished by several means and is often carried out through a period of grooming. Grooming refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity." *Id*. at 412 (quotations and citations omitted). "Sections 2422(b) and 2251(a) target the sexual grooming of minors as well as the actual sexual exploitation of them." *Id*. (quotation and citation omitted).

18 U.S.C. § 2251A SELLING OR BUYING CHILDREN FOR SEX

[1139] *United States v. Goodwin*, 854 F.2d 33, 37 n.3 (4th Cir. 1988).

Title 18, United States Code, Section 2251A makes it a crime to sell or buy any minor to engage in any sexually explicit conduct. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2251A(a)(1)

- First, that the defendant was a parent, legal guardian, or other person who had custody or control of a minor;
- Second, that the defendant sold or otherwise transferred, or offered to sell or otherwise transfer, custody or control of the minor;
- Third, that the defendant knew that, as a consequence of the sale or transfer, the minor would be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; and
- Fourth, that the minor or other person traveled in or was transported in interstate or foreign commerce in the course of the selling or transferring of custody; that any offer to sell or otherwise transfer custody of a minor was communicated or transported in interstate or foreign commerce by any means including by computer or mail; or that the sale or transfer of custody took place in a territory or possession of the United States.

§ 2251A(a)(2)

- First, that the defendant was a parent, legal guardian, or other person who had custody or control of a minor;
- Second, that the defendant sold or otherwise transferred, or offered to sell or otherwise transfer, custody or control of the minor;
- Third, that the defendant did so with intent to promote the engaging in of sexually explicit conduct by the minor for the purpose of producing a visual depiction of sexually explicit conduct, or to promote the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing a visual depiction of sexually explicit conduct; and
- Fourth, that the minor or other person traveled in or was transported in interstate or foreign commerce in the course of the selling or transferring of custody; that any offer to sell or otherwise transfer custody of a minor was communicated or transported in interstate or foreign commerce by any means including by computer or mail; or that the sale or transfer of custody took place in a territory or possession of the United States.

§ 2251A(b)(1)

- First, that the defendant purchased or otherwise obtained, or offered to purchase or otherwise obtain, custody and control of a minor;
- Second, that the defendant knew that, as a consequence of the purchase or obtaining of custody, the minor would be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; and
- Third, that the minor or other person traveled in or was transported in interstate or foreign commerce in the course of the selling or transferring of custody; that any offer to sell or otherwise transfer custody of a minor was communicated or transported in interstate or foreign commerce by any means including by computer or mail; or that the sale or transfer of custody took place in a territory or possession of the United States.

§ 2251A(b)(2)

- First, that the defendant purchased or otherwise obtained, or offered to purchase or otherwise obtain, custody and control of a minor;
- Second, that the defendant did so with intent to promote the engaging in of sexually explicit conduct by the minor for the purpose of producing a visual depiction of sexually explicit conduct, or to promote the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing a visual depiction of sexually explicit conduct; and
- Third, that the minor or other person traveled in or was transported in interstate or foreign commerce in the course of the selling or transferring of custody; that any offer to sell or otherwise transfer custody of a minor was communicated or transported in interstate or foreign commerce by any means including by computer or mail; or that the sale or transfer of custody took place in a territory or possession of the United States.[1140]

"Minor" means any person under the age of 18 years. [§ 2256(1)]

"Sexually explicit conduct"[1141] means actual or simulated

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person. [§ 2256(2)(A)]

"Producing" means producing, directing, manufacturing, issuing, publishing, or advertising. [§ 2256(3)]

"Visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image. [§ 2256(5)]

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. [18 U.S.C. § 1030(e)(1)]

"Custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained. [§ 2256(7)]

Custody means the power to manage, command, direct or restrain another person.[1142]

[1140] *See United States v. Moser*, 235 F. App'x 138 (4th Cir. 2007) (district court did not plainly err in incorrectly instructed jury that "engaging in sexually explicit conduct with a minor is in fact obtaining control.").

[1141] "Sexually explicit conduct" has a different meaning for purposes of "child pornography" when the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256(2)(B).

[1142] Instruction approved in *United States v. Buculei*, 262 F.3d 322, 332 n.9 (4th Cir. 2001). *See Moser*, 235 F. App'x 138 (district court did not plainly err when incorrectly instructed the jury that

(continued...)

Control involves something more than mere persuasion, inducement, or coercion.

However, the custody or control need not be of the same degree as that exercised by a parent or guardian.[1143]

"Child pornography" means any visual depiction, including any photograph, film video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where–

(A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. [§ 2256(8)]

"Identifiable minor" means a person

(i) who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

shall not be construed to require proof of the actual identity of the identifiable minor. [§ 2256(9)]

"Graphic" means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted. [§ 2256(10)]

"Indistinguishable" means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This does not apply to depictions that are drawings, cartoons, sculptures, or paintings. [§ 2256(11)]

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

NOTE

See United States v. Cedelle, 89 F.3d 181, 185 (4th Cir. 1996) (a § 2252 case), where the court said the government is required to prove that the defendant knew that the visual depiction portrayed a person under the age of 18 and that the minor was engaged in sexually explicit conduct.

[1142] (...continued)
"engaging in sexually explicit conduct with a minor is in fact obtaining control.").

[1143] *Buculei*, 262 F.3d at 332 n.9. However, the court declined to decide whether psychological control would be sufficient under the statute.

18 U.S.C. § 2252 SEXUAL EXPLOITATION OF MINORS

Title 18, United States Code, Section 2252 makes it a crime to transport in interstate commerce, receive, or distribute, sell, or possess with intent to sell, visual depictions involving the use of a minor engaging in sexually explicit conduct. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2252(a)(1)

- First, that the defendant transported or shipped using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed any visual depiction;
- Second, that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such sexually explicit conduct; and
- Third, that the defendant acted knowingly.

§ 2252(a)(2)

- First, that the defendant received or distributed any visual depiction using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which contained materials which had been mailed or shipped or transported in or affecting interstate or foreign commerce by any means including by computer;

OR

- First, that the defendant reproduced any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails;
- Second, that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such sexually explicit conduct; and
- Third, that the defendant acted knowingly.

§ 2252(a)(3)(A)

- First, that the defendant sold or possessed with intent to sell any visual depiction;
- Second, that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such sexually explicit conduct;
- Third, that the defendant did so in the special maritime and territorial jurisdiction of the United States or on any land or building owned by, leased, to, or otherwise used by or under the control of the Government of the United States, or in the Indian country [as defined in 18 U.S.C. § 1151]; and
- Fourth, that the defendant acted knowingly.

§ 2252(a)(3)(B)

- First, that the defendant sold or possessed with intent to sell any visual depiction;
- Second, that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such sexually explicit conduct;

- Third, that the visual depiction had been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or had been shipped or transported in or affecting interstate or foreign commerce, or was produced using materials which had been mailed or shipped or transported using any means or facility or interstate or foreign commerce, including by computer; and
- Fourth, that the defendant acted knowingly.

§ 2252(a)(4)(A)

- First, that the defendant possessed or accessed with intent to view, one or more books, magazines, periodicals, films, videotapes, or other matter which contained any visual depiction;
- Second, that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such sexually explicit conduct;
- Third, that the defendant did so in the special territorial jurisdiction of the United States or on any land or building owned by, leased, to, or otherwise used by or under the control of the Government of the United States, or in the Indian country [as defined in 18 U.S.C. § 1151]; and
- Fourth, that the defendant acted knowingly.

§ 2252(a)(4)(B)

- First, that the defendant possessed or accessed with intent to view, one or more books, magazines, periodicals, films, video tapes, or other matter which contained any visual depiction;
- Second, that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such sexually explicit conduct;
- Third, that the visual depiction had been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or had been shipped or transported in or affecting interstate or foreign commerce, or was produced using materials which had been mailed or shipped or transported using any means or facility or interstate or foreign commerce, including by computer; and
- Fourth, that the defendant acted knowingly.

To act knowingly means to do an act voluntarily and intentionally and not because of mistake or accident or other innocent reason.[1144]

The government is required to prove that the defendant knew that the visual depiction portrayed a person under the age of 18 and that the minor was engaged in sexually explicit conduct.[1145]

"Minor" means any person under the age of 18 years. [§ 2256(1)]

[1144] *United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988) (a § 2252 case). *But c.f. United States v. Matthews*, 209 F.3d 338, 351-52 (4th Cir. 2000) (a § 2252 case) ("to act knowingly is to act with knowledge of the facts that constitute the offense, but not necessarily with knowledge that the facts amount to illegal conduct unless the statute indicates otherwise.").

[1145] *United States v. Cedelle*, 89 F.3d 181, 185 (4th Cir. 1996).

"Sexually explicit conduct"[1146] means actual or simulated

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person. [§ 2256(2)(A)]

"Producing" means producing, directing, manufacturing, issuing, publishing, or advertising. [§ 2256(3)]

"Visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image. [§ 2256(5)]

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. [18 U.S.C. § 1030(e)(1)]

"Child pornography" means any visual depiction, including any photograph, film video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where–

(A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. [§ 2256(8)]

"Identifiable minor" means a person

(i) who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

shall not be construed to require proof of the actual identity of the identifiable minor. [§ 2256(9)]

"Graphic" means that a viewer can observe any part of the genitals or pubic area of

[1146] "Sexually explicit conduct" has a different meaning for purposes of "child pornography" when the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256(2)(B).

any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted. [§ 2256(10)]

"Indistinguishable" means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This does not apply to depictions that are drawings, cartoons, sculptures, or paintings. [§ 2256(11)]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1147]

"Interstate commerce" includes commerce between one State, territory, possession, or the District of Columbia and another State, territory, possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

AFFIRMATIVE DEFENSE TO § 2252(a)(4) [§ 2252(c)]

- First, that the defendant possessed less than three matters containing any visual depictions involving the use of a minor engaging in sexually explicit conduct and the visual depiction was of such sexually explicit conduct; and
- Second, that the defendant promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof, took reasonable steps to destroy each such visual depiction, or reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

The government does not have to prove that the visual depictions were transported in interstate commerce. It is sufficient if they were mailed.[1148]

NOTE

In *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000), the Fourth Circuit rejected the appellant's First Amendment defense that he was doing research for a valid journalistic purpose. *See also United States v. Bausch*, 140 F.3d 739, 741-42 (8th Cir. 1998) (holding district court's failure to address First Amendment issue was not plain error).

[1147] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[1148] *United States v. Goodwin*, 854 F.2d 33, 37 n.3 (4th Cir. 1988)

There is no commercial purpose requirement. *Matthews*, 209 F.3d at 343 n.2.

"Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997).

In *Bausch*, 140 F.3d 739 (8th Cir. 1998), the Eighth Circuit emphasized the "express jurisdictional element requiring the transport in interstate or foreign commerce of the visual depictions or the materials used to produce them." 140 F.3d at 741. Bausch used a Japanese camera.

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

18 U.S.C. § 2252A CHILD PORNOGRAPHY

Title 18, United States Code, Section 2252A makes it a crime to transport in interstate commerce, receive, or distribute, sell or possess with intent to sell child pornography. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2252A(a)(1)

- First, that the defendant mailed, or transported or shipped using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign by any means, including by computer;
- Second, any child pornography; and
- Third, that the defendant acted knowingly.

§ 2252A(a)(2)

- First, that the defendant received or distributed;
- Second, any child pornography, or any material that contained child pornography;
- Third, that had been mailed, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; and
- Fourth, that the defendant acted knowingly.

§ 2252A(a)(3)(A)

- First, that the defendant reproduced;
- Second, any child pornography;
- Third, for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; and

- Fourth, that the defendant acted knowingly.[1149]

§ 2252A(a)(3)(B)

- First, that the defendant advertised, promoted, presented, distributed, or solicited;[1150]
- Second, through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;
- Third, any material or purported material in a manner that reflected the belief,[1151] or that was intended to cause another to believe,[1152] that the material or purported material was, or contained, an obscene visual depiction of a minor engaging in sexually explicit conduct, or a visual depiction of an actual minor engaging in sexually explicit conduct; and
- Fourth, that the defendant acted knowingly.[1153]

"Promotes" means the act of recommending purported child pornography to another for his acquisition.[1154]

"Presents" means showing or offering child pornography to another person with a view to his acquisition.[1155]

The government must prove that the defendant believed the material offered was child pornography, and that the defendant said or did something that would lead a reasonable

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[1149] "Knowingly" "applies to every element of the two provisions." *United States v. Williams*, 553 U.S. 285, 294 (2008).

[1150] The "string of operative verbs ... is reasonably read to have a transactional connotation. That is to say, the statute penalizes speech that accompanies or seeks to induce a transfer of child pornography." However, the transactions need not be commercial. *Id.* at 294.

[1151] In *Williams*, the Court determined that

> the phrase "in a manner that reflects the belief" includes both subjective and objective components. *** Thus, a misdescription that leads the listener to believe the defendant is offering child pornography, when the defendant in fact does not believe the material is child pornography, does not violate this prong of the statute. (It may, however, violate the "manner ... that is intended to cause another to believe" prong if the misdescription is intentional.) There is also an objective component to the phrase "manner than reflects the belief." The statement or action must objectively manifest a belief that the material is child pornography; a mere belief, without an accompanying statement or action that would lead a reasonable person to understand that the defendant holds that belief, is insufficient.

553 U.S. at 295-96.

[1152] The phrase "that is intended to cause another to believe" "contains only a subjective element: the defendant must 'intend' that the listener believe the material to be child pornography, and must select a manner of 'advertising, promoting, presenting, distributing, or soliciting' the material that he thinks will engender that belief– whether or not a reasonable person would think the same." *Id.* at 296.

[1153] *Id.*

[1154] *United States v. Williams*, 553 U.S. 285, 294 (2008).

[1155] *Id.*

person to understand that the defendant believed that the material was child pornography.[1156]

Finally, the government must prove that the defendant intended that the other person believed the material to be child pornography, and that the defendant selected a manner of advertising, promoting, presenting, distributing, or soliciting the material that the defendant thought would cause that belief, whether or not a reasonable person would think so.[1157]

§ 2252A(a)(4)(A)

- First, that the defendant sold or possessed with intent to sell any child pornography;
- Second, that the defendant did so in the special maritime and territorial jurisdiction of the United States or on any land or building owned by, leased, to, or otherwise used by or under the control of the Government of the United States, or in the Indian country [as defined in 18 U.S.C. § 1151]; and
- Third, that the defendant acted knowingly.

§ 2252A(a)(4)(B)

- First, that the defendant sold or possessed with intent to sell any child pornography;
- Second, that had been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or was produced using materials that had been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; and
- Third, that the defendant acted knowingly.

§ 2252A(a)(5)(A)

- First, that the defendant possessed or accessed with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contained an image of child pornography;
- Second, that the defendant did so in the special maritime and territorial jurisdiction of the United States or on any land or building owned by, leased, to, or otherwise used by or under the control of the Government of the United States, or in the Indian country [as defined in 18 U.S.C. § 1151]; and
- Third, that the defendant acted knowingly.

§ 2252A(a)(5)(B)

- First, that the defendant possessed or accessed with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contained an image of child pornography;
- Second, that had been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or was produced using materials that had been mailed, or shipped or transported in or affecting

[1156] *Id.*
[1157] *Id.*

interstate or foreign commerce by any means, including by computer; and

- Third, that the defendant acted knowingly.

§ 2252A(a)(6)

- First, that the defendant distributed, offered, sent, or provided to a minor;
- Second, any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction was, or appeared to be, of a minor engaging in sexually explicit conduct;
- Third, [one of the following]:

  1. that had been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

  2. that was produced using materials that had been mailed, shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

  3. which distribution, offer, sending, or provision was accomplished using the mails or any means or facility of interstate or foreign commerce; and
- Third, that the defendant did so knowingly and for the purpose of inducing or persuading a minor to participate in any activity was illegal.

§ 2252A(a)(7)

- First, that the defendant produced with intent to distribute or distributed;
- Second, child pornography that was an adapted or modified depiction of an identifiable minor;
- Third, that the defendant did so by any means, including a computer, in or affecting interstate or foreign commerce; and
- Third, that the defendant acted knowingly.

To act knowingly means to do an act voluntarily and intentionally and not because of mistake or accident or other innocent reason.[1158]

The government is required to prove that the defendant knew that the visual depiction portrayed a person under the age of 18 and that the minor was engaged in sexually explicit conduct.[1159]

"Minor" means any person under the age of 18 years. [§ 2256(1)]

"Sexually explicit conduct"[1160] means actual or simulated

[1158] *See United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988). *But c.f. United States v. Matthews*, 209 F.3d 338, 351-52 (4th Cir. 2000) ("to act knowingly is to act with knowledge of the facts that constitute the offense, but not necessarily with knowledge that the facts amount to illegal conduct unless the statute indicates otherwise.").

[1159] *See United States v. Cedelle*, 89 F.3d 181, 185 (4th Cir. 1996).

[1160] "Sexually explicit conduct" has a different meaning for purposes of "child pornography" when the visual depiction is a digital image, computer image, or computer-generated image that is, or

(continued...)

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person. [§ 2256(2)(A)]

"Visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image. [§ 2256(5)]

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. [18 U.S.C. § 1030(e)(1)]

"Child pornography" means any visual depiction, including any photograph, film video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where–

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. [§ 2256(8)]

"Producing" means producing, directing, manufacturing, issuing, publishing, or advertising. [§ 2256(3)]

"Identifiable minor" means a person

(i) who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

shall not be construed to require proof of the actual identity of the identifiable minor. [§ 2256(9)]

"Graphic" means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted. [§ 2256(10)]

[1160] (...continued)
is indistinguishable from, that of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256(2)(B).

"Indistinguishable" means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This does not apply to depictions that are drawings, cartoons, sculptures, or paintings. [§ 2256(11)]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1161]

The jury must determine, based on all the evidence, whether a reasonable viewer would consider the depiction to be of an actual minor. The jury may look to the manner in which the image was marketed to determine whether it is prohibited material.[1162]

The government does not have to prove that the visual depictions were transported in interstate commerce. It is sufficient if they were mailed.[1163]

AFFIRMATIVE DEFENSE TO § 2252A(a)(1), (2), (3)(A), (4), or (5) [§ 2252A(c)]

That the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct and each such person was an adult at the time the material was produced; or the alleged child pornography was not produced using any actual minor or minors.[1164]

AFFIRMATIVE DEFENSE TO § 2252A(a)(5) [§ 2252A(d)]

- First, that the defendant possessed less than three images of child pornography; and
- Second, that the defendant promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof, took reasonable steps to destroy each such image, or reported the matter to a law enforcement agency and afforded that agency access to each

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[1161] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[1162] *United States v. Mento*, 231 F.3d 912, 922 (4th Cir. 2000).

[1163] *United States v. Goodwin*, 854 F.2d 33, 37 n.3 (4th Cir. 1988)

[1164] This defense is unavailable to mere possessors. *United States v. Mento*, 231 F.3d 912, 921 (4th Cir. 2000).

such image.

_____NOTE_____

In *United States v. Mento*, 231 F.3d 912, 923 (4th Cir. 2000), the Fourth Circuit held that the Child Pornography Protection Act does not offend the First Amendment.

In *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000), a § 2252 prosecution, the Fourth Circuit rejected the appellant's First Amendment defense that he was doing research for a valid journalistic purpose. *See also United States v. Bausch*, 140 F.3d 739, 741-42 (8th Cir. 1998) (district court's failure to address Bausch's First Amendment issue raised for first time on appeal was not plain error).

"Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." *United States v. Carroll,* 105 F.3d 740, 742 (1st Cir. 1997).

"[T]here seems to be general agreement among the circuits that pornographic images themselves are sufficient to prove the depiction of actual minors" *United States v. Bynum*, 604 F.3d. 161, 166 (4th Cir. 2010) (quotations and citation omitted).

Section 2252A(a)(3), which prohibits pandering, does not require the actual existence of child pornography. *United States v. Williams*, 553 U.S. 285, 293 (2008).

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

18 U.S.C. § 2261 INTERSTATE DOMESTIC VIOLENCE

§ 2261(a)(1)

Title 18, United States Code, Section 2261(a)(1) makes it a crime to travel in interstate commerce with the intent to kill, injure, harass, or intimidate a spouse or intimate partner and, in the course or as a result of such travel, commit a crime of violence against such person. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant traveled in interstate or foreign commerce or entered or left Indian country or within the special maritime and territorial jurisdiction of the United States;
- Second, that the defendant did so with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner; and
- Third, that in the course of or as a result of such travel, the defendant committed or attempted to commit a crime of violence against that spouse or intimate partner or dating partner.

§ 2261(a)(2)

Title 18, United States Code, Section 2261(a)(2) makes it a crime to cause a spouse or intimate partner to travel in interstate commerce by force, coercion, duress, or fraud and, in the course or as a result of such travel, to commit a crime of violence against such

person. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was a spouse, intimate partner, or dating partner of [the victim];
- Second, that the defendant caused [the victim] to travel in interstate commerce, or to enter or leave Indian country, by force, coercion, duress, or fraud; and
- Third, that in the course of, as a result of, or to facilitate that conduct or travel, the defendant committed or attempted to commit a crime of violence against [the victim].[1165]

ADDITIONAL ELEMENTS, IF APPROPRIATE:

1. Did the defendant's conduct result in the death of the victim? [§ 2261(b)(1)]

2. Did the defendant's conduct result in permanent disfigurement or life threatening bodily injury to the victim? [§ 2261(b)(2)]

3. Did the defendant's conduct result in serious bodily injury to the victim, or did the defendant use a dangerous weapon during the offense? [§ 2261(b)(3)]

4. Did the defendant's conduct constitute [here the Court should identify the elements of the conduct that would constitute an offense under §§ 2241-2245, without regard to whether the offense committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison]. [§ 2261(b)(4)]

"Spouse or intimate partner" includes a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser [§ 2266(7)(A)(I)] and any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the state or tribal jurisdiction in which the injury occurred or where the victim resides. [§ 2266(7)(B)]

"Bodily injury" means any act, except one done in self-defense, that results in physical injury or sexual abuse. [§ 2266(1)]

"Serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [18 U.S.C. §§ 2119(2) and 1365(h)(3)]

"Course of conduct" means a pattern of conduct composed of two or more acts, evidencing a continuity of purpose. [§ 2266(2)]

"Dating partner" refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. The existence of such a relationship is based on a consideration of the length of the relationship and the type of relationship and the frequency of interaction between the persons involved in the relationship. [§ 2266(10)]

"As" means in the role, capacity, or function of, in a manner similar to, like.[1166]

"Coercion" or "duress" exists when an individual is subject to actual or threatened force of such a nature as to induce a well-founded fear of impending death or serious

[1165] *See United States v. Helem*, 186 F.3d 449, 453 (4th Cir. 1999).
[1166] *United States v. Barnette*, 211 F.3d 803, 815 (4th Cir. 2000).

bodily harm from which there is no reasonable opportunity to escape.[1167]

"Crime of violence" means an offense act that has as an element the use, attempted use, or threatened use of physical force against the person or property of another or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the act. [18 U.S.C. § 16]

The term "protection order" includes any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. [§ 2266(5)]

A protection order issued by a state or tribal or territorial court is consistent with Section 2262 if:

(1) such court has jurisdiction over the parties and matter under the law of such state or Indian tribe or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. [*See* § 2265(b)]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1168]

NOTE

In *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000), the defendant argued that the victim was not his "intimate partner." The Fourth Circuit found no decisions

[1167] Instruction given by district court in *Helem*, 186 F.3d at 453.

[1168] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

construing the phrase "as a spouse," and ruled that it was not reversible error that the district court instructed the jury in the words of the statute and left it to the jury to decide whether or not the defendant and victim lived together as spouses. *Id*. at 814-15.

Physical violence that occurs before interstate travel begins can satisfy the "in the course or as a result of that conduct" requirement of § 2261(a)(2). *United States v. Helem*, 186 F.3d 449, 455 (4th Cir. 1999). The court did not reach the issue of whether preventing the victim from obtaining medical treatment, thereby exacerbating her injuries, would support a conviction.

In *Helem*, the defendant argued that the district court erred in not instructing the jury that consent of the victim was a defense. The district court did instruct the jury that consent was a defense to kidnapping, a separate charge in the indictment. The Fourth Circuit stated that, given the district court's instruction on coercion and duress, when considered as a whole, the jury was fairly apprised that consent precluded a conviction under § 2261(a)(2).

The venue provisions of § 3237(a) apply, therefore venue is appropriate where the travel occurred. *Barnette*, 211 F.3d at 813.

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

18 U.S.C. § 2261A INTERSTATE STALKING

§ 2261A(1)

Title 18, United States Code, Section 2261A(1) makes it a crime to travel in interstate commerce, or within the special territorial jurisdiction of the United States, with the intent to stalk another person. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant traveled in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or entered or left Indian country;
- Second, that the defendant did so with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate another person; and
- Third, that in the course of, or as a result of , such travel, the defendant placed that person in reasonable fear of the death of, or serious bodily injury to, or caused substantial emotional distress to that person, a member of that person's immediate family, or spouse or intimate partner of that person.[1169]

§ 2261A(2)

Title 18, United States Code, Section 2261A(2) makes it a crime to use the mail or any facility in interstate commerce to engage in a course of conduct that places another

[1169] *See United States v. Wills*, 346 F.3d 476, 498, 493-94 (4th Cir. 2003). The district court in *Wills* made clear that the victim had to experience the fear.

person in reasonable fear of death or serious bodily injury. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2261A(2)(A)

- First, that the defendant used the mail, any interactive computer service, or any facility of interstate or foreign commerce;
- Second, that the defendant did so to engage in a course of conduct that caused substantial emotional distress to another person or placed that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family of that person, or a spouse or intimate partner of that person; and
- Third, that the defendant did so with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress to that person; and
- Fourth, that the other person was in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States.

§ 2261A(2)(B)

- First, that the defendant used the mail, any interactive computer service, or any facility of interstate or foreign commerce;
- Second, that the defendant did so to engage in a course of conduct that caused substantial emotional distress to another person or placed that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family of that person, or a spouse or intimate partner of that person; and
- Third, that the defendant did so with the intent to place another person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family that person, or the spouse or intimate partner of that person; and
- Fourth, that the other person was in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States.

"Spouse or intimate partner" includes a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking or a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, the frequency of interaction between the persons involved in the relationship. [§ 2266(7)(A)(ii)]

"As" means in the role, capacity, or function of, in a manner similar to, like.[1170]

"Bodily injury" means any act, except one done in self-defense, that results in physical injury or sexual abuse. [§ 2266(1)]

"Course of conduct" means a pattern of conduct composed of two or more acts, evidencing a continuity of purpose. [§ 2266(2)]

[1170] *United States v. Barnette*, 211 F.3d 803, 815 (4th Cir. 2000)(a § 2261 prosecution).

"Dating partner" refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. The existence of such a relationship is based on a consideration of the length of the relationship and the type of relationship and the frequency of interaction between the persons involved in the relationship. [§ 2266(10)]

"Coercion" or "duress" exists when an individual is subject to actual or threatened force of such a nature as to induce a well-founded fear of impending death or serious bodily harm from which there is no reasonable opportunity to escape.[1171]

"Crime of violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the act. [18 U.S.C. § 16]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1172]

ADDITIONAL ELEMENTS, IF APPROPRIATE:

1. Did the defendant's conduct result in the death of the victim? [§ 2261(b)(1)]

2. Did the defendant's conduct result in permanent disfigurement or life threatening bodily injury to the victim? [§ 2261(b)(2)]

3. Did the defendant's conduct result in serious bodily injury to the victim, or did the defendant use a dangerous weapon during the offense? [§ 2261(b)(3)]

4. Did the defendant's conduct constitute [here the Court should identify the elements of the conduct that would constitute an offense under §§ 2241-2245, without regard to whether the offense committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison]. [§ 2261(b)(4)]

"Serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [18 U.S.C. §§ 2119(2) and 1365(h)(3)]

[1171] Instruction given by district court in *United States v. Helem*, 186 F.3d 449, 453 (4th Cir. 1999).

[1172] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

NOTE

In *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000), a § 2261 prosecution, the defendant argued that the victim was not his "intimate partner." The Fourth Circuit found no decisions construing the phrase "as a spouse," and ruled that it was not reversible error that the district court instructed the jury in the words of the statute and left it to the jury to decide whether or not the defendant and victim lived together as spouses. 211 F.3d at 814-15.

The venue provisions of § 3237(a) apply, therefore venue is appropriate where the travel occurred. *Id.* at 813.

In *United States v. Wills*, 346 F.3d 476, 499 n.17 (4th Cir. 2003), the Fourth Circuit rejected the argument that stalking does not begin until a person is placed in fear of death or serious bodily injury.

In *United States v. Young*, 248 F.3d 260, 274 n.9 (4th Cir. 2001), the defendant contended that the government had to prove that he possessed the intent to injure the victim prior to traveling. The Fourth Circuit did not need to, and did not, decide that issue, as the evidence supporting the kidnapping conviction supported the stalking conviction.

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); and *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds by Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

18 U.S.C. § 2262 INTERSTATE VIOLATION OF PROTECTION ORDER

Title 18, United States Code, Section 2262 makes it a crime to travel in interstate commerce, or cause another to travel in interstate commerce, with intent to violate a protection order. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2262(a)(1)

- First, that there was a protection order that prohibited or provided protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person;
- Second, that the defendant traveled in interstate or foreign commerce or, entered or left Indian country, or within the special maritime and territorial jurisdiction of the United States;
- Third, that the defendant did so with the intent to engage in conduct that violated the portion of the protection order that prohibited or provided protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued; and
- Fourth, that the defendant thereafter engaged in such conduct, that violated the

protection order.[1173]

The government must prove the defendant's intent at the time he traveled.[1174]

§ 2262(a)(2)

- First, that there was a protection order that prohibited or provided protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person;
- Second, that the defendant caused the another person to travel in interstate or foreign commerce or to enter or leave Indian country;
- Third, that the defendant caused such travel by force, coercion, duress, or fraud; and
- Fourth, that, in the course of, as a result of, or to facilitate such conduct or travel, the defendant engaged in conduct that violated the protection order that prohibited or provided protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of the protection order in the jurisdiction in which the order was issued.

ADDITIONAL ELEMENTS, IF APPROPRIATE:

1. Did the defendant's conduct result in the death of the victim? [§ 2261(b)(1)]

2. Did the defendant's conduct result in permanent disfigurement or life threatening bodily injury to the victim? [§ 2261(b)(2)]

3. Did the defendant's conduct result in serious bodily injury to the victim, or did the defendant use a dangerous weapon during the offense? [§ 2261(b)(3)]

4. Did the defendant's conduct constitute [here the Court should identify the elements of the conduct that would constitute an offense under §§ 2241-2245, without regard to whether the offense committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison]. [§ 2261(b)(4)]

The term "protection order" includes any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual

[1173] *See United States v. Young*, 208 F.3d 216 (6th Cir. 2000) (Table); *United States v. Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998).

[1174] *Young*, 218 F.3d 216.

assault, dating violence, or stalking. [§ 2266(5)]

A protection order issued by a state or tribal or territorial court is consistent with Section 2262 if:

(1) such court has jurisdiction over the parties and matter under the law of such state or Indian tribe or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. [*See* § 2265(b)]

"Serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [§ 2266(6)]["Serious bodily injury" also includes any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate 18 U.S.C. §§ 2241 or 2242.]

"Spouse or intimate partner" includes a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of the relationship, the frequency of interaction between the persons involved in the relationship; and any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the state or tribal jurisdiction in which the injury occurred or where the victim resides. [§ 2266(7)]

"Dating partner" refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. The existence of such a relationship is based on a consideration of the length of the relationship, and the type of the relationship, and the frequency of interaction between the persons involved in the relationship.[§ 2266(10)]

18 U.S.C. § 2265 FULL FAITH AND CREDIT FOR PROTECTION ORDERS

NOTE

In *United States v. Casciano*, 124 F.3d 106, 111 (2d Cir. 1997), the defendant contested the validity of the protection order. In rejecting his argument, the Second Circuit held "that the question whether a protection order was validly issued is at most an issue for the judge to resolve." Moreover, "we are not holding that the [district] judge was required to pass upon the validity of service on Casciano under *state* law." *Id.* at 114 n.5.

Thus, validity of the protection order under the law of the jurisdiction in which it was issued is not an essential element of the crime that must be submitted to the jury. "[W]e are comforted by the thought that it is unlikely that in prosecutions under § 2262(a)(1) Congress intended federal juries to explore the intricacies of 50 state statutes relating to service of process." *Id.* at 111.

18 U.S.C. § 2312 INTERSTATE TRANSPORTATION OF STOLEN VEHICLE

Title 18, United States Code, Section 2312 makes it a crime to transport a stolen

motor vehicle in interstate commerce. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported a motor vehicle in interstate or foreign commerce;
- Second, that the motor vehicle was a stolen vehicle; and
- Third, that the defendant knew the motor vehicle was stolen.[1175]

"Motor vehicle" includes an automobile, truck, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails. [§ 2311]

"Interstate commerce" means commerce or trade between one state, territory, or possession of the United States and another state, territory, or possession of the United States, including the District of Columbia. [18 U.S. C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Stolen" includes all wrongful and dishonest takings of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[1176]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[1177]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or

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[1175] *United States v. Spoone*, 741 F.2d 680, 686 (4th Cir. 1984).

[1176] In *United States v. Turley*, 352 U.S. 407, 411 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417.

[1177] "When the government seeks to establish constructive possession under § 922(g)(1), it must prove that the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Our juries should be instructed accordingly." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). "[I]t would have been better for the district court to have repeated the intent requirement close to its definition of constructive possession." *Id.* at 436. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

property.[1178]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[1179]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[1180]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[1181] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation of such possession.][1182] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[1183]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially

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[1178] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[1179] *Herder*, 594 F.3d 352.

[1180] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[1181] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[1182] *Id.* at 580.

[1183] *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[1184]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[1185]

NOTE

United States v. Turley, 352 U.S. 407 (1957).

In *United States v. Bunch*, 399 F. Supp. 1156 (D. Md. 1975), *aff'd*, 542 F.2d 629 (4th Cir. 1976), the prosecution proceeded on two theories: first, that the car was stolen; second, that Bunch drove the car across state lines at the request of the owner, knowing that the car was subject to a bank's security interest and that the owner wished to get rid of it since he could not keep up the payments. The owner used the insurance proceeds to pay off the bank loan. The Fourth Circuit held that a car which has been taken with the intent to deprive a creditor of a security interest can said to have been stolen within the meaning of the act. Stolen does not require possession, but a significant property interest, tantamount to ownership. Nevertheless, not every interstate transportation of a car that defeats a security interest can support a Dyer Act prosecution. "[B]efore Bunch took the car across a state line, he intended to deprive the bank of its security. It is this intent that made his conduct criminal." *United States v. Bunch*, 542 F.2d 629, 630 (4th Cir. 1976).

Stolen property loses its character when the owner or his agent has recovered actual, physical possession of the property. Law enforcement officers holding recaptured stolen property in trust for the owner are agents of the owner. However, the courts recognize a distinction between recovering the property and merely observing the stolen property for the purpose of apprehending criminals. *See United States v. Dove*, 629 F.2d 325 (4th Cir. 1980).

Regarding interstate transportation, the Fourth Circuit stated the following in *Barfield v. United States*, 229 F.2d 936, 939 (4th Cir. 1956):

> We think the offense does not necessarily require the actual, physical driving across a state line by the accused. The offense is interstate transportation and, assuming the presence of the requisite knowledge and guilty purpose, any driving, whether wholly within the state of origin, state of destination, or from and to, if done as a substantial step in the furtherance of the intended interstate journey is, we think, within the act.

18 U.S.C. § 2313 RECEIPT OF STOLEN VEHICLE

Title 18, United States Code, Section 2313 makes it a crime to receive or sell a motor vehicle which had crossed a state line after being stolen. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received, possessed, concealed, stored, bartered, sold,

[1184] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).
[1185] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

or disposed of a motor vehicle;

- Second, that the motor vehicle had crossed a state or United States boundary after being stolen; and
- Third, that the defendant knew the motor vehicle had been stolen.

"Motor vehicle" includes an automobile, truck, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails. [§ 2311]

"State" includes a state of the United States, any commonwealth, territory, or possession of the United States, and the District of Columbia. [§ 2313(b)]

Stolen includes all wrongful and dishonest takings of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[1186]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[1187]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[1188]

Proof of constructive possession requires proof that the defendant had knowledge of

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[1186] In *United States v. Turley*, 352 U.S. 407, 411 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417.

[1187] "When the government seeks to establish constructive possession under § 922(g)(1), it must prove that the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Our juries should be instructed accordingly." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). "[I]t would have been better for the district court to have repeated the intent requirement close to its definition of constructive possession." *Id.* at 436. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[1188] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

the presence of the item or property.[1189]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[1190]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[1191] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation of such possession.][1192] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[1193]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[1194]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from

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[1189] *Herder*, 594 F.3d 352.

[1190] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[1191] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[1192] *Id.* at 580.

[1193] *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[1194] *United States v. Gallo*, 543 F.2d 361, 368 n. 6 (D.C. Cir. 1976).

possession.[1195]

NOTE

In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the district judge, in answer to a question from the jury, stated that it would be possible for one juror to believe that the defendant had stored property, and another to believe that he had received property, that as long as each juror was satisfied that the defendant did any one of those acts, there would be a unanimous verdict, even though there may be disagreement as to which one it was. The Fifth Circuit reversed, ruling that Gipson's right to a unanimous jury verdict was violated. In doing so, the Fifth Circuit found that the six acts proscribed fall into two distinct conceptual groupings, keeping a vehicle and marketing a vehicle. This approach was disapproved in *Schad v. Arizona*, 501 U.S. 624, 635-36 (1991).

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF STOLEN PROPERTY

Title 18, United States Code, Section 2314 makes it a crime to transport stolen property in interstate commerce and certain other related offenses. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

¶ 1

- First, that the defendant transported, transmitted, or transferred in interstate or foreign commerce any goods, wares, merchandise, securities, or money;
- Second, that the goods, wares, merchandise, securities, or money had a value of $5,000 or more; and
- Third, that the defendant knew that the goods, wares, merchandise, securities, or money had been stolen, converted, or taken by fraud.[1196]

¶ 2

- First, that the defendant devised or participated in a scheme or artifice to defraud or to obtain money or property;
- Second, that the scheme involved false or fraudulent pretenses, representations, or promises that were material;[1197]
- Third, that the defendant transported, or caused to be transported, or induced a person to travel in, or to be transported in interstate or foreign commerce;
- Fourth, that the travel in interstate or foreign commerce was in the execution or concealment of the scheme to defraud that person of money or property having a value of $5,000 or more; and

[1195] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[1196] *Dowling v. United States*, 473 U.S. 207, 214 (1985).

[1197] Since this paragraph is obviously modeled on the mail fraud statute, and materiality is an element of mail fraud, materiality is included here.

- Fifth, that the defendant did so knowingly and with intent to defraud.[1198]

¶ 3[1199]

- First, that the defendant transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited security or tax stamp;
- Second, that the false making, forgery, alteration, or counterfeit was material;
- Third, that the defendant did so knowing that the security or tax stamp was falsely made, forged, altered, or counterfeited; and
- Fourth, that the defendant did so with unlawful or fraudulent intent.[1200]

¶ 4

- First, that the defendant transported in interstate or foreign commerce any traveler's check bearing a forged countersignature; and
- Second, that the defendant did so with unlawful or fraudulent intent.

¶ 5

- First, that the defendant transported in interstate or foreign commerce any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof; and
- Second, that the defendant did so with unlawful or fraudulent intent.

Regarding "taken by fraud," fraud is a broad term, which includes false representations, dishonesty, and deceit. It may result from reckless and needless representations, even when not made with a deliberate intent to deceive.[1201]

The goods, wares, merchandise, securities, or money must have been physically taken before they were transported.[1202]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the

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[1198] *See generally United States v. Biggs*, 761 F.2d 184 (4th Cir. 1985); *United States v. Hassel*, 341 F.2d 427 (4th Cir. 1965) (§ 2314 requires proof of specific intent to defraud).

[1199] A violation of ¶ 3 can be proved by either of two means: that the defendant actually transported a counterfeit security from one state to another, or the defendant caused a counterfeit security to be transported from one state to another through the negotiation process. In the first means, transporting as a group any number of counterfeit securities would constitute one offense. In the second means, the negotiation of each separate check is a separate offense, "but there is only one offense if the defendant can prove the negotiated checks actually traveled in one package." *United States v. Squires*, 581 F.2d 408, 411-12 (4th Cir. 1978).

[1200] *Moskal v. United States*, 498 U.S. 103, 118 (1990). *See also United States v. Pomponio*, 517 F.2d 460, 463 (4th Cir. 1975).

[1201] *United States v. Grainger*, 701 F.2d 308, 311 (4th Cir. 1983).

[1202] *Dowling v. United States*, 473 U.S. 207, 216 (1985). The Supreme Court held that § 2314 does not cover "bootleg" phonorecords, manufactured and distributed without the consent of the copyright owner of the musical composition performed on the record.

item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the item or property, sometimes through another person.[1203]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[1204]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[1205]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[1206]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[1207] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation

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[1203] "When the government seeks to establish constructive possession under § 922(g)(1), it must prove that the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Our juries should be instructed accordingly." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). "[I]t would have been better for the district court to have repeated the intent requirement close to its definition of constructive possession." *Id*. at 436. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[1204] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[1205] *Herder*, 594 F.3d at 358.

[1206] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located)). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[1207] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

of such possession.][1208] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[1209]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[1210]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[1211]

The government does not need to prove an actual defrauding. It is enough for the government to prove a scheme intending to defraud. The $5,000 amount applies to the scheme and not to its execution.[1212]

The government need not prove personal contact between the defendant and the victim. Nor does the government need to prove a specific representation to each of the victims.[1213]

"Falsely made" securities include genuine documents that contain false information.[1214]

[1208] *Id.* at 580.

[1209] *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[1210] *United States v. Gallo*, 543 F.2d 361, 368 n.6 (D.C. Cir. 1976).

[1211] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[1212] *United States v. Hassel*, 341 F.2d 427, 431 (4th Cir. 1965).

[1213] *United States v. Biggs*, 761 F.2d 184, 187 (4th Cir. 1985). However, the defendant must be the "motivating force" in the transportation. *Id.* at 188 (citing *United States v. Kelly,* 569 F.2d 928, 935 (5th Cir. 1978)).

[1214] *Moskal v. United States*, 498 U.S. 103, 109 (1990). The defendant participated in a titlewashing scheme in which used cars had their odometers rolled back, titles were altered to reflect the lower mileage figures, and new genuine titles were obtained from a different state but which incorporated the false mileage figures. Documents validly issued containing material false information

(continued...)

It is not necessary for the government to prove that the defendant knew that the counterfeit securities would be transported in interstate commerce, or that the defendant intended to transport the counterfeit securities in interstate commerce.[1215]

The government does not have to prove that the security had been forged before crossing state lines.[1216]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

Interstate commerce may begin before state lines are crossed, and ends only when movement of the item in question has ceased in the destination State.[1217]

A shipment is "in foreign commerce" once property bound for a foreign destination arrives in a customs area.[1218]

"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest, or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; valid or blank motor vehicle title; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing. [§ 2311][1219]

[1214] (...continued)
are "falsely made" for the purposes of § 2314. *United States v. Cotoia*, 785 F.2d 497, 502 (4th Cir. 1986).

[1215] *United States v. Squires*, 581 F.2d 408, 409 (4th Cir. 1978) (the interstate commerce requirement is a jurisdictional basis).

[1216] *McElroy v. United States*, 455 U.S. 642, 654 (1982).

[1217] *Id.* at 653. Section 2314 proscribes the

> transportation of a forged security at any and all times during the course of its movement in interstate commerce, and ... the stream of interstate commerce may continue after a state border has been crossed. [T]ransportation of the forged check within Pennsylvania would violate § 2314 if the jury found that movement to be a continuation of the movement that began out of state.

Id. at 654.

[1218] *United States v. Ajlouny*, 629 F.2d 830, 837 (2d Cir. 1980).

[1219] Section 2314 does not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States. In *United States v. Jones*, 553 F.2d 351 (4th Cir. 1977), the defendant caused checks to be transported from Canada to Maryland, which checks were issued based on altered accounts payable data. The district court dismissed the indictment, citing the exclusion. The Fourth Circuit reversed. "Falsely made and forged"
(continued...)

"Value" means the face, par, or market value, whichever is greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof. [§ 2311]

Market value is simply what a willing buyer would pay a willing seller.[1220]

Stolen includes all wrongful and dishonest takings of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[1221]

NOTE

To satisfy the "interstate transportation" requirement, the government need only show that an individual knowingly cashed a check in one state drawn on an out-of-state bank. *United States v. Boone*, 460 F.2d 1285 (4th Cir. 1972).

In *United States v. Ruhe*, 191 F.3d 376 (4th Cir. 1999), the defendant was convicted of transporting stolen scrap aircraft parts. The court distinguished *United States v. Clutterbuck*, 421 F.2d 485 (9th Cir. 1970), which held "that where as here machine parts have been used by the government to the point where their usefulness to the government as such has been exhausted; and where they have been discarded and held for disposal as scrap rather than as classified, segregated parts, they have lost their original identity and have been transformed into scrap." Thus, the fact that the parts were "scrap" determined their value. The Fourth Circuit held that even though the parts in *Ruhe* were destined for sale as scrap, they also had an independent resale value in the overhaul market, and the government had met the jurisdictional requirement.

Value may also be satisfied by reference to a thieves' market. *United States v. Moore*, 571 F.2d 157 (3d Cir. 1978).

The $5,000 requirement is designed to avoid overtaxing the Department of Justice. In *Moore*, blank Ticketron tickets were stolen. The government conceded that the blank tickets were not securities. The defendants were responsible for completing the tickets to appear legitimate. The Third Circuit held that the value element may be proved by evidence of the stolen property's value either at the time of theft or at the time of transportation. "Although the defendants may have increased the value of the Ticketron blanks by their counterfeiting efforts, they did not by their actions so substantially alter the stolen blanks as to render the transported counterfeit tickets essentially different from what was stolen." *Id.* at 157. See also *United States v. Jones*, 797 F.2d 184, 187 (4th Cir. 1986) (citing *Moore*, 571 F.2d 157).

In such a case, the jury should be instructed to determine the value of the stolen

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[1219] (...continued)
relate to genuineness of execution and not falsity of content. In this case, the victim company had issued a genuine instrument containing a false statement of fact as to the true creditor. Because the alteration of supporting documents generated a valid security, the court concluded that the crime was fraud or false pretense, not forgery, and not covered by the exclusion.

[1220] *United States v. Wentz*, 800 F.2d 1325, 1326 (4th Cir. 1986).

[1221] In *United States v. Turley*, 352 U.S. 407, 411, 417 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings ... with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny."

property in light of the condition in which the property had been placed by the defendant, i.e., blanks filled in to appear legitimate. *Moore*, 571 F.2d at 158 (citing *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961)).

In *United States v. Holtzclaw*, NO. 97-4133, 1997 WL 734026 (4th Cir. Nov. 26, 1997), the court stated that reliance is not an essential element under § 2314.

In *United States v. Cotoia*, 785 F.2d 497 (4th Cir. 1986), the defendants were prosecuted for a title-washing scheme which involved the interstate transportation of motor vehicles with false mileage readings. The court found that the statute is designed "to reach all ways by which an owner is wrongfully deprived of the use or benefits of the use of his property, then surely procuring issuance of a certificate of title falsely stating the odometer reading and thereby substantially affecting the sale value of the vehicle is material." 785 F.2d at 501.

Stolen property loses its character when the owner or his agent has recovered actual, physical possession of the property. Law enforcement officers holding recaptured stolen property in trust for the owner are agents of the owner. However, the courts recognize a distinction between recovering the property and merely observing the stolen property for the purpose of apprehending criminals. *See United States v. Dove*, 629 F.2d 325 (4th Cir. 1980).

18 U.S.C. § 2315 RECEIPT OF STOLEN PROPERTY

Title 18, United States Code, Section 2315 makes it a crime to receive stolen property valued at more than $5,000 which had crossed a state boundary after being stolen. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that goods, wares, merchandise, securities, or money were/was stolen, unlawfully converted, or taken;
- Second, that the goods, wares, merchandise, securities, or money had a value of $5,000.00 or more;
- Third, that the goods, wares, merchandise, securities, or money crossed a State or United States boundary after being stolen;
- Fourth, that the defendant willfully received, possessed, concealed, stored, bartered, sold, or disposed of the goods, wares, merchandise, securities, or money; and
- Fifth, that the defendant knew the goods, wares, merchandise, securities, or money had been stolen, unlawfully converted, or taken.[1222]

The government must prove that the defendant knew that the property was stolen, but the government need not prove that the defendant knew that the property had crossed a state boundary after being stolen.[1223]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of

[1222] *See United States v. Jones*, 797 F.2d 184, 186 (4th Cir. 1986).
[1223] *See Corey v. United States*, 305 F.2d 232, 237 (9th Cir. 1962).

Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; valid or blank motor vehicle title; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing; [§ 2311][1224]

"Value" means the face, par, or market value, whichever is greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof. [§ 2311]

Market value is simply what a willing buyer would pay a willing seller.[1225]

Stolen includes all wrongful and dishonest takings of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[1226]

To possess an item or property means to exercise control or authority over the item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant alone, or joint, that is, it may be shared with other persons, as long as the defendant exercised control or authority over the item or property.

Possession may be either actual or constructive.

Actual possession is knowingly having direct physical control or authority over the item or property.

Constructive possession is when a person does not have direct physical control or authority, but has the power and the intention to exercise control or authority over the

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[1224] Section 2315 does not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, etc. In *United States v. Jones*, 553 F.2d 351 (4th Cir. 1977), the defendant caused checks to be transported from Canada to Maryland, which checks were issued based on altered accounts payable data. The district court dismissed the indictment, citing the exclusion. The Fourth Circuit reversed. "Falsely made and forged" relate to genuineness of execution and not falsity of content. In this case, the victim company had issued a genuine instrument containing a false statement of fact as to the true creditor. Because the alteration of supporting documents generated a valid security, the court concluded that the crime was fraud or false pretense, not forgery, and not covered by the exclusion.

[1225] *United States v. Wentz*, 800 F.2d 1325, 1326 (4th Cir. 1986).

[1226] In *Turley*, 352 U.S. at 411, the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings ... with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417.

item or property, sometimes through another person.[1227]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, control or authority over the item or property itself, or the premises, vehicle, or container where the item or property is, such that a person exercises or has the power and intention to exercise control or authority over that item or property.[1228]

Proof of constructive possession requires proof that the defendant had knowledge of the presence of the item or property.[1229]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with actual or inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[1230]

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[1231] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation of such possession.][1232] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In

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[1227] "When the government seeks to establish constructive possession under § 922(g)(1), it must prove that the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary. Our juries should be instructed accordingly." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005). "[I]t would have been better for the district court to have repeated the intent requirement close to its definition of constructive possession." *Id*. at 436. *See also United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010).

[1228] *Scott*, 424 F.3d at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citations omitted).

[1229] *Herder*, 594 F.3d 352.

[1230] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[1231] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[1232] *Id.* at 580.

considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[1233]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[1234]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[1235]

_____NOTE_____

Value may also be satisfied by reference to a thieves market. *United States v. Moore*, 571 F.2d 154, 157 (3d Cir. 1978).

"[S]everal courts have held that value may be determined as of the time of theft or at any time upon receipt or during concealment." *Id.* at 156. The $5,000 requirement is designed to avoid overtaxing the Department of Justice. In *Moore*, blank Ticketron tickets were stolen. The government conceded that the blank tickets were not securities. The defendants were responsible for completing the tickets to appear legitimate. The Third Circuit held that the value element may be proved by evidence of the stolen property's value whether at the time of theft or at the time of transportation. "Although the defendants may have increased the value of the Ticketron blanks by their counterfeiting efforts, they did not by their actions so substantially alter the stolen blanks as to render the transported counterfeit tickets essentially different from what was stolen." *Id.* at 157. See also *United States v. Jones*, 797 F.2d 184, 187 (4th Cir. 1986) (citing *Moore*, 571 F.2d 157).

In such a case, the jury should be instructed to determine the value of the stolen property in light of the condition in which the property had been placed by the defendant, i.e., blanks filled in to appear legitimate. *Id.* at 158 (citing *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961)).

18 U.S.C. § 2319 COPYRIGHT INFRINGEMENT (17 U.S.C. § 506)

Title 18, United States Code, Section 2319 makes it a crime to infringe a copyright. For you to find the defendant guilty, the government must prove each of the following

[1233] *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (instruction in prosecution under 18 USC § 1708).

[1234] *United States v. Gallo*, 543 F.2d 361, 368 n. 6 (D.C. Cir. 1976).

[1235] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

beyond a reasonable doubt:

- First, that there was a valid copyright protecting the work involved;
- Second, that the defendant infringed the copyright;
- Third, that the defendant did so willfully; and [1236]

§ 2319(b)(1)

- Fourth, that the defendant did so by reproducing or distributing, including by electronic means, during any 180-day period, at least 10 copies or phonorecords of one or more copyrighted works, having a total retail value of more than $2,500.

§ 2319(b)(3)

- Fourth, that the defendant did so

  a. for purposes of commercial advantage or private financial gain;[1237]

  b. by reproducing or distributing, including by electronic means, during any 180-day period, one or more copies or phonorecords of one or more copyrighted works, having a total retail value of more than $1,000; or

  c. by distributing a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, provided the defendant knew or should have known that the work was intended for commercial distribution.

§ 2319(c)(1)

- Fourth, that the defendant did so by reproducing or distributing 10 or more copies or phonorecords of one or more copyrighted works, having a total retail value of more than $2,500.

§ 2319(c)(3)

- Fourth, that the defendant did so by reproducing or distributing one or more copies or phonorecords of one or more copyrighted works, having a total retail value of more than $1,000.

§ 2319(d)(1)

- Fourth, that the defendant did so by distributing a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, provided the defendant knew or should have known that the work was intended for commercial distribution.

§ 2319(d)(2)

- Fourth, that the defendant did so by distributing a work being prepared for commercial distribution, by making it available on a computer network

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[1236] *See United States v. Manzer*, 69 F.3d 222, 227 (8th Cir. 1995); *United States v. Goss*, 803 F.2d 638, 642 (11th Cir. 1986).

[1237] The government does not have to prove that the defendant actually realized either a commercial advantage or private financial gain. The government must prove that the activity be for the purpose of financial gain or benefit. *United States v. Cross*, 816 F.2d 297, 301 (7th Cir. 1987).

accessible to members of the public, provided the defendant knew or should have known that the work was intended for commercial distribution; and

- Fifth, that the defendant did so for purposes of commercial advantage or private financial gain.[1238]

"Work being prepared for commercial distribution" means:

1. a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if at the time of unauthorized distribution, the copyright owner had a reasonable expectation of commercial distribution and the copies or phonorecords of the work had not been commercially distributed, or
2. a motion picture, if, at the time of unauthorized distribution, the motion picture had been made available for viewing in a motion picture exhibition facility and had not been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside a motion picture exhibition facility.[17 U.S.C. § 506(a)(3)]

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed. [17 U.S.C. § 101]

["Audiovisual work," "computer program,""copies,""financial gain," "fixed," "motion pictures," "sound recordings," "work of visual art," and other terms are also defined in 17 U.S.C. § 101.]

To infringe a copyright [17 U.S.C. § 501(a)] means to violate one of the exclusive rights of a copyright owner, which are:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by

[1238] The government does not have to prove that the defendant actually realized either a commercial advantage or private financial gain. The government must prove that the activity be for the purpose of financial gain or benefit. *Id.* at 301.

means of a digital audio transmission. [17 U.S.C. § 106]

Importing into the United States, without the authority of the owner of the copyright, copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords. [17 U.S.C. § 602]

Evidence of reproduction or distribution of a copyrighted work, by itself, is not sufficient to establish willful infringement of a copyright. [17 U.S.C. § 506(a)(2)]

"Retail value" refers to prices assigned to commodities and goods for sale at the retail level at the time of the sales alleged in this case, representing face value or par value, or prices of commodities and goods determined by actual transactions between willing buyers and willing sellers at the retail [as opposed to wholesale] level, whichever is the greatest.[1239]

AFFIRMATIVE DEFENSE ("First sale" doctrine)

If the defendant is the owner of a particular copy or phonorecord lawfully made, he is entitled, without authority of the copyright owner, to sell or otherwise dispose of that copy or phonorecord. [17 U.S.C. § 109(a)][1240]

INNOCENT INFRINGEMENT

"Innocent infringement" is not a defense if a notice of copyright in the form and position specified by 17 U.S.C. § 401 appears on the published copy or copies to which the defendant had access. [17 U.S.C. § 401(d)]

NOTE

In *United States v. Goss*, 803 F.2d 638 (11th Cir. 1986), a case dealing with the distribution of allegedly counterfeit video games, the Eleventh Circuit held it is necessary to identify precisely the audiovisual work and the copy in which it was fixed. In a footnote, the court indicated that the trier of fact must determine which component of a video game constituted the copy in which the audiovisual work was fixed. The Court of Appeals reversed the conviction, implicitly criticizing the government for incorrectly analyzing what was copyrighted and what was copied. In addition, the government failed to rebut evidence that the defendant owned certain ROMs that he distributed.

In *United States v. Cross*, 816 F.2d 297, 303 (7th Cir. 1987), the Seventh Circuit stated that it was not error for the district court to include civil definitions in its instructions, because "[i]n order to understand the meaning of criminal copyright infringement it is necessary to resort to the civil law of copyright."

18 U.S.C. § 2320 TRAFFICKING IN COUNTERFEIT GOODS [LAST UPDATED: 7/3/14]

[1239] *United States v. Armstead*, 524 F.3d 442, 446 (4th Cir. 2008).

[1240] In *Goss*, 803 F.2d at 644, the Eleventh Circuit held that § 109(a) was a defense, and that when the defendant makes a showing under the section, the burden shifted to the government to demonstrate beyond a reasonable doubt that the pertinent copies were either not legally made or not owned by the defendant.

Title 18, United States Code, Section 2320 makes it a crime to traffic in counterfeit goods. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant trafficked or attempted to traffic in goods or services;
- Second, that the defendant did so intentionally;
- Third, that the defendant used a counterfeit mark on or in connection with such goods or services; and
- Fourth, that the defendant knew that the mark was counterfeit.[1241]

OR

- First, that the defendant trafficked or attempted to traffic in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;
- Second, that the defendant did so intentionally;
- Third, that a counterfeit mark had been applied to the labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature; and
- Fourth, that the defendant knew that the mark was counterfeit.[1242]

A "counterfeit mark" means

(1) a spurious mark that is used in connection with trafficking in goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature that is identical with, or substantially indistinguishable from a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered, that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office, and the use of which is likely to cause confusion, to cause mistake, or to deceive; or

(2) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of 36 U.S.C. § 220506. [§ 2320(e)(1)]

☞ **Counterfeit mark does not include any mark or designation used in connection with goods or services, or a mark or designation applied to labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature used in**

[1241] *United States v. Habegger*, 370 F.3d 441, 444 (4th Cir. 2004).

[1242] *Id.* at 441. The statute was amended March 16, 2006.

connection with such goods or services, of which the manufacturer or producer was, at the time of the manufacture or production in question, authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation. [§ 2320(e)(1)][1243]

"Traffic" means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent so to transport, transfer, or dispose of. [§ 2320(e)(2)]

"Financial gain" includes the receipt, or expected receipt, of anything of value. [§ 2320(e)(3)]

"Spurious" means deceptively suggesting an erroneous origin; fake.[1244]

"Substantial" means considerable in importance, value, degree, amount, or extent.[1245]

"Indistinguishable" means impossible to differentiate or tell apart.[1246]

"A mark does not have to be an exact replica of a registered trademark to be deemed a counterfeit."[1247]

"You have to determine whether or not the mark that is alleged to be counterfeit is identical to or substantially indistinguishable from the mark that is registered [with the Patent and Trademark Office]. In order to carry out your responsibility, you have to compare the marks, the mark alleged to be counterfeit and the mark that is the genuine mark. You do that, and you make a decision. This is based on your side-by-side comparison, use of your own eyes, and any other evidence that came into the record that might help you in that task."[1248]

The government must prove that the defendant knowingly used a counterfeit mark that was likely to cause confusion or to mislead. The government does not have to prove either actual confusion or an intent to mislead.[1249]

NOTE

In *United States v. Habegger*, 370 F.3d 441 (4th Cir. 2004), the Fourth Circuit reversed a conviction for insufficient evidence of trafficking. The only evidence was that the defendant was furnishing the counterfeit clothing as samples, not as consideration for anything of value.

[1243] These are so-called gray market goods, overruns, etc.

[1244] *United States v. Chong Lam*, 677 F.3d 190, 202 (4th Cir. 2012) (quoting BLACK'S LAW DICTIONARY 1533 (9th ed. 2009)).

[1245] *Id*. (quoting *American Heritage Dictionary* 1727 (4th ed. 2006)).

[1246] *Id*. (quoting *American Heritage Dictionary* 893 (4th ed. 2006)).

[1247] *Id*. at 199.

[1248] *Id*. (approvingly quoting district court jury charge).

[1249] *United States v. Brooks*, 111 F.3d 365, 372 (4th Cir. 1997).

18 U.S.C. § 2381 TREASON

The United States Constitution, Article III, § 3, clause 1, and Title 18, United States Code, Section 2381 make it a crime to commit treason against the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant owed allegiance to the United States;
- Second, that the defendant did wage war against the United States, or did give aid and comfort to the enemies of the United States;
- Third, that two witnesses testified to the same overt act of waging war or giving aid and comfort; and
- Fourth, that the defendant acted with a purpose to aid the enemy.

The overt act must be established by direct evidence of two witnesses.[1250] The defendant must not only intend the act, but he must intend to betray his country by means of the act. In that regard, every man is assumed to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.[1251]

The overt act must show sufficient action by the defendant, in its setting, to demonstrate that the defendant actually gave aid and comfort to the enemy.[1252]

_____NOTE_____

See Haupt v. United States, 330 U.S. 631, 641 (1947); *Morissette v. United States*, 342 U.S. 246, 265 (1952).

"[T]he crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort." *Cramer v. United States*, 325 U.S. 1, 29 (1945).

18 U.S.C. § 2384 SEDITIOUS CONSPIRACY

Title 18, United States Code, Section 2384 makes it a crime to conspire to overthrow or wage war against the Government of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant conspired with at least one other person; and
- Second, the defendant did so to overthrow, put down, or to destroy by force the Government of the United States, or

  to levy war against the Government of the United States, or

  to oppose by force the authority of the Government of the United States, or

[1250] The Constitutional requirement is not satisfied by testimony to some separate act from which it can be inferred that the charged overt act took place. *Haupt v. United States*, 330 U.S. 631, 640 (1947). Two witnesses must testify to the same overt act. *Cramer v. United States*, 325 U.S. 1, 30 (1945).

[1251] *Cramer*, 325 U.S. at 30-31.

[1252] *Id.* at 34.

by force to prevent, hinder, or delay the execution of any law of the United States, or

by force to seize, take, or possess any property of the United States contrary to the authority of the Government of the United States.

_____NOTE_____

See United States v. Khan, 461 F.3d 477 (4th Cir. 2006).

18 U.S.C. § 2390 ENLISTMENT TO SERVE AGAINST THE UNITED STATES

Title 18, United States Code, Section 2390 makes it a crime to enlist to serve in armed hostility against the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant enlisted or was engaged within the United States or in any place subject to the jurisdiction of the United States; and
- Second, that the defendant did so with intent to serve in armed hostility against the United States.

_____NOTE_____

United States v. Khan, 461 F.3d 477 (4th Cir. 2006).

18 U.S.C. § 2421 MANN ACT/WHITE SLAVE TRAFFIC ACT

Title 18, United States Code, Section 2421 makes it a crime to transport an individual in interstate commerce to engage in prostitution or other illegal sexual activity. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported, or attempted to transport, an individual in interstate or foreign commerce;
- Second, that the defendant did so with intent that the individual engage in prostitution or in any sexual activity for which any person could be charged with a criminal offense [the court must identify the elements of the criminal offense];[1253] and
- Third, that the defendant did so knowingly.

Whether the sexual activity is of a commercial (prostitution) or noncommercial nature, criminal sexual activity must be a purpose motivating the interstate transportation.[1254]

[1253] *See United States v. Kaye*, 243 F. App'x 763 (4th Cir. 2007) ("To obtain a conviction under § 2422(b), the Government must also prove that the additional elements of Va. Code Ann. § 18.2-370, which makes it unlawful for an individual to take indecent liberties with a child, were satisfied.")

[1254] *See United States v. Bennett*, 364 F.2d 77, 78 (4th Cir. 1966). *But see United States v. Vang*, 128 F.3d 1065, 1071 n.9 (7th Cir. 1997) (intent that individual engage in sexual activity must

The defendant's intent that the individual engage in prostitution or criminal sexual activity is an element of the crime and must exist prior to, or at the same time as, the interstate trip.[1255]

The government does not need to prove that the defendant accomplished his intent that the individual engage in prostitution or any criminal sexual activity after the interstate transportation.[1256]

"Congress made the statute gender-neutral in a 1986 amendment, retired the 'purpose' test for interstate transportation, and clarified the amorphous phrase 'any immoral purpose' by narrowing the statute's coverage to illegal sexual activity." *United States v. Vang*, 128 F.3d 1065, 1069 (7th Cir. 1997). In interpreting § 2423, a statutory cousin of § 2421, the Seventh Circuit drew upon its own Mann Act precedent.

The unit of prosecution is the transportation. *See Bell v. United States*, 349 U.S. 81 (1955) (two women transported on the same trip in the same vehicle equals one offense). *See also Nelms v. United States*, 291 F.2d 390, 394 (4th Cir. 1961) (number of separate transportations determines number of offenses). Thus, a round trip might be one offense or two.

"[W]here an interstate journey is motivated by an innocent purpose, no violation of the Mann Act can be predicated upon incidental immoral activities during the trip or upon the resumption of such activities after returning." *Nelms*, 291 F.2d at 393.

18 U.S.C. § 2422 WHITE SLAVE TRAFFIC ACT [LAST UPDATED: 5/1/14]

Title 18, United States Code, Section 2422 makes it a crime to induce any individual to travel in interstate commerce to engage in prostitution, or to induce a minor to engage in prostitution. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2422(a)

- First, that the defendant persuaded, induced, enticed, or coerced [or attempted or conspired to do so];
- Second, another person;
- Third, to travel in interstate or foreign commerce;
- Fourth, that the purpose of the travel was for the person to engage in prostitution or in any sexual activity for which any person could be charged with a criminal offense [the court must identify the elements of the criminal

be one of dominant purposes of the interstate travel); *United States v. Drury*, 582 F.2d 1181, 1185 (8th Cir. 1978) (same). In *United States v. Wadford*, 331 F. App'x 198 (4th Cir. 2009), the Fourth Circuit acknowledged that the government does not need to establish that an unlawful purpose was the sole factor motivating interstate travel. "Some courts have sustained Mann Act convictions where the unlawful purpose was simply *one* of the purposes motivating the interstate travel while other courts have required the unlawful purpose to be the dominant purpose." 331 F. App'x at 203.

[1255] *United States v. Sapperstein*, 312 F.2d 694, 697 (4th Cir. 1963).

[1256] *United States v. Marks*, 274 F.2d 15, 18-19 (7th Cir. 1959).

offense];[1257] and

- Fifth, that the defendant did so knowingly.

§ 2422(b)

- First, that the defendant persuaded, induced, enticed, or coerced [or attempted to do so];
- Second, another person who had not attained the age of 18 years;
- Third, to engage in prostitution or in any sexual activity for which any person could be charged with a criminal offense [the court must identify the elements of the criminal offense];
- Fourth, that in doing so, the defendant used the mail, any facility or means of interstate or foreign commerce, or the conduct occurred within the special maritime and territorial jurisdiction of the United States; and
- Fifth, that the defendant did so knowingly.[1258]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

" Persuade," "induce," and "entice" convey the idea of one person leading or moving another by persuasion or influence, as to action or state of mind.[1259]

The government does not have to prove that the defendant directed or knew that the individual would travel by interstate carrier. The government must prove that the defendant knowingly induced or persuaded the individual, and that a trip by interstate carrier followed.[1260]

The inducement that is required is any offer sufficient to cause the person to respond. The government does not have to prove an affirmative directive act by the defendant.[1261]

Whether the sexual activity is of a commercial (prostitution) or noncommercial nature, criminal sexual activity must be a purpose motivating the interstate transportation.[1262]

[1257] *See United States v. Kaye*, 243 F. App'x 763 (4th Cir. 2007) ("To obtain a conviction under § 2422(b), the Government must also prove that the additional elements of Va. Code Ann. § 18.2-370, which makes it unlawful for an individual to take indecent liberties with a child, were satisfied.").

[1258] *See United States v. Engle*, 676 F.3d 405, 411-12 (4th Cir. 2012); *United States v. Helder*, 452 F.3d 751, 755 (8th Cir. 2006).

[1259] *Engle*, 676 F.3d at 411 n.3.

[1260] *Harms v. United States*, 272 F.2d 478, 480 (4th Cir. 1959).

[1261] *Id.* at 481; *United States v. Truglio*, 731 F.2d 1123 (4th Cir. 1984).

[1262] *See United States v. Bennett*, 364 F.2d 77, 78 (4th Cir. 1966). *But see United States v. Vang*, 128 F.3d 1065, 1071 n.9 (7th Cir. 1997) (intent that individual engage in sexual activity must be one of dominant purposes of interstate travel); *United States v. Drury*, 582 F.2d 1181, 1185 (8th Cir. 1978) (same). In *United States v. Wadford*, 331 F. App'x 198 (4th Cir. 2009), the Fourth Circuit acknowledged that the government does not need to establish that an unlawful purpose was the sole

The defendant's intent that the individual engage in prostitution or criminal sexual activity is an element of the crime and must exist prior to, or at the same time as, the interstate trip.[1263]

The government does not need to prove that the defendant accomplished his intent that the individual engage in prostitution or any criminal sexual activity after the interstate transportation.[1264]

The government does not have to prove that an actual minor was placed at risk. In other words, the government must prove that the defendant believed the person to be a minor regardless of whether the person actually was a minor.[1265]

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[1266]

_____NOTE_____

"Congress made the statute gender-neutral in a 1986 amendment, retired the 'purpose' test for interstate transportation, and clarified the amorphous phrase 'any immoral purpose' by narrowing the statute's coverage to illegal sexual activity." *United States v. Vang*, 128 F.3d 1065, 1069 (7th Cir. 1997). In interpreting § 2423, a statutory cousin of § 2421, the Seventh Circuit drew upon its own Mann Act precedent. The same argument can be made concerning § 2422.

In *Harms v. United States*, 272 F.2d 478, 480 (4th Cir. 1959), the court stated that the offense was complete, once the government proved knowing inducement or persuasion and the fact of resultant interstate travel. "It is sufficient if the accused knows or should have known that interstate transportation by common carrier would reasonably result and if it does." *Id*. at 481 (quoting *United States v. Saledonis*, 93 F.2d 302, 304 (2d Cir. 1937)).

If the defendant is charged with attempt under § 2422(b), an actual minor victim is

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factor motivating interstate travel. "Some courts have sustained Mann Act convictions where the unlawful purpose was simply *one* of the purposes motivating the interstate travel while other courts have required the unlawful purpose to be the dominant purpose." 331 F. App'x at 203.

[1263] *See United States v. Sapperstein*, 312 F.2d 694, 697 (4th Cir. 1963) (§ 2421 prosecution).

[1264] *See United States v. Marks*, 274 F.2d 15, 18-19 (7th Cir. 1959) (§ 2421 prosecution).

[1265] *See United States v. Kaye*, 243 F. App'x 763 (4th Cir. 2007); *United States v. Kelly*, 510 F.3d 433, 441 n.7 (4th Cir. 2007).

[1266] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

not required. *United States v. Helder*, 452 F.3d 751, 756 (8th Cir. 2006). *See also United States v. Root*, 296 F.3d 1222 (11th Cir. 2002), *superseded by statute on other grounds as recognized in United States v. Jerchower*, 631 F.3d 1181, 1186–87 (11th Cir. 2011).

In *United States v. Evans*, 272 F.3d 1069, 1084 (8th Cir. 2001), the district court failed to identify the victims in its instructions. The Eighth Circuit held that the failure was not plain error.

The number of separate transportations determines the number of offenses. *Nelms v. United States*, 291 F.2d 390, 394 (4th Cir. 1961) (§ 2421 prosecution). Thus, a round trip might be one offense or two.

"[W]here an interstate journey is motivated by an innocent purpose, no violation of the Mann Act can be predicated upon incidental immoral activities during the trip or upon the resumption of such activities after returning." *Id.* at 393.

"When a defendant initiates conversation with a minor, describes the sexual acts that he would like to perform on the minor, and proposes a rendezvous to perform those acts, he has crossed the line toward [enticing] a minor to engage in unlawful sexual activity." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). Moreover, "the prohibited act of persuasion can occur over a distance, as the statute expressly contemplates, and logic would appear to dictate that having discussions with [minors] about meeting to have sex is a substantial step toward persuading them to have sex." *United States v. Broussard*, 669 F.3d 537, 550 (5th Cir.2012).

"Although it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice in § 2422(b) to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves." *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (quotation and citation omitted).

In *Engle*, the Fourth Circuit found that

> [s]exual abuse of minors can be accomplished by several means and is often carried out through a period of grooming. Grooming refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity.

Id. at 412 (quotations and citations omitted). "Sections 2422(b) and 2251(a) target the sexual grooming of minors as well as the actual sexual exploitation of them." *Id*. (quotation and citation omitted).

18 U.S.C. § 2423 TRANSPORTING A MINOR FOR SEX

Title 18, United States Code, Section 2423 makes it a crime to transport a minor in interstate commerce to engage in prostitution, or to travel in interstate commerce to engage in any illicit sexual conduct with another person. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2423(a)

- First, that the defendant transported an individual in interstate or foreign

commerce;

- Second, that the defendant did so knowingly;
- Third, that the defendant did so with intent that the individual engage in prostitution or in any sexual activity for which any person could be charged with a criminal offense [the court must identify the elements of the criminal offense];[1267] and
- Fourth, that the individual transported had not attained the age of 18 years.[1268]

The government does not have to prove that the defendant knew that the individual had not attained the age of 18 years.[1269]

§ 2423(b)

- First, that the defendant
  (1) traveled in interstate commerce, or
  (2) traveled into the United States, or
  (3) was a United States citizen and traveled in foreign commerce, or
  (4) was an alien admitted for permanent residence in the United States and traveled in foreign commerce; and
- Second, the defendant did so for the purpose of engaging in any illicit sexual conduct with another person.

The government does not have to prove that actual sexual activity took place. The government is required to prove that the defendant had formed the intent to engage in sexual activity with a minor when he traveled.[1270]

The government does not have to prove that an actual minor was placed at risk. In other words, the government must prove that the defendant believed the person to be a minor regardless of whether the person actually was a minor.[1271]

§ 2423(c)

- First, that the defendant was a United States citizen or an alien admitted for permanent residence in the United States;
- Second, that the defendant traveled in foreign commerce; and
- Third, that the defendant engaged in any illicit sexual conduct with another

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[1267] *See United States v. Kaye*, 243 F. App'x 763, 766 (4th Cir. 2007) ("To obtain a conviction under § 2422(b), the Government must also prove that the additional elements of Va. Code Ann. § 18.2-370, which makes it unlawful for an individual to take indecent liberties with a child, were satisfied.").

[1268] *See United States v. Bonty*, 383 F.3d 575, 578 (7th Cir. 2004). In *United States v. Wild*, 143 F. App'x 938 (10th Cir. 2005), the Tenth Circuit combined the second and third elements above.

[1269] *United States v. Jones*, 471 F.3d 535, 541 (4th Cir. 2006). "Knowingly" modifies the verb "transports," not the noun "individual." *Id.* at 539. *Accord United States v. Washington*, 743 F.3d 938 (4th Cir. 2014).

[1270] *United States v. Hersh*, 297 F.3d 1233, 1245-46 (11th Cir. 2002).

[1271] *United States v. Kelly*, 510 F.3d 433, 441 (4th Cir. 2007).

person [or attempted or conspired to do so].[1272]

The statute does not require that the illicit sexual conduct occur while traveling in foreign commerce.[1273]

"Travel" includes an active motion component, as to go on or as if on a trip, to go from place to place.[1274]

§ 2423(d)

- First, that the defendant arranged, induced, procured, or facilitated the travel of another person in interstate or foreign commerce [or attempted or conspired to do so];
- Second, that the defendant did so knowing that such person was traveling for the purpose of engaging in illicit sexual conduct; and
- Third, that the defendant did so for the purpose of commercial advantage or private financial gain.

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

"Illicit sexual conduct" means:

(1) a sexual act, that is, any of the following:

(a) contact between the penis and the vulva or the penis and the anus — contact occurs upon penetration, however slight;

(b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(d) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. [§ 2246(2)]

with a person under 18 years of age that would be [here the Court must identify the elements of the violation of §§ 2241-2245 if the sexual act occurred in the special

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[1272] *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006). The Ninth Circuit did not identify the status of the defendant as an element. Clark was a 71 year old U.S. citizen who paid boys in Cambodia for sex.

[1273] *Id.* at 1107.

[1274] In *United States v. Jackson*, 480 F.3d 1014 (9th Cir. 2007), the defendant moved to Cambodia before the effective date of the statute, and engaged in commercial sex after the effective date of the statute. The Ninth Circuit set forth two alternate meanings of the term "travel." "Travel could end when the citizen arrives in a foreign country, or travel could end only once the citizen resettles in or takes up residence in a foreign country." 480 F.3d at 1023. The court did not need to choose between the two alternatives, as the defendant's travel had ended before the effective date of the statute.

maritime and territorial jurisdiction of the United States] [§ 2423(f)(1)];[1275] or

(2) any commercial sex act, that is, any sex act on account of which anything of value was given to or received by any person, with a person under 18 years of age..[§ 2423(f)(2) and 18 U.S.C. § 1591][1276]

Whether the sexual activity is of a commercial (prostitution) or noncommercial nature, criminal sexual activity must be a purpose motivating the interstate transportation.[1277]

The defendant's intent that the individual engage in prostitution or criminal sexual activity is an element of the crime and must exist prior to, or at the same time as, the interstate trip.[1278]

The government does not need to prove that the defendant accomplished his intent that the individual engage in prostitution or any criminal sexual activity after the interstate transportation.[1279]

AFFIRMATIVE DEFENSE [§ 2423(g)][1280]

It is a defense that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years. The defendant must establish his belief by a preponderance of the evidence.

NOTE

Section 2423(e) has its own attempt and conspiracy provision.

"Congress made the statute gender-neutral in a 1986 amendment, retired the 'purpose' test for interstate transportation, and clarified the amorphous phrase 'any immoral purpose' by narrowing the statute's coverage to illegal sexual activity." *United States v. Vang*, 128 F.3d 1065, 1069 (7th Cir. 1997). In interpreting § 2423, a statutory cousin of § 2421, the Seventh Circuit drew upon its own Mann Act precedent.

Section 2423(b) requires that the foreign travel be with the specific intent to engage in illicit sex, whereas § 2423(c) does not have such a specific intent requirement. *See United States v. Clark*, 435 F.3d 1100, 1116 (9th Cir. 2006).

[1275] In other words, non-commercial criminal sexual conduct.

[1276] In other words, commercial sex.

[1277] *See United States v. Bennett*, 364 F.2d 77, 78 (4th Cir. 1966) (a § 2421 prosecution). "When the charge here is so viewed and considered we reach the conclusion that the jury was not misled and that they fully understood that immoral activities must be found to be a 'purpose' of the interstate transportation." *Id.* at 79. *But see United States v. Vang*, 128 F.3d 1065, 1071 n.9 (7th Cir. 1997) (intent that individual engage in sexual activity must be one of dominant purposes of interstate travel); *United States v. Drury*, 582 F.2d 1181, 1185 (8th Cir. 1978) (same). In *United States v. Wadford*, 331 F. App'x 198 (4th Cir. 2009), the Fourth Circuit acknowledged that the government does not need to establish that an unlawful purpose was the sole factor motivating interstate travel. "Some courts have sustained Mann Act convictions where the unlawful purpose was simply *one* of the purposes motivating the interstate travel while other courts have required the unlawful purpose to be the dominant purpose." 331 F. App'x at 203.

[1278] *See United States v. Sapperstein*, 312 F.2d 694, 697 (4th Cir. 1963) (§ 2421 prosecution).

[1279] *See United States v. Marks*, 274 F.2d 15, 18-19 (7th Cir. 1959) (§ 2421 prosecution).

[1280] *See* discussion of this defense in *United States v. Buttrick*, 432 F.3d 373 (1st Cir. 2005).

18 U.S.C. § 2511 WIRETAPPING

Title 18, United States Code, Section 2511 makes it a crime to intercept certain wire, oral, or electronic communications. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2511(1)(a)

- First, that the defendant intercepted, endeavored to intercept, or procured any other person to intercept or endeavor to intercept;
- Second, any wire, oral, or electronic communication; and
- Third, that the defendant did so intentionally.

§ 2511(1)(b)(i)

- First, that the defendant used, endeavored to use, or procured any other person to use or endeavor to use any electronic, mechanical, or other device;
- Second, to intercept an oral communication;
- Third, that the device was affixed to, or otherwise transmitted a signal through a wire, cable, or other like connection used in wire communication; and
- Fourth, that the defendant did so intentionally.

§ 2511(1)(b)(ii)

- First, that the defendant used, endeavored to use, or procured any other person to use or endeavor to use any electronic, mechanical, or other device;
- Second, to intercept an oral communication;
- Third, that the device transmitted communications by radio, or interfered with the transmission of such communication; and
- Fourth, that the defendant did so intentionally.

§ 2511(1)(b)(iii)

- First, that the defendant used, endeavored to use, or procured any other person to use or endeavor to use any electronic, mechanical, or other device;
- Second, to intercept an oral communication;
- Third, that the defendant or other person knew, or had reason to know, that the device or any component of the device had been sent through the mail or transported in interstate or foreign commerce; and
- Fourth, that the defendant did so intentionally.

§ 2511(1)(b)(iv)

- First, that the defendant used, endeavored to use, or procured any other person to use or endeavor to use any electronic, mechanical, or other device;
- Second, to intercept an oral communication;
- Third, that the interception occurred on the premises of a business or other commercial establishment the operations of which affect interstate or foreign commerce; and

- Fourth, that the defendant did so intentionally.

§ 2511(1)(c)

- First, that the defendant disclosed, or endeavored to disclose, to any other person the contents of a wire, oral, or electronic communication;
- Second, that the defendant knew or had reason to know that the information which was disclosed or endeavored to be disclosed was obtained through the interception of a wire, oral, or electronic communication intercepted in violation of this statute;[1281] and
- Third, that the defendant did so intentionally.[1282]

§ 2511(1)(d)

- First, that the defendant used, or endeavored to use, the contents of a wire, oral, or electronic communication;
- Second, that the defendant knew or had reason to know that the information which was used or endeavored to be used was obtained through the interception of a wire, oral, or electronic communication intercepted in violation of this statute;[1283] and
- Third, that the defendant did so intentionally.[1284]

§ 2511(1)(e)

- First, that the defendant disclosed, or endeavored to disclose, to any other person the contents of a wire, oral, or electronic communication intercepted lawfully;
- Second, that the defendant knew or had reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in connection with a criminal investigation;
- Third, that the defendant obtained or received the information in connection with a criminal investigation; and
- Fourth, that the defendant did so with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation.

"Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce. [§ 2510(1)]

"Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under

[1281] *United States v. Wuliger*, 981 F.2d 1497, 1501 (6th Cir. 1992).
[1282] *See id.*
[1283] *Id.*
[1284] *See id.*

circumstances justifying such expectation, but such term does not include any electronic communication. [§ 2510(2)]

"Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device. [§ 2510(4)]

"Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal. [§ 2510(5)]

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include

(a) any wire or oral communication;

(b) any communication made through a tone-only paging device;

(c) any communication from a tracking device (as defined in 18 U.S.C. § 3117);

(d) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds. [§ 2510(12)]

"Intentionally" means that the defendant acted deliberately and purposefully; that is, the defendant's act must have been the product of the defendant's conscious objective rather than the product of a mistake or an accident.[1285]

The government does not need to prove the identity of the conversant whose communications were intercepted.[1286]

NOTE

In *United States v. Burroughs*, 564 F.2d 1111 (4th Cir. 1977), *overruled in part on other grounds by United States v. Steed*, 674 F.2d 284, 285 n.2 (4th Cir. 1982) (*en banc*),

[1285] Instruction suggested by Second Circuit in *United States v. Townsend*, 987 F.2d 927, 930 (2d Cir. 1993). The statute "only requires intentional interception of communications, not willful interception. The question of whether the defendant had a good or evil purpose ... is, therefore, irrelevant." *Id.* at 931.

[1286] *United States v. Duncan*, 598 F.2d 839, 848 (4th Cir. 1979).

two management employees of J.P. Stevens & Co. were charged with violating § 2511(1)(a) for endeavoring to intercept the oral communications of union organizers by converting a telephone in a motel room into a listening device. The district court granted judgment of acquittal, and the Fourth Circuit affirmed because the government had failed to prove a federal nexus. The Fourth Circuit pointed out that in § 2511(1)(b), Congress had legislated based on its power to regulate interstate commerce, and each subsection required a specific showing of an effect upon interstate commerce. In § 2511(1)(a), the statutory definitions for wire and electronic communications provide the necessary federal nexus concerning those communications. However, for oral communications, there must be some demonstrated federal nexus. 564 F.2d at 1115.

In *United States v. Duncan*, 598 F.2d 839, 850 (4th Cir. 1979), the Fourth Circuit stated the following instruction "could have been clearer [but did not constitute] reversible error":

> If a person knows for a fact that his conversations are being monitored ... the person would not have a reasonable expectation that his communications were private and not subject to interception. However, the mere fact that one might suspect that his private conversations could or might be surreptitiously intercepted does not remove his utterances from the definition of oral communication. The test is whether the utterances were made by a person exhibiting an expectation that his utterances were not subject to interception, that is, his utterances were private and that under the circumstances such expectation was justified.

In *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984), the Fourth Circuit held there is no interspousal exception in 18 U.S.C. § 2511.

18 U.S.C. § 2701 ACCESS TO STORED COMMUNICATIONS [LAST UPDATED: 7/11/14]

Title 18, United States Code, Section 2701 makes it a crime to access stored communications. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2701(a)(1)

- First, that the defendant accessed without authorization;
- Second, a facility through which an electronic communication service is provided;
- Third, that thereby the defendant obtained, altered, or prevented authorized access to a wire or electronic communication while it was in electronic storage in such system; and
- Fourth, that the defendant did so intentionally.[1287]

AGGRAVATED PENALTY [§2701(b)(1)]

1. Did the defendant commit the offense for purposes of commercial advantage, malicious destruction or damage, private commercial gain, or in furtherance of

[1287] *See United States v. Moriarty*, 962 F. Supp. 217, 218 (D. Mass. 1997).

[specify the elements of the criminal or tortious act in violation of the Constitution or laws of the United States or any State]?

§ 2701(a)(2)

- First, that the defendant had authorization to access a facility through which an electronic communication service is provided;
- Second, that the defendant exceeded that authorization;
- Third, that thereby the defendant obtained, altered, or prevented authorized access to a wire or electronic communication while it was in electronic storage in such system; and
- Fourth, that the defendant did so intentionally.

AGGRAVATED PENALTY [§ 2701(b)(1)]

1. Did the defendant commit the offense for purposes of commercial advantage, malicious destruction or damage, private commercial gain, or in furtherance of [specify the elements of the criminal or tortious act in violation of the Constitution or laws of the United States or any State]?

_____NOTE_____

Access to unopened emails is a requirement for proving a violation of § 2701(a). *United States v. Cioni*, 649 F.3d 276 (4th Cir. 2011).

The crimes described in §§ 1030 and 2701 "are similar, and a violation of § 1030 may be a lesser included offense of a violation of § 2701, since a person usually must obtain information through access to a computer in order to obtain access to communications in electronic storage." *Id*. at 282. Section 1030 criminalizes *attempts*, *see* 18 U.S.C. § 1030(c)(2), but § 2701 requires completed access. *Id*. at 283.

18 U.S.C. § 3146 FAILURE TO APPEAR – BAIL JUMPING

Title 18, United States Code, Section 3146 makes it a crime to fail to appear for court after having been released on bond. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant had been released on bond;
- Second, that the defendant failed to appear before a court as required [or failed to surrender for service of sentence pursuant to a court order]; and
- Third, that the defendant did so knowingly.

_____NOTE_____

See Section 3146(c) for affirmative defense concerning uncontrollable circumstances.

If the defendant was released on bond in connection with a misdemeanor, the offense is a misdemeanor.

18 U.S.C. § 3591 DEATH PENALTY

The defendant shall be sentenced to death if you find, unanimously and beyond a reasonable doubt, the following:

- First, that the defendant was older than 18 years of age at the time of the offense [§ 3591(a)]; and
- Second, you must find one of the following four factors. Consider them in order. Once you have agreed unanimously on one factor, do not consider any more of these four factors [§ 3591(a)(2)(A)-(D)] (see below):[1288]
- Third, you must find an aggravating factor:[1289] [§ 3592(c)]

AGGRAVATING FACTORS:

1. Did the death, or injury resulting in death, occur during the commission or attempted commission of, or during the immediate flight from the commission of [specify the enumerated offense]?
2. Has the defendant previously been convicted of a state or federal offense punishable by a term of imprisonment of more than one year, involving the use or attempted or threatened use of a firearm?
3. Has the defendant previously been convicted of another state or federal offense resulting in the death of a person, for which a sentence of life imprisonment or of death was authorized by statute?
4. Has the defendant previously been convicted of two or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person?
5. Did the defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly create a grave risk of death to one or more persons in addition to the victim of the offense?

"Grave risk of death" means a significant and considerable possibility of death and

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[1288] *See United States v. Tipton*, 90 F.3d 861, 899 (4th Cir. 1996). "[C]umulative findings of more than one of the (n)(1) circumstances as an aggravating factor is constitutional error."

[1289] Aggravating factors do not need to be alleged in the indictment, but they are required to be found by the jury. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002)*; United States v. Wills*, 346 F.3d 476, 501 (4th Cir. 2003) (*Wills II*).

The jury may take into account the circumstances of the crime, even though this information duplicates elements of the underlying crime, so long as this does not duplicate another aggravating factor. *United States v. Johnson*, 136 F. Supp. 2d 553, 559 (W.D. Va. 2001). "[I]t is constitutional error for the same aggravating factor to be considered by the sentencer more than once, even if dressed in new clothing." *United States v. Rivera*, 405 F. Supp. 2d 662, 668 (E.D. Va. 2005). *See also United States v. Tipton*, 90 F.3d 861, 899 (4th Cir. 1996). *But see United States v. McCullah*, 76 F.3d 1087, 1107-08 (10th Cir. 1996) (commission of the charged offense may be used as a non-statutory aggravating factor). However, the *McCullah* court held "that the use of duplicative aggravating factors creates an unconstitutional skewing of the weighing process." *Id*. at 1112.

"Because a death sentence cannot be imposed unless at least one statutory aggravating factor has been proved, statutory aggravating factors are determined before any alleged mitigating or non-statutory aggravating factors are considered." *United States v. Caro*, 597 F.3d 608, 611 n.4 (4th Cir. 2010).

placing other persons in a zone of danger.[1290]

6. Did the defendant commit the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim?
7. Did the defendant procure the commission of the offense by payment, or promise of payment, of anything of pecuniary value?
8. Did the defendant commit the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value?
9. Did the defendant commit the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism?

"Substantial planning" means planning which is considerable or ample for the commission of this offense [that is, the underlying offense].[1291]

10. Has the defendant previously been convicted of two or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance?
11. Was the victim particularly vulnerable due to old age, youth, or infirmity?
12. Has the defendant previously been convicted of violating _____ for which a sentence of five or more years may be imposed, or has previously been convicted of engaging in a continuing criminal enterprise?
13. Did the defendant commit the offense in the course of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, and that violation involved the distribution of drugs to persons under the age of 21?
14. Did the defendant commit the offense against [an enumerated individual–the fourth category of enumerated officials requires, in addition, that the offense was committed while the person was engaged in the performance of official duties, because of the performance of official duties, or because of the person's status as a public servant]?
15. Has the defendant previously been convicted of a crime of sexual assault or a crime of child molestation?
16. Did the defendant intentionally kill or attempt to kill more than one person in a single criminal episode?

[17. Does any other aggravating factor exist, for which notice has been given? § 3592(c)]

If you unanimously find, beyond a reasonable doubt, at least one aggravating factor, then you must weigh these aggravating factors against mitigating factors. Any juror may consider any mitigating factor found by him to exist by a preponderance of the evidence, without regard to whether it has been found by any other juror.

[1290] Clarifying instruction given by district court in *United States v. Barnette*, 211 F.3d 803, 819 (4th Cir. 2000).

[1291] The Tenth Circuit found no error in this instruction. Substantial planning does not require considerably more planning than is typical. *See McCullah*, 76 F.3d at 1110-11 (§ 848(e) prosecution).

§ 3591(a)(2)(A)

- First, that the defendant killed the victim; and
- Second, that the defendant did so intentionally.

§ 3591(a)(2)(B)

- First, that the defendant inflicted serious bodily injury on the victim;
- Second, that the victim died as a result of the serious bodily injury; and
- Third, that the defendant did so intentionally.

"Serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty. [18 U.S.C. § 1365(h)(3)]

§ 3591(a)(2)(C)

- First, that the defendant participated in an act;
- Second, that the defendant contemplated that the life of a person would be taken or the defendant intended that lethal force would be used in connection with a person [other than one of the participants in the offense];
- Third, that the victim died as a direct result of the act; and
- Fourth, that the defendant acted intentionally.

§ 3591(a)(2)(D)

- First, that the defendant engaged in an act of violence;
- Second, that the defendant did so intentionally and specifically;
- Third, that the defendant knew that the act of violence created a grave risk of death to a person [other than one of the participants in the offense] so that participating in the act of violence constituted a reckless disregard for human life; and
- Fourth, that the victim died as a direct result of the act.

MITIGATING FACTORS:[1292] **[§ 3592]**

The word "mitigate" means to make less severe or to moderate. A "mitigating factor" is information that you deem relevant that would suggest that a sentence of death is not the most appropriate punishment.

The defendant has the burden of proving any of the following factors by a preponderance of the information. Something is proved by a preponderance of the evidence if the evidence proves that it is more likely than not that the factor is so.

First, you must determine if the evidence establishes the existence of the factor by a preponderance of the evidence. If it has been proved, then you must determine whether

[1292] The range of possible sentences that the defendant might receive in the event the jury does not recommend death does not fall within the definition of mitigating factors. And the jury is not required to return written findings of mitigating factors that the jury has either found to exist or found not to exist. *United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993).

the factor mitigates against a sentence of death. Moreover, the law does not require that you be unanimous as to mitigating factors. Any juror who is persuaded that a mitigating factor exists, must consider that factor in this case. It is up to each individual juror to determine how much weight to give to any particular mitigating factor.

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired.
2. The defendant was under unusual and substantial duress.
3. The defendant's participation in the offense was relatively minor.
4. Another defendant, equally culpable in the crime, will not be punished by death.
5. The defendant does not have a significant prior history of other criminal conduct.
6. The defendant committed the offense under a severe mental or emotional disturbance.
7. The victim consented to the criminal conduct that resulted in the victim's death.
8. Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

Unlike aggravating factors, the law does not limit your consideration of mitigating factors to those that are listed for you; therefore, if there are any mitigating factors not listed in these instructions, but which any juror finds to be established by a preponderance of the evidence, that juror is free to consider them in his or her sentencing decision.[1293]

You have the option to return written findings of mitigating factors if you choose, but you are not required to do so.[1294]

You must consider whether the aggravating factors sufficiently outweigh the mitigating factors to justify a sentence of death.

☞ **If no mitigating factors**

You must consider whether the aggravating factor(s) is/are sufficient to justify a sentence of death.[1295]

This weighing process is not a mechanical process and the different factors can be given different weights. Moreover, you should not reach a decision based on the number of aggravating or mitigating factors.[1296]

Even if you find that all of the aggravating factors are established beyond a reasonable doubt and that none of you have found that any mitigation has been established at all, you still have the right to decide against the death penalty in this case.[1297]

In deciding what recommendation to make, you are not to be concerned with the

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[1293] *United States v. Basham*, 561 F.3d 302, 336 (4th Cir. 2009).

[1294] *Chandler*, 996 F.2d at 1087 (§ 848(e) case).

[1295] *Id.* at 1091.

[1296] *Id.* at 1093.

[1297] Instruction given by the district court in *United States v. Higgs*, 353 F.3d 281, 332 (4th Cir. 2003).

question of what sentence the defendant might receive in the event you determine not to recommend a death sentence. That is a matter for me to decide in the event you conclude that a sentence of death should not be recommended. If you do not make such a recommendation, the court is required by law to impose a sentence other than death, which sentence is to be determined by the court alone.[1298]

In the event of disagreement as to punishment, the defendant will be sentenced as provided by law up to life without the possibility of release.[1299]

Finally, you are not to consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim. Moreover, you should not recommend a sentence of death unless you would have recommended a sentence of death no matter what the race, color, religious beliefs, national origin, or sex of the defendant are, and no matter what the race, color, religious beliefs, national origin, or sex of the victim were. [§ 3593(f)]

☞ **Limiting instruction in the event of rebuttal evidence**

Rebuttal evidence may only be considered by you insofar as it may rebut the mitigating factor[s] that [was/were] specified by the defendant. It is not to be considered by you for any other purpose.[1300]

_____NOTE_____

The jury must unanimously agree that the government has proved beyond a reasonable doubt at least one statutory intent factor and at least one statutory aggravating factor for which notice was given. *See United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003); *United States v. Johnson*, 136 F. Supp. 2d 553, 557 (W.D. Va. 2001).

The defendant's burden of establishing any mitigating factor is by a preponderance of the information, and unanimity is not required. *Johnson*, 136 F. Supp. 2d at 558.

The jury is required to recommend by unanimous vote whether the defendant should be sentenced to death or life imprisonment. *Id.*

An aggravating factor must not be overbroad. The circumstances may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder. *Id.*

An aggravating factor must not be unconstitutionally vague. Vagueness is ascertained by assessing whether an aggravating factor is defined in terms too vague to provide sufficient guidance to the sentencer. The factor must have some common-sense core meaning that criminal juries should be capable of understanding. *Id.*

An aggravating factor must be sufficiently relevant to the question who should live and who should die. *Id.* A relevant factor is one that assists the sentencer in distinguishing those who deserve capital punishment from those who do not. If the aggravator has only a tangential relationship to a determination of who is more worthy of receiving a sentence

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[1298] Instruction approved as proper in *United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993). Moreover, the district court is not required to inform the jury of the possible sentences the defendant might face. *Id*.

[1299] Instruction given by district court in *United States v. Barnette,* 211 F.3d 803, 817 (4th Cir. 2000). *But see Chandler*, 996 F.2d at 1089 ("[T]he district court is not required to instruct the jury on the consequences of an inability to reach a unanimous verdict.")

[1300] Limiting instruction given by district court in *Higgs*, 353 F.3d at 330.

of death, it should be excluded from the sentencer's review. Relevant information is particularized to the individual defendant. *United States v. Cisneros*, 363 F. Supp. 2d 827, 834 (E.D. Va. 2005).

An aggravating factor must be measured in perspective of the fundamental requirement of heightened reliability that is keystone to making the determination that death is the appropriate punishment in the specific case. *Johnson*, 136 F. Supp. 2d at 558.

The jury may be instructed that the nonstatutory aggravating factor relates solely to conduct underlying the defendant's contemporaneous convictions during the guilt phase of trial and the existence of those contemporaneous convictions, and further, that the defendant will be separately punished for those alleged crimes. *United States v. Le*, 327 F. Supp. 2d 601, 614 (E.D. Va. 2004).

General deterrence is not an aggravating factor within the meaning of § 3591. *United States v. Caro*, 461 F. Supp. 2d 459, 462 (W.D. Va. 2006), *aff'd*, 597 F.3d 608 (4th Cir. 2010).

A defendant's immigration status is unconstitutionally irrelevant to whether he merits the death penalty. *Cisneros*, 363 F.Supp.2d at 835.

The indictment need only allege one aggravating factor, but need not allege prior convictions. *Higgs*, 353 F.3d at 299, 304.

The jury must determine whether the victim is dead, and if so, whether his death resulted from the willful and intentional conduct of the defendant. *United States v. Wills*, 346 F.3d 476, 500 (4th Cir. 2003) (*Wills II*).

The Eleventh Circuit interprets *Beck v. Alabama*, 447 U.S. 625 (1980), "as granting a defendant, who faces the possibility of a death sentence, the constitutional right to have a lesser included instruction read to the jury." *United States v. Chandler*, 996 F.2d 1073, 1099 (11th Cir. 1993).

In *Caro*, the sentencing hearing was divided into two phases, an "eligibility" phase and a "selection" phase. The first phase involved determining whether Caro had committed a capital offense under § 3591 and whether the government had proved at least one statutory aggravating factor beyond a reasonable doubt, together making Caro eligible for the death penalty. The second phase involved determining the mitigating and non-statutory aggravating factors and selecting either a death sentence or life imprisonment.

Estelle v. Smith, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999), together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the non-statutory aggravating factor of lack of remorse. *United States v. Caro*, 597 F.3d 608, 630 (4th Cir. 2010).

In *Caro*, the Fourth Circuit held that because the defendants proposed instruction that mercy alone could justify a life sentence was legally incorrect, the district court's refusal to give the instruction was not an abuse of discretion. 597 F.3d at 631-33.

IV. OTHER TITLES

7 USC § 2024 FOOD STAMP FRAUD

Title 7, United States Code, Section 2024, makes it a crime to use food stamp access devices illegally. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 2024(b)(1)

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

- First, that the defendant used, transferred, acquired, altered, or possessed food stamp coupons, authorization cards, or access devices;
- Second, that the defendant did so in a manner contrary to law [the court should instruct on the underlying illegality];
- Third, that the defendant did so knowingly and willfully.

AGGRAVATED PENALTIES

☞ **The jury must determine the value of the coupons, authorization cards, or access devices, as follows: $5,000 or more, $100 or more, but less than $5,000 less than $100.**

The government must prove that the defendant knew that his use, transfer, acquisition, or possession of food stamps, authorization cards, or access devices was in a manner unauthorized by the food stamp law or regulations.[1]

§ 2024(c)

- First, that the defendant presented, or caused to be presented, food stamp coupons for payment or redemption;
- Second, that the food stamp coupons had been received, transferred, or used illegally [the court should instruct on the underlying illegality];
- Third, that the defendant knew the food stamp coupons had been received, transferred, or used illegally.

AGGRAVATED PENALTIES

☞ **The jury must determine the value of the coupons, authorization cards, or access devices, as follows: $100 or more; or less than $100.**

The government must prove that the defendant knew that the food stamps, authorization cards, or access devices had been received, transferred, or used in a manner unauthorized by the food stamp law or regulations.[2]

7 U.S.C. § 2156 ANIMAL FIGHTING

§ 2156(a)(1)

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[1] *Liparota v. United States*, 471 U.S. 419, 433 (1985), where the Supreme Court's concern was to avoid criminalizing otherwise non-culpable conduct.

[2] *See id*. at 433.

Title 7, United States Code, Section 2156(a), makes it a crime to sponsor or exhibit an animal in an animal fighting venture. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant sponsored or exhibited;
- Second, an animal in;
- Third, an animal fighting venture; and
- Fourth, that the defendant did so knowingly.[3]

§ 2156(b)

Title 7, United States Code, Section 2156(b), makes it a crime to sell, buy, possess, train, transport, deliver, or receive any animal for purposes of having the animal participate in an animal fighting venture. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant sold, bought, possessed, trained, transported, delivered, or received;
- Second, an animal;
- Third, that the defendant did so for the purpose of having the animal participate in an animal fighting venture; and
- Fourth, that the defendant did so knowingly.[4]

§ 2156(c)

Title 7, United States Code, Section 2156(c), makes it a crime to use the mail to advertise an animal fighting venture. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant used the mail service of the United States Postal Service or any instrumentality of interstate commerce for commercial speech;
- Second, that the defendant did so for the purposes of any of the following:

  (1) advertising an animal for use in an animal fighting venture;

  (2) advertising a knife, gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture; or

  (3) promoting or in any other manner furthering an animal fighting venture; and
- Third, that the defendant did so knowingly.

§ 2156(e)

Title 7, United States Code, Section 2156(e), makes it a crime to sell, buy, transport,

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[3] *See United States v. Kingrea*, 573 F.3d 186 (4th Cir. 2009). Kingrea was indicted on September 18, 2007. The statute was amended in 2008, deleting "if any animal in the venture was moved in interstate or foreign commerce." The opinion cites the 2008 version of the statute, but does not address the amendment. It would appear that federal jurisdiction is grounded on the definition of animal fighting venture, which means any event in or affecting interstate or foreign commerce.

[4] *Id.*

or deliver in interstate or foreign commerce certain sharp instruments for use in an animal fighting venture. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant sold, bought, transported, or delivered in interstate or foreign commerce;
- Second, a knife, gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture; and
- Third, that the defendant did so knowingly.

"Animal fighting venture" means any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least two animals for purposes of sport, wagering, or entertainment, except that the term "animal fighting venture" shall not be deemed to include any activity the primary purpose of which involves the use of one or more animals in hunting another animal. [§ 2156(g)(1)]

"Instrumentality of interstate commerce" means any written, wire, radio, television or other form of communication in, or using a facility of, interstate commerce. [§ 2156(g)(2)]

"Animal" means any live bird, or any live mammal, except man. [§ 2156(g)(4)]

8 U.S.C. § 1324 BRINGING IN OR HARBORING ALIENS [LAST UPDATED: 7/2/14]

Title 8, United States Code, Section 1324 makes it a crime to bring or harbor certain aliens in the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1324(a)(1)(A)(i)

- First, that the defendant brought [or attempted to bring] a person who was an alien into the United States at a place other than a designated port of entry or at a place other than as designated by a United States immigration official;
- Second, that the defendant knew that the person was an alien; and
- Third, that the defendant acted with the intent to violate the United States immigration laws by assisting that person to enter the United States at a time or place other than as designated by a United States immigration official or to otherwise elude United States immigration officials.[5]

§ 1324(a)(1)(A)(ii)

- First, that the defendant transported, moved, or attempted to transport or move an alien within the United States by means of transportation or otherwise;
- Second, that the alien was in the United States in violation of law;
- Third, that the defendant was aware of the alien's status, [or recklessly disregarded the fact, that the alien had come to, entered, or remained in the

[5] *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005).

United States in violation of law]; and

- Fourth, that the defendant acted willfully in furtherance of the alien's violation of the law.[6]

To "come to" the United States means to cross the border into the United States so as to be physically present in the United States whether or not one has actually "entered" [an immigration law term of art] the United States.[7]

The government must prove that the defendant transported within this country an alien who had come to the United States unlawfully.[8]

The government must prove a direct and substantial relationship between the transportation of the illegal alien and furthering his illegal presence in the United States. In other words, mere or incidental transportation of an alien is not enough to prove this offense.[9]

The government can prove that the defendant was aware of the alien's illegal status by showing that the defendant had actual knowledge of his status or that he recklessly disregarded the fact that the alien was in the country illegally.[10]

§ 1324(a)(1)(A)(iii)

- First, that an alien had come to, entered, or remained in the United States in violation of law;
- Second, that the defendant knew or acted in reckless disregard of the fact that the alien had come to, entered, or remained in the United States in violation of law;
- Third, that the defendant concealed, harbored, or shielded from detection, or

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[6] *United States v. Barajas-Chavez*, 162 F.3d 1285, 1287 (10th Cir. 1999) (*en banc*). *See also United States v. Barajas-Montoya*, 223 F. App'x 293 (4th Cir. 2007); *United States v. Martinez-Marin*, No. 05-5167, 2006 WL 2520319 (4th Cir. Aug. 31, 2006). The statute includes "reckless disregard," apparently a reference to willful blindness. Regardless, the Tenth Circuit found that the "defendant's guilty knowledge that his transportation activity furthers an alien's illegal presence in the United States is an essential element of the crime." *Barajas-Chavez*, 162 F.3d at 1287 (citing *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994)). *See also United States v. Nolasco-Rosas*, 286 F.3d 762 (5th Cir. 2002), which identified the elements as follows:

> 1. an alien entered or remained in the United States in violation of the law; 2. the defendant transported the alien within the United States with intent to further the alien's unlawful presence; and 3. the defendant knew or recklessly disregarded the fact that the alien was in the country in violation of the law.

286 F.3d at 765.

[7] *United States v. Munoz*, 412 F.3d 1043, 1049 (9th Cir. 2005). The Immigration Reform and Control Act, by utilizing the phrase "come to," removed the official restraint doctrine as a hurdle to criminal liability for alien smuggling. "Congress intended to separate the concept of bringing or coming *to* the United States from 'entry.'" *United States v. Hernandez-Garcia*, 284 F.3d 1135, 1138 (9th Cir. 2002).

[8] *Hernandez-Garcia*, 284 F.3d at 1139.

[9] *See United States v. Merkt*, 794 F.2d 950, 965 (5th Cir. 1986) (predecessor statute).

[10] *Barajas-Montoya*, 223 F. App'x at 294 (citing *United States v. Nolasco-Rosas*, 286 F.3d 762, 765 (5th Cir. 2002)). For "recklessly disregarded the fact," see instruction on Willful Blindness.

attempted to conceal, harbor, or shield from detection, the alien in any place, including any building or any means of transportation; and

- Fourth, that the defendant's conduct tended to substantially facilitate the alien remaining in the United States illegally.[11]

To "harbor" means to afford shelter to and does not require an intent to avoid detection.[12]

§ 1324(a)(1)(A)(iv)

- First, that the defendant encouraged or induced an alien;
- Second, to come to, enter, or reside in the United States in violation of law; and
- Third, that the defendant knew or acted in reckless disregard of the fact that the alien's coming to, entry, or residence in the United States was or would be in violation of law.

"Encouraging" relates to actions taken to convince the illegal alien to come to this country or to stay in this country.[13]

AGGRAVATED PENALTIES

1. Was the offense done for the purpose of commercial advantage or private financial gain?
2. Did the defendant cause serious bodily injury to, or place in jeopardy the life of, any person during and in relation to the offense?[14]
3. Did the offense result in the death of any person?

"Serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [18 U.S.C. § 1365(h)(3)]

"In jeopardy" means putting the life of a person in an objective state of danger.[15]

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[11] *United States v. De Jesus-Batres*, 410 F.3d 154, 160 (5th Cir. 2005). A circuit split exists regarding whether this is an element of the offense. *Compare United States v. Cuevas-Reyes*, 572 F.3d 119, 121-22 (3d Cir. 2009) (requiring substantial facilitation), *with United States v. Ye*, 588 F3d. 411, 416-17 (7th Cir. 2009) (rejecting defendant's argument that element is required). The Fourth Circuit has not decided this issue. *United States v. Aquilar*, 477 F. App'x 1000, 1002 (4th Cir. 2012).

[12] *United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989), *superceded by* 8 U.S.C. § 1324.

[13] *United States v. Oloyede*, 982 F.2d 133, 137 (4th Cir. 1993).

[14] *But see United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005) ("the indictment's reference to the girls' injuries was surplusage because it was an issue relevant to sentencing rather than an element of the offense.").

[15] In *United States v. Newkirk*, 481 F.2d 881 (4th Cir. 1973), the Fourth Circuit held the following instruction did not constitute plain error: "To put in jeopardy the life of a person by the use of a dangerous weapon or device means, then, to expose such person to a risk of death or to the fear of death, by the use of such dangerous weapon or device." 481 F.2d at 883 n.1. However, jeopardy "is commonly defined as referring to an objective state of danger, not to a subjective feeling of fear." *United States v. Donovan*, 242 F.2d 61, 63 (2d Cir. 1957). *See also Wagner v. United States*, 264 F.2d

Therefore, "to put in jeopardy" means to expose a person to a risk of death.[16]

§ 1324(a)(2)(B)(i)[17]

- First, that the defendant brought to or attempted to bring to the United States in any manner whatsoever;
- Second, an alien who had not received prior official authorization to come to, enter, or reside in the United States;
- Third, that the defendant knew, or recklessly disregarded the fact that the alien had not received prior official authorization to come to, enter, or reside in the United States; and
- Fourth, that the defendant acted with intent or with reason to believe that the alien unlawfully brought into the United States would commit an offense against the United States or any state punishable by imprisonment for more than one year.

§ 1324(a)(2)(B)(ii)

- First, that the defendant brought to or attempted to bring to the United States in any manner whatsoever;
- Second, an alien who had not received prior official authorization to come to, enter, or reside in the United States;
- Third, that the defendant knew, or recklessly disregarded the fact that the alien had not received prior official authorization to come to, enter, or reside in the United States; and
- Fourth, that the defendant acted for the purpose of commercial advantage or private financial gain.[18]

§ 1324(a)(2)(B)(iii)

- First, that the defendant brought to or attempted to bring to the United States in any manner whatsoever;
- Second, an alien who had not received prior official authorization to come to, enter, or reside in the United States;
- Third, that the defendant knew, or recklessly disregarded the fact that the alien had not received prior official authorization to come to, enter, or reside in the United States; and
- Fourth, that the alien was not, upon arrival, immediately brought and presented

524, 530 (9th Cir. 1959). Therefore, the "fear of death" language is not included.

[16] *Newkirk*, 481 F.3d at 883 n.1.

[17] "Smuggling aliens to the United States does not require entry." *United States v. Gonzalez-Torres*, 309 F.3d 594, 599 (9th Cir. 2001).

[18] If the defendant is being prosecuted as a principal, as opposed to an aider and abettor, the government must prove that the defendant intended to receive financial gain, not someone else. *See United States v. Munoz*, 412 F.3d 1043, 1047 (9th Cir. 2005). However, "[w]hen a defendant is tried ... for aiding and abetting under 8 U.S.C. § 1324, the question of financial gain by the defendant or others is immaterial." *United States v. De Jesus-Batres*, 410 F.3d 154, 161 (5th Cir. 2005).

to an appropriate immigration officer at a designated port of entry.

"Alien" means any person not a citizen or national of the United States. [8 U.S.C. § 1101(a)(3)].

A "national" is a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. [8 U.S.C. § 1101(a)(22)]

The term does not include a person who illegally enters the United States and subjectively considers himself a person who owes permanent allegiance to the United States.[19]

To "come to" the United States means to cross the border into the United States so as to be physically present in the United States whether or not one has actually "entered" [an immigration law term of art] the United States.[20]

To "enter," an alien must cross the United States border free from official restraint. An alien is under official restraint if, after crossing the border without authorization, he is deprived of his liberty and prevented from going at large within the United States. An alien does not have to be in the physical custody of the authorities to be officially restrained. Restraint may take the form of surveillance, unbeknownst to the alien. When under surveillance, the alien has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population. On the other hand, if an alien is not discovered until some time after exercising his free will within the United States, he has entered free from official restraint.[21]

A person is "found in" the United States when his physical presence is discovered and noted by the immigration authorities.[22]

The government does not have to prove that the defendant knew he was not entitled to enter [or re-enter] the United States without the permission of the Attorney General.[23]

_____NOTE_____

Specific intent to violate the immigration laws is not an element of the offense of alien harboring [8 U.S.C. § 1324(a)(1)(A)(ii)]. *United States v. De Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005). *But see United States v. Barajas-Montiel*, 185 F.3d 947, 951-53 (9th Cir. 1999).

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[19] *United States v. Sotelo*, 109 F.3d 1446, 1448 (9th Cir. 1997).

[20] *Munoz*, 412 F.3d at 1049. The Immigration Reform and Control Act, by utilizing the phrase "come to," removed the official restraint doctrine as a hurdle to criminal liability for alien smuggling."Congress intended to separate the concept of bringing or coming *to* the United States from 'entry.'" *United States v. Hernandez-Garcia*, 284 F.3d 1135, 1138 (9th Cir. 2002).

[21] *Gonzalez-Torres*, 309 F.3d at 598.

[22] *United States v. Uribe-Rios*, 558 F.3d 347, 352 (4th Cir. 2009) (quoting *United States v. Reyes-Nava*, 169 F.3d 278, 280 (5th Cir. 1999)).

[23] *United States v. Pena-Cabanillas*, 394 F.2d 785, 790 (9th Cir. 1968), *abrogated on other grounds by United States v. Smith–Baltiher*, 424 F.3d 913, 920 (9th Cir.2005).

Concerning the "in furtherance of" element, the Tenth Circuit in *United States v. Barajas-Chavez*, 162 F.3d 1285, 1288 (10th Cir. 1999), agreed that

> the element does not encompass persons who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with illegal aliens socially or otherwise, [but] we do not agree that the element is limited solely to those who support the presence of illegal aliens in this country through a smuggling operation or some other form of illicit transportation.

162 F.3d at 1288. The court found that

> the element is sufficiently broad to encompass any person who acts, regardless of profit motive or close relationship, with knowledge or with reckless disregard of the fact that the person transported is an illegal alien and that transportation or movement of the alien will help, advance, or promote the alien's illegal entry or continued illegal presence in the United States.

Id.

Circuit Courts have adopted different tests for determining whether the "in furtherance of" element is satisfied. The Eighth and Ninth Circuits have adopted the "direct or substantial relationship" test. The element is not satisfied if a defendant's transportation of an alien is only incidentally connected to the alien's illegal entry or continued illegal presence. The Ninth Circuit has suggested relevant factors include the time, place, distance and overall impact of the transportation.

The Sixth Circuit uses the "intent-based" approach, under which the factfinder is directed to consider all credible evidence concerning a defendant's intentions in transporting an illegal alien, such as compensation, what efforts the defendant took to conceal or harbor the alien, and whether the alien was a friend, co-worker, companion, or merely "human cargo." The Fifth Circuit appears to have adopted a more general approach that encompasses the 'direct or substantial relationship test, but also focuses on the defendant's intent in transporting the alien. *United States v. Merkt*, 794 F.2d 950, 964-65 (5th Cir. 1986). The Seventh Circuit has refused to adopt either test, allowing the government to prove the element by reference to the facts and circumstances surrounding each particular case. The Tenth Circuit rejected the use of any particular test. "We believe the proper approach is a general one.... [A] factfinder may consider any and all relevant evidence bearing on the 'in furtherance of' element (time, place, distance, reason for trip, overall impact of trip, defendant's role in organizing and/or carrying out the trip)." *Barajas-Chavez*, 162 F.3d at 1288-89.

In *United States v. Rivera*, 859 F.2d 1204, 1209 (4th Cir. 1988), the defendant appealed the district court's failure to instruct on the "substantial relationship between the transportation of the alien and the furtherance of the alien's unlawful presence in the United States." The Fourth Circuit affirmed, finding the trial judge covered this element in his instructions; however, the instructions are not reprinted in the opinion.

An aider and abettor is subject to a lesser penalty. 8 U.S.C. § 1324(a)(1)(B)(I).

8 U.S.C. § 1325 ILLEGAL ENTRY BY ALIEN/MARRIAGE FRAUD [LAST UPDATED: 2/4/15]

Title 8, United States Code, Section 1325 makes it a crime for an alien to enter the

United States in violation of certain requirements. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1325(a)

- First, that the defendant is an alien; and
- Second, that the defendant did one of the following:
  1. entered or attempted to enter the United States at any time or place other than as designated by immigration officers, or
  2. eluded examination or inspection by immigration officers, or
  3. attempted to enter or obtain entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.

☞ **First offense is a petty offense; a subsequent offense is a felony.**

"Alien" means any person not a citizen or national of the United States. [8 U.S.C. § 1101(a)(3)].

A "national" is a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. [8 U.S.C. § 1101(a)(22)]

The term does not include a person who illegally enters the United States and subjectively considers himself a person who owes permanent allegiance to the United States.[24]

To "enter," an alien must cross the United States border free from official restraint. An alien is under official restraint if, after crossing the border without authorization, he is deprived of his liberty and prevented from going at large within the United States. An alien does not have to be in the physical custody of the authorities to be officially restrained. Restraint may take the form of surveillance, unbeknownst to the alien. When under surveillance, the alien has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population. On the other hand, if an alien is not discovered until some time after exercising his free will within the United States, he has entered free from official restraint.[25]

A person is "found in" the United States when his physical presence is discovered and noted by the immigration authorities.[26]

"Elude" means to avoid or escape from, by quickness or cunning, or to escape detection.[27]

The government does not have to prove that the defendant knew he was not entitled

[24] *United States v. Sotelo*, 109 F.3d 1446, 1448 (9th Cir. 1997).

[25] *United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002).

[26] *United States v. Uribe-Rios*, 558 F.3d 347, 352 (4th Cir. 2009) (quoting *United States v. Reyes-Nava*, 169 F.3d 278, 280 (5th Cir. 1999)).

[27] *United States v. Oscar*, 496 F.2d 492, 494 (9th Cir. 1974).

to enter [or re-enter] the United States without the permission of the Attorney General.[28]

§ 1325(c)

- First, that the defendant knowingly entered into a marriage with a United States citizen;
- Second, that the defendant entered into the marriage for the purpose of evading any provision of the immigration laws of the United States; and
- Third, that the defendant knew of said purpose and had reason to know that his conduct was unlawful.[29]

The government need not prove that the defendant knew the specific law being violated, but that he was violating some immigration law.[30]

§ 1325(d)

- First, that the defendant knowingly established a commercial enterprise;
- Second, that the defendant established the commercial enterprise for the purpose of evading any provision of the immigration laws of the United States; and
- Third, that the defendant knew or had reason to know of the relevant immigration laws.

NOTE

In *United States v. Sonmez*, 777 F.3d 684 (4th Cir. 2015), the Fourth Circuit rejected the defendant's argument that the Government must prove the sole reason the marriage was entered into was to obtain an immigration benefit. The court recognized that "the intent to establish a life with one's spouse is a relevant consideration in determining whether a 777 F.3d at 690. "However, the relevance of this concept does not transform that consideration into an element of the offense . . . ." *Id*. The court concluded that "the district court did not abuse its discretion in refusing to instruct the jury that the government had the burden of proving that Sonmez did not 'intend to establish a life' with [the woman he married]. . . . [T]he test of Section 1325(c) does not provide any support for such a requirement." *Id*.

In *United States v. Chowdhury*, 169 F.3d 402, 407 (6th Cir. 1999), the Sixth Circuit rejected the appellant's argument that the government must prove that the defendant knew the specific law being violated. The Sixth Circuit also rejected his argument that the jury instruction should have included, as part of the second element, "*with the intention* and for the *sole* purpose of evading the immigration laws."

The Ninth Circuit has extensive case law on the term "entry." "Entry" is defined as physical presence free from official restraint.[31] According to the Ninth Circuit, other

[28] *United States v. Pena-Cabanillas*, 394 F.2d 785, 790 (9th Cir. 1968), *abrogated on other grounds by United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005).

[29] *United States v. Sonmez*, 777 F.3d 684, 687 (4th Cir. 2015).

[30] *United States v. Chowdhury*, 169 F.3d 402, 407 (6th Cir. 1999).

[31] *United States v. Oscar*, 496 F.2d 492, 493 (9th Cir. 1974). "Illegal aliens who technically had crossed the international border but were in the constructive custody of immigration authorities

circuits have established a similar doctrine. *United States v. Vela-Robles*, 397 F.3d 786, 789 n.3 (9th Cir. 2004). In *United States v. Ramos-Godinez*, 273 F.3d 820, 823-24 (9th Cir. 2001), a § 1326 prosecution, the court reiterated that mere physical presence on United States soil is not enough. To have entered the United States, the alien must not only have crossed the border, but also be exercising his free will while physically present in this country. Thus, the government must establish that the alien entered the United States "free from official restraint at the time officials discovered or apprehended him." 273 F.3d at 824. The concept of "official restraint" includes continuous surveillance from the border. *See United States v. Vela-Robles*, 397 F.3d 786, 789 (9th Cir. 2004) ("An alien must be in the visual or physical grasp of the authorities at all times to show that he is under official restraint.") (citation omitted). When the defendant has managed to evade detection, even for a brief period, he has "entered" the United States.

In *United States v. Madrigal-Valadez*, 561 F.3d 370, 376 (4th Cir. 2009), the court stated "[o]ur research has not disclosed any authority that makes the *status* of being in the United States after entering in violation of § 1325(a) a separate crime."

8 U.S.C. § 1326(a) REENTRY OF REMOVED ALIEN

Title 8, United States Code, Section 1326(a) makes it a crime for a removed alien to reenter the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant is an alien, that is, not a citizen of the United States;
- Second, that the defendant had been denied admission, excluded, deported, or removed or had departed the United States while an order of exclusion, deportation, or removal was outstanding;
- Third, that the defendant entered, [attempted to enter,] or was found in the United States;
- Fourth, that the defendant failed to secure the express permission of the Attorney General to reenter [or attempt to reenter]; and
- Fifth, the defendant did so voluntarily.[32]

AGGRAVATED PENALTIES §§ 1326(b)(3) and (4)[33]

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at that time are not said to have entered the United States. Continuous surveillance by immigration authorities can be sufficient to place an alien under official restraint." *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *superceded by* 8 U.S.C. § 1324.

[32] *See United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989) (§ 1326 is a general intent crime). *But see United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1191-92 (9th Cir. 2000) (when attempt to reenter is alleged, *mens rea* is elevated to specific intent).

See also United States v. De La Pava, 268 F.3d 157, 160-62 (2d Cir. 2001) (omission of the term "alien" did not render indictment charging § 1326 violation invalid); *United States v. Jaimes-Bustos*, 360 F. App'x 481 (4th Cir. 2010).

[33] In *United States v. Crawford*, 18 F.3d 1173 (4th Cir. 1994), the Fourth Circuit held that § 1326(b), and particularly § (b)(2), is a sentence enhancement and not an element. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Supreme Court held that Congress set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense. Clearly, Sections (b)(1) and

1. Was the defendant previously excluded from the United States [pursuant to 8 U.S.C. § 1225(c)] or removed from the United States [pursuant to 8 U.S.C. § 1231(a)(4)(B)].

"Alien" means any person not a citizen or national of the United States. [8 U.S.C. § 1101(a)(3).

A "national" is a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. [8 U.S.C. § 1101(a)(22)]

The term does not include a person who illegally enters the United States and subjectively considers himself a person who owes permanent allegiance to the United States.[34]

To "enter," an alien must cross the United States border free from official restraint. An alien is under official restraint if, after crossing the border without authorization, he is deprived of his liberty and prevented from going at large within the United States. An alien does not have to be in the physical custody of the authorities to be officially restrained. Restraint may take the form of surveillance, unbeknownst to the alien. When under surveillance, the alien has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population. On the other hand, if an alien is not discovered until some time after exercising his free will within the United States, he has entered free from official restraint.[35]

A person is "found in" the United States when his physical presence is discovered and noted by the immigration authorities.[36]

The government does not have to prove that the defendant knew he was not entitled to enter [or re-enter] the United States without the permission of the Attorney General.[37]

NOTE

In *United States v. Uribe-Rios*, 558 F.3d 347 (4th Cir. 2009), the court held that the statute of limitations does not begin to run until the defendant's presence as well as the illegal status of that presence is discovered by federal immigration authorities. The immigration agency's discovery of the alien is not an element of the offense. Moreover, the "found in" violation of § 1326 is a continuing offense.

"Because a deportation order is an element of the offense of illegal reentry, the Supreme Court has recognized that an alien can collaterally attack the propriety of the

(2), which set forth recidivism-based enhancements, are not elements. *United States v. Cheek*, 415 F.3d 349 (4th Cir. 2005). However, the other two enhancements, in Sections (b)(3) and (4), might be considered elements.

[34] *United States v. Sotelo*, 109 F.3d 1446, 1448 (9th Cir. 1997).

[35] *United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002).

[36] *United States v. Uribe-Rios*, 558 F.3d 347, 352 (4th Cir. 2009) (quoting *United States v. Reyes-Nava*, 169 F.3d 278, 280 (5th Cir. 1999)).

[37] *United States v. Pena-Cabanillas*, 394 F.2d 785, 790 (9th Cir. 1968), *abrogated on other grounds by United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005).

original deportation order in the later criminal proceeding." *United States v. El Shami*, 434 F.3d 659, 663 (4th Cir. 2005) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 838-39 (1987)).

To attack the underlying deportation order successfully, the defendant must demonstrate that: (a) he exhausted any administrative remedies that may have been available to seek relief against the order; (b) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (c) the entry of the deportation order was fundamentally unfair. 8 U.S.C. § 1326(d).

An order of deportation is insufficient as a matter of law to establish a defendant's alien status. *United States v. Sotelo*, 109 F.3d 1446, 1449 (9th Cir. 1997).

The Ninth Circuit has extensive case law on the term "entry." "Entry" is defined as physical presence free from official restraint.[38] According to the Ninth Circuit, other circuits have established a similar doctrine. *United States v. Vela-Robles*, 397 F.3d 786, 789 n.3 (9th Cir. 2004). In *United States v. Ramos-Godinez*, 273 F.3d 820, 823-24 (9th Cir. 2001), a § 1326 prosecution, the court wrote that mere physical presence on United States soil is not enough. To have entered the United States, the alien must not only have crossed the border, but also be exercising his free will while physically present in this country. Thus, the government must establish that the alien entered the United States free from official restraint at the time officials discovered or apprehended him. The concept of "official restraint" includes continuous surveillance from the border. *See Vela-Robles*, 397 F.3d at 789 ("An alien must be in the visual or physical grasp of the authorities at all times to show that he is under official restraint.").

When the defendant has managed to evade detection, even for a brief period, he has "entered" the United States. In *Vela-Robles*, the Ninth Circuit declined to extend the definition to a person who merely tripped a seismic sensor.

"[A]n indictment alleging attempted illegal reentry under § 1326(a) need not specifically allege a particular overt act or any other 'component par[t]' of the offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007).

12 U.S.C. § 1715z-19 EQUITY SKIMMING

Title 12, United States Code, Section 1715z-19 makes it a crime to use any part of the rents, assets, income, or other funds derived from property covered by a Department of Housing mortgage for any purpose other than reasonable and necessary expenses. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was an owner, agent, manager, or otherwise in custody, control, or possession of a multifamily project or a one- to four-family residence;

[38] *United States v. Oscar*, 496 F.2d 492, 493 (9th Cir. 1974). "Illegal aliens who technically had crossed the international border but were in the constructive custody of immigration authorities at that time are not said to have entered the United States. Continuous surveillance by immigration authorities can be sufficient to place an alien under official restraint." *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *superceded by statute*, 8 U.S.C. § 1324.

- Second, that the property in question was security for a mortgage that was
  1. insured, acquired, or held by the Secretary of Housing and Urban Development;
  2. made [pursuant to § 1701q]; or
  3. insured or held [pursuant to section 542 of the Housing and Community Development Act of 1992];
- Third, that the defendant used or authorized the use of any part of the rents, assets, proceeds, income, or other funds derived from the property covered by that mortgage for any purpose other than to meet reasonable and necessary expenses; and
- Fourth, the defendant did so willfully.

NOTE

See United States v. Norris, 749 F.2d 1116 (4th Cir. 1984), *abrogated on other grounds by United States v. Gaudin*, 471 U.S. 1065 (4th Cir. 1995). The statute was amended in 1988. § 1715z-4(b) was eliminated, and z-19 was added.

15 U.S.C. § 1 TRUST IN RESTRAINT OF TRADE [LAST UPDATED: 7/11/14]

Title 15, United States Code, Section 1 makes it a crime to combine or conspire to restrain trade or commerce among the several States or with foreign nations. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant entered into an agreement with others to restrain trade;
- Second, that the purpose of the agreement was to restrain trade or commerce among the several States;
- Third, that the defendant did so knowingly; in other words, the defendant acted with knowledge of the probable consequences of his actions;[39] and
- Fourth, that the defendant's activity was itself in interstate commerce or it had a substantial effect on interstate commerce.[40]

[39] In *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the Supreme Court held that intent is a necessary element of a criminal antitrust violation, but opted for knowledge over purpose. 438 U.S. at 443. Thus, the government does not have to prove that the conduct was undertaken with the conscious object of producing anticompetitive effects, only that the conduct was undertaken with knowledge that anticompetitive effects would most likely follow. *Id.* at 444. In so holding, the Court did "not mean to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass." *Id*. at 444 n.21.

[40] The jurisdictional requirement may be satisfied under the "in commerce" or the "effect on commerce" theory. *McLain v. Real Estate Bd. Of New Orleans*, 444 U.S. 232 (1980). The traditional mode of analysis seeks the requisite nexus along one or both of two general lines of inquiry unrelated in terms to particular categories of commercial activities. One inquires whether the activities alleged to be under illegal restraint lie directly in the flow of interstate commerce; the other, whether though

An agreement among suppliers upon the prices to charge for their products is an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of those who agree.[41]

An agreement formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal.[42]

NOTE

"To prove a conspiracy under § 1 of the Sherman Act, the government must prove that (1) the defendant entered into a contract, combination or conspiracy, and (2) the contract, combination or conspiracy amounted to an unreasonable restraint of trade or commerce among the several States. *Cont'l Cablevision of Ohio, Inc. v. Am. Elec. Power Co.*, 715 F.2d 1115, 1118 (6th Cir. 1983). Dissemination of price information alone, without a purpose to restrain competition, does not offend the Act. Similarly, absent an unlawful purpose, a company may examine and consider in the establishment of its own rates, the rates charged by similar companies in the industry." *United States v. True*, 250 F.3d 410, 423 (6th Cir. 2001) (citation omitted).

The government does not have to prove that the prices were raised and maintained at high, arbitrary, and non-competitive levels.[43]

The government does not have to prove that the defendant had the power to fix prices.[44]

MEETING-COMPETITION DEFENSE[45] (15 U.S.C. § 13(b))

Title 15, United States Code § 13(b) provides that a seller may show that his lower price "was made in good faith to meet an equally low price of a competitor ...."

This statute "at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[46]

Thus, "a good-faith belief, rather than absolute certainty, that a price concession is

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intrastate in nature, they nevertheless have so great an impact on interstate commerce that they substantially affect it." *United States v. Foley*, 598 F.2d 1323, 1328 (4th Cir. 1979). "Under either test, the impact must be upon an identifiable stream of 'commerce,' and not simply upon a particular business that may be engaged in interstate commerce." *Id*. at 1329.

[41] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212 (1940) ("no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense").

[42] *Id*. at 223.

[43] *Id*. at 222.

[44] *Id*. at 224 n.59.

[45] The kind of showing which a seller must make was set out in *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746.

[46] *Id*. at 759.

being offered to meet an equally low price offered by a competitor is sufficient to satisfy" this defense.[47] Evidence that a seller had received reports of similar discounts from other customers or was threatened with a termination of purchases if the discount were not met would be relevant.[48]

NOTE

Sections 1 and 2 require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap. *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946).

The monopolist must have both the power to monopolize and the intent to monopolize. *Id.* at 814.

There is no requirement of an overt act, and the amount of interstate or foreign trade involved is not material–it is the character of the restraint not the amount of commerce affected. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59 (1940)(a § 1 prosecution).

Acceptance by competitors of an invitation to participate in a plan, the necessary consequence of which, if carried out, is a restraint of commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act, where each competitor knew that cooperation was essential to the successful operation of the plan. *United States v. Foley*, 598 F.2d 1323, 1331 (4th Cir. 1979)(a § 1 prosecution) (quoting 3 P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* P 841a at 361-62 (1978)).

"Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy ...." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-20 (1940).

"[A]n effect on prices, without more, will not support a criminal conviction under the Sherman Act." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978).

Venue lies where the agreement was formed, or where some act pursuant to the conspiracy took place. *Socony-Vacuum Oil Co.*, 310 U.S. at 252.

Certain business agreements, because of their inherent tendency to eliminate competition, are presumed unreasonable and are therefore illegal per se. Under such circumstances, the government is not required to prove unreasonablesness. Price fixing, contract allocation, and bid rigging schemes are typical of those agreements and are illegal per se under § 1. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1983).

Bid-rigging is defined as any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party. *Id*. at 325.

"Collusive bidding is an agreement between competitors in a bidding contest to submit identical bids or, by preselecting the lowest bidder, to abstain from all bona fide effort to obtain the contract." *Id*. at 325, n.18 (quotations and citation omitted).

[47] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 453 (1978).

[48] *Id*. at 455.

Section 1 proscribes agreement alone. Therefore, the government need not prove an overt act. *Id*. at 324.

The practice of inter-seller price verification is not, in itself, unlawful per se. An effect on prices, without more, will not support a criminal conviction. It is necessary to show that such a consequence was intended by the alleged participants. *United States v. SIGMA*, 624 F.2d 461, 465 (4th Cir. 1980).

Regarding statute of limitations, the government must prove that the offending agreement continued into the five-year limitations period, but the government is not required to prove a new agreement. *Portsmouth Paving*, 694 F.2d at 324.

15 U.S.C. § 2 MONOPOLIZING TRADE

Title 15, United States Code, Section 2 makes it a crime to combine or conspire to monopolize any part of the trade or commerce among the several States or with foreign nations. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant entered into an agreement with others to monopolize trade;
- Second, that the purpose of the agreement was to monopolize trade or commerce among the several States;
- Third, that the defendant did so knowingly, in other words, the defendant acted with knowledge of the probable consequences of his actions;[49] and
- Fourth, that the defendant's activity was itself in interstate commerce or it had a substantial effect on interstate commerce.[50]

The term "monopolize" means the joint acquisition or maintenance by the members of a conspiracy formed for that purpose, of the power to control and dominate interstate

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[49] In *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 (1978) (a § 1 prosecution), the Supreme Court held that intent is a necessary element of a criminal antitrust violation, but opted for knowledge over purpose. Thus, the government does not have to prove that the conduct was undertaken with the conscious object of producing anticompetitive effects, only that the conduct was undertaken with knowledge that anticompetitive effects would most likely follow. *Id.* at 444. In so holding, the court did "not mean to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass." *Id*. at 444 n.21.

[50] The jurisdictional requirement may be satisfied under the "in commerce" or the "effect on commerce" theory. *McLain v. Real Estate Bd. Of New Orleans*, 444 U.S. 232 (1980).

In *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), the Fourth Circuit found in this § 1 prosecution that

> [t]he traditional mode of analysis seeks the requisite nexus along one or both of two general lines of inquiry unrelated in terms to particular categories of commercial activities. One inquires whether the activities alleged to be under illegal restraint lie directly in the flow of interstate commerce; the other, whether although intrastate in nature, they nevertheless have so great an impact on interstate commerce that they substantially affect it.

598 F.2d at 1329. Under either test, "the impact must be upon an identifiable stream of 'commerce,' and not simply upon a particular business that may be engaged in interstate commerce." *Id.*

trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power.

The phrase "attempt to monopolize" means the employment of methods, means and practices which should, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of a combination or conspiracy and pursuant to a combination or conspiracy formed for the purpose of such accomplishment.

It is in no respect a violation of the law that a number of individuals or corporations, each acting for himself or itself, may own or control a large part, or even all of a particular commodity, or all the business of a particular commodity.

An essential element of the illegal monopoly or monopolization is the existence of a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent.[51]

The government does not have to prove that competitors were actually excluded. What is required is the power to exclude competitors with the intent and purpose to exercise that power.[52]

It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful.[53]

The material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so. Trade and commerce are monopolized when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient.[54]

The government must prove a connection between the conspiracy and interstate commerce. However, the government does not have to prove that the activities of each charged defendant had an effect on interstate commerce.[55]

MEETING-COMPETITION DEFENSE[56] (15 U.S.C. § 13(b))

Title 15, United States Code § 13(b) provides that a seller may show that his lower price "was made in good faith to meet an equally low price of a competitor ...."

This statute "at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe

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[51] These four paragraphs were instructions given by the district court, and approved in *American Tobacco Co. v. United States*, 328 U.S. 781, 784-85, 815 (1946).

[52] *See id.* at 809.

[53] *Id.* at 809.

[54] *Id.* at 811.

[55] *See United States v. Foley*, 598 F.2d 1323, 1328 (4th Cir. 1979) (a § 1 prosecution).

[56] The kind of showing which a seller must make was set out in *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746.

that the granting of a lower price would in fact meet the equally low price of a competitor."[57]

Thus, "a good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy" this defense.[58] Evidence that a seller had received reports of similar discounts from other customers or was threatened with a termination of purchases if the discount were not met would be relevant.[59]

NOTE

Sections 1 and 2 require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap. *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946).

The monopolist must have both the power to monopolize and the intent to monopolize. *Id.* at 814.

There is no requirement of an overt act, and the amount of interstate or foreign trade involved is not material–it is the character of the restraint not the amount of commerce affected. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)(§ 1 prosecution).

Acceptance by competitors of an invitation to participate in a plan, the necessary consequence of which, if carried out, is a restraint of commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act, where each competitor knew that cooperation was essential to the successful operation of the plan. *United States v. Foley*, 598 F.2d 1323, 1331 (4th Cir. 1979) (§ 1 prosecution).

Venue lies where the agreement was formed, or where some act pursuant to the conspiracy took place. *Socony-Vacuum Oil Co.*, at 252.

15 U.S.C. § 77q SECURITIES FRAUD [LAST UPDATED: 7/1/14]

Title 15, United States Code, Section 77q makes it a crime to commit securities fraud. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 77q(a)

- First, that the defendant offered or sold the securities described in the indictment;
- Second, that in the offer or sale of these securities, the defendant made use of any means or instruments of transportation or communication in interstate commerce or made use of the United States mails;
- Third, that, in the offer or sale of these securities, the defendant did one of the following:

  1. employed any device, scheme, or artifice to defraud, or

  2. obtained money or property by means of any untrue statement of a material

[57] *Id.* at 759.

[58] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 453 (1978).

[59] *Id.* at 455.

fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they made, not misleading, or

3. engaged in a transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser; and

- Fourth, that the defendant did so knowingly and willfully, that is, deliberately.[60]

"Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, any collateral trust certificate, preorganization certificate or subscription, transferable share, voting trust certificate, certificate of deposit, certificate of deposit for a security, or any security future (as that term is defined in § 78c(a)(55)(A)), any investment contract or certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or mineral royalty or lease (if such investment contract or interest is the subject of a registration statement with the Commission pursuant to the provision os 15 U.S.C. § 77a et seq.) any put, call, straddle, option, or privilege on any security, or group of index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase or sell any of the foregoing, and any other instrument commonly known as a security. Except as specifically provided above, the term "security" does not include any currency, or any commodity or relate contract or futures contract, or any warrant or right to subscribe to or purchase or sell any of the foregoing. [§ 78lll(14)]

"Sell," "sale," "offer to sell," and "offer for sale" includes every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. [§ 80a-2(a)(34)]

The government is required to prove specific intent only as it relates to the action constituting the fraudulent misleading or deceitful conduct, but not as to the knowledge that the instrument used is a security under the Securities Act. The government need only prove that the object sold or offered is, in fact, a security; it need not be proved that the defendant had specific knowledge that the object sold or offered was a security.[61]

It is not necessary for the government to prove that the defendant either purchased or sold securities. It is sufficient for the government to prove that there were purchases or sales and that the device or scheme employed was of a kind which would cause

[60] "To obtain a conviction for securities fraud under 15 U.S.C. § 77q(a), the government must show that the defendant willfully offered to sell or actually sold a security through the mails, knowing that he was employing a statement containing either material misstatements or omissions of material fact." *United States v. Abdulwahab*, 713 F.3d 521, 533 (4th Cir. 2013) (citing *United States v. Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1402 (4th Cir. 1993)).

[61] *United States v. Brown*, 578 F.2d 1280, 1284-85 (9th Cir. 1978). *See also United States v. Tucker*, 345 F.3d 320, 330 (5th Cir. 2003) (defendant's belief concerning nature of the securities is irrelevant).

reasonable investors to rely and that some purchasers or seller did rely.[62]

No amount of honest belief that the enterprise would ultimately make money can justify baseless, false or reckless misrepresentations or promises.[63]

The use of the mails, or any means of communication in interstate commerce, need not be central to the fraudulent scheme and may be entirely incidental to the fraudulent scheme.[64]

The government does not need to prove that the defendant knew that the mails or an interstate communication would be used.[65]

The government need not establish a direct or close relationship between the fraudulent transaction and the purchase or sale of a security. The government need only show that the fraudulent conduct touches the purchase or sale of the security.[66]

"Deceptive device" includes so-called insider-trading, when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information.[67]

"Deceptive device" also includes when a person misappropriates material nonpublic information in connection with the purchase or sale of securities, in breach of a duty owed to the source of the information.[68]

A person may not gain advantage by conduct constituting secreting, stealing, purloining or otherwise misappropriating material non-public information in breach of an employer-imposed fiduciary duty of confidentiality.[69]

"In connection with the purchase or sale of a security" can be satisfied not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide.[70]

In other words, there must be some connection between the alleged fraudulent conduct and the sale or purchase of securities. The connection is satisfied if there is proof that accomplishing the fraudulent conduct directly related to the trading process. Fraudulent conduct may be in connection with the purchase or sale of securities if you find that the alleged fraudulent conduct touched upon a securities transaction or was of a

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[62] *United States v. Persky*, 520 F.2d 283, 288 (2d Cir. 1975).

[63] Appropriate instruction, based on the facts. *United States v. Boyer*, 694 F.2d 58, 60 (3d Cir. 1982).

[64] *United States v. Cashin*, 281 F.2d 669, 673 (2d Cir. 1960) ("The purpose of the requirement that there be a use of the mails or other facilities of commerce is solely to create a basis for federal jurisdiction."). *See also Little v. United States*, 331 F.2d 287, 292 (8th Cir. 1964).

[65] *United States v. Kaufman*, 429 F.2d 240, 245 (2d Cir. 1970).

[66] *United States v. Gruenberg*, 989 F.2d 971, 976 (8th Cir. 1993).

[67] Referred to as the "traditional" or "classical" theory of insider trading liability, it qualifies as deceptive "because a relationship of trust and confidence exists between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997) (quoting *Chiarella v. United States*, 445 U.S. 222, 228 (1980)).

[68] Referred to as the "misappropriation theory." *See id.*

[69] *United States v. Carpenter*, 791 F.2d 1024, 1031 (2d Cir. 1986).

[70] *O'Hagan*, 521 U.S. at 657.

sort that would cause a reasonable investor to rely upon and in connection with it did rely to purchase or sell a security.[71]

In other words, while the defendant was a participant in the scheme he used or caused to be used the facilities of the National Securities Exchange in connection with the purchase or sale of stock. An act done with knowledge that the national securities exchange would be used in the ordinary course of business is one which knowingly causes the exchange to be used.[72]

The fraudulent and deceptive practice need not result in defrauding a purchaser or seller of a security, as long the device or practice is used in connection with the purchase or sale of a security.[73]

The government does not need to prove that the defendant intended that his action would influence a security transaction.[74]

_____NOTE_____

Intent to defraud is not an element of § 77q(a). *United States v. Tucker*,, 345 F.3d 320, 335 n. 46 (5th Cir. 2003).

The statute can be violated even if the ultimate purchaser is not harmed by the transaction. *United States v. Brown*, 555 F.2d 336, 338 (2d Cir. 1977).

In *United States v. Gentile*, 530 F.2d 461 (2d Cir. 1976), the defendant pledged fraudulent stock certificates at a bank as collateral for a loan. The court found this type of transaction to be a sale of a security within § 77q, holding that "[t]here is no requirement that title pass to constitute a 'sale' ... Congress intended that Act to protect defrauded lenders as well as defrauded buyers." 530 F.2d at 466-67.

Reckless indifference for the true facts is tantamount to intentional misrepresentation in the sale of securities. *United States v. Boyer*, 694 F.2d 58, 59-60 (3d Cir. 1982).

Venue lies where the illegal scheme was devised as well as where the mailed matter had its impact. *United States v. Cashin*, 281 F.2d 669, 674-75 (2d Cir. 1960).

In *United States v. Rubin*, 836 F.2d 1096, 1103 (8th Cir. 1988), a conviction for the use of a blatantly fraudulent prospectus, based on falsified financial records, was upheld.

Each sale of a security is a separate offense. *United States v. Naftalin*, 606 F.2d 809, 810 (8th Cir. 1979).

Section 77q(a)(1) prohibits frauds against brokers as well as investors, because the section does not require injury to a purchaser, unlike § 77q(a)(3). *United States v. Naftalin*, 441 U.S. 768, 770, 773 (1979).

Section 77q is intended to cover any fraudulent scheme in an offer or sale of securities, whether in the course of an initial distribution or in the course of ordinary

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[71] *United States v. Gruenberg*, 989 F.2d 971, 976 (8th Cir. 1993) ("After reviewing the jury instructions as a whole, we conclude that the jury instructions correctly defined the 'in connection with' requirement.").

[72] Instruction approved in *United States v. Read*, 658 F.2d 1225, 1240-41 (7th Cir. 1980).

[73] *See United States v. Newman*, 664 F.2d 12, 19 (2d Cir. 1981), *overruled on other grounds by McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346.

[74] *United States v. Read*, 658 F.2d 1225, 1241 (7th Cir. 1980) ("No such intent is required.").

market trading. *Id.* at 778.

The statute does not confine its coverage to deception of a purchaser or seller of securities, but reaches any deceptive device used in connection with the purchase or sale of any security.

Under the classical theory, a person violates 10b-5 when an insider buys or sells securities on the basis of material, non-public information.

Under the misappropriation theory, the trader breached a fiduciary obligation to the party from whom the material nonpublic information was obtained, notwithstanding whether that party had any connection to, or even an interest in, the securities transaction, and also without concern as to whether a party who did care about the securities transaction was defrauded. *See United States v. O'Hagan*, 92 F.3d 612, 616, 617 (8th Cir. 1996), *overruled on other grounds*, 521 U.S. 642 (1997).

The two theories ["classical" and "misappropriation"] "are complementary, each addressing efforts to capitalize on nonpublic information through the purchase or sale of securities. The classical theory targets a corporate insider's breach of duty to shareholders with whom the insider transacts; the misappropriation theory outlaws trading on the basis of nonpublic information by a corporate outsider in breach of a duty owed not to a trading party, but to the source of the information. The misappropriation theory is thus designed to protect the integrity of the securities markets against abuses by outsiders to a corporation who have access to confidential information that will affect the corporation's security price when revealed, but who owe no fiduciary or other duty to that corporation's shareholders." *United States v. O'Hagan*, 521 U.S. at 642, 652-53 (1997) (citation omitted).

Failure to disclose that market prices are being artificially depressed operates as a deceit on the market place and is an omission of a material fact. *United States v. Regan*, 937 F.2d 823, 829 (2d Cir. 1991).

Failure to disclose material information prior to consummating a transaction constitutes fraud only when the person is under a duty to disclose. *Chiarella v. United States*, 445 U.S. 222, 228 (1980). In *Chiarella*, the defendant learned from confidential documents of one corporation that it was planning an attempt to secure control of a second corporation, and he failed to disclose the impending takeover before trading in the securities of the target company. In reversing the conviction, the Supreme Court held that a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information. *Id*. at 235.

Failure to disclose material information may be excused where that information has been made credibly available to the market by other sources. *Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993) (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1115 (9th Cir. 1989)).

Puffing and nonspecific predictions concerning future growth lack materiality, as do projections of future performance not worded as guarantees. However, predictions supported by specific statements of fact that are false or misleading are material. *See id.* at 289, 290.

A defendant may not be imprisoned for violating this section if he proves that he had no knowledge of SEC Rule 10b-5. *O'Hagan*, 521 U.S. at 666.

The following instruction was approved in *United States v. Gruenberg*, 989 F.2d

971, 976 (8th Cir. 1993):

First, that the defendant did one or more of the following in connection with the purchase or sale of a security:

1. employed a device, scheme, or artifice to defraud;
2. made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading; or
3. engaged in an act, practice or course of business that operated or would operate, as a fraud or deceit upon a purchaser or seller.

Venue lies in any district wherein any act or transaction constituting the violation occurred. § 78aa. *United States v. Johnson*, 510 F.3d 521, 524, 527 (4th Cir. 2007) (causing transmission of Form 10-Q to Eastern District of Virginia sufficient to sustain venue).

15 U.S.C. § 714m COMMODITY CREDIT CORPORATION

Title 15, United States Code, Section 714m makes it a crime to make false statements to, or steal from, the Commodity Credit Corporation. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 714m(a) [75]

- First, that the defendant made a false statement or report, or overvalued any security;
- Second, that the defendant did so for the purpose of influencing in any way the action of the Commodity Credit Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value; and
- Third, that the defendant did so knowingly [concerning a false statement] or willfully [concerning overvaluing land, property, or security].

§ 714m(b)(i) [76]

- First, that the defendant was connected in any capacity with the Commodity Credit Corporation or any of its programs;
- Second, that the defendant embezzled, abstracted, purloined or misapplied any money, funds, securities, or other things of value, whether belonging to the Corporation or pledged or otherwise entrusted to the Corporation; and
- Third, the defendant did so willfully.

§ 714m(b)(ii) [77]

- First, that the defendant was connected in any capacity with the Commodity Credit Corporation or any of its programs;
- Second, that the defendant made a false entry in any book, report, or statement

[75] This section is analogous to 18 U.S.C. § 1014.
[76] This section is analogous to 18 U.S.C. § 656.
[77] This section is analogous to 18 U.S.C. § 1005.

of, or to, the Corporation, or drew any order, or issued, put forth or assigned any note or other obligation or draft, mortgage, judgment, or decree of the Corporation; and

- Third, that the defendant did so with intent to defraud the Corporation, or any other entity or individual, or any officer, auditor, or examiner of the Corporation.

§ 714m(b)(iii) [78]

- First, that the defendant was connected in any capacity with the Commodity Credit Corporation or any of its programs;
- Second, that the defendant participated or shared in, or received directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of the Corporation; and
- Third, that the defendant did so with intent to defraud the Corporation.

§ 714m(c) [79]

- First, that the defendant stole, concealed, removed, disposed of, or converted to his own use or to that of another;
- Second, any property owned or held by, or mortgaged or pledged to the Corporation, or any property mortgaged or pledged as security for any promissory note, or other evidence of indebtedness, which the Corporation had guaranteed or was obligated to purchase upon tender;
- Third, that the value of the property exceeded $500.00;[80] and
- Fourth, that the defendant did so willfully.

_____NOTE_____

Section 714m(d) has its own conspiracy provision.

"[Section] 714m(a) should be interpreted to mean not only false statements of existing fact but also false and fraudulent promises which the maker does not intend to perform." *Elmore v. United States*, 267 F.2d 595, 603 (4th Cir. 1959).

16 U.S.C. §§ 704 and 707 MIGRATORY BIRD TREATY ACT

Title 16, United States Code, Sections 704 and 707 make certain conduct regarding migratory birds illegal. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 704(b)(1)

- First, that the defendant took a migratory bird by the aid of baiting, or on or over any baited area; and
- Second, that the defendant knew or reasonably should have known that the area was a baited area.

[78] This section is analogous to 18 U.S.C. § 1005.

[79] This section is analogous to 18 U.S.C. § 658.

[80] If the value of the property is $500 or less, the penalty is a misdemeanor.

§ 704(b)(2)

- First, that the defendant placed or directed the placement of bait on or adjacent to an area; and
- Second, that the defendant did so for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.

§ 707(b)(1)

- First, that the defendant took a migratory bird;
- Second, that the defendant did so with intent to sell, offer to sell, barter or offer to barter the migratory bird; and
- Third, that the defendant did so knowingly.

§ 707(b)(2)

- First, that the defendant sold, offered for sale, bartered, or offered to barter a migratory bird; and
- Second, that the defendant did so knowingly.

"Possession" means the detention and control, or the manual or ideal custody of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Possession includes the act or state of possessing and that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. Possession includes constructive possession which means not actual but assumed to exist, where one claims to hold by virtue of some title, without having actual custody. [50 C.F.R. § 10.12, Sept. 24, 2007]

"Take" means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect. [50 C.F.R. § 10.12, Sept. 24, 2007 [81]]

Normal agricultural planting, harvesting, or post-harvest manipulation means a planting or harvesting undertaken for the purpose of producing and gathering a crop, or manipulation after such harvest and removal of grain, that is conducted in accordance with official recommendations of State Extension Specialists of the Cooperative Extension Service of the U.S. Department of Agriculture. [50 C.F.R. § 20.11(g), Aug. 20, 2007]

Normal agricultural operation means a normal agricultural planting, harvesting, post-harvest manipulation, or agricultural practice, that is conducted in accordance with official recommendations of State Extension Specialists of the Cooperative Extension Service of the U.S. Department of Agriculture. [50 C.F.R. § 20.11(h), Aug. 20, 2007]

Baited area means any area on which salt, grain, or other feed has been placed, exposed, deposited, distributed, or scattered, if that salt, grain, or other feed could serve as a lure or attraction for migratory game birds to, on, or over areas where hunters are attempting to take them. Any such area will remain a baited area for ten days following

[81] *See also United States v. Chew*, 540 F.2d 759, 761 (4th Cir. 1976).

the complete removal of all such salt, grain, or other feed. [50 C.F.R. § 20.11(j), Aug. 20, 2007]

Baiting means the direct or indirect placing, exposing, depositing, distributing, or scattering of salt, grain, or other feed that could serve as a lure or attraction for migratory game birds to, on, or over any areas where hunters are attempting to take them. [50 C.F.R. § 20.11(k), Aug. 20, 2007][82]

Manipulation means the alteration of natural vegetation or agricultural crops by activities that include but are not limited to mowing, shredding, discing, rolling, chopping, trampling, flattening, burning, or herbicide treatments. The term manipulation does not include the distributing or scattering of grain, seed, or other feed after removal from or storage on the field where grown. [50 C.F.R. § 20.11(l), Aug. 20, 2007]

_____NOTE_____

In *United States v. Boynton*, 63 F.3d 337 (4th Cir. 1995), the defendant argued that the grain which constituted the bait came within the regulatory exception in concerning agricultural operations. The regulation now provides that nothing in the regulation prohibits the taking of any migratory game bird on or over "lands or areas where seeds or grains have been scattered solely as the result of a normal agricultural planting, harvesting, post-harvest manipulation or normal soil stabilization practice." 50 C.F.R. § 20.21(i)(1)(I). The regulation no longer contains "as a result of bona fide agricultural operations or procedures," which language the Fourth Circuit said led "to the absurd result of requiring the prosecution to prove an intent element ...." *Id*. at 342. The Fourth Circuit held that the exception for "normal" planting refers to an objective measure of the agricultural practices of the community. *Id*. at 345.

In 1998, Congress eliminated the strict liability aspect of the crime by amending § 704(b)(1) to impose a *mens rea* requirement.

16 U.S.C. § 1538 ENDANGERED SPECIES ACT

Title 16, United States Code, Section 1538 makes it a crime to sell in interstate commerce endangered animals or plants. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

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[82] However, baiting does not include, among other things, taking birds over the following lands or areas that are not otherwise baited areas:

> "(i) standing crops ... or lands or areas where seeds or grains have been scattered solely as the result of a normal agricultural planting, harvesting, post-harvest manipulation or normal soil stabilization practice;
>
> ****
>
> (2) ... and where grain or other feed has been distributed or scattered solely as a result of manipulation of an agricultural crop or other feed on the land where grown, or solely as the result of a normal agricultural operation. [50 C.F.R. § 20.21(i)]

In *United States v. Adams,* 174 F.3d 571, 578 (5th Cir. 1999), the Fifth Circuit held that the above exceptions are not affirmative defenses, but rather "[t]he onus is therefore on the Government to prove that neither circumstance existed in the present case."

§ 1538(a)(1)

- First, that the defendant did one of the following with respect to a species of fish or wildlife listed as an endangered species:
  1. imported into, or exported from the United States such fish or wildlife;
  2. took such fish or wildlife within the United States or the territorial sea of the United States;
  3. took such fish or wildlife upon the high seas;
  4. possessed, sold, delivered, carried, transported, or shipped, by any means whatever, such fish or wildlife taken in the United States or the territorial sea of the United States or the high seas;
  5. sold or offered for sale in interstate or foreign commerce such fish or wildlife; and
- Second, the defendant did so knowingly.

The government must prove that the defendant acted with general intent to commit the act which is prohibited by the statute. The government does not have to prove that the defendant knew that he was violating a particular law.[83]

§ 1538(a)(2)

- First, that the defendant did one of the following with respect to a species of plant listed as an endangered species:
  1. imported into, or exported from the United States such plant;
  2. removed and reduced to possession such plant from areas under Federal jurisdiction; maliciously damaged or destroyed such plant on areas under Federal jurisdiction; or removed, cut, dug up, or damaged or destroyed such plant on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law;
  3. delivered, received, carried, transported, or shipped in interstate or foreign commerce, by any means whatever and in the course of a commercial activity, such plant;
  4. sold or offered for sale in interstate or foreign commerce such plant; and
- Second, the defendant did so knowingly.

§ 1538(c)

- First, that the defendant was subject to the jurisdiction of the United States;
- Second, that the defendant engaged in any trade in endangered species contrary to the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora [16 U.S.C § 1532(4)]; and
- Third, the defendant did so knowingly.

§ 1538(d)

- First, that the defendant engaged in business as an importer or exporter of fish or

[83] *United States v. Ivey*, 949 F.2d 759, 766 (5th Cir. 1991) (knowledge of the law is not an element of § 1538).

wildlife or plants listed as endangered species, or as an importer or exporter of any amount of raw or worked African elephant ivory;

- Second, that the defendant did so without first having obtained permission from the Secretary of the Interior; and
- Third, that the defendant did so knowingly.

_____NOTE_____

Section 1538(g) includes an attempt provision applicable to all provisions.

"Convention" refers to the Convention as of the date an offense is committed, and therefore includes animals on the endangered species list on the date the offense was committed. *United States v. Ivey*, 949 F.2d 759, 764 (5th Cir. 1991).

See also United States v. Clark, 986 F.2d 65 (4th Cir. 1993).

16 U.S.C. § 3372 LACEY ACT

Title 16, United States Code, Section 3372 makes it a crime to import, export, sell, possess, or transport fish, wildlife, or plants taken illegally, or falsely label fish, wildlife, or plants. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 3372(a)(1)[84]

- First, that the defendant knowingly did, or attempted to, import or export any fish, wildlife, or plant;
- Second, that the fish, wildlife, or plant was taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States, or in violation of any Indian tribal law [here, the court should instruct on the elements of the law violated]; and
- Third, that the defendant knew that the fish, wildlife, or plant was taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation.

§ 3372(a)(2) [85]

- First, that the defendant did, or attempted to, import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any of the following:
  1. any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law [here, the court should instruct on the elements of the law violated];
  2. any plant taken, possessed, transported, or sold in violation of any law or regulation of any state [here, the court should instruct on the elements of the law violated]; or
  3. any prohibited wildlife species;

[84] Penalty set forth in § 3373(A)(1)(a).

[85] Penalty set forth in § 3373(d)(1)(B).

- Second, that the defendant's conduct involved the sale or purchase, offer of sale or purchase, or intent to sell or purchase, fish, wildlife, or plant(s) with a market value in excess of $350; and
- Third, that the defendant knew that the fish, wildlife, or plant was/were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation.

The government can establish the requirement of interstate or foreign commerce by proving that the defendant knew that [fish, wildlife, or plants] would be transported in interstate commerce and took the steps that began their travel to interstate markets.[86]

§ 3372(a)(3) [87]

- First, that the defendant did possess, or attempt to possess, any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law or Indian tribal law, or any plant taken, possessed, transported, or sold in violation of any law or regulation of any state [here, the court should instruct on the elements of the law violated];
- Second, that the defendant did so within the special maritime and territorial jurisdiction of the United States;
- Third, that the defendant's conduct involved the sale or purchase, offer of sale or purchase, or intent to sell or purchase, fish, wildlife, or plant(s) with a market value in excess of $350; and
- Fourth, that the defendant knew that the fish, wildlife, or plant was taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation.

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building.[88]

§ 3373(d)(3)

- First, that the defendant made or submitted any false record, account or label for, or any false identification of, any fish, wildlife, or plant which had been, or was

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[86] *United States v. Fejes*, 232 F.3d 696, 703 (9th Cir. 2000) (citing *United States v. Atkinson*, 966 F.2d 1270, 1275 (9th Cir. 1992), and *United States v. Gay-Lord*, 799 F.2d 124, 126 (4th Cir. 1986)).

[87] Penalty set forth in § 3373(d)(1)(B).

[88] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

intended to be imported, exported, transported, sold, purchased, or received from any foreign country, or transported in interstate or foreign commerce;

- Second, that the fish, wildlife, or plant was/were imported or exported, or involved the sale or purchase, the offer of sale or purchase, or commission of an act with intent to sell or purchase, fish, wildlife, or plants with a market value in excess of $350.00;[89] and
- Third, that the defendant acted knowingly.

The government does not have to prove that the defendant had a duty to file the records or accounts.[90]

A sale of fish or wildlife is deemed in violation of this statute if a person, for money or other consideration, offers or provides guiding, outfitting, or other services, or a hunting or fishing license or permit, for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife. [The court should identify the elements of the underlying illegality of the taking, acquiring, receiving, transporting, or possession.] [§ 3372(c)(1)]

A purchase of fish or wildlife is deemed in violation of this statute if a person, for money or other consideration, obtains guiding, outfitting, or other services, or a hunting or fishing license or permit, for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife. [The court should identify the elements of the underlying illegality of the taking, acquiring, receiving, transporting, or possession.] [§ 3372(c)(2)][91]

Market value may be determined by the price that the fish, wildlife, or plant would bring if sold on the open market, or by the price paid for guiding services in which the fish, wildlife, or plant was taken.[92]

_____NOTE_____

The felony penalty in § 3373(d)(1) requires knowledge that the animal or plant was illegally taken.

The misdemeanor penalty in § 3373(d)(2) requires only "exercise of due care should know" that the animal or plant was illegally taken.

The substantive elements of other laws, be they federal, state, or tribal, are incorporated in the Lacey Act. *United States v. Borden*, 10 F.3d 1058, 1062 (4th Cir. 1993). Therefore, the court should instruct on the elements of the law incorporated. However, the Lacey Act does not incorporate state procedural law. *Id.*

"In order to violate the Lacey Act a person must do something to wildlife that has already been 'taken or possessed' in violation of law." *United States v. Carpenter*, 933 F.2d 748, 750 (9th Cir. 1991). The government claimed that the defendant violated the

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[89] The penalty is a misdemeanor if the animal or plant was not imported, exported, or had a market value less then $350. 16 U.S.C. § 3373(d)(3)(B).

[90] *United States v. Allemand*, 34 F.3d 923, 926 (10th Cir. 1994) ("making or submitting false records is illegal regardless of whether one has a duty to submit those records").

[91] In *United States v. Romano*, 137 F.3d 677 (1st Cir. 1998), the First Circuit held that § 3373(d)(1) does not encompass prospective conduct. Thus, a hunter could be prosecuted for purchasing guide services only after wildlife was illegally taken.

[92] Instruction approved in *United States v. Atkinson*, 966 F.2d 1270, 1273 (9th Cir. 1992).

Lacey Act by acquiring birds taken in violation of the Migratory Bird Treaty Act, 16 U.S.C. § 703. "The bird must be taken before acquiring it violates the Lacey Act." *Id.*

Interstate commerce nexus is an element in § 3372(a)(2), *see United States v. Gay-Lord*, 799 F.2d 124, 126 (4th Cir. 1986), but not in § 3372(a)(1), where the jurisdictional basis is a law of the United States or a tribal law. *See United States v. Gardner*, 244 F.3d 784, 788 (10th Cir. 2001).

Willfulness and materiality are not elements of § 3372(d). *United States v. Fountain*, 277 F.3d 714, 717 (5th Cir. 2001).

In *United States v. Hale*, No. 113 F. App'x 108 (6th Cir. 2004), *vacated on other grounds*, 545 U.S. 1112 (2005), the defendants argued that the indictment failed to allege an essential element of § 3372(d). The defendants falsified the identity and address of the seller, and argued that the indictment did not allege a false identification of the fish. The court rejected defendants' argument, finding that the "statute clearly criminalizes making and submitting false records relating to fish that are sold in interstate commerce. It does not, as the defendants suggest, criminalize only the false identification of fish (*i.e.*, passing off paddlefish caviar as sturgeon caviar)." 113 F. App'x at 112.

"[T]he government need not prove that [the defendant] actually hunted or exported the animal trophies in violation of a foreign law himself, but only that he received and acquired them in interstate and foreign commerce knowing that they had been hunted, possessed or transported in violation of foreign law." *United States v. Mitchell*, 985 F.2d 1275, 1284 (4th Cir. 1993).

In *United States v. Fejes*, 232 F.3d 696 (9th Cir. 2000), the defendant was convicted of violating §§ 3372(a)(2)(A) and 3373(d)(1)(B) for providing guide services to two hunters who took caribou in violation of Alaska law. The Ninth Circuit held that "a 'sale' of wildlife for purposes of § 3373(d)(1)(B) [the felony provision] encompasses not only the agreement to provide guide or outfitting services, but also the actual provision of such services," 232 F.3d at 698, and therefore the district court properly instructed the jury as follows:

> to convict Fejes, the jury must find (1) that Fejes "knowingly engaged in conduct that involved a sale or purchase of the caribou," (2) that Fejes "knew that the caribou had been taken, possessed, transported or sold" in violation of law, (3) that the market value of the caribou exceeded $350, and (4) that Fejes "knowingly sold or transported the caribou in interstate commerce."

Id. at 700.

The criminal penalty section, § 3373(d), has its own venue provision. "[N]ot only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants." 16 U.S.C. § 3373(d)(2).

20 U.S.C. § 1097 STUDENT LOANS

Title 20, United States Code, Section 1097 makes it a crime to steal or obtain by fraud federally guaranteed student loans. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1097(a)

- First, that the defendant embezzled, misapplied, stole, or obtained by fraud,[93] false statement, or forgery, or failed to refund [or attempted to do so];
- Second, any funds, assets, or property provided under the federally guaranteed student aid program [such as Pell grants, 42 U.S.C. § 1070, work-study programs, 42 U.S.C. § 2753, and the Federal Family Education Loan Program];
- Third, that the amount of the funds, assets, or property exceeded $200.00; and
- Fourth, that the defendant did so knowingly and willfully.

☞ **If by false statement, the statement must be material.**

☞ **If a disputed issue is whether the property stolen had a value exceeding $200.00, the court should consider given a lesser included offense instruction.**

To misapply funds means to use funds in a way that deprives the Department of Education of its right to make its own decisions as to how the funds or credits were to be used.[94]

Misapplication requires the defendant to have intentionally converted funds or property to his own use or the use of a third party.[95]

Conversion may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use.[96]

To embezzle funds means to take for the defendant's own use, or the use of another, funds belonging to the Department of Education over which the defendant had been given control.[97]

The fact that the defendant may have intended to repay the funds at the time the funds were taken is not a defense. Nor is it a defense that the defendant believed he would eventually be entitled to the funds, if at the time the funds were taken the defendant acted knowingly and with the intent to appropriate the funds to use inconsistent with the rights of the Department of Education.[98]

§ 1097(b)

- First, that the defendant made a false statement, furnished false information, or concealed material information, or attempted to do so;

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[93] "A traditional element of fraud is the requirement that the defendant intend for someone to rely upon a particular misrepresentation." *United States v. Ranum*, 96 F.3d 1020, 1030 (7th Cir. 1996).

[94] Jury instruction from *United States v. Bailie*, No. 96-30047, 1996 WL 580350 (9th Cir. Oct. 8, 1996).

[95] *United States v. Bates*, 96 F.3d 964, 968 (7th Cir. 1996). Misapplication implies conversion. "Fails to refund" "does not imply that a conversion must exist." *United States v. Weaver*, 275 F.3d 1320, 1333 (11th Cir. 2001).

[96] *Morissette v. United States*, 342 U.S. 246, 271-72 (1952).

[97] *Bailie*, No. 96-30047, 1996 WL 580350.

[98] *Id.*

- Second, in connection with the assignment of a federally guaranteed or insured student loan; and
- Third, that the defendant did so knowingly and willfully.

§ 1097(c)

- First, that the defendant made, or attempted to make, an unlawful payment to an eligible lender as an inducement to make, or to acquire by assignment, a loan insured by the Secretary of Education; and
- Second, that the defendant did so knowingly and willfully.

§ 1097(d)

- First, that the defendant destroyed or concealed, or attempted to destroy or conceal;
- Second, any record relating to the provision of assistance of federally guaranteed or insured student loans;
- Third, that the defendant did so with intent to defraud the United States or to prevent the United States from enforcing any right obtained by subrogation; and
- Fourth, that the defendant did so knowingly and willfully.

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process. A false statement's capacity to influence must be measured at the point in time that the statement was made.[99]

An act is done willfully when it is committed voluntarily and purposefully, with the specific intent to do something the law forbids, that is with bad purpose, either to disobey or disregard the law.[100]

NOTE

Specific intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of funds proscribed by § 1097(a). *Bates v. United States*, 522 U.S. 23, 25 (1997).

The following charge was upheld in *United States v. Redfearn*, 906 F.2d 352 (8th Cir. 1990):

> You are instructed that a statement is false if untrue when made and known to be untrue by the person making it or causing it to be made. A statement or representation is fraudulent if known to be untrue and made or caused to be made with the intent to deceive the governmental agency to whom submitted. This would include a statement made to a loan guaranty agency authorized by the government.
>
> You are instructed that "willfully" means to do an act voluntarily and intentionally. An act is done knowingly if the defendant realized what she was doing and did not act through ignorance, mistake, or accident. You may

[99] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[100] *United States v. Weaver*, 275 F.3d 1320, 1325 (11th Cir. 2001).

> consider the evidence of defendant's acts and words, along with all the other evidence in deciding whether the defendant acted knowingly. You should view the element of knowingly and willfully by looking at whether the evidence showed that the defendant knew she was filling out a student loan form falsely. In this regard your focus should be upon the state of mind of the defendant when she completed the application for funds under the student guaranteed loan provision of the federal law.

906 F.2d at 354-55.

The crime is not complete until the loan funds are obtained. In *United States v. Redfearn*, 906 F.2d 352 (8th Cir. 1990), the Eighth Circuit found that the offense was a continuing offense which was begun in the district where the application was filled out, continued in another district when the loan was approved and completed in the first district when the funds were received. Therefore, venue was proper in the district where the loan was approved.

In *Redfearn*, which was before *United States v. Gaudin*, 515 U.S. 506 (1995), the district court found as a matter of law that the false statement was material. *Redfearn*, 906 F.2d at 354.

21 U.S.C. § 331 ADULTERATED OR MISBRANDED FOOD OR DRUGS

Title 21, United States Code, Section 331 makes it a crime to do certain acts concerning food, drugs, and cosmetics. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 331(a)

- First, that the defendant introduced or delivered for introduction into interstate commerce (or caused to be introduced or delivered);
- Second, a food, drug, device, or cosmetic that was adulterated or misbranded; and
- Third, that the defendant did so with intent to defraud or mislead.

§ 331(b)

- First, that the defendant adulterated or misbranded (or caused the adulteration or misbranding);
- Second, of a food, drug, device, or cosmetic in interstate commerce; and
- Third, that the defendant did so with intent to defraud or mislead.

§ 331(c)

- First, that the defendant received in interstate commerce any food, drug, device, or cosmetic that was adulterated or misbranded;
- Second, that the defendant delivered or proffered delivery of the adulterated or misbranded food, drug, device, or cosmetic for pay or otherwise; and
- Third, that the defendant did so with intent to defraud or mislead.[101]

[101] Section 331 is a felony if committed with intent to defraud or mislead. 21 U.S.C. § 333(a)(2). Otherwise, the offense is a misdemeanor. In *United States v. Ellis*, 326 F.3d 550, 556-57

§ 331(d)

- First, that the defendant introduced or delivered for introduction into interstate commerce any article;
- Second, in violation of [§ 344, when the Secretary finds that any class of food may be injurious to health because of contamination with micro-organisms; or § 355, no person shall introduce any new drug, unless an approval of an application is effective; or § 360bbb-3, the Secretary may authorize introduction of a drug, device, or biological product intended for use in an actual or potential emergency]; and
- Third, that the defendant did so with intent to defraud or mislead.

§ 331(e)

- First, that the defendant refused to permit access to or copying of any record required to be maintained by [enumerated sections], or failed to establish or maintain any record, or make any report, required by [enumerated sections]; and
- Second, that the defendant did so with intent to defraud or mislead.

§ 331(f)

- First, that the defendant refused to permit entry or inspection;
- Second, that the entry or inspection was authorized [by § 374]; and
- Third, that the defendant did so with intent to defraud or mislead.

§ 331(h)

- First, that the defendant gave a guaranty or undertaking [referred to in § 333(c)(2)];
- Second, that the guaranty or undertaking was false; and
- Third, that the defendant did so with intent to defraud or mislead.

§ 331(i)

- First, that the defendant forged, counterfeited, simulated, or falsely represented, or without proper authority used any mark, stamp, tag, label, or other identification device authorized or required; and
- Second, that the defendant did so with intent to defraud or mislead.

§ 331(k)

- First, that the defendant altered, mutilated, destroyed, obliterated, or removed all or any part of the labeling of a food, drug, device, or cosmetic, or did any other act with respect to a food, drug, device, or cosmetic (or caused such alteration,

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(4th Cir. 2003), the Fourth Circuit approvingly quoted the following instruction:

> You are further charged that the defendants could be in violation of the law, even if they did not act with the intent to defraud or mislead. Therefore, if you find that the government has proven each of the elements of the offense charged but did not prove beyond a reasonable doubt that the defendants acted with the intent to defraud or mislead, you should indicate that you are finding that they have violated the law without the intent to defraud or mislead.

326 F.3d at 556-57.

etc. or act);

- Second, that the act resulted in the food, drug, device, or cosmetic being adulterated or misbranded;
- Third, that the act was done while the food, drug, device, or cosmetic was held for sale after being shipped in interstate commerce; and
- Fourth, that the defendant did so with intent to defraud or mislead.[102]

§ 331(t) and § **333(b)(1)(A)**

- First, that the defendant imported into the United States;
- Second, a prescription drug or a drug composed wholly or partly of insulin which was manufactured in a state and exported;
- Third, that the defendant is someone other than the manufacturer of the drug; and
- Fourth, that the defendant did so knowingly.

§ 331(t) and § 333(b)(1)(B)

- First, that the defendant sold, purchased, or traded, or offered to sell, purchase, or trade;
- Second, a drug sample; and
- Third, that the defendant did so knowingly.

The term "drug sample" means a unit of a drug, [subject to § 353(b)] which is not intended to be sold and is intended to promote the sale of the drug. [§ 353(c)(1)]

§ 331(t) and § 333(b)(1)(C)

- First, that the defendant sold, purchased, or traded, or offered to sell, purchase, or trade, or counterfeited;
- Second, a coupon; and
- Third, that the defendant did so knowingly.

The term "coupon" means a form which may be redeemed, at no cost or at a reduced cost, for a drug which is prescribed in accordance with § 353(b). [§ 353(c)(2)]

§ 331(t) and § 333(b)(1)(D)

- First, that the defendant engaged in the wholesale distribution of drugs;
- Second, that the distribution was in interstate commerce;
- Third, that the drugs were subject to § 353(b);
- Fourth, that the defendant was not licensed by a State; and
- Fifth, that the defendant did so knowingly.

§ 331(w)

- First, that the defendant did one of the following:
  1. knowingly made a false statement in any statement, certificate of analysis, record, or report required under § 381(d)(3);

[102] *See United States v. Sullivan*, 332 U.S. 689, 695 (1948).

2. failed to submit a certificate of analysis as required under § 381(d)(3);
3. failed to maintain records or to submit records or reports as required under § 381(d)(3);
4. released into interstate commerce any article or portion of any article imported into the United States under § 381(d)(3) or any finished product made from such article or portion; or
5. failed to export or to destroy any article or portion of any article imported into the United States under § 381(d)(3) or any finished product made from such article or portion; and

- Second, that the defendant did so with intent to defraud or mislead.

☞ **"Food," "drug," "counterfeit drug," "device," "cosmetic," "label," "immediate container," "labeling," "new drug," "pesticide chemical," "raw agricultural commodity," "food additive," "color additive," "safe," "new animal drug," "animal feed," "saccharin," "infant formula," "high managerial agent," "drug product," "dietary supplement," "processed food," "compounded positron emission tomography drug," and "antibiotic drug" are all defined in § 321.**

Adulterated food is defined in § 342.

Misbranded food is defined in § 343.

Adulterated drugs and devices are defined in § 351.

Misbranded drugs and devices are defined in § 352.

"Knowingly" or "knew" means that a person, with respect to information, had actual knowledge of the information, or acted in deliberate ignorance or reckless disregard of the truth or falsity of the information. [§ 321(bb)]

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[103]

It does not matter how long after the shipment in interstate commerce that the alleged adulteration or misbranding occurred, or how many sales occurred in between the interstate shipment and the alleged adulteration or misbranding, or who received the food, drug, device, or cosmetic at the end of the interstate shipment.[104]

The defendant need not have participated personally in the conduct charged in this case, if the government proves that he held a position of authority and responsibility in the operation of the business and, by reason of that position, he either failed to prevent the conduct charged in this case, or failed to correct promptly the conduct charged in this

[103] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[104] *United States v. Sullivan*, 332 U.S. 689, 696 (1948). The purpose of the act is to "safeguard the consumer by applying the Act to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer." 332 U.S. at 698.

case. Thus, the government must prove more than just the defendant's position in the business organization. The government must prove that the defendant is accountable because of the responsibility and authority of his position.[105]

AFFIRMATIVE DEFENSE

The defendant has the burden of coming forward with evidence that he was powerless to prevent or correct the violation.[106]

_____NOTE_____

Violating § 331 is a felony if a second offense, or if committed with intent to defraud or mislead. 21 U.S.C. § 333(a)(2). Thus, the lesser included offense does not require intent to defraud or mislead.

In *United States v. Dotterweich*, 320 U.S. 277 (1943), the president of a pharmaceutical company invoked what is now § 335, which requires the Food and Drug Administration to give a suspect an opportunity to present his views before reporting a violation to the United States Attorney. The Supreme Court held the giving of such an opportunity is not a prerequisite to prosecution. *Id*. at 279.

In *United States v. Abbott Laboratories*, 505 F.2d 565 (4th Cir. 1974), the court stated that "scienter is not a necessary element" of § 331(a). However, only those employees of Abbott who shared in the responsibility of distributing adulterated or misbranded drugs were criminally liable. And responsibility depended on knowledge, "and if knowledge is established it depends further on the action or nonaction of the officer or employee after he has obtained knowledge." *Id.* at 573.

The statute imposes strict liability, at least at the misdemeanor level, on those persons who hold a position of responsibility. *See United States v. Park*, 421 U.S. 658 (1975); *Abbott Laboratories*, 505 F.2d 565.

21 U.S.C. § 333(e) HUMAN GROWTH HORMONES

Title 21, United States Code, Section 333(e) makes it a crime to distribute, or possess with intent to distribute, human growth hormones. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant distributed, or possessed with intent to distribute;
- Second, human growth hormone for any use in humans other than the treatment of a disease or other recognized medical condition; and
- Third, that the defendant did so knowingly.

AGGRAVATED PENALTY

1. Did the offense involve an individual under 18 years of age?

"Human growth hormone" means somatrem, somatropin, or an analogue of either of them. [§ 333(e)(4)]

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[105] *United States v. Park*, 421 U.S. 658, 671, 673-74, 675 (1975) ("the Act punishes neglect where the law requires care, or inaction where it imposes a duty").

[106] *Id.* at 673.

21 U.S.C. § 622 BRIBERY/MEAT INSPECTION ACT

Title 21, United States Code, Section 622 makes it a crime to give or receive gifts in connection with meat inspections. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

☞ **Briber**

- First, that the defendant gave, paid, or offered, directly or indirectly;
- Second, any money or other thing of value;
- Third, to any inspector or officer or employee of the United States authorized to perform duties prescribed by the Meat Inspection Act; and
- Fourth, that the defendant did so with intent to influence the discharge of any official duty under the Meat Inspection Act.[107]

☞ **Bribee**

- First, that the defendant was an inspector or officer or employee of the United States authorized to perform duties prescribed by the Meat Inspection Act;
- Second, that the defendant accepted any money, gift, or other thing of value;
- Third, that the money, gift, or other thing of value was from a person, firm, corporation, or officer, agent, or employee of a firm or corporation; and
- Fourth, that the money, gift or thing of value was given with intent to influence the official action of the inspector.

OR

- First, that the defendant was an inspector or officer or employee of the United States authorized to perform duties prescribed by the Meat Inspection Act;
- Second, that the defendant accepted any money, gift, or other thing of value;
- Third, that the money, gift or thing of value was from a person, firm, or corporation engaged in commerce; and
- Fourth, that the money, gift or thing of value was given with any purpose or intent whatsoever.[108]

The term "commerce" means commerce between any state, any territory, or the District of Columbia, and any place outside thereof; or within any territory not organized with a legislative body, or the District of Columbia. [21 U.S.C. § 601(h)]

"Thing of value" must be something of monetary value. And it must be of more than trivial value.[109]

The government must prove a connection between the gift and the official duties of the inspector.[110]

_____NOTE_____

[107] *United States v. Schaffer*, 183 F.3d 833, 845 (D.C. Cir. 1999), *vacated as moot*, 240 F.3d 35 (D.C. Cir. 2001). "The statute requires an intent to *influence*, not an attempt to *block* or to *eviscerate* some particular official act." *Id*. at 849.

[108] *See United States v. Seuss*, 474 F.2d 385, 387 n.3 (1st Cir. 1973).

[109] *United States v. Mullens*, 583 F.2d 134, 138 (5th Cir. 1978); *Seuss*, 474 F.2d 390 n.9.

[110] *Seuss*, 474 F.2d at 388.

"While it is necessary to establish specific intent to sustain a conviction under the statute as regards a donor ... such intent is not necessary as regards a donee meat inspector." *United States v. Mullens*, 583 F.2d 134, 139 (5th Cir. 1978).

This statute's "gratuity provision is actually more expansive than the general gratuity statute [18 U.S.C. § 201(c)], as it seemingly can be triggered without reference to a particular official act." *United States v. Schaffer*, 183 F.3d 833, 846 (D.C. Cir. 1999), *vacated as moot*, 240 F.3d 35 (D.C. Cir. 2001).

In *United States v. Mullens*, 583 F.2d 134 (5th Cir. 1978), the Fifth Circuit approved the following instruction:

> Under the terms of the statute the purpose or intent with which the money, gift, or things of value was given to the defendant or was accepted by him is irrelevant. The acceptance by a meat inspector of the United States for any purpose of money, gifts, or other things of value from a corporation he was inspecting or should reasonably expect that he would inspect is sufficient to establish the offense charged. However, the jury must find that he received the money, gift or other thing of value willfully and knowingly beyond a reasonable doubt, and not by accident, mistake, inadvertence or misunderstanding.

583 F.2d at 138 n.1.

21 U.S.C. § 841 DISTRIBUTION OR POSSESSION WITH INTENT TO DISTRIBUTE [LAST UPDATED: 8/14/14]

(INSTRUCTIONS RE: DISTRIBUTION BY PHYSICIAN and DISTRIBUTION OF CONTROLLED SUBSTANCE ANALOGUE FOLLOW)

Title 21, United States Code, Section 841 makes it a crime to distribute a controlled substance or to possess a controlled substance with intent to distribute it. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant distributed the amount of controlled substance alleged in the indictment;
- Second, that the defendant knew that the substance distributed was a controlled substance under the law at the time of the distribution; and
- Third, that the defendant did so knowingly or intentionally.

OR

- First, that the defendant possessed the amount of controlled substance alleged in the indictment;
- Second, that the defendant knew that the substance possessed was a controlled substance under the law at the time of the possession; and
- Third, that the defendant did so with the intent to distribute the controlled substance.[111]

AGGRAVATED PENALTIES

[111] *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*); *United States v. Collins*, 412 F.3d 515, 519 (4th Cir. 2005).

1. Did death or serious bodily injury result from the use of the controlled substance?
2. Specific threshold quantities.[112]

Distribute means to deliver a controlled substance. [§ 802(11)]

Thus, distribution includes a range of conduct broader than selling controlled substances and is not limited to just selling controlled substances.[113]

Deliver means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship. [§ 802(8)]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[114]

Possession means to exercise dominion and control over an item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant himself, or joint, that is, it may be shared with other persons, as long as the defendant exercised dominion and control over the item or property.

Possession may be either actual or constructive.

Actual possession is defined as physical control over property.

Constructive possession occurs when a person exercises or has the power and the intention to exercise dominion and control over an item or property.[115]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, dominion, or control over the item or property itself, or the premises, vehicle, or container in which the item or property is concealed, such that a person exercises or has the power and intention to exercise dominion and control over that item or property.[116]

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[112] *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*).

[113] *United States v. Washington*, 41 F.3d 917, 919 (4th Cir. 1994) ("Sharing drugs with another constitutes 'distribution.'").

[114] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict, but instead instructed that substance qualified as controlled substance as defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002). *See* 21 U.S.C. § 802(6) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used to subtitle E of the Internal Revenue Code of 1986.").

[115] To prove constructive possession under § 922(g)(1), the government "must prove that the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005).

[116] *Id.* at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*)); *United*

A defendant's mere presence at, or joint tenancy of, a location where contraband is found, or his mere association with another person who possesses contraband, is not sufficient to establish constructive possession.[117] However, proximity to the contraband coupled with inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the contraband was found.[118]

Multiple persons possessing a large quantity of drugs and working in concert would be evidence of constructive possession.[119]

However, the law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.

Intent to distribute may be inferred from a number of factors, including but not limited to: (1) the quantity of the drugs is greater than for personal use; (2) the packaging and/or possession of packaging paraphernalia; (3) where the drugs were hidden; and (4) the amount of cash seized with the drugs.[120]

You may not infer an intent to distribute from possession of a small quantity of drugs by itself.[121]

The government must prove that the defendant possessed the controlled substance reasonably near the "on or about" date specified in the indictment.[122]

Mere presence on the premises where drugs are found, or association with one who possesses drugs, is insufficient to establish possession needed under the statute.[123]

_____NOTE_____

United States v. Burgos, 94 F.3d 849 (4th Cir. 1996) (*en banc*).

"[P]ossession with intent to distribute and distribution are necessarily two different offenses." *United States v. Randall*, 171 F.3d 195, 209 (4th Cir. 1999).

States v. Pearce, 65 F.3d 22, 26 (4th Cir. 1995) (citing *United States v. Blue*, 957 F.2d 106, 108 (4th Cir. 1992).

[117] *United States v. Blue*, __ F.3d __, 2015 WL 8479810, at *5 (4th Cir. Dec. 10, 2015).

[118] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[119] *Burgos*, 94 F.3d at 873.

[120] *See United States v. Collins,* 412 F.3d 515, 519 (4th Cir. 2005); *United States v. Fisher*, 912 F.2d 728, 730 (4th Cir. 1990); *Burgos* 94 F.3d at 873 (*en banc*).

[121] *Fisher*, 912 F.2d at 730.

[122] *United States v. Smith*, 441 F.3d 254, 261 (4th Cir. 2006) ("time is not an element of possession with the intent to distribute").

[123] *United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984).

Drug quantity is a substantive element of the offense. *United States v. Alvarado*, 440 F.3d 191, 199 (4th Cir. 2006) (citing *United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (*en banc*)).

In *United States v. Ramos*, 462 F.3d 329, 332 (4th Cir. 2006), the court commended the district court for a thorough special verdict form which asked about drug quantities.

In *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), the Second Circuit held that "where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse–simple joint possession, without any intent to distribute the drug further." 548 F.2d at 450. The Fourth Circuit has, on several occasions, declined to reach whether *Swiderski* is good law in the Fourth Circuit. *See*, *e.g.*, *United States v. Washington*, 41 F.3d 917, 920 n.2 (4th Cir. 1994).

See *United States v. Ramos*, 462 F.3d 329 (4th Cir. 2006), for the court's "contribut[ion] to the ongoing discussion among the circuits regarding the definition of 'cocaine base' under 21 U.S.C. § 841." 462 F.3d at 331. The substance was referred to as both cocaine base and crack in the indictment, trial, and jury instructions. "We are of opinion that no further inquiry is necessary than a reference to the statutory text." *Id.* at 333. Congress did not use the term "crack." The Fourth Circuit agrees with the Second Circuit that while Congress probably contemplated that cocaine base would include crack, Congress did not limit the term to that form. Congress used the chemical term cocaine base without explanation or limitation. *Id.* at 333-34 (citing *United States v. Jackson*, 968 F.2d 158, 162 (2d Cir. 1992)).

Possession is a lesser included offense of possession with intent to distribute, "unless, as a matter of law, the evidence would rule out the possibility of a finding of simple possession, because the quantity of drugs found was so huge as to require that the case proceed on the theory that the quantity conclusively has demonstrated an intent to distribute." *United States v. Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993) (quotations, citations, and alternations in original omitted). *See also United States v. Wright*, 131 F.3d 1111 (4th Cir. 1997) (fact that defendant found in possession of 3.25 grams of crack cocaine insufficient alone to require the lesser-included offense instruction requested).

21 U.S.C. § 841 DISTRIBUTION OF CONTROLLED SUBSTANCES BY PHYSICIAN

Title 21, United States Code, Section 841 makes it a crime for a physician to distribute controlled substances outside the bounds of his professional medical practice. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant distributed or dispensed the controlled substance alleged in the indictment;
- Second, that the defendant did so knowingly or intentionally, that is to say, that the defendant knew the substance was a controlled substance under the law; and
- Third, that the defendant did so outside the usual course of professional

practice.[124]

AGGRAVATED PENALTIES

1. Did death or serious bodily injury result from the use of the controlled substance?
2. Specific threshold quantities.[125]

Acting outside the bounds of professional medical practice would include writing prescriptions for the purpose of assisting another in the maintenance of a drug habit or the personal profit of the physician.[126]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[127]

GOOD FAITH

Good faith is relevant to your determination of whether the defendant acted outside the bounds of medical practice [or with a legitimate medical purpose] when prescribing narcotics. However, the good faith must be objective. Good faith means good intentions and honest exercise of best professional judgment as to a patient's medical needs. It connotes an observance of conduct in accordance with what the physician should reasonably believe to be proper medical practice.[128]

NOTE

See United States v. Moore, 423 U.S. 122, 142 (1975); *United States v. McIver*, 470 F.3d 550 (4th Cir. 2006); *United States v. Hurwitz*, 459 F.3d 463 (4th Cir. 2006); *United States v. Singh*, 54 F.3d 1182, 1187 (4th Cir. 1995); *United States v. Tran Trong Cuong*, 18 F.3d 1132 (4th Cir. 1994). *See also United States v. Alerre*, 430 F.3d 681 (4th Cir. 2005), where the court discussed the distinction between the criminal and civil standards for liability and standard-of-care evidence.

In *United States v. McIver*, 470 F.3d 550 (4th Cir. 2006), the court found no error in the following instruction:

> There are no specific guidelines concerning what is required to support a conclusion that a defendant physician acted outside the usual course of professional practice and for other than a legitimate medical purpose. In making

[124] *United States v. McIver*, 470 F.3d 550 (4th Cir. 2006). In *United States v. Hurwitz*, 459 F.3d 463, 475 n.7 (4th Cir. 2006), the Fourth Circuit acknowledged that other circuits have concluded that whether the defendant's actions were for legitimate medical purposes or were beyond the bounds of medical practice is not an essential element of a § 841 charge against a practitioner.

[125] *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*).

[126] *United States v. Tran Trong Cuong,* 18 F.3d 1132, 1138 (4th Cir. 1994).

[127] *United States v. Cotton*, 261 F.3d 397, 402 n. 2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[128] *United States v. Hurwitz*, 459 F.3d 463 (4th Cir. 2006), citing *United States v. Voorhies*, 663 F.2d 30, 34 (6th Cir. 1981). *See* Judge Floyd's instruction in Note Section.

a medical judgment concerning the right treatment for an individual patient, physicians have discretion to choose among a wide range of options. Therefore, in determining whether a defendant acted without a legitimate medical purpose, you should examine all of a defendant's actions and the circumstances surrounding the same. If a doctor dispenses a drug in good faith, in medically treating a patient, then the doctor has dispensed that drug for a legitimate medical purpose in the usual course of medical practice. That is, he has dispensed the drug lawfully. Good faith in this context means good intentions, and the honest exercise of professional judgment as to the patent's needs. It means that the defendant acted in accordance with what he reasonably believed to be proper medical practice. If you find that a defendant acted in good faith in dispensing the drugs charged in this indictment, then you must find that defendant not guilty. For you to find that the government has proved this essential element, you must determine that the government has proved beyond a reasonable doubt that the defendant was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or dispensing controlled substances for other than a legitimate medical purpose, in other words, the personal profit of the physician. Put another way, the government must prove as to each count beyond a reasonable doubt that the defendant dispensed the specific controlled substance other than for a legitimate medical purpose and not within the bounds of professional medical practice. A physician's own methods do not themselves establish what constitutes medical practice. In determining whether the defendant's conduct was within the bounds of professional practice, you should, subject to the instructions I give you concerning the credibility of experts and other witnesses, consider the testimony you have heard relating to what has been characterized during the trial as the norms of professional practice. You should also consider the extent to which, if at all, any violation of professional norms you find to have been committed by the defendant interfered with his treatment of his patients and contributed to an over prescription and/or excessive dispensation of controlled substances. You should consider the defendant's actions as a whole and the circumstances surrounding them. A physician's conduct may constitute a violation of applicable professional regulations as well as applicable criminal statutes. However, a violation of a professional regulation does not in and of itself establish a violation of the criminal law. As I just indicated, in determining whether or not the defendant is guilty of the crimes with which he is charged, you should consider the totality of his actions and the circumstances surrounding them and the extent and severity of any violations of professional norms you find he committed. There has been some mention in this case from time to time of the standard of care. During the trial the words medical malpractice may have been used. Those words relate to civil actions. When you go to see a doctor, as a patient, that doctor must treat you in a way so as to meet the standard of care that physicians of similar training would have given you under the same or similar circumstances. And if they fall below that line or what a reasonable physician would have done, then they have not exercised that standard of care, which makes them negligent and which subjects themselves to suits for malpractice. That is not what we're talking about. We're talking about

> this physician acting better or worse than other physicians. We're talking about whether or not this physician prescribed a controlled substance outside the bounds of his professional medical practice.

470 F.3d 556 n.9.

In *Tran Trong Cuong*, the Fourth Circuit approved a charge that included the following:

> [E]vidence that a doctor warns his patients to fill their prescriptions at different drug stores, prescribes drugs without performing any physical examinations or only very superficial ones, or asks patients about the amount or type of drugs they want, may suggest that the doctor is not acting for a legitimate medical purpose and is outside the usual course of medical practice. ... A doctor dispenses a drug in good faith in medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of medical practice. Good faith in this context means good intentions in the honest exercise of best professional judgment as to a patient's need. **** If you find the defendant acted in good faith in dispensing the drug, then you must find him not guilty.

18 F.3d at 1138.

In *Hurwitz*, the court stated the instruction approved in *Tran Trong* correctly established a criminal standard of liability, but incorrectly set out a subjective standard for measuring a physician's good faith. Instead, the physician's good faith must be measured by an objective standard. 459 F.3d at 479.

21 U.S.C. § 841 DISTRIBUTION OF CONTROLLED SUBSTANCE ANALOGUE
[LAST UPDATED: 1/20/2016]

Commonly referred to as the "analogue statute," Section 813 of Title 21 extends the prohibitions contained in § 841 to substances which are not themselves listed as controlled substances, but which are chemical analogues of controlled substances. It reads: "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for purposes of any Federal law as a controlled substance in Schedule I." Accordingly, distribution or possession with intent to distribute controlled substance analogues is prosecuted under § 841, with the government required to prove several additional elements related to the controlled substance analogue.

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

- First, that the defendant has knowledge that the substance is a controlled substance analogue[129];
- Second, that the substance has a chemical structure substantially similar to the chemical structure of a controlled substance classified under Schedule I or Schedule II;
- Third, that the substance has an actual, intended or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than such effect produced by a Schedule I or

[129] *McFadden v. United States*, 135 S. Ct. 2298 (2015).

Schedule II controlled substance; and

- Fourth, that the substance was intended for human consumption.[130]

A defendant has knowledge that a substance is an analogue when the defendant knows that the substance was controlled under the Controlled Substances Act or the Analogue Act, even if the defendant does not know the identity of the substance.[131] A defendant also has knowledge if the defendant knows the specific analogue with which he was dealing, even if he did not know its legal status as an analogue.[132] A defendant knows the specific analogue with which he is dealing when the defendant possesses a substance with knowledge that the substance has a substantially similar chemical structure to a controlled substance and that it produces substantially similar effects on the user as a controlled substance produces.[133] The Government need not show that the defendant had knowledge of the existence of the Analogue Act to find that the defendant possessed the requisite knowledge.[134]

A "controlled substance analogue" means a "substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II."[135]

"Human consumption" means "the use of a substance by a human being in a manner that introduces the substance into the body."[136]

NOTE

In *United States v. McFadden*, 753 F.3d 432 (4th Cir. 2014), and *United States v. Klecker*, 348 F.3d 69 (4th Cir. 2003), the Fourth Circuit held that the *mens rea* requirement for a conviction under the Controlled Substance Analogue Enforcement Act ("CSAEA") is that the defendant intended the substance to be used for human consumption. On June 18, 2015, the Supreme Court vacated and remanded the Fourth Circuit's decision in *McFadden*, finding that the Government must prove more than just intent by the defendant that the substance be consumed by humans. *McFadden v. United States*, 135 S. Ct. 2298 (2015).

The Supreme Court determined that the Government can prove the *mens rea* for a

[130] *See United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003). Whether a particular substance qualifies as a controlled substance analogue is a question of fact. *Id.* at 72.

[131] *McFadden*, 135 S. Ct. at 2305.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] 21 U.S.C. § 802(32)(A).

[136] *United States v. McFadden*, 753 F.3d 432, 440 (4th Cir. 2014), *rev'd on other grounds*, 135 S. Ct. 2298 (2015).

CSAEA prosecution one of two ways:

> First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.

Id. at 2305. Under the first method, a defendant has the requisite mental state for a violation of the CSAEA if he knew the substance was considered an analogue, regardless of whether the person knew the identity of the specific substance. *Id.* Under the second method, a defendant has the requisite mental state if he "knew the specific analogue [he] was dealing with" and knew the features that make it an analogue, regardless of whether he knew it was an analogue. *Id.* Additionally, the Supreme Court found that the Government could prove the *mens rea* through either direct or circumstantial evidence. *Id.* at 2306 n.3. The Court stated that when the Government attempts to prove the requisite mental state through circumstantial evidence "it will be left to the trier of fact to determine whether the circumstantial evidence proves that the defendant knew that the substance was a controlled substance under the CSA or Analogue Act . . . ." *Id.*

See 21 U.S.C. 841 for other instructions, as appropriate.

21 U.S.C. § 843(a)(3) ACQUIRING DRUGS BY FRAUD

Title 21, United States Code, Section 843 makes it a crime to acquire or obtain a controlled substance by misrepresentation, fraud, deception, or subterfuge. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant acquired or obtained possession of a controlled substance;
- Second, that the defendant did so by misrepresentation, fraud, deception, or subterfuge; and
- Third, that the defendant did so knowingly and intentionally.

21 U.S.C. § 843(b) USING COMMUNICATION FACILITY TO COMMIT DRUG FELONY

Title 21, United States Code, Section 843(b) makes it a crime to use any communication facility in committing or facilitating a drug felony. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant used a communication facility;
- Second, that the defendant did so in committing or in causing or facilitating the commission of a drug felony [the elements of the drug felony must be identified]; and
- Third, that the defendant did so knowingly or intentionally.[137]

"Felony drug offense" means an offense that is punishable by imprisonment for

[137] 21 U.S.C. 843(b).

more than one year under any law of the United States or of any state or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances. [21 U.S.C. § 802(44)]

The government must prove the commission of the underlying substantive drug offense.[138]

Communication facility means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication. [§ 843(b)]

"Facilitating" means to make easier or less difficult, or to assist or aid.[139]

Thus, to prove that the use of the communication facility facilitated the commission of a drug felony, the government must establish that the communication made committing the drug felony easier or less difficult, or assisted or aided the commission of the drug felony.[140]

The government must specify and prove the type of communication facility used, the controlled substance involved, and what is being facilitated with that controlled substance which constitutes a felony.[141]

The government does not have to prove who committed the drug felony.[142]

_____NOTE_____

In *Abuelhawa v. United States*, 556 U.S. 816 (2009), the Supreme Court overruled the Fourth Circuit and reversed the conviction of a misdemeanant drug user who had used a telephone to order drugs from his supplier.

21 U.S.C. § 844 SIMPLE POSSESSION

Title 21, United States Code, Section 844 makes it a crime to possess a controlled substance. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant possessed a controlled substance [amount is an element if the drug is cocaine base]; and
- Second, that the defendant did so knowingly and intentionally.

The government must prove that the defendant knew that the substance possessed was a controlled substance under the law at the time of the possession.

Possession means to voluntarily and intentionally exercise dominion and control over an item or property.

Possession may be either sole, by the defendant himself, or joint, that is, it may be shared with other persons, as long as the defendant exercised dominion and control over the item or property.

Possession may be either actual or constructive.

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[138] *United States v. Lee*, No. 95-5782, 1996 WL 383917 (4th Cir. July 10, 1996) (citing *United States v. Webster*, 639 F.2d 174, 189 (4th Cir. 1981), *cert. denied*, 454 U.S. 857 (1981); *modified on other grounds on reh'g*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982)).

[139] *United States v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988).

[140] *See id.*

[141] *United States v. Hinkle*, 637 F.2d 1154, 115\8 (7th Cir. 1981).

[142] *United States v. Abuelhawa*, 523 F.3d 415, 421 (4th Cir. 2008), *overruled on other grounds*, 556 U.S. 816 (2009).

Actual possession is defined as physical control over property.

Constructive possession occurs when a person exercises or has the power and the intention to exercise dominion and control over an item or property.[143]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, dominion, or control over the item or property itself, or the premises, vehicle, or container in which the item or property is concealed, such that a person exercises or has the power and intention to exercise dominion and control over that item or property.[144]

However, the law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.

The government must prove that the defendant possessed the controlled substance reasonably near the "on or about" date specified.[145]

_____NOTE_____

United States v. Schocket, 753 F.2d 336, 340 (4th Cir. 1985).

In *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), the Second Circuit held that where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse–simple joint possession, without any intent to distribute the drug further. The Fourth Circuit has, on several occasions, declined to reach whether *Swiderski* is good law in the Fourth Circuit. *See*, *e.g.*, *United States v. Washington*, 41 F.3d 917, 920 n.2 (4th Cir. 1994).

Simple possession of the threshold amount of cocaine base can be a felony and therefore qualifies as a drug trafficking offense and a predicate offense under § 924(c). *United States v. Garnett*, 243 F.3d 824, 830-31 (4th Cir. 2001).

21 U.S.C. § 846 CONSPIRACY

Title 21, United States Code, Section 846 makes it a crime to conspire with someone else to commit a drug offense against the laws of the United States. A conspiracy is an agreement between two or more persons to join together to accomplish an unlawful purpose. It is a kind of partnership in crime in which each member becomes the agent of every other member. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that there was an agreement between two or more persons to

[143] To prove constructive possession under § 922(g)(1), the government "must prove that the defendant intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005).

[144] *Id.* at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003)(quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citing *United States v. Blue*, 957 F.2d 106, 108 (4th Cir. 1992), and *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*)).

[145] *United States v. Smith*, 441 F.3d 254, 261 (4th Cir. 2006) ("time is not an element of possession with the intent to distribute").

[specify the object of the conspiracy];[146]

- Second, that the defendant knew of this agreement, or conspiracy; and
- Third, that the defendant knowingly and voluntarily participated in or became a part of this agreement or conspiracy.[147]

FOR AGGRAVATED PENALTIES:

- Fourth, you must determine the type and quantity of controlled substance attributable to the defendant. You should include the type and quantity that the defendant himself was involved in, and you should include the type and quantity that other members of the conspiracy were involved in, provided that the actions of those other members were in furtherance of the conspiracy and reasonably foreseeable to the defendant as a necessary or natural consequence of the conspiracy.[148]

☞ ***Collins* instruction**[149]

A special verdict form will be given to you on which, if you find the government has proved the defendant's membership in the charged conspiracy beyond a reasonable doubt, you must use to determine the quantity of drugs attributable to the defendant.

In determining what quantity of controlled substance is attributable to the defendant, if any, you should consider the following factors:

- First, the defendant is accountable for the quantity of drugs which he personally distributed or possessed with intent to distribute;
- Second, the defendant is also accountable for any quantity of drugs which he attempted to or planned to distribute or possess with intent to distribute. Specifically, the defendant is accountable for those drugs even

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[146] If necessary, a special verdict form should be submitted, so the jury can determine the type and quantity of controlled substance involved. *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999), *vacated in part on other grounds*, 218 F.3d 310 (4th Cir. 2000) (*en banc*); *United States v. Barnes*, 158 F.3d 662, 672 (4th Cir. 1998) (government's responsibility to seek special verdicts).

[147] *United States v. Strickland*, 245 F.3d 368, 384-85 (4th Cir. 2001); *United States v. Burgos,* 94 F.3d 849, 857 (4th Cir. 1996)(*en banc*). However, in *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001), the court stated the elements as follows:

> "(1) an agreement with another person to violate the law, (2) knowledge of the essential objectives of the conspiracy, (3) knowing and voluntary involvement, and (4) interdependence among the alleged conspirators.."

In *United States v. Mills*, 995 F.2d 480, 483 (4th Cir. 1993), the court identified the essential elements as (1) an agreement, (2) which the defendant willfully joined, (3) "with intent to accomplish the criminal purpose of the conspiracy."

Section 846 does not require proof of an overt act. *United States v. Clark,* 928 F.2d 639, 641 (4th Cir. 1991).

[148] *United States v. Collins*, 415 F.3d 304, 314 (4th Cir. 2005). In *United States v. Aramony*, 88 F.3d 1369, 1381 (4th Cir. 1996), the court held that the district court did not abuse its discretion in omitting the "reasonably foreseeable" language from the *Pinkerton* instruction. However, in *United States v. Foster*, 507 F.3d 233 (4th Cir. 2007), the Court reiterated that "the jury must determine that the threshold drug amount was reasonably foreseeable to the individual defendant." 507 F.3d at 250. The Court also acknowledged that "other [circuit] courts have held that, in drug conspiracy cases, the jury is not required to determine the amount of drugs attributable to individual co-conspirators; rather, a jury's finding of drug amounts for the conspiracy as a whole sets the maximum sentence that each coconspirator could be given." *Id.* at 251 n.12.

[149] *United States v. Collins*, 415 F.3d 304, 314 (4th Cir. 2005).

if those drugs were never actually obtained or distributed, so long as an objective of the conspiracy was for the defendant to distribute or possess with intent to distribute such a quantity of drugs;

- Third, the defendant is also accountable for any quantity of drugs which another member of the conspiracy distributed or possessed with intent to distribute as part of the conspiracy, so long as it was reasonably foreseeable to the defendant that such a quantity of drugs would be involved in the conspiracy which he joined;
- Fourth and finally, the defendant is also accountable for any quantity of drugs which another member of the conspiracy attempted to or planned to distribute or possess with intent to distribute, so long as it was reasonably foreseeable to the defendant that such a quantity of drugs would be involved in the conspiracy which he joined. The defendant is accountable for those drugs even if those drugs were never actually obtained or distributed by other members of the conspiracy, so long as an objective of the conspiracy was for the other members of the conspiracy to distribute or possess with intent to distribute such a quantity of drugs.

These last two rules apply even if the defendant did not personally participate in the acts or plans of his co-conspirators or even if the defendant did not have actual knowledge of those acts or plans, so long as those acts or plans were reasonably foreseeable to the defendant. The reason for this is simply that a co-conspirator is deemed to be the agent of all other members of the conspiracy. Therefore, all of the co-conspirators bear criminal responsibility for acts or plans that are undertaken to further the goals of the conspiracy.

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[150]

The government must prove that the conspiracy came into existence during or reasonably near the period of time charged in the indictment and the defendant knowingly joined in the conspiracy within or reasonably near the same time period.[151]

A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in a criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is

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[150] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[151] In *United States v. Queen*, 132 F.3d 991 (4th Cir. 1997), the defendant was charged with conspiring to tamper with a witness during the period from February 1994 to March 1995. The district court charged that the first two elements of conspiracy are proved

> if you find beyond a reasonable doubt that a conspiracy as charged in the indictment came into existence at any point in time within or reasonably near to the window from February 1994 to March 1995, and that [the defendant] knowingly joined in the conspiracy at some point within or reasonably near to that same window ....

Id. at 999 n.5. The Fourth Circuit concluded that the jury "may find that the starting date of a conspiracy begins anytime in the time window alleged, so long as the time frame alleged places the defendant sufficiently on notice of the acts with which he is charged." *Id*. at 999.

responsible for the acts of each other.[152]

You may find that a defendant was a member of the conspiracy only from evidence of his own acts and statements.[153]

The essence of the crime of conspiracy is an agreement to commit a criminal act. But there does not have to be evidence that the agreement was specific or explicit. By its very nature, a conspiracy is clandestine and covert, thereby frequently resulting in little direct evidence of such an agreement. Therefore, the government may prove a conspiracy by circumstantial evidence. Circumstantial evidence tending to prove a conspiracy may consist of a defendant's relationship with other members of the conspiracy, the length of this association, the defendant's attitude and conduct, and the nature of the conspiracy.

One may be a member of a conspiracy without knowing the full scope of the conspiracy, or all of its members, without taking part in the full range of its activities or over the whole period of its existence. The conspiracy does not need a discrete, identifiable organizational structure. The fact that a conspiracy is loosely-knit, haphazard, or ill-conceived does not render it any less a conspiracy. The government need not prove that the defendant knew all the particulars of the conspiracy or all of his co-conspirators. It is sufficient if the defendant played only a minor part in the conspiracy. Thus, a variety of conduct can constitute participation in a conspiracy. Moreover, a defendant may change his role in the conspiracy.

Once it has been shown that a conspiracy existed, the evidence need only establish a slight connection between the defendant and the conspiracy. The government must produce evidence to prove the defendant's connection beyond a reasonable doubt, but the connection itself may be slight, because the defendant does not need to know all of his co-conspirators, understand the reach of the conspiracy, participate in all the enterprises of the conspiracy, or have joined the conspiracy from its inception.

Presence at the scene of criminal activity is material and probative in the totality of the circumstances in determining the defendant's participation in the conspiracy. Mere presence alone is not sufficient to prove participation in the conspiracy, but proof beyond a reasonable doubt of presence coupled with an act that advances the conspiracy is sufficient to establish participation in the conspiracy.[154]

A conspirator must intend to further an endeavor which, if completed, would [be a federal crime], but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the [criminal objective].[155]

Mere presence at the scene of an alleged transaction or event, mere association with persons conducting the alleged activity, mere similarity of conduct among various persons and the fact that they may have associated with each other or assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not

[152] *Salinas v. United States*, 522 U.S. 52, 63-64 (1997).

[153] *United States v. Read*, 658 F.2d 1225, 1231 (7th Cir. 1980).

[154] The principles stated in these four paragraphs come from *United States v. Burgos*, 94 F.3d 849, 857-61, 869 (4th Cir. 1996) (*en banc*).

[155] *Salinas*, 522 U.S. at 65.

thereby become a conspirator.[156]

The statements of an alleged co-conspirator may be considered in determining the existence of the conspiracy. [157]

The jury may find knowledge and voluntary participation from evidence of presence when the presence is such that it would be unreasonable for anyone other than a knowledgeable participant in the conspiracy to be present.[158]

Mere knowledge, acquiescence, or approval of a crime is not enough to establish that an individual is part of a conspiracy.[159] The government must show that the defendant knew the purpose of the conspiracy and took some action indicating his participation.[160]

The conduct of alleged conspirators can give rise to an inference that an agreement exists.[161]

If the government proves that the defendant understood the unlawful nature of the agreement and intentionally joined in that agreement on one occasion, that is sufficient to find him guilty of conspiracy, even though the defendant had not participated before and even though the defendant played only a minor part.[162]

In determining if the defendant knowingly and voluntarily participated in the conspiracy, you may consider the purity of the controlled substance, the quantity of the controlled substance, the presence of equipment used in processing or sale of the controlled substances, and large amounts of cash or weapons.[163]

Evidence of a large quantity of controlled substances creates an inference of a conspiracy.[164]

ADDITIONAL INSTRUCTIONS, IF APPLICABLE

Buyer-Seller Defense[165]

Multiple sales of controlled substances can be evidence of a conspiracy to distribute controlled substances.[166] However, mere evidence of a simple buy-sell transaction is sufficient to prove a distribution violation, but not conspiracy. This is so because the buy-sell agreement, while illegal in itself, is not an agreement to commit an

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[156] Instruction given by the district court and approved in *United States v. Heater*, 63 F.3d 311, 326 (4th Cir. 1995). *See also United States v. Fleschner*, 98 F.3d 155, 160 (4th Cir. 1996).

[157] *United States v. Neal*, 78 F.3d 901, 905 (4th Cir. 1996) (citing *United States v. Blevins,* 960 F.2d 1252, 1255 (4th Cir. 1992)).

[158] *United States v. Gallardo-Trapero*, 185 F.3d 307, 322 (5th Cir. 1999).

[159] *See United States v. Pupo*, 841 F.2d 1235, 1238 (4th Cir. 1988) (*en banc*).

[160] *United States v. Chorman*, 910 F.2d 102, 109 (4th Cir. 1990).

[161] *United States v. Collazo*, 732 F.2d 1200, 1205 (4th Cir. 1984).

[162] *United States v. Mabry*, 953 F.2d 127, 130 (4th Cir. 1991).

[163] Jury so instructed in *United States v. Strickland*, 245 F.3d 368, 377 (4th Cir. 2001).

[164] *United States v. Bourjaily*, 781 F.2d 539, 545 (6th Cir. 1986).

[165] In *United States v. Mills*, 995 F.2d 480 (4th Cir. 1993), the appellant argued that the district court should have instructed the jury on the buyer-seller defense. The Fourth Circuit assumed that there may be instances where one is merely a buyer or seller, but not a conspirator. 995 F2d. at 485. However, "the facts of this case demonstrate [the defendant] was far more than a mere buyer." *Id*.

In *United States v. Edmonds*, 679 F.3d 169 (4th Cir. 2012), *vacated on other grounds*, 568 U.S. __, 133 S. Ct. 376 (2012), the court stated that "a conspiracy to commit the distribution [of narcotics] offense must involve an agreement separate from the immediate distribution conduct that is the object of the conspiracy." 649 F.3d at 174.

[166] *United States v. Sullivan*, 455 F.3d 249, 261 (4th Cir. 2006).

offense, it is the offense of distribution itself. But evidence of any understanding reached as part of the buy-sell transaction that either party will engage in or assist in further distribution is sufficient to prove both a distribution violation and a conspiracy violation.

***Pinkerton* Liability**[167]

A member of a conspiracy who commits another crime during the existence or life of a conspiracy and commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy. Under certain conditions, therefore, a defendant may be found guilty of this other crime even though he or she did not participate directly in the acts constituting the offense. If you find that the government has proven a defendant guilty of conspiracy as charged in the indictment, you may also find him guilty of the crimes alleged in any other counts of the indictment in which he is charged provided you find that the essential elements of these counts as defined in these instructions have been established beyond a reasonable doubt. And further that you also find beyond a reasonable doubt that the substantive offense was committed by a member of the conspiracy, during the existence or life of the conspiracy and in furtherance of the goals and objectives of the conspiracy. You must also find that at the time this offense was committed, the defendant was a member of the conspiracy.[168]

In order to hold a co-conspirator criminally liable for acts of other members of the conspiracy, the act must be done in furtherance of the conspiracy and be reasonably foreseen as a necessary or natural consequence of the conspiracy. In order to be reasonably foreseeable to another member of the criminal organization, and thus to hold a co-conspirator criminally liable, acts of a co-conspirator must fall within the scope of the agreement between the specific individual and the co-conspirator.[169]

The government need not prove that the alleged conspirators entered into any formal agreement, or that they directly stated between/among themselves all the details of the agreement. The government need not prove that all of the details of the agreement alleged in the indictment were actually agreed upon or carried out. The government need not prove that all of the persons alleged to have been members of the conspiracy were in fact members of the conspiracy, only that the defendant and at least one other person were members. Finally, the government need not prove that the alleged conspirators actually accomplished the unlawful objective of their agreement.

Whenever it appears beyond a reasonable doubt from the evidence that a conspiracy existed and that the defendant was one of the members, then you may consider as evidence against the defendant the statements knowingly made and acts knowingly done by any other person also found to be a member of the conspiracy. These statements and acts may have occurred in the absence of and without the knowledge of the defendant,

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[167] *Pinkerton v. United States*, 328 U.S. 640 (1946).“Proper application of the *Pinkerton* theory depends on appropriate instructions to the jury.” *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990).

[168] *United States v. Irvin*, 2 F.3d 72, 75 (4th Cir. 1993). In *United States v. Aramony*, 88 F.3d 1369, 1380 (4th Cir. 1996), the court held that the district court did not abuse its discretion in omitting the “reasonably foreseeable” language from the instruction. However, in light of *Irvin*, the district court would be better advised to include language regarding reasonably foreseeable.

[169] *Irvin*, 2 F.3d 72.

provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.[170]

A statement by a co-conspirator is made in furtherance of a conspiracy if it was intended to promote the conspiracy's objectives, whether or not it actually had that effect. For example, statements made by a conspirator to a non-member of the conspiracy may be considered to be in furtherance of the conspiracy if they are designed to induce that person either to join the conspiracy or to act in a way that will assist the conspiracy in accomplishing its objectives.[171]

Multiple versus Single Conspiracy[172]

The government has charged a particular conspiracy, and the government has to prove that the defendant was a member of the conspiracy charged in the indictment. If the government does not prove that, then you must find the defendant not guilty, even if you find that he was a member of some other conspiracy not charged in the indictment. Proof that a defendant was a member of some other conspiracy is not enough to convict unless the government also proves beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment.[173]

Whether the evidence proves a single conspiracy or, instead, multiple

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[170] *See United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990), where a similarly worded instruction "fairly expressed the *Pinkerton* principle." The Fourth Circuit has specifically approved this instruction holding the defendant responsible for statements and acts of co-conspirators without referring to substantive crimes. The substantive offense need not be a charged object of the conspiracy. *Id.* at 110-12.

See Aramony, 88 F.3d at 1381 (district court did not abuse discretion in omitting "reasonably foreseeable" language from *Pinkerton* instruction).

[171] *United States v. Smith*, 441 F.3d 254, 262 (4th Cir. 2006).

[172] "A court need only instruct on multiple conspiracies if such an instruction is supported by the facts." *United States v. Bowens*, 224 F.3d 302, 307 (4th Cir. 2000) (quoting *United States v. Mills*, 995 F.2d 480, 485 (4th Cir. 1993)). "A multiple conspiracy instruction is not required unless the proof demonstrates that the defendant was involved *only* in a separate conspiracy *unrelated* to the overall conspiracy charged in the indictment." *United States v. Squillacote*, 221 F.3d 542, 574 (4th Cir. 2000) (quotation and citation omitted). The Double Jeopardy Clause prevents the government from splitting a single conspiracy into multiple offenses. The Fourth Circuit employs a totality of the circumstances test to decide whether two conspiracies are distinct. Five factors guide this determination:

1. the time periods covered by the alleged conspiracies;
2. the places where the conspiracies are alleged to have occurred;
3. the persons charged as co-conspirators;
4. the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offense charged which indicate the nature and scope of the activities being prosecuted; and
5. the substantive statutes alleged to have been violated.

United States v. Ragins, 840 F.2d 1184, 1189 (4th Cir. 1988). The test is a flexible one; some factors may be more important than others depending on the circumstances of the case. *United States v. Alvarado*, 440 F.3d 191, 198 (4th Cir. 2006).

[173] This instruction was approved as correct and fair in *United States v. Sullivan*, 455 F.3d 248, 259 (4th Cir. 2006).

conspiracies, is an issue for you, the jury.[174]

A single conspiracy exists where there is one overall agreement, or one general business venture. Whether there is a single conspiracy or multiple conspiracies depends upon the overlap of key actors, methods, and goals.[175]

A single conspiracy exists when the conspiracy has the same objective, the same goal, the same nature, the same geographic spread, the same results, and the same product.[176]

A single overall agreement need not be manifested by continuous activity. A conspiracy may suspend active operations for a period: for logistical reasons, to escape detection, or even to afford its members an opportunity to spend their ill-gotten gains. The question is not the timing of the conspiracy's operations but whether it functioned as an ongoing unit.[177]

You may find a single conspiracy, despite looseness of organization structure, changing membership, shifting roles of participants, limited roles and knowledge of some members.[178]

A conspiracy is an ongoing crime, and if a criminal conspiracy is established, it is presumed to continue until its termination is affirmatively shown.[179]

Withdrawal[180]

If the government proves that a conspiracy existed, and that the defendant willfully joined the conspiracy, you may conclude that the conspiracy continued unless or until the defendant shows that the conspiracy was terminated or the defendant withdrew from it. The defendant must show affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach his co-conspirators.[181]

A member of a conspiracy remains in the conspiracy unless he can show that at some point he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient. The defense of withdrawal requires the defendant to make a substantial showing that he took some affirmative step to terminate or abandon his participation in the conspiracy. In other words, the defendant must demonstrate some type of affirmative action which disavowed or defeated the purpose of the conspiracy. This

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[174] *United States v. Banks*, 10 F.3d 1044, 1051 (4th Cir. 1993); *United States v. Harris*, 39 F.3d 1262, 1267 (4th Cir. 1994).

[175] *Squillacote*, 221 F.3d at 574 (quotation and citation omitted).

[176] *United States v. Johnson*, 54 F.3d 1150, 1154 (4th Cir. 1995).

[177] *United States v. Leavis*, 853 F.2d 215, 218-19 (4th Cir. 1988).

[178] *Banks*, 10 F.3d at 1051.

[179] *United States v. Barsanti*, 943 F.2d 428, 437 (4th Cir. 1991). A conspiracy is presumed to continue until there is affirmative evidence of abandonment or defeat of its purposes. *Leavis*, 853 F.2d at 218.

[180] Withdrawal is a complete defense to the crime of conspiracy only when it is coupled with the defense of the statute of limitations. A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981). Otherwise, by definition, the defendant is criminally responsible for acts committed by the conspiracy prior to his withdrawal.

Withdrawal would limit the defendant's responsibility for substantive offenses committed after his withdrawal, and would impact the defendant's culpability for drug amounts under *United States v. Collins*, 415 F.3d 304 (4th Cir. 2005).

[181] *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986).

would include, for example, voluntarily going to the police and telling them about the conspiracy; telling the other conspirators that he did not want to have anything more to do with the agreement; or any other affirmative act that was inconsistent with the object of the conspiracy which was communicated to other members of the conspiracy.[182] Merely doing nothing or avoiding contact with other members of the conspiracy is not enough.

The defendant has the burden of proving that he withdrew from the conspiracy, by a preponderance of the evidence. To prove something by a preponderance of the evidence means that when all the relevant evidence is considered, the fact alleged is more likely so than not so.[183] The government may refute evidence from the defendant that he withdrew from the conspiracy by showing beyond a reasonable doubt that the defendant did not withdraw from the conspiracy as claimed.[184]

_____NOTE_____

"In a conspiracy, two different types of intent are generally required–the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 n.20 (1978). *See also United States v. Atkinson*, 966 F.2d 1270, 1275 (9th Cir. 1992) ("and (3) the requisite intent to commit the underlying substantive offense").

Sections 963 and 846 proscribe separate statutory offenses. *Albernaz v. United States*, 450 U.S. 333, 339 (1981).

Aiding and abetting is not a lesser included offense of conspiracy. *United States v. Price*, 763 F.2d 640, 642 (4th Cir. 1985).

Conspiracy to possess is a lesser included offense of conspiracy to possess with intent to distribute, unless, as a matter of law, the evidence would rule out the possibility of a finding of simple possession because the quantity of drugs found was so huge as to require that the case proceed on the theory that the quantity conclusively has demonstrated an intent to distribute. *United States v. Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993).

The jury must also be instructed on the elements of the object of the conspiracy. If that crime is charged in a separate substantive count of the indictment, the instruction can be by reference to that portion of the charge.

Because of accomplice liability, a defendant can be found guilty of a substantive offense committed by a co-conspirator in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640 (1946).

"A person ... may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas v. United States*, 522 U.S. 52, 64 (1997).

A defendant may be convicted of conspiracy even if his co-conspirator is acquitted. *United States v. Collins*, 412 F.3d 515, 520 (4th Cir. 2005).

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[182] "These acts or statements need not be known or communicated to all other co-conspirators as long as they are communicated in a manner reasonably calculated to reach some of them." *Read*, 658 F.2d at 1231.

[183] *Hyde v. United States*, 225 U.S. 347, 369 (1912). *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978); *United States v. Cardwell*, 433 F.3d 378 (4th Cir. 2005); *Walker*, 796 F.2d at 49.

[184] *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989).

"Escaping detection and apprehension by police officers further[s] the continued viability of [a] conspiracy." *United States v. Neal*, 78 F.3d 901, 905 (4th Cir. 1996) (citation omitted).

A conspiracy ends when its central purpose has been accomplished. *United States v. United Medical and Surgical Supply Corp.*, 989 F.2d 1390, 1399 (4th Cir. 1993).

A conspiracy continues until the "spoils are divided among the miscreants," and the payments made constitute overt acts made in furtherance of the conspiracy. *United States v. Automated Sciences Group, Inc.*, No. 91-5063, 1992 WL 103647 (4th Cir. May 18, 1992). In *Automated Sciences*, one of the objects of the conspiracy involved sharing money.

The scope of the conspiratorial agreement determines the duration of the conspiracy. In *Grunewald v. United States*, 353 U.S. 391, 397 (1957), the Supreme Court rejected the government's theory that an agreement to conceal a conspiracy can be deemed part of the conspiracy and can extend the duration of the conspiracy for purposes of the statute of limitations. A "distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." 353 U.S. at 405.

Actions taken to conceal a conspiracy after its accomplishment do not postpone the running of the statute of limitations, where concealing the crime was not an objective of the conspiracy. *Id.* at 399.

In *United States v. Stewart*, 256 F.3d 231, 241 n. 3 (4th Cir. 2001), the court noted that "venue in the Eastern District of Virginia arguably would have been improper on the conspiracy count ... unless ... the Government was able to [demonstrate that the defendant] knowingly and voluntarily entered into a conspiracy involving the Eastern District of Virginia."

After a conspiracy has ended, acts of a conspirator occurring thereafter are admissible against former co-conspirators only where they are relevant to show the previous existence of the conspiracy or the attainment of its illegal ends; and subsequent declarations, if otherwise relevant, are admissible only against the declarant. *United States v. Chase*, 372 F.2d 453, 460 (4th Cir. 1967).

Factual impossibility exists where the objective is proscribed by the criminal law but a factual circumstance unknown to the actor prevents him from bringing it about. Factual impossibility is not a defense to an attempt crime or conspiracy. *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995).

21 U.S.C. § 846 ATTEMPT

Title 21, United States Code, Section 846 makes it a crime to attempt to commit a drug offense against the laws of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant intended to [here, the court should instruct the jury on the elements of the object of the attempt][185]; and

[185] If necessary, a special verdict form should be submitted, so the jury can determine the type and quantity of controlled substance involved. *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999), *vacated in part on other grounds*, 218 F.3d 310 (4th Cir. 2000) (*en banc*); *United States v. Barnes*, 158 F.3d 662, 672 (4th Cir. 1998) ("it is the government's responsibility to seek special verdicts").

- Second, that the defendant committed an act which constituted a substantial step toward the commission of [the object of the attempt].[186]

A substantial step is more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.[187]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[188]

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE

Title 21, United States Code, Section 848 makes it a crime to engage in a continuing criminal enterprise (CCE). For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant committed a felony violation of the federal drug laws [the court must specify the elements of the particular felony violation or may refer to the instruction if that violation is a separate substantive count];
- Second, that this violation was part of a continuing series of violations of the drug laws, that is, at least three violations of the drug laws;
- Third, that the series of violations was undertaken by the defendant in agreement with five or more other persons;
- Fourth, that the defendant occupied a position of organizer, a supervisory position, or any other position of management with respect to these other persons; and
- Fifth, that the defendant received substantial income or resources from the continuing series of violations of the drug laws.[189]

"A continuing series of violations of the drug laws" means a total of three or more violations of the federal drug laws committed over a period of time with a single or similar purpose.[190]

The jury must agree, unanimously, about which specific violations make up the

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[186] *See United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003).

[187] *United States v. Sutton*, 961 F.2d 476, 478 (4th Cir. 1992). "But if preparation comes so near to the accomplishment of the crime that it becomes *probable* that the crime will be committed absent an outside intervening circumstance, the preparation may become an attempt." *Pratt*, 351 F.3d at 136.

[188] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[189] *United States v. Stewart*, 256 F.3d 231, 254 (4th Cir. 2001); *United States v. Hall*, 93 F.3d 126, 129 (4th Cir. 1996), *abrogated on other grounds by Richardson v. United States*, 526 U.S. 813 (1999); *United States v. Heater*, 63 F.3d 311, 316-17 (4th Cir. 1995); *United States v. Ricks*, 882 F.2d 885, 890-91 (4th Cir. 1989).

[190] Instruction given in *Hall*, 93 F.3d 126. In *Hall*, the defendant complained that the district court failed to instruct the jury that it must unanimously agree that the three or more drug violations were "related" to each other. The Fourth Circuit said there "[t]here was no need to instruct on any requirement of 'relatedness.'" 93 F.3d at 129. "[T]he very phrase, 'continuing series,' denotes related events." *Id.*

continuing series of violations and that the defendant committed each of the individual violations necessary to make up the continuing series of violations. In other words, you must agree on which three drug crimes the defendant committed.[191]

"Organizer," "supervisor," and "management capacity" should be given their usual and ordinary meaning. The terms imply the exercise of power and authority by a person who occupies some position of management or supervision, but who need not be the sole or only organizer, supervisor, or manager of the activities in question. It is possible for a single criminal enterprise to have more than one organizer.[192]

The government does not have to prove that the five individuals were supervised and acted in concert at the same time, or even that they were collectively engaged in at least one specific offense. The statute does not require that the additional five individuals be under the direct and immediate control or supervision of the defendant. The government does not have to prove that the defendant had personal contact with the five persons because organizational authority and responsibility may be delegated. Rather, the government need only prove that the defendant occupied a position of organizer, a supervisory position, or any other position of management. A defendant may not insulate himself from liability by carefully pyramiding authority so as to maintain fewer than five direct subordinates.[193]

The defendant's relationships with the other persons need not have existed at the same time, the five persons involved need not have acted in concert at the same time or with each other, and further the same type of relationship need not exist between the defendant and each of the five. The defendant did not have to have personal contact with the five persons because organizational authority and responsibility may be delegated. Although proof of a supervisory or managerial relationship requires a showing of some degree of control by the defendant over the persons, such proof is not required to show that a defendant acted as an organizer. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in an essentially orderly operation or enterprise. A management role may be proved by showing that the defendant arranged delivery, and set price and credit terms.[194]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[195]

AGGRAVATED PENALTIES:

§ 848(b)

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[191] *Richardson*, 526 U.S. 813, 815 (1999).

[192] Charge approved in *United States v. Tipton*, 90 F.3d 861, 886 (4th Cir. 1996). A defendant need not fit the label of kingpin or ringleader, and a CCE may have more than one head. *United States v. Johnson*, 54 F.3d 1150, 1155 (4th Cir. 1995).

[193] *Ricks*, 882 F.2d at 891; *Heater*, 63 F.3d at 317.

[194] *United States v. Butler*, 885 F.2d 195, 200-01 (4th Cir. 1989). The mere showing of a buyer-seller relationship, without more, is not sufficient under § 848.

[195] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

- First, that the defendant was the principal administrator, organizer, or leader of the enterprise, or was one of several such principal administrators, organizers, or leaders; and
- Second, that the continuing criminal enterprise involved at least 30,000 grams of heroin; 150,000 grams of cocaine; 1,500 grams of cocaine base; 3,000 grams of PCP or 30,000 grams of a mixture containing a detectable amount of PCP; 300 grams of LSD; 12,000 grams of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 3,000 grams of a mixture containing a detectable amount; 30,000 kilograms of marijuana or 30,000 marijuana plants; or 1,500 grams of methamphetamine;

OR

the enterprise received $10 million in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of controlled substances.

DEATH PENALTY – § 848(e)

The defendant shall be sentenced to death if you find, unanimously and beyond a reasonable doubt, the following:

§ 848(e)(1)(A)

- First, that the defendant was engaged in or working in furtherance of the continuing criminal enterprise charged in the indictment, or engaged in [an offense punishable under § 841(b)(1)(A) or § 960(b)(1)];
- Second, that while so engaged, the defendant either killed or counseled, commanded, induced, procured, or caused the killing of an individual;
- Third, the defendant acted intentionally; and
- Fourth, the death of [the victim] resulted from the activity of the defendant.[196]

It is not enough for the government to prove that the defendant killed someone. The defendant must be engaged in or working in furtherance of the continuing criminal enterprise and the killing must have occurred while the defendant was so engaged.[197]

A killing may be committed "in furtherance" of a continuing criminal enterprise even though it does not actually further the goals of the enterprise. However, the government must prove that the killing was designed and intended to further the enterprise, even though it may have failed to fulfill that goal.[198]

The government does not have to prove that the defendant had full knowledge of the objectives or the extent of the continuing criminal enterprise.[199]

§ 848(e)(1)(B)

- First, that the defendant killed or counseled, commanded, induced,

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[196] *See Tipton*, 90 F.3d at 887. The Fourth Circuit found this instruction sufficiently required proof of a substantive as well as merely temporal connection between the § 848(e) murder and the § 848(a) CCE, although the substantive connection was not as clearly expressed as it might have been. *See also United States v. Chandler*, 996 F.2d 1073, 1097 (11th Cir. 1993).

[197] Both a substantive and a temporal connection must be proved between the § 848(e) murder and the § 848(a) CCE. *United States v. Tipton*, 90 F.3d 861, 887 (4th Cir. 1996).

[198] *United States v. McCullah*, 76 F.3d 1087, 1103 (10th Cir. 1996).

[199] *Id.* at 1102-03 (§ 848(e) extends to hired henchmen who commit murder to further a drug enterprise in which they may not otherwise be intimately involved).

procured, or caused the killing of a Federal, State, or local law enforcement officer engaged in, or on account of the performance of that officer's official duties while the defendant was committing, in furtherance of, or while the defendant was attempting to avoid apprehension, prosecution or service of a prison sentence for [any federal drug felony];

- Second, that the death of the law enforcement officer resulted from the activity of the defendant; and
- Third, that the defendant acted intentionally.[200]

"Law enforcement officer" means a public servant authorized by law or by a government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions. [§ 848(e)(2)]

_____NOTE_____

Section 846 conspiracy is a lesser included offense of § 848. *Rutledge v. United States*, 517 U.S. 292, 307 (1996). However, a lesser included § 846 conspiracy may not always be coterminous with the larger CCE. *Id*. at 307, n.17.

A defendant convicted under § 848 may not also be convicted for any predicate conspiracy charges proved as elements of the § 848 offense. *United States v. Wilson*, 135 F.3d 291, 303 (4th Cir. 1998).

A CCE offense is different from the predicate offenses. *Garrett v. United States*, 471 U.S. 773, 779-86 (1985).

In *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the appellant argued that the district court should have instructed the jury that it must be unanimous as to the three predicate violations and the five supervisees. No "special unanimity" instruction was requested. The Fourth Circuit acknowledged the division among the circuits on whether a special unanimity instruction is required as to predicate violations, and did not decide that question because it was not plain error. The court did hold that no special unanimity instruction is required concerning the five supervisees because the focus of this element is upon the size of the enterprise rather than the particular identities of those who make up the requisite number. *Id*. at 885-86.

The "murder-in-furtherance" provision in § 848(e) may be counted "a part of a continuing series of violations" making up the proscribed continuing enterprise. Therefore, the "district court did not err in instructing the jury that it might consider any murder-in-furtherance violations found under § 848(e) among the predicate violations required to convict on the CCE count." *Id.* at 884.

Using a communication facility in committing a drug felony can also be a predicate violation in a CCE prosecution. *See United States v. Head*, 755 F.2d 1486, 1490 (11th Cir. 1985).

Section 848(e) defines an offense; it is not merely a sentencing provision. *United States v. Chandler*, 996 F.2d 1073, 1099-1100 (11th Cir. 1993).

An outside hitman, hired by a continuing criminal enterprise is subject to prosecution under § 848(e), provided he knows he is working to the benefit of the criminal enterprise. It is inconsequential that the hitman may not otherwise be involved with the organization. As long as he realizes that he is working to further the enterprise,

[200] *Cf. United States v. Chandler*, 996 F.2d 1073, 1097 (11th Cir. 1993).

he is subject to § 848(e). *United States v. McCullah*, 76 F.3d 1087, 1103 n.4 (10th Cir. 1996).

Section 848(e) is not victim-specific. As long as the required nexus is established, the identity of the actual victim does not matter. *Id.* at 1103.

21 U.S.C. § 856 MAINTAINING DRUG-INVOLVED PREMISES

Title 21, United States Code, Section 856 makes it a crime to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 856(a)(1)

- First, that the defendant opened, leased, rented, used, or maintained any place, either permanently or temporarily; and
- Second, that the defendant did so knowingly; and
- Third, that the defendant did so for the purpose of manufacturing, distributing, or using any controlled substance.[201]

§ 856(a)(2)

- First, that the defendant managed or controlled, either permanently or temporarily, as an owner, lessee, agent, employee, occupant, or mortgagee, any place;
- Second, that the defendant rented, leased, profited from, or made available for use the place; and
- Third, that the defendant did so knowingly and intentionally; and
- Fourth, that the defendant did so for the purpose of manufacturing, storing, distributing, or using a controlled substance.[202]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[203]

Where the "place" in question is a residence, the defendant must have a substantial connection to the home and must be more than a casual visitor.[204]

However, it is not necessary that the defendant lease or own the "place." Acts that evidence "maintenance" are such matters as control, duration, acquisition of the site, renting or furnishing the site, repairing the site, supervising, protecting, supplying food to those at the site, and continuity.[205]

"For the purpose of" means a significant or important reason.[206]

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[201] *United States v. Goff*, 404 F. App'x 768 (4th Cir. 2010).

[202] *See id.*

[203] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[204] *United States v. Williams*, 923 F.2d 1397, 1403 (10th Cir. 1990).

[205] *United States v. Russell*, 595 F.3d 633, 644 (6th Cir. 2010) (citing *United States v. Clavis*, 956 F.2d 1079, 1091 (11th Cir. 1992)).

[206] *Id.* at 642-43.

NOTE

See United States v. Valencia-Tepoz, 93 F. App'x 500, 502 (4th Cir. 2004) ("the offense of maintaining a stash house could involve maintaining a place for drug use only").

In *Abuelhawa v. United States,* 556 U.S.816 (2009), a § 843(b) case, the Court made the following observation:

> The Government does nothing for its own cause by noting that 21 U.S.C. § 856 makes it a felony to facilitate "the simple possession of drugs by others by making available for use ... a place for the purpose of unlawfully using a controlled substance" even though the crime facilitated may be a mere misdemeanor. Brief for United States 21 (internal quotation marks and alterations omitted). This shows that Congress knew how to be clear in punishing the facilitation of a misdemeanor as a felony, and it only highlights Congress's decision to limit § 843(b) to the facilitation of a "felony."

556 U.S. at 824 n.4.

In *United States. v. Verners*, 53 F.3d 291 (10th Cir. 1995), the Tenth Circuit agreed with the Fifth Circuit that "for the purpose of" is synonymous with objective, intention, and aim. Thus, the defendant must personally have the specific purpose; it is not sufficient for others to possess it. Although the purpose of the drug offense need not be the sole purpose for which the place is used, it must be at least one of the primary or principal uses to which the place is put. The Sixth Circuit, in *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010), disagreed, stating that the "purpose" need only be "significant or important."

The Seventh Circuit has drawn upon a business analogy to interpret the term "for the purpose of." *United States v. Banks*, 987 F.2d 463 (7th Cir. 1993). Evidence that a place is being ued to run such a business might include: investment in the tools of the trade (*e.g.*, laboratory equipment, scales, guns and ammunition to protect the inventory and profits); packaging materials (*e.g.*, baggies, vials, gelcaps); financial records; profits (either in the form of cash or in expensive merchandise); and the presence of multiple employees or customers. *Verners*, at 53 F.3d at 297.

21 U.S.C. § 858 ENDANGERING LIFE WHILE MANUFACTURING CONTROLLED SUBSTANCE

Title 21, United States Code, Section 858 makes it a crime to create a substantial risk of harm to human life while manufacturing a controlled substance. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant manufactured, or attempted to manufacture, a controlled substance in violation of federal law, or transported or caused to be transported materials, including chemicals, to manufacture a controlled substance in violation of federal law;
- Second, that while doing so, the defendant created a substantial risk of harm to a human life other than his own; and
- Third, that the risk of harm originated from the process of manufacturing or attempting to manufacture, or transporting materials to manufacture a

controlled substance in violation of federal law.[207]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[208]

Substantial means real and significantly large, and harm refers to physical damage.[209]

_____NOTE_____

In *United States v. Evans*, 318 F.3d 1011 (10th Cir. 2003), the Tenth Circuit was impressed that the district court instructed the jury that the government could not satisfy the risk element by proving that weapons were present where the defendant was manufacturing methamphetamine, and that the risk had to be to someone other than the defendant.

The court also noted that "the district court did not read a particular scienter requirement into § 858, and the parties do not argue that such a requirement exists." *Id*. at 1017 n.3.

21 U.S.C. § 860 DISTRIBUTION NEAR SCHOOLS

Title 21, United States Code, Section 860 makes it a crime to distribute, possess with intent to distribute, or manufacture a controlled substance within 1,000 feet of a school, playground, or public housing facility, or within 100 feet of a youth center, public swimming pool, or video arcade facility. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 860(a)(§ 841(a)(1))

- First, that the defendant distributed, possessed with intent to distribute, or manufactured, the amount of controlled substance alleged in the indictment;
- Second, that the defendant knew that the substance was a controlled substance under the law;
- Third, that the defendant did so in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, secondary school or a public or private college, junior college, or university, or a playground or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility; and
- Fourth, that the defendant did so knowingly or intentionally.[210]

§ 860(a)(§ 856(a)(1))

- First, that the defendant opened, leased, rented, used, or maintained any

[207] *See United States v. Evans*, 318 F.3d 1011, 1016 n.2 (10th Cir. 2003).

[208] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[209] *Evans*, 318 F.3d at 1016.

[210] *See United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*); *United States v. Collins*, 412 F.3d 515, 519 (4th Cir. 2005).

place, either permanently or temporarily;

- Second, that the place was within one thousand feet of the real property comprising a public or private elementary, vocational, secondary school or a public or private college, junior college, or university, or a playground or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility; and
- Third, that the defendant did so knowingly and for the purpose of manufacturing, distributing, or using any controlled substance.

§ 860(a)(§ 856(a)(2))

- First, that the defendant managed or controlled, either permanently or temporarily, as an owner, lessee, agent, employee, occupant, or mortgagee, any place;
- Second, that the defendant rented, leased, profited from, or made available for use the place;
- Third, that the place was within one thousand feet of the real property comprising a public or private elementary, vocational, secondary school or a public or private college, junior college, or university, or a playground or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility; and
- Fourth, that the defendant did so knowingly and intentionally and for the purpose of manufacturing, storing, distributing, or using a controlled substance.

§ 860(c)(1)

- First, that the defendant was at least twenty-one years of age at the time of the offense;
- Second, that the defendant employed, hired, used, persuaded, induced, enticed, or coerced, a person under eighteen years of age to [violate § 860– the court must specify the elements]; and
- Third, that the defendant did so knowingly and intentionally.

§ 860(c)(2)

- First, that the defendant was at least twenty-one years of age at the time of the offense;
- Second, that the defendant employed, hired, used, persuaded, induced, enticed, or coerced, a person under eighteen years of age to assist in avoiding detection or apprehension by any law enforcement official for [any offense under § 860– the court must specify the elements]; and
- Third, that the defendant did so knowingly and intentionally.

"Playground" means any outdoor facility (including any parking lot appurtenant thereto) intended for recreation, open to the public, and with any portion thereof containing three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards. [§ 860(e)(1)]

"Youth center" means any recreational facility and/or gymnasium (including any parking lot appurtenant thereto) intended primarily for use by persons under 18 years of age, which regularly provides athletic, civic, or cultural activities. [§ 860(e)(2)]

"Video arcade facility" means any facility, legally accessible to persons under 18 years of age, intended primarily for the use of pinball and video machines for amusement

containing a minimum of ten pinball and/or video machines. [§ 860(e)(3)]

"Swimming pool" includes any parking lot appurtenant thereto. [§ 860(e)(4)]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[211]

It is not necessary that the government prove that the defendant knew or had knowledge that he was within one thousand feet of the real property comprising a public or private elementary, vocational, secondary school or a public or private college, junior college, or university, or a playground or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility.[212]

It is not necessary that the government prove that the defendant knew or had knowledge that the juvenile with whom the defendant was dealing was under eighteen years of age.[213]

NOTE

See United States v. Bledsoe, 898 F.2d 430 (4th Cir. 1990). The indictment alleged a distribution "within one thousand feet of ... a public secondary school," but the sale took place 800 feet from a private secondary school. The district court allowed the government to amend the indictment by deleting the word "public." *Bledsoe* has since been limited to its facts by *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994).

"The proper measurement of distance for purposes of § 860 is a straight line; that is, an 'as the crow flies' measurement." *United States v. Hardy*, 322 F. App'x 298, 299 (4th Cir. 2009) (citation omitted).

21 U.S.C. § 861(a) USING MINORS IN DRUG OPERATIONS

Title 21, United States Code, Section 861(a) makes it a crime to use minors to violate federal drug laws. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was at least eighteen years of age at the time of the offense;
- Second, that the defendant employed, hired, used, persuaded, induced, enticed, or coerced, a person under eighteen years of age
  1. to [violate any provision of this subchapter–specify elements] OR
  2. to assist in avoiding detection or apprehension by any law enforcement official for [any offense of this subchapter–specify elements] OR
  3. to receive a controlled substance from a person under eighteen years of age, other than an immediate family member, [in

[211] *Cotton*, 261 F.3d at 402 n.2 (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[212] *See United States v. Jackson*, 443 F.3d 293 (3d Cir. 2006).

[213] *United States v. Cook*, 76 F.3d 596, 602 (4th Cir. 1996); *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992)(opinion by then Judge Ruth Bader Ginsburg).

violation of this subchapter–specify elements]; and

- Third, that the defendant did so knowingly and intentionally.

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[214]

It is not necessary that the government prove that the defendant knew or had knowledge that the juvenile with whom the defendant was dealing was under eighteen years of age.[215]

_____NOTE_____

Section 861 is a continuing offense for venue purposes. *United States v. Chin*, 981 F.2d 1275, 1278 (D.C. Cir. 1992).

21 U.S.C. § 863 DRUG PARAPHERNALIA

Title 21, United States Code, Section 863 makes it a crime to sell, transport, or import, drug paraphernalia. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 863(a)(1)

- First, that the defendant sold or offered for sale;
- Second, drug paraphernalia; and
- Third, that the defendant did so knowingly.[216]

§ 863(a)(2)

- First, that the defendant used the mails or any other facility of interstate commerce to transport;
- Second, drug paraphernalia; and
- Third, that the defendant did so knowingly.

§ 863(a)(3)

- First, that the defendant imported or exported;
- Second, drug paraphernalia; and
- Third, that the defendant did so knowingly.

"Drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under [federal law]. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, methamphetamine, or amphetamines into the human body, such as (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; (2) water pipes; (3) carburetion tubes

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[214] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[215] *United States v. Cook*, 76 F.3d 596, 602 (4th Cir. 1996). *See also United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992).

[216] *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 523 (1994).

and devices; (4) smoking and carburetion masks; (5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand; (6) miniature spoons with level capacities of one-tenth cubic centimeter or less; (7) chamber pipes; (8) carburetor pipes; (9) electric pipes; (10) air-driven pipes; (11) chillums; (12) bongs; (13) ice pipes or chillers; (14) wired cigarette papers; or (15) cocaine freebase kits. [§ 863(d)]

There are two categories of drug paraphernalia: "items primarily intended for use" and "items designed for use."

An item is "designed for use" if it is principally used with illegal drugs by virtue of its objective features or characteristics, in other words, features designed by the manufacturer.

Thus, an item meets the "designed for use" standard regardless of the knowledge or intent of the person who sells or transports it.[217]

The term "primarily intended for use" refers generally to an item's likely use.[218]

In determining whether an item constitutes drug paraphernalia, you may consider, in addition to other evidence, the following:

1. instructions, oral or written, provided with the item concerning its use;
2. descriptive materials accompanying the item which explain or depict its use;
3. national and local advertising concerning its use;
4. the manner in which the item is displayed for sale;
5. whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
6. direct or circumstantial evidence of the ratio of sales of the item to the total sales of the business enterprise;
7. the existence and scope of legitimate uses of the item in the community; and
8. expert testimony concerning its use. [§ 863(e)]

The government must prove that the defendant knew that the item involved is likely to be used with an illegal drug, but the government does not have to prove that the defendant knew that a particular customer would actually use an item of drug paraphernalia with illegal drugs.[219]

The government does not have to prove that the defendant had specific knowledge that the item involved was "drug paraphernalia" within the meaning of the statute.[220]

NOTE

In *United States v. Marshall*, 332 F.3d 254 (4th Cir. 2003), the district court refused to include in its instruction the list of examples in the statutory definition. The Fourth Circuit held the district court did not abuse its discretion in refusing to do so, as listing the examples "might well have been more confusing than helpful." *Id.* at 262.

See discussion of "intended for" and "designed for" concerning destructive

[217] *Id.* at 518 ("The 'designed for use' element ... does not establish a scienter requirement.").

[218] *Id.* at 521. *See also United States v. Marshall*, 332 F.3d 254, 260 (4th Cir. 2003). "Primarily intended" states an objective standard.

[219] *Posters 'N' Things*, 511 U.S. at 524.

[220] *Id.* at 524.

devices in 26 U.S.C. § 5861.

21 U.S.C. § 952 IMPORTING CONTROLLED SUBSTANCES

Title 21, United States Code, Section 952 makes it a crime to import a controlled substance. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant imported into the United States from any place outside of the United States [or into the customs territory of the United States from any place outside of the customs territory but within the United States];
- Second, the amount of controlled substance alleged in the indictment; and
- Third, that the defendant did so knowingly or intentionally.[221]

AGGRAVATED PENALTY

1. Did death or serious bodily injury result from the use of the controlled substance?
2. [Specific threshold quantities.][222]

"Import" means any bringing in or introduction of any article into any area [of the United States]. [§ 951(a)(1)]

"Customs territory of the United States" includes only the States, the District of Columbia and Puerto Rico. [The Harmonized Tariff Schedule is not published in the Code. It is published periodically by the United States International Trade Commission.] [§ 951(a)(2)]

The government must prove that the defendant in some manner participated in or helped effectuate the act of importing.[223]

The government must prove that the defendant knew the item being imported was a controlled substance.[224]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[225]

And the government must prove that the defendant knew that the destination of the controlled substance would be the United States.[226]

Evidence of the foreign origin of the controlled substance is a factor to be considered, but is not sufficient in itself to prove importation.[227]

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[221] *See United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984); *United States v. Seni*, 662 F.2d 277, 280 (4th Cir. 1981).

[222] *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*).

[223] *United States v. Manbeck*, 744 F.2d 360, 385 (4th Cir. 1984).

[224] Although knowledge that the substance imported is a particular narcotic need not be proven, § 952(a) is a specific intent statute and requires knowledge that such substance is a controlled substance. *United States v. Restrepo-Granda*, 575 F.2d 524, 527 (5th Cir. 1978).

[225] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[226] *United States v. Londono-Villa*, 930 F.2d 994, 998 (2d Cir. 1991).

[227] *Manbeck*, 744 F.2d 385.

Mere possession of a controlled substance that is of foreign origin is not sufficient to establish importation.[228]

_____NOTE_____

The *mens rea* is stated in the penalty section, § 960.

A critical element of the offense is that the defendant import the substance or cause it to be imported. *United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984).

"[I]f a boat is encountered in territorial waters, and the only evidence advanced to support a claim of importation is the size of the boat and the quantity of marijuana, that is not enough." *United States v. Seni*, 662 F.2d 277, 287 (4th Cir. 1981).

In *United States v. Manbeck*, 744 F.2d 360, 385 (4th Cir. 1984), the court found that the size of the ship and the quantity of the substance alone are not enough to prove importation. However, there was a navigational chart which indicated a path of travel extending deep into the customs waters of the United States.

Conspiracy to import does not require proof of the existence of a subsequent plan for distribution. *Id.* at 387.

Venue is proper in any district "along the way" because importing is a continuous crime that is not complete until the controlled substance reaches its final destination. *United States v. Lowry*, 675 F.2d 593, 596 (4th Cir. 1982). *See also United States v. MacDougall*, 790 F.2d 1135, 1151 (4th Cir. 1986).

A violation of § 952(a) and § 957(a) merge if based on the same episode. *United States v. Zabaneh*, 837 F.2d 1249, 1258-59 (5th Cir. 1988).

21 U.S.C. § 953 EXPORTING CONTROLLED SUBSTANCES

Title 21, United States Code, Section 953 makes it a crime to export a controlled substance. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant exported from the United States;
- Second, the amount of controlled substance alleged in the indictment; and
- Third, that the defendant did so knowingly or intentionally.

AGGRAVATED PENALTY

1. Did death or serious bodily injury result from the use of the controlled substance?

_____NOTE_____

The *mens rea* is stated in the penalty section, § 960. *See* Notes and cases under § 952.

21 U.S.C. § 955 POSSESSION OF CONTROLLED SUBSTANCES ON BOARD AIRCRAFT OR VESSELS ARRIVING IN OR DEPARTING FROM THE UNITED STATES

Title 21, United States Code, Section 955 makes it a crime to possess a controlled substance on board any vessel or aircraft arriving in or departing from the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

[228] *United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984).

- First, that the defendant was on board a vessel or aircraft, or any vehicle of a carrier, arriving in or departing from the United States or the customs territory of the United States;
- Second, that the defendant brought or possessed on board a controlled substance; and
- Third, that the defendant did so knowingly or intentionally; that is to say, the defendant knew the item was a controlled substance.

AGGRAVATED PENALTY

1. Did death or serious bodily injury result from the use of the controlled substance?
2. [Specific threshold quantities.][229]

"Customs territory of the United States" includes only the States, the District of Columbia and Puerto Rico. [The Harmonized Tariff Schedule is not published in the Code. It is published periodically by the United States International Trade Commission.] [§ 951(a)(2)]

The government must prove that the defendant was on board a vessel or aircraft arriving in, or departing from, the United States or the customs territory of the Untied States.[230]

The government does not have to prove that the defendant knew that the aircraft or vessel would stop in the United States.[231]

_____NOTE_____

The *mens rea* is stated in the penalty section, § 960.

Section 955 contains a statutory exception, "unless such substance is a part of the cargo entered in the manifest or part of the official supplies."

The statute does not prohibit failure to make a declaration. *United States v. Bernal-Rojas*, 933 F.2d 97, 100 (1st Cir. 1991).

Section 955 applies not only to common carriers but also to private craft. *United States v. Zabaneh*, 837 F.2d 1249, 1253 (5th Cir. 1988).

21 U.S.C. § 957 REGISTERED IMPORTERS AND EXPORTERS OF CONTROLLED SUBSTANCES

Title 21, United States Code, Section 957 makes it a crime to import or export a controlled substance unless one is registered. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant imported into the United States from any place outside of the United States [or into the customs territory of the United States from any place outside of the customs territory but within the United States], or exported from the United States;
- Second, the amount of controlled substance or list I chemical alleged in the indictment;

[229] *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*).

[230] *United States v. Rendon*, 354 F.3d 1320, 1325 n.2 (11th Cir. 2003).

[231] In *United States v. Bernal-Rojas*, 933 F.2d 97, 101 (1st Cir. 1991), the defendant traveled from Venezuela to Spain, with a brief scheduled stop in Puerto Rico, where she was arrested in possession of cocaine. Her conviction was affirmed.

- Third, that the defendant was not registered with the Attorney General; and
- Fourth, that the defendant did so knowingly or intentionally.[232]

"Import" means any bringing in or introduction of any article into any area [of the United States]. [§ 951(a)(1)]

"Customs territory of the United States" includes only the States, the District of Columbia and Puerto Rico. [The Harmonized Tariff Schedule is not published in the Code. It is published periodically by the United States International Trade Commission.] [§ 951(a)(2)]

You are instructed that, as a matter of law, [the controlled substance charged in the indictment] is a controlled substance as that term is used in these instructions and in the indictment and the statute I just read to you. You must, of course, determine whether or not the substance in question was, in fact [the controlled substance charged in the indictment].[233]

Evidence of the foreign origin of the controlled substance is a factor to be considered, but is not sufficient in itself to prove importation.[234]

Mere possession of a controlled substance that is of foreign origin is not sufficient to establish importation.[235]

The government must prove that the defendant knew the item being imported was a controlled substance.[236]

[FOR IMPORTATION]

And the government must prove that the defendant knew that the destination of the controlled substance would be the United States.[237]

AGGRAVATED PENALTY

1. Did death or serious bodily injury result from the use of the controlled substance?
2. [Specific threshold quantities.][238]

_____NOTE_____

The *mens rea* is stated in the penalty section, § 960.

A critical element of the offense is that the defendant import the substance or cause it to be imported. *United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984).

The government must prove that the defendant in some manner participated in or helped effectuate the act of importing. *United States v. Manbeck*, 744 F.2d 360, 385 (4th Cir. 1984).

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[232] *See Samad*, 754 F.2d at 1096. *See also United States v. Seni*, 662 F.2d 277, 280 (4th Cir. 1981).

[233] *United States v. Cotton*, 261 F.3d 397, 402 n.2 (4th Cir. 2001) (district court did not charge jury on what it must find to convict; instructed jury that substance qualified as controlled substance defined in § 802(6)), *overruled on other grounds*, 535 U.S. 625 (2002).

[234] *Manbeck*, 744 F.2d 360 (4th Cir. 1984).

[235] *United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984).

[236] In *United States v. Restrepo-Granda*, 575 F.2d 524, 527 (5th Cir. 1978), the Eleventh Circuit held that § 952(a) is a specific intent statute and requires knowledge that the substance is a controlled substance, although knowledge that the substance imported is a particular narcotic need not be proven.

[237] *United States v. Londono-Villa*, 930 F.2d 994, 998 (2d Cir. 1991).

[238] *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*).

A violation of § 957(a) and § 952(a) merge if based on the same episode. *United States v. Zabaneh*, 837 F.2d 1249, 1258-59 (5th Cir. 1988).

21 U.S.C. § 959 **POSSESSION, MANUFACTURE, OR DISTRIBUTION OF CONTROLLED SUBSTANCE, INTENDING IT BE IMPORTED**

Title 21, United States Code, Section 959 makes it a crime to manufacture or distribute controlled substances knowing or intending that they be imported into the United States, or possess a controlled substance on an aircraft, with intent to distribute it. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 959(a)

- First, that the defendant manufactured or distributed a [schedule I or II] controlled substance, flunitrazepam, or listed chemical;
- Second, that the defendant intended or knew that the substance or listed chemical would be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States; and
- Third, that the defendant did so knowingly or intentionally. That is to say, the defendant knew the substance was a controlled substance or listed chemical.

§ 959(b)

- First, that the defendant was either a United States citizen on board an aircraft, or the defendant was on board an aircraft owned by a United States citizen or registered in the United States;
- Second, that the defendant manufactured or distributed a controlled substance or listed chemical, or possessed a controlled substance or listed chemical with intent to distribute it; and
- Third, that the defendant did so knowingly or intentionally. That is to say, the defendant knew the substance was a controlled substance or listed chemical.

AGGRAVATED PENALTY

1. Did death or serious bodily injury result from the use of the controlled substance or listed chemical?
2. [Specific threshold quantities.][239]

"Customs territory of the United States" includes only the States, the District of Columbia and Puerto Rico. [The Harmonized Tariff Schedule is not published in the Code. It is published periodically by the United States International Trade Commission.] [§ 951(a)(2)]

_____NOTE_____

The *mens rea* is stated in the penalty section, § 960.

Section 959(c) says this section is intended to reach acts committed outside the territorial jurisdiction of the United States. Venue is point of entry or the District of Columbia. However, this venue provision is not exclusive; 18 U.S.C. §3237 still applies. *United States v. Zabaneh*, 837 F.2d 1249, 1256 (5th Cir. 1988).

[239] *Id.*

21 U.S.C. § 963 CONSPIRACY [240]

Title 21, United States Code, Section 963 makes it a crime to conspire to import controlled substances (§ 952), export controlled substances (§ 953) or possess controlled substances on board certain vessels (§ 955). A conspiracy is an agreement between two or more persons to join together to accomplish an unlawful purpose. It is a kind of partnership in crime in which each member becomes the agent of every other member. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that there was an agreement between two or more persons to [specify the object of the conspiracy] [specify the type and quantity of controlled substance];[241]
- Second, that the defendant knew of this agreement, or conspiracy; and
- Third, that the defendant knowingly and voluntarily participated in or became a part of this agreement or conspiracy.[242]

NOTE

Sections 963 and 846 proscribe separate statutory offenses. *Albernaz v. United States*, 450 U.S. 333, 339 (1981).

21 U.S.C. § 963 ATTEMPT[243]

Title 21, United States Code, Section 963 makes it a crime to attempt to import controlled substances (§ 952), export controlled substances (§ 953) or possess controlled substances on board certain vessels (§ 955). For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant intended to commit the crime [this will necessitate instructing the jury on the elements of the crime charged];[244] and
- Second, that the defendant committed an act which constituted a substantial step toward the commission of the crime.[245]

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[240] See instructions for 21 U.S.C. §846.

[241] If necessary, a special verdict form should be submitted, so the jury can determine the type and quantity of controlled substance involved. *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999), *vacated in part on other grounds,* 218 F.3d 310 (4th Cir. 2000) (*en banc*); *United States v. Barnes*, 158 F.3d 662, 672 (4th Cir. 1998) ("it is the government's responsibility to seek special verdicts").

[242] *United States v. Strickland*, 245 F.3d 368, 384-85 (4th Cir. 2001; *United States v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996) (*en banc*). However, in *United States v. Stewart*, 256 F.3d 231 (4th Cir. 2001), the court stated the elements as follows: "(1) an agreement with another person to violate the law, (2) knowledge of the essential objectives of the conspiracy, (3) knowing and voluntary involvement, and (4) interdependence among the alleged conspirators." 256 F.3d at 250.

In *United States v. Mills*, 995 F.2d 480, 483 (4th Cir. 1993), the court identified the essential elements as (1) an agreement, (2) which the defendant willfully joined, (3) "with intent to accomplish the criminal purpose of the conspiracy." 995 F.2d at 483.

[243] See instructions for §846, Attempt.

[244] If necessary, a special verdict form should be submitted, so the jury can determine the type and quantity of controlled substance involved. *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999), *vacated in part on other grounds,* 218 F.3d 310 (4th Cir. 2000) (*en banc*); *United States v. Barnes*, 158 F.3d 662, 672 (4th Cir. 1998) ("it is the government's responsibility to seek special verdicts").

[245] *See United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003).

A substantial step is more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.[246]

22 U.S.C. § 2778 CONTROL OF ARMS EXPORTS AND IMPORTS [LAST UPDATED: 4/7/14]

The Arms Export Control Act (AECA), 22 U.S.C. § 2778, regulates the export and import of certain "defense articles," such as ammunition, and subjects to criminal liability anyone who "willfully" violates its requirements. The Department of State has promulgated the International Traffic in Arms Regulations (ITAR). These regulations include the United States Munitions List, which consists of categories of certain items that cannot be exported without a license issued by the Department of State's Office of Defense Trade Controls.[247] For you to find the defendant guilty under the applicable section of this statute, the government must prove each of the following beyond a reasonable doubt:

§ 2778(b)(1)(A)(i) and (ii)

- First, that the defendant engaged in the business of[248] manufacturing, exporting, or importing, or of brokering activities with respect to the manufacture, export, import, or transfer of any defense articles designated on the United States Munitions List;
- Second, that the defendant did not register with the United States Department of State, Office of Munitions Control; and
- Third, that the defendant did so willfully.

§ 2778(b)(2)

- First, that the defendant exported [or imported] or attempted to export [or attempted to import];[249]
- Second, goods that were on the United States Munitions List;
- Third, that the defendant did so without first having obtained a license for the export [or import]; and
- Fourth, that the defendant did so willfully.[250]

§ 2778(c)

- First, that the defendant made an untrue statement of a material fact, or omitted to state a material fact required to be stated or necessary to make the statements not misleading;
- Second, in a registration or license application or required report; and
- Third, that the defendant did so willfully.

The government must prove that the defendant voluntarily and intentionally

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[246] *United States v. Sutton*, 961 F.2d 476, 478 (4th Cir. 1992). Preparation may become attempt if it "comes so near to the accomplishment of the crime that it becomes *probable* that the crime will be committed absent an outside intervening circumstance ...." *Pratt*, 351 F.3d at 136.

[247] *United States v. Sun*, 278 F.3d 302, 306 (4th Cir. 2002).

[248] In *United States v. Durrani*, 659 F. Supp. 1177, 1181 (D. Conn. 1987), *aff'd*, 835 F.2d 410 (2d Cir. 1987), the defendant moved to dismiss the § 2778(b) charge, arguing that "engaging in the business" was void for vagueness. The district court found the case law for 18 U.S.C. § 922(a)(1) helpful (engaging in the business means "more than one isolated sale or transaction") and denied the motion.

[249] Attempts to export are covered in 22 C.F.R. § 127.1(a)(1).

[250] *United States v. Bishop*, 740 F.3d 927 (4th Cir. 2014).

violated the law.[251]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process. A false statement's capacity to influence must be measured at the point in time that the statement was made.[252]

"Engaged in the business" means devoting time, attention, and labor to ... a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale ..., but such term shall not include a person who makes occasional sales, exchanges, or purchases ... for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection.... [18 U.S.C. § 921(a)(21)(C)]

_____NOTE_____

"STATUTORY" DEFENSES

In *United States v. Sun*, 278 F.3d 302 (4th Cir. 2002), the defendants argued that the exported material fell within the so-called "scrap exemption" contained in a Department of Commerce regulation, 15 C.F.R. § 770.2(g)(3). The district court allowed the defendants to pursue their defense theory and instructed the jury as follows:

> There has been some reference to the Department of Commerce in this case and demilitarization in this case. Title 15, Part 770.2, § (g)(3) of the Federal Code of Regulations states, in part, that "commodities that may have been on the United States munitions list are scrap and, therefore, under the jurisdiction of the Department of Commerce, if they have been rendered useless beyond the possibility of restoration to their original identity only by means of mangling, crushing, or cutting."
>
> This section means that if any item that may have been on the munitions list has been rendered useless beyond the possibility of restoration to its original identity by means of mangling, cutting, or crushing, it may be exported without a license or written authorization from the Department of State. If, on the other hand, that item that may have been on the munitions list has not been rendered useless beyond the possibility of restoration to its original identity by means of mangling, crushing, or cutting, it may not be exported without a license or a written authorization from the State Department.
>
> The defendants contend that items which they purchased that may have been on the munitions list were rendered useless beyond the possibility of restoration to their original identity by means of mangling, crushing, or cutting and therefore, could be exported without a license or a written authorization from the State Department....
>
> If you find and accept as true the evidence in support of this contention and theory and believe the defendants' defense theory, and this defense leaves you with a reasonable doubt as to whether the government has proved beyond a reasonable doubt each and every element of the crimes charged ... then you must find the defendants not guilty.

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[251] *Id*.

[252] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

278 F.3d at 310-11. The Fourth Circuit assumed for the sake of argument that the regulation applied and held that the exception is not an element of the offense which the government must prove does not apply, but rather is an affirmative defense, and the jury was instructed correctly. *Id*. at 312.

In *United States v. Durrani*, 835 F.2d 410 (2d Cir. 1987), the defendant claimed that his activities derived from the officially-sanctioned covert operations in the Oliver North-Iran/Contra scandal. The Second Circuit discussed two exemptions from the International Traffic in Arms Regulations (ITAR). The "foreign assistance" exception, which requires that parts be sold to a foreign government representative in the United States and picked up by a foreign vessel, did not apply. 22 C.F.R. § 126.6. The "official use" exception is not interpreted in the ITAR. Section 126.4 states that the exemption applies when all aspects of a transaction are effected by a government agency or when the export is covered by a government bill of lading. Therefore, the Second Circuit had serious doubt whether either exemption could ever apply to a private individual who had not obtained a government bill of lading. Nevertheless, the district court had instructed the jury on the "official use" exception. The Second Circuit held that the exception was an affirmative defense, and not an element of the crime.

"[W]illfulness under the AECA requires only general knowledge of illegality." *United States v. Bishop*, 740 F.3d 927, 935 (4th Cir. 2014) (quoting *Bryan v. United States*, 524 U.S. 184, 196 (1998)). That is, the government must prove that a defendant "intended to violate the law," *United States v. Hsu*, 364 F.3d 192, 197 (4th Cir. 2004). "Willfulness" under the AECA does not include the more stringent requirements of "willfulness" as required under *Cheek v. United States*, 498 U.S. 192 (1991), and *Ratzlaf v. United States*, 510 U.S. 135 (1994). Both *Cheek* and *Ratzlaf* addressed "highly technical statutes" involving taxes and currency transactions that "presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194.

Section 2778(b)(1)(A) requires that persons in the business of exporting arms obtain a license. On the other hand, § 2778(b)(2), requires a license for each *export* of listed firearms, regardless of whether the exporter is a licensed dealer. *See United States v. Mitchell*, No. 92-5072, 1993 WL 136996 (4th Cir. Apr. 30, 1983).

Engaging in the business of exporting firearms is not an element of § 2778(b)(2). *Id.*

In *United States v. Durrani*, 659 F. Supp. 1177, 1182 (D. Conn. 1987), *aff'd*, 835 F.2d 410 (2d Cir. 1987), the district court ruled that the alleged transportation of defense articles in foreign commerce appeared to be a continuing offense.

26 U.S.C. § 5861 NATIONAL FIREARMS ACT

Title 26, United States Code, Section 5861 makes it a crime to commit certain acts concerning firearms covered by the National Firearms Act.

The term "firearm" means

1. a shotgun having a barrel or barrels of less than 18 inches in length [§ 5845 (a)(1)];
2. a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length [§ 5845 (a)(2)];
3. a rifle having a barrel or barrels of less than 16 inches in length [§ 5845 (a)(3)];
4. a weapon made from a rifle if such weapon as modified has an

overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length [§ 5845 (a)(4)];

5. any other weapon [see § 5845(e)];
6. a machine gun [see § 5845(b)];
7. a silencer [18 U.S.C. § 921]; and
8. a destructive device [see § 5845(f)].

"Unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition. [§ 5845(h)]

§ 5861(a)

§ 5861(a) makes it a crime to engage in business involving firearms without having paid the required tax or having registered. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant engaged in business[253] as a manufacturer of, importer of, or dealer in, firearms;
- Second, that the defendant did not pay the special occupational tax required or did not register as required; and
- Third, that the defendant did so knowingly.

"Manufacturer" means any person who is engaged in the business of manufacturing firearms. [§ 5845(m)]

"Importer" means any person who is engaged in a business of importing or bringing firearms into the United States. [§ 5845(l)]

"Dealer" means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans. [§ 5845(k)]

"Engaged in the business" means

(A) As applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principle objective of livelihood and profit through the sale or distribution of the firearms manufactured; ....

(C) As applied to a dealer in firearms, a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principle objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

(D) As applied to a dealer in firearms, a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principle objective of livelihood and profit, but such term shall not include a person who makes occasional repairs of firearms, or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms;

(E) As applied to an importer of firearms, a person who devotes time, attention, and labor to importing firearms as a regular course of

[253] See definition of "engaged in business" in 18 U.S.C. § 921(a)(21)(C).

trade or business with the principle objective of livelihood and profit through the sale or distribution of the firearms imported. [18 U.S.C. § 921(a)(21)]

"With the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominately one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection [but see proviso]. [18 U.S.C. § 921(a)(22)]

§ 5861(b)

§ 5861(b) makes it a crime to receive or possess a firearm transferred to the defendant in violation of the National Firearms Act. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received or possessed a firearm;
- Second, that the firearm was transferred to the defendant in violation of the National Firearms Act [here, the provision of the Act violated must be identified];[254] and
- Third, the defendant acted knowingly.

The government must prove that the defendant knew of the features, or characteristics, of the firearm that brought it [within one of the definitions set forth above].[255]

§ 5861(c)

§ 5861(c) makes it a crime to receive a possess a firearm made in violation of the National Firearms Act. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received or possessed a firearm;
- Second, that the firearm was made in violation of the National Firearms Act [here, the provision of the Act violated must be identified]; and
- Third, the defendant acted knowingly.

The government must prove that the defendant knew of the features, or characteristics, of the firearm that brought it [within one of the definitions set forth above].[256]

§ 5861(d)

Title 26, United States Code, Section 5861(d) makes it a crime to receive or possess a firearm which is not registered. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received or possessed a firearm;
- Second, that the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record; and
- Third, that the defendant acted knowingly.

The government must prove that the defendant knew of the features, or

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[254] In *United States v. Daniels*, 973 F.2d 272, 275 (4th Cir. 1992), the Fourth Circuit held that because the transfer of a firearm must violate other provisions of Title 26, Chapter 53 in order to violate § 5861(e) [and therefore, by analogy, § 5861(b)], this element is necessary to establish the very illegality of the behavior and is, therefore, an essential element of the offense. (For example, § 5812 states that a firearm shall not be transferred unless the transferor has complied with the requirements listed in the statute.)

[255] *Staples v. United States*, 511 U.S. 600, 619 (1994).

[256] *Id.*

characteristics, of the firearm that brought it [within one of the definitions set forth above].[257]

The government does not have to prove that the defendant knew the firearm was not registered.[258]

§ 5861(e)

§ 5861(e) makes it a crime to transfer a firearm in violation of the National Firearms Act. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transferred a firearm;
- Second, in violation of the National Firearms Act [here, the provision of the Act violated must be identified];[259] and
- Third, that the defendant acted knowingly.

The government must prove that the defendant knew of the features, or characteristics, of the firearm that brought it [within one of the definitions set forth above].[260]

§ 5861(f)

§ 5861(f) makes it a crime to make a firearm in violation of the National Firearms Act. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made a firearm;
- Second, in violation of the National Firearms Act [here, the provision of the Act violated must be identified]; and
- Third, that the defendant acted knowingly.

The government must prove that the defendant knew of the features, or characteristics, of the firearm that brought it [within one of the definitions set forth above].[261]

§ 5861(g)

§ 5861(g) makes it a crime to obliterate, remove, change, or alter the serial number or other identification of a firearm required by the National Firearms Act. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant obliterated, removed, changed, or altered;
- Second, the serial number or other identification of a firearm required by the National Firearms Act; and
- Third, the defendant did so knowingly.

§ 5861(h)

Title 26, United States Code, Section 5861(h) makes it a crime to receive or possess a firearm which has the required serial number obliterated, removed, changed, or

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[257] *Id.*

[258] *United States v. Freed*, 401 U.S. 601 (1971).

[259] In *United States v. Daniels*, 973 F.2d 272, 275 (4th Cir. 1992), the Fourth Circuit held that because the transfer of a firearm must violate other provisions of Title 26, Chapter 53 in order to violate § 5861(e) [and therefore, by analogy, § 5861(b)], this element is necessary to establish the very illegality of the behavior and is, therefore, an essential element of the offense. (For example, § 5812 states that a firearm shall not be transferred unless the transferor has complied with the requirements listed in the statute.)

[260] *Staples v. United States*, 511 U.S. 600, 619 (1994).

[261] *Id.*

altered. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received or possessed a firearm;
- Second, that the serial number or other identification of the firearm required by the National Firearms Act had been obliterated, removed, changed, or altered; and
- Third, that the defendant acted knowingly.

§ 5861(i)

Title 26, United States Code, Section 5861(i) makes it a crime to receive or possess a firearm which is not identified by a serial number. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received or possessed a firearm;
- Second, that the firearm was not identified by a serial number as required by the National Firearms Act;[262] and
- Third, that the defendant acted knowingly.

§ 5861(j)

Title 26, United States Code, Section 5861(j) makes it a crime to transport, deliver, or receive a firearm which is not registered. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported, delivered, or received in interstate commerce;
- Second, a firearm which had not been registered in the National Firearms Registration and Transfer Record; and
- Third, that the defendant acted knowingly.

The government must prove that the defendant knew of the features, or characteristics, of the firearm that brought it [within one of the definitions set forth above].[263]

The government does not have to prove that the defendant knew the firearm was not registered.[264]

§ 5861(k)

Title 26, United States Code, Section 5861(k) makes it a crime to receive or possess a firearm which had been illegally imported into the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant received or possessed a firearm;
- Second, that the firearm had been imported or brought into the United States in violation of [§ 5844]; and
- Third, that the defendant acted knowingly.

The government must prove that the defendant knew of the features, or characteristics, of the firearm that brought it [within one of the definitions set forth above].[265]

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[262] 27 C.F.R. § 179.102 provides for an alternative identification, but the Ninth Circuit construed that as an affirmative defense. *United States v. Cantaloupi*, No. 97-10382, 2001 WL 1507260 (9th Cir. Oct. 10, 2001).

[263] *Staples v. United States*, 511 U.S. 600, 619 (1994).

[264] *See United States v. Freed*, 401 U.S. 601 (1971).

[265] *Staples v. United States*, 511 U.S. 600, 619 (1994).

§ 5861(*l*)

Title 26, United States Code, Section 5861(*l*) makes it a crime to make a false entry in any record required by the National Firearms Act. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made or caused the making of a false entry;
- Second, on any application, return, or record required by the National Firearms Act; and
- Third, that the defendant did so knowing the entry was false.

The government must prove that the defendant knew of the features, or characteristics, of the firearm that brought it [within one of the definitions set forth above].[266]

Possession means to voluntarily and intentionally exercise dominion and control over an item or property.

Possession may be either sole, by the defendant himself, or joint, that is, it may be shared with other persons, as long as the defendant exercised dominion and control over the item or property.

Possession may be either actual or constructive.

Actual possession is defined as physical control over property.

Constructive possession occurs when a person exercises or has the power and the intention to exercise dominion and control over an item or property.[267]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, dominion, or control over the item or property itself, or the premises, vehicle, or container in which the item or property is concealed, such that a person exercises or has the power and intention to exercise dominion and control over that item or property.[268]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[269]

However, the government does not have to prove that the defendant knew that his

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[266] *Staples v. United States*, 511 U.S. 600, 619 (1994).

[267] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005).

[268] *Id.* at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citing *United States v. Blue*, 957 F.2d 106, 108 (4th Cir. 1992), and *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*)).

[269] *See Shorter*, 328 F.3d 167 (contraband found in residence permitted inference of constructive possession; bolstered by evidence that contraband in plain view or material associated with contraband in closet where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on premises or association with possessor is insufficient to establish possession).

possession was unlawful.[270]

NOTE

"Section 5861(d) does not establish a specific intent crime requiring the defendant to know that it was unlawful to possess the weapon; but it is a strict liability crime. Therefore, Wright's lack of knowledge is inconsequential." *United States v. Wright*, 991 F.2d 1182, 1188 (4th Cir. 1993) (citation ommited). The defendant must, however, know the features of the firearm that bring it within the scope of the National Firearms Act. *Staples v. United States*, 511 U.S. 600, 619 (1994).

The Eighth Circuit has nevertheless indicated that a lesser *mens rea* showing is sufficient if the firearm is of a "quasi-suspect" character, such as a sawed-off shotgun. In *United States v. Barr*, 32 F.3d 1320 (8th Cir. 1994), the district court instructed that an element was "knowingly possessed a firearm, as the term firearm is defined in these instructions," which included the statutory dimensions. The Eighth Circuit observed that the Supreme Court's holding in *Staples* "was a narrow one. Specifically, the Court stated, '[O]ur reasoning depends upon a common-sense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items.'" 32 F.3d at 1323-24. The Eighth Circuit concluded that

> [w]here, as here, the characteristics of the weapon itself render it 'quasi-suspect,' *Staples* does not require proof that the defendant knew of the specific characteristics which made the weapon subject to the Act. The government need only prove that the defendant possessed the 'quasi-suspect' weapon and observed its characteristics. A defendant who observes such a weapon cannot possess it with innocence.

Id. at 1324. The government would have to prove that the defendant actually observed the firearm and the characteristics were clearly noticeable. *Id.*

In *United States v. Otto*, 64 F.3d 367 (8th Cir. 1995), the defendant requested an instruction that the government had to prove that he knew the weapon he possessed was a firearm of a type that required it to be registered to him. The district court, instead, instructed that the government had to prove that the defendant knew that the firearm had been modified to reduce its barrel length or its overall length. The Eighth Circuit held the "instruction fairly and adequately set forth the *mens rea* requirement." 64 F.3d at 370. Based on this resolution, the court did not consider whether a sawed-off rifle is of such a "quasi-suspect" character that a lesser *mens rea* showing would be sufficient. *Id.* at n.3.

In *United States v. Summers*, 268 F.3d 683 (9th Cir. 2001), the defendant requested an instruction that the government must prove the defendant knew of the specific features that subjected the firearm to regulation, namely that it had an overall length of less than 26 inches or a barrel of less than 18 inches. The district court instead instructed that the government must prove that the defendant knowingly possessed a weapon made from a shotgun, modified to have an overall length of less than 26 inches or a barrel of less than 18 inches. The Ninth Circuit said that the government was required to prove beyond a reasonable doubt that the defendant knew the shotgun found in his car had an overall length of less than 26 inches or a barrel length of less than 18 inches, and ruled that the instruction was an accurate statement of the intent required for § 5861(d). However, the district court "could have more artfully formulated the first instruction." 268 F.3d at 688. The court referred to the Ninth Circuit Model Criminal Jury Instruction

[270] *See United States v. Freed*, 401 U.S. 601 (1971).

9.31, which reads, in part, "First, the defendant knowingly possessed [e.g., a shotgun having a barrel or barrels of less than 18 inches in length.]" The court thought the language proposed by the Model Instruction clearer and preferable. *Summers,* at 688 n.2.

In *United States v. Wright*, 991 F.2d 1182 (4th Cir. 1993), appellant argued that the firearm must be operational. The Fourth Circuit affirmed because the record showed the firearm was capable of "being readily restored to a firing condition." See definition for "unserviceable firearm," 26 U.S.C. § 5845(h).

"Destructive device" is defined in § 5845(f). Subparagraph (1) includes any explosive, incendiary, or poison gas bomb, grenade, rocket having a propellent charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter ounce, mine, or other statutorily defined items "which have no business or industrial utility. They are covered regardless of their intended use." *United States v. Morningstar*, 456 F.2d 278, 280 (4th Cir. 1972). If the device is fully assembled, "the only question is whether it is, or is not, designed for use as a weapon ... the defendant's intent to use the fully assembled [device] as a weapon is not a necessary element." *United States v. Ruiz*, 73 F.3d 949, 951 (9th Cir. 1996). In *Ruiz*, the defendant was convicted of transferring stun grenades, in violation of § 5861(e). The defendant argued that stun grenades were not destructive devices because the government had not proved that he intended to use them as weapons. The Ninth Circuit held that "the defendant's intent to use the fully assembled stun grenades as a weapon is not a necessary element." *Id*. at 951. Intent is a necessary element, absent proof of original design or redesign for use as a weapon, when dealing with unassembled commercial explosive materials. If the materials are assembled, the only question is whether the device was designed for use as a weapon. *Id*.

Subparagraph (3) of § 5845(f) deals with two types of materials: any combination of parts *designed* for use in converting any device into a destructive device, or any combination of parts *intended* for use in converting any device into a destructive device. The first group is proscribed because of their design, and therefore the possessor's intent is not relevant. *Morningstar*, 456 F.2d at 280. However, concerning the second group, the government must prove that the defendant *intended* to convert the parts into an illegal firearm. *Id.* at 281. *See also United States v. Uzenski*, 434 F.3d 690, 701 n.4 (4th Cir. 2006). In addition, the "combination of parts" must be designed for use in converting a device into a destructive device and "readily assembled" into a destructive device and designed for use as a weapon.

In *Morningstar*, 456 F.2d at 281-82, the court did not view § 5845(f)(3) as creating an affirmative defense. The government must prove beyond a reasonable doubt that: 1. the commercial materials mentioned in the indictment could have been readily assembled into a bomb; 2. the defendant intended to convert the materials into a bomb; and 3. the defendant dealt with materials in a manner prohibited by law.

If the firearm is a destructive device which consists of a combination of parts, § 5845(f)(3), the government might have to prove that the defendant *intended* to use the parts as a weapon. *Uzenski*, 434 F.3d at 701 n.4.

The government is not required to establish that the destructive device operate as intended. *Id.* at 703 (citing *United States v. Langan*, 263 F.3d 613 (6th Cir. 2001)). In *Langan*, the defendant was convicted of bank robbery and using a destructive device in committing the robbery, in violation of § 924(c). The definition of destructive device in § 921(a)(4) is similar to § 5845(f). The Sixth Circuit does not require that the destructive device operate as intended, or that any particular component be present for a device to qualify as a destructive device. The government must prove that the device is "capable of

exploding or be readily made to explode."*Langan*, 263 F.3d at 625.

In *United States v. Oba*, 448 F.2d 892 (9th Cir. 1971), the Ninth Circuit held that the exceptions to the definition of destructive device in § 5845(f) constitute an affirmative defense which, if asserted, must be negated beyond a reasonable doubt by the government.

In *Ruiz*, 73 F.3d 949, the Ninth Circuit approved using the dictionary definition of "weapon" as "an instrument of offensive or defensive combat." *Id*. at 953.

In *United States v. Daniels*, 973 F.2d 272 (4th Cir. 1992), the Fourth Circuit emphasized that "in charging a violation of § 5861(e) the better practice is to track the statutory language, reference the provisions of Title 26, Chapter 53 allegedly violated, and set forth how the defendant's actions violated these provisions." 973 F.2d at 275 n.2.

26 U.S.C. § 6050I CASH TRANSACTION REPORTS

Title 26, United States Code, Section 6050I makes it a crime not to file or to evade the reporting requirements concerning a business receiving more than $10,000 in cash. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 6050I(a)

- First, that the defendant was engaged in a trade or business;
- Second, that in the course of that trade or business, the defendant received more than $10,000 in cash in one transaction or two or more related transactions;
- Third, that the defendant failed to make the return prescribed by the Secretary of the Treasury; and
- Fourth, that the defendant did so willfully.

§ 6050I(f)

- First, that the defendant knew of a trade or business's duty to report currency transactions in excess of $10,000;
- Second, that the defendant caused or attempted to cause the trade or business to fail to file the required return, OR to file the required report that contained a material omission or misstatement of fact, OR that the defendant structured or assisted in structuring, or attempted to structure or assist in structuring, a cash transaction with one or more trades or businesses;[271] and
- Third, that the defendant did so willfully and to evade the transaction reporting requirement.[272]

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[271] The defendant may either structure or cause a failure to file, both are not required. *United States v. McLamb*, 985 F.2d 1284, 1289 (4th Cir. 1993).

[272] *See United States v. McGuire*, 99 F.3d 671, 673 (5th Cir. 1996), where the elements were set forth as follows:

> First, that the defendant knew of a trade or business's duty to report currency transactions in excess of $10,000;
>
> Second, that with such knowledge, the defendant knowingly and willfully caused or attempted to cause a trade or business to file the required report that contained a material omission or misstatement of fact; and
>
> Third, that the purpose of the material omission or misstatement of fact was to evade the transaction reporting requirement.

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process. A false statement's capacity to influence must be measured at the point in time that the statement was made.[273]

"Engaged in the business" means devoting time, attention, and labor to ... a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale ..., but such term shall not include a person who makes occasional sales, exchanges, or purchases ... for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection .... [18 U.S.C. § 921(a)(21)(C)]

Willfulness is defined as the voluntary intentional violation of a known legal duty.[274]

The government must prove that the defendant was aware of the return obligations of a trade or business and acted to evade them.[275]

NOTE

26 U.S.C. § 7203 fixes the punishment for a willful violation of 26 U.S.C. § 6050I.

The statute's structuring prohibition is not limited to those on whom the duty to file falls, and a person's ability to structure a transaction for the purpose of evading the reporting obligation does not turn on when that obligation arises. *United States v. McLamb*, 985 F.2d 1284, 1288 (4th Cir. 1993).

26 U.S.C. § 7201 TAX EVASION [LAST UPDATED: 7/14/14]

Title 26, United States Code, Section 7201 makes it a crime to endeavor to evade one's taxes. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, the existence of a substantial tax deficiency, that is, that the defendant owed taxes to the Internal Revenue Service;
- Second, that the defendant committed an affirmative act constituting an evasion or attempted evasion of the tax; and
- Third, that the defendant did so willfully.[276]

Willfulness is defined as the voluntary intentional violation of a known legal duty.[277]

The prosecution must prove beyond a reasonable doubt that the defendant willfully attempted to evade or defeat a tax due the government. This involves the specific intent to evade the tax and some willful commission or omission or affirmative action by the defendant in furtherance of that intent. The attempt to evade or defeat the tax must be a willful attempt, that is to say it must be an attempt made voluntarily and intentionally

[273] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[274] *Cheek v. United States*, 498 U.S. 192, 201 (1991).

[275] *United States v. Rogers*, 18 F.3d 265, at 267 n.4 (4th Cir. 1994).

[276] *United States v. Goodyear*, 649 F.2d 226, 227-28 (4th Cir. 1981). In *United States v. Head*, 697 F.2d 1200, 1208 (4th Cir. 1982), the jury was instructed that the amount evaded had to be "substantial;" however; that jury instruction was not an issue on appeal. *See also Sansone v. United States*, 380 U.S. 343, 351 (1965).

[277] *Cheek v. United States*, 498 U.S. 192, 201 (1991).

and with the specific intent to keep from the government a tax imposed by the income tax laws which it was the legal duty of the defendant to pay to the government and which the defendant knew it was his legal duty to pay. In other words, the attempt must be made with the bad purpose of willfully seeking to defraud the government of some substantial amount of income tax lawfully due from the defendant. *** Willfulness under the tax laws requires an intentional rather than an inadvertent act or omission and that willfulness must be characterized by a specific intent to conceal in contrast to a genuine misunderstanding of the law's requirements or a good faith belief that certain income is not taxable.[278]

A willful attempt may be inferred from any conduct having the likely effect of misleading or concealing.[279]

The defendant's conduct would not be willful if you find that he acted in accordance with a good faith misunderstanding of the law. The defendant's views need not be legally correct, just as long as he honestly and in good faith really and truly believed and acted upon them. A good faith misunderstanding of the law, as distinct from disagreement [with] the law, is a defense.[280]

The government must prove the existence of a tax deficiency. To show a tax deficiency, the government must prove first that the taxpayer had unreported income, and second, that the income was taxable. The government need not prove the precise amount of the tax due and owing.[281]

NOTE

Failure to file a tax return, 26 U.S.C. § 7203, can be a lesser-included offense. *United States v. Snyder*, 766 F.2d 167, 171 (4th Cir. 1985) ("Where one of the affirmative acts of evasion relied upon by the government in proving attempted tax evasion under Section 7201 is the failure to file an income tax return, failure to file is a lesser included offense.")

In *United States v. Head*, 641 F.2d 174, 180 (4th Cir. 1981), the defendant submitted an instruction stating that he could not be found guilty of tax evasion if he relied upon accountants to prepare tax returns and did nothing to obstruct the flow of information necessary to prepare those returns. Such an instruction should have been given.

In *United States v. Habig*, 390 U.S. 222, 223 (1968), the defendant was charged with attempting to evade taxes by filing a false return. The Supreme Court held that the offense was committed at the time the return was filed.

A formal assessment is not required to prove tax evasion. *United States v. Silkman*, 156 F.3d 833, 835 (8th Cir. 1998).

In *United States v. Poole*, 640 F.3d 114, 122 (4th Cir. 2011), a § 7206 prosecution, the Fourth Circuit stated that in a criminal tax prosecution, when the

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[278] District court's instruction approved in *United States v. Callahan*, 588 F.2d 1078, 1081, 1083 (5th Cir. 1979).

[279] *Goodyear*, 649 F.2d at 228 ("Accordingly, we hold that the Goodyears' false statements to I.R.S. agents in 1974 may constitute affirmative acts evidencing a willful attempt to evade taxes for 1971.").

[280] Instruction given in *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985).

[281] *See Boulware v. United States,* 552 U.S. 421, 424 (2008); *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997). *See also United States v. Abodeely,* 801 F.2d 1020, 1023 (8th Cir. 1986); *United States v. Citron*, 783 F.2d 307, 314-15 (2d Cir. 1986).

evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts pointing to such liability, the trier of fact may find that the defendant exhibited "willful blindness," satisfying the scienter requirement of knowledge.

26 U.S.C. § 7202 FAILURE TO COLLECT OR PAY TAX

Title 26, United States Code, Section 7202 makes it a crime to fail to collect, account for, and pay any tax that is required. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was required to collect, account for, and pay over taxes imposed by federal law [the court should identify which tax is imposed];
- Second, that the defendant either failed to truthfully account for such tax or failed to pay over such tax;[282] and
- Third, that the defendant did so willfully.

Willfulness is defined as the voluntary intentional violation of a known legal duty.[283]

Willfulness does not require the government to prove that a defendant had the ability to meet his tax obligations.[284]

The government must prove that the defendant did not have a good faith belief that he was complying with the tax laws. A defendant's belief can be in good faith even if it is unreasonable.[285]

The defendant's conduct would not be willful if you find that he acted in accordance with a good faith misunderstanding of the law. The defendant's views need not be legally correct, just as long as he honestly and in good faith really and truly believed and acted upon them. A good faith misunderstanding of the law, as distinct from disagreement [with] the law, is a defense.[286]

The tax laws do not permit an employer to choose to use the monies held in trust for the United States for other purposes, such as to pay business expenses.[287]

NOTE

No additional instruction on good faith is necessary when the jury is instructed on the elements of willfulness. *See Cheek v. United States*, 498 U.S. 192, 201 (1991).

"[W]illfulness does not require the government prove that a defendant had the ability to meet his tax obligations." Therefore, the district court did not abuse its discretion in refusing to admit evidence to show how and why the defendant spent money owed to the IRS. *United States v. Easterday*, 564 F.3d 1004, 1011 (9th Cir. 2009).

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[282] "[W]e hold that the government satisfies the requirements for conviction under § 7202 when it proves beyond a reasonable doubt that the defendant willfully failed *either* to 'truthfully account for' *or* to 'pay over' the required trust fund taxes." *United States v. Evangelista*, 122 F.3d 112, 122 (2d Cir. 1997).

[283] *Cheek v. United States*, 498 U.S. 192, 201 (1991).

[284] *United States v. Easterday*, 564 F.3d 1004, 1011 (9th Cir. 2009).

[285] *Id.*

[286] Instruction given in *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985) (tax evasion prosecution; court found "the trial judge did give a very fair and complete charge as to the defendant's good faith misunderstanding of the law.").

[287] *Easterday*, 564 F.3d 1011.

26 U.S.C. § 7203 FAILURE TO FILE RETURN

Title 26, United States Code, Section 7203 makes it a crime to fail to pay any tax or to fail to file any return that is required. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was required by law to do one of the following: pay a tax, make a return, keep a record, or supply information [the court must instruct on the legal requirement];
- Second, that the defendant failed to do so at the time required by law; and
- Third, that the defendant did so willfully.[288]

Willfulness is defined as the voluntary intentional violation of a known legal duty.[289]

The defendant's conduct would not be willful if you find that he acted in accordance with a good faith misunderstanding of the law. The defendant's views need not be legally correct, just as long as he honestly and in good faith really and truly believed and acted upon them. A good faith misunderstanding of the law, as distinct from disagreement [with] the law, is a defense.[290]

_____NOTE_____

See generally Sansone v. United States, 380 U.S. 343 (1965).

In *United States v. Hawk*, 497 F.2d 365, 366 n. 2 (9th Cir. 1974), the Ninth Circuit approved the following charge:

> There is no necessity that the government prove that the defendant had the intention to defraud it or to evade the payment of any taxes for the defendant's failure to file to be willful under this provision of law. That is, the intention to avoid the law or to pay the taxes constitutes the crime charged as long as it is willful and knowing. On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident, or due to his good faith misunderstanding of the requirements of the law, if there was such misunderstanding.

26 U.S.C. § 7205 FRAUDULENT WITHHOLDING

Title 26, United States Code, Section 7205 makes it a crime to file a false withholding certification. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was required to supply information to his employer under Title 26, United States Code, Section 3402;
- Second, that the defendant supplied false or fraudulent information, or failed to supply information which would require an increase in the tax to be withheld; and
- Third, that the defendant acted willfully.

Willfulness is defined as the voluntary intentional violation of a known legal

[288] *United States v. Ostendorff*, 371 F.2d 729, 730 (4th Cir. 1967).

[289] *Cheek v. United States*, 498 U.S. 192, 201 (1991).

[290] Instruction given in *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985) (tax evasion prosecution; court found "the trial judge did give a very fair and complete charge as to the defendant's good faith misunderstanding of the law.").

duty.[291]

The government must prove that either (1) the information was supplied with an intent to deceive, or (2) the information was false in the sense of deceptive – of such a nature that it could reasonably affect withholding to the detriment of the government. "False" means more than merely "untrue" or "incorrect."[292]

The defendant's conduct would not be willful if you find that he acted in accordance with a good faith misunderstanding of the law. The defendant's views need not be legally correct, just as long as he honestly and in good faith really and truly believed and acted upon them. A good faith misunderstanding of the law, as distinct from disagreement [with] the law, is a defense.[293]

NOTE

See generally United States v. Aramony, 88 F.3d 1369, 1382 (4th Cir. 1996); *United States v. Bishop*, 412 U.S. 346, 350, 359 (1973).

26 U.S.C. § 7206 FILING FALSE TAX RETURN [LAST UPDATED: 7/11/14]

§ 7206(1)

Title 26, United States Code, Section 7206(1) makes it a crime to file a false federal income tax return. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant made, or caused to be made, and signed a tax return for the year in question containing a written declaration;
- Second, that the tax return was made under the penalties of perjury;
- Third, that the defendant did not believe the return to be true and correct as to every material matter; and
- Fourth, that the defendant acted willfully.[294]

§ 7206(2)

Title 26, United States Code, Section 7206(2) makes it a crime to aid or assist in the preparation of a false federal income tax return. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant aided, assisted, or otherwise caused the preparation and presentation of a tax return for the year in question;
- Second, that the tax return was fraudulent or false as to a material matter; and
- Third, that the defendant acted willfully.[295]

It is not enough for the government to prove simply that the tax return was erroneous.[296]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service. The test of materiality is whether a particular

[291] *Cheek*, 498 U.S. at 201.

[292] *United States v. Snider*, 502 F.2d 645, 655 (4th Cir. 1974).

[293] Instruction given in *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985) (tax evasion prosecution; court found "the trial judge did give a very fair and complete charge as to the defendant's good faith misunderstanding of the law.").

[294] *United States v. Aramony*, 88 F.3d 1369, 1382 (4th Cir. 1996); *United States v. Nicolaou*, 180 F.3d 565 (4th Cir. 1999).

[295] *Aramony*, 88 F.3d at 1382.

[296] *See Nicolaou*, 180 F.3d at 572.

item must be reported in order that the taxpayer estimate and compute his tax correctly. The purpose of this law is not simply to ensure that the taxpayer pay the proper amount of taxes, but also to ensure that the taxpayer not make misstatements that could hinder the Internal Revenue Service in carrying out such functions as the verification of the accuracy of the return or of a related return. Thus, your determination of materiality does not depend upon the amount of the unpaid tax. For example, any failure to report income is material; the omission of information necessary to compute income is material; and false statements relating to gross income, irrespective of the amount, constitute material misstatements.[297]

Willfulness is defined as the voluntary intentional violation of a known legal duty.[298]

A defendant's conduct is not willful if it was due to negligence, inadvertence, or mistake, or was the result of a good faith misunderstanding of the requirements of the law.[299]

The defendant's conduct would not be willful if you find that he acted in accordance with a good faith misunderstanding of the law. The defendant's views need not be legally correct, just as long as he honestly and in good faith really and truly believed and acted upon them. A good faith misunderstanding of the law, as distinct from disagreement [with] the law, is a defense.[300]

_____NOTE_____

See generally United States v. Aramony, 88 F.3d 1369, 1382 (4th Cir. 1996); *United States v. Bishop*, 412 U.S. 346, 350, 359 (1973).

In *United States v. Poole*, 640 F.3d 114, 122 (4th Cir. 2011), the Fourth Circuit stated that "in a criminal tax prosecution, when the evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts pointing to such liability, the trier of fact may find that the defendant exhibited 'willful blindness,' satisfying the scienter requirement of knowledge."

26 U.S.C. § 7207 FILING A FALSE DOCUMENT

Title 26, United States Code, Section 7207 makes it a crime to file a false document with the Internal Revenue Service. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant delivered or disclosed to the Internal Revenue Service any list, return, account, statement, or other document;
- Second, that the list, return, account, statement, or other document was known by the defendant to be false or fraudulent as to any material matter; and
- Third, that the defendant did so willfully.

Willfulness is defined as the voluntary intentional violation of a known legal

[297] *United States v. Aramony*, 88 F.3d 1369, 1384-85 (4th Cir. 1996).

[298] *Cheek v. United States*, 498 U.S. 192, 201 (1991).

[299] *See United States v. Nicolaou*, 180 F.3d 565, 572 (4th Cir. 1999).

[300] Instruction given in *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985) (tax evasion prosecution; court found "the trial judge did give a very fair and complete charge as to the defendant's good faith misunderstanding of the law.").

duty.[301]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[302]

The defendant's conduct would not be willful if you find that he acted in accordance with a good faith misunderstanding of the law. The defendant's views need not be legally correct, just as long as he honestly and in good faith really and truly believed and acted upon them. A good faith misunderstanding of the law, as distinct from disagreement [with] the law, is a defense.[303]

_____NOTE_____

See generally Sansone v. United States, 380 U.S. 343 (1965).

26 U.S.C. § 7212(a) INTERFERING WITH ADMINISTRATION OF TAX LAWS

Title 26, United States Code, Section 7212 makes it a crime to endeavor to intimidate an IRS employee or obstruct the due administration of the tax code. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

First clause

- First, that the defendant endeavored to intimidate or impede any officer or employee of the United States acting in an official capacity under the Internal Revenue Code, and
- Second, that the defendant did so corruptly, or by force, or by threats of force, including a threatening communication.

Second, omnibus clause[304]

- First, that the defendant obstructed, impeded, or endeavored to obstruct or impede the due administration of the Internal Revenue Code; and
- Second, that the defendant did so corruptly, or by force, or by threats of force, including a threatening communication.[305]

"Threats of force" means threat of bodily harm to an employee of the United States or to a member of his family.

The term "corruptly" forbids acts committed with the intent to secure an unlawful benefit either for oneself or for another. The acts need not be illegal. Legal actions can violate this statute if the defendant commits them to secure an unlawful benefit for himself or others.[306]

The government does not have to prove that the defendant successfully impeded

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[301] *Cheek v. United States*, 498 U.S. 192, 201 (1991).

[302] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

[303] Instruction given in *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985) (tax evasion prosecution; court found "the trial judge did give a very fair and complete charge as to the defendant's good faith misunderstanding of the law.").

[304] *See United States v. Mitchell*, 985 F.2d 1275 (4th Cir. 1993).

[305] *See United States v. Bostian*, 59 F.3d 474, 477 (4th Cir. 1995); *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997).

[306] *Wilson*, 118 F.3d at 234.

the administration of the tax laws.[307]

_____NOTE_____

There is a lesser included offense if the offense is committed only by threats of force.

Title 26 U.S.C. § 7212 and 18 U.S.C. §§ 1503 and 1505 are obstruction statutes with similarly worded omnibus provisions that are intended to serve comparable goals. The identity of purpose among these provisions makes case law interpreting any one of these provisions strongly persuasive authority in interpreting the others. *United States v. Mitchell*, 877 F.2d 294, 299 n.4 (4th Cir. 1989).

"The proper inquiry is whether a defendant had the requisite corrupt intent to improperly influence the investigation, not on the means the defendant employed in bringing to bear this influence." *Id.* at 299.

In *United States v. Mitchell*, 985 F.2d 1275 (4th Cir. 1993), the court declined to adopt the narrow interpretation of "corruptly" as only describing an element of *actus reus*. Instead, the court held that § 7212(a) "should be given the full scope its broad language commands" and therefore encompasses fraud. 985 F.2d at 1279. In *Mitchell*, the defendant incorporated an organization and filed an application for tax-exempt status so he could solicit contributions to promote research in ecology. In fact, he solicited "contributions" from big-game hunters to arrange hunting privileges in Pakistan and China, and then caused the hunters to file fraudulent tax returns claiming tax-deductible contributions. The indictment alleged that the defendant's activities comprised an artifice and scheme to defraud the United States and a corrupt endeavor to impede and obstruct the tax laws, and therefore a violation of § 7212(a). The district court dismissed the count of the indictment, and the Fourth Circuit reversed.

In *United States v. Grubb*, 11 F.3d 426, 437 (4th Cir. 1993), the defendant was charged with violating § 1503. The operative wording of the statute is "corruptly endeavor." Such an endeavor need not be successful. The section is not directed at success but at the endeavor. In *Grubb*, the defendant "gave false information in an endeavor to get the FBI agent to give false information to the grand jury." 11 F.3d at 438.

29 U.S.C. § 186 PAYMENTS TO UNION OFFICIALS (TAFT-HARTLEY ACT)

Title 29, United States Code, Section 186 makes it a crime to pay money or other thing of value to a labor union official. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 186(a)

- First, that the defendant was an employer (or association of employers) or a person who acted as a labor relations expert, adviser, or consultant to an employer or who acted in the interest of an employer;
- Second, that the defendant paid, lent, or delivered, or agreed to pay, lend, or deliver, any money or other thing valued at $1,000 or more;
- Third, to
  1. any representative of any of his employees who were employed in an industry affecting commerce; or
  2. any labor organization, or any officer or employee of a labor organization, which represented, sought to represent, or would

[307] *Bostian*, 59 F.3d at 479.

admit to membership, any of the employees of that employer who were employed in an industry affecting commerce; or

3. any employee or group or committee of employees of that employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing that employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
4. any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as an officer or employee of a labor organization; and

- Fourth, that the defendant did so willfully.

§ 186(b)(1)

- First, that the defendant requested, demanded, received, accepted, or agreed to receive or accept, any payment, loan, or delivery of any money or other thing valued at $1,000 or more;
- Second, from
  1. any representative of any of his employees who were employed in an industry affecting commerce; or
  2. any labor organization, or any officer or employee of a labor organization, which represented, sought to represent, or would admit to membership, any of the employees of that employer who were employed in an industry affecting commerce; or
  3. any employee or group or committee of employees of that employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing that employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
  4. any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as an officer or employee of a labor organization; and
- Third, that the defendant did so willfully.

§ 186(b)(2)

- First, that the defendant was a labor organization or person who acted as an officer, agent, representative, or employee of a labor organization;
- Second, that the defendant demanded or accepted from the operator of a motor vehicle employed in the transportation of property in commerce, or the employer of that motor vehicle operator, any money or other thing valued at $1,000 or more payable to the labor organization or to an officer, agent, representative or employee of that labor organization as a fee or charge for the unloading, or in connection with the unloading, of the cargo of the motor vehicle; and

- Third, that the defendant did so willfully.

☞ **Section 186(d)(2) contains a lesser-included misdemeanor, if the value does not exceed $1,000.**

The word "willfully" means that the defendant knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidently or by some mistake. The government is not required to prove a specific intent by the defendant to violate this Taft-Hartley statute or a particular part of it in order to establish the federal criminal offense charged.[308]

"Industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act [29 U.S.C. § 141 et seq.] or the Railway Labor Act [45 U.S.C. § 151 *et seq*.]. [§ 402 (c)]

"Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of [federal law]. [§ 402(f)]

"Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof. [§ 402(e)]

"Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint counsel so engaged which is subordinate to a national or international labor organization, other than a state or local central body. [§ 402(i)]

"Motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary [of Transportation], but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service. [49 U.S.C. § 13102(16)]

GOOD FAITH DEFENSE [§ 186(c)]

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[308] Charge approved in *United States v. Phillips*, 19 F.3d 1565,1577-82 (11th Cir. 1994) ("willfully" in § 186(d)(2) requires a finding of only general intent, and not a specific intent to violate the law, that is, acting with a bad purpose to disobey or disregard the law). *See also United States v. Georgopoulos*, 149 F.3d 169, 172 (2d Cir. 1998) ("the 'willfulness' element of Section 186 requires only a finding of general intent").

The above prohibitions do not apply in respect to any money payable by an employer to any officer or employee of a labor organization, who is also an employee or former employee of the employer in question, as compensation for, or by reason of, his service as an employee of such employer.

Thus, this exception applies only to payments by an employer to former employees for past services actually rendered by those former employees while they were employees of the employer.[309]

_____NOTE_____

The Taft-Hartley Act is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement. To achieve this goal, Congress prohibited *all* payments from employers to representatives of their employees and union officials. Section 186(a) prohibits employers, in industries affecting interstate commerce, from paying anything of value to representatives of their employees or union officials. § 186(b) prohibits representatives and union officials from receiving such payments. *United States v. Phillips*, 19 F.3d 1565, 1571 (11th Cir. 1994).

Section 186 has five basic components. Subsections (a) and (b) are outlined above. Subsections (c)(1) through (c)(3) set forth certain categorical exceptions to the prohibitions set forth in subsections (a) and (b). Subsections (c)(4) through (c)(9) identify certain types of payments, particularly contributions to employee trust funds and pension plans, that are permitted if specified requirements are met. Subsections (d)(1) and (2) set forth the penalties. To be convicted of violating subsections (c)(4) through (c)(9), one must have acted willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment under those subsections. § 186(d)(1). *See United States v. Georgopoulos*, 149 F.3d 169, 172 (2d Cir. 1998).

Regarding venue, in *United States v. Billups*, 692 F.2d 320 (4th Cir. 1982), the court held that venue "lies either wherever commerce is affected or wherever the proscribed act occurs." 692 F.2d at 333. However, that holding may be in doubt if robbery or extortion is deemed the essential conduct element. *See United States v. Bowens*, 224 F.3d 302, 309 (4th Cir. 2000).

However, "[w]hen Congress defines the essential conduct elements in terms of their particular effects [such as affecting interstate commerce], venue will be proper where those proscribed effects are felt." *Id.* at 313.

29 U.S.C. § 501 EMBEZZLING UNION FUNDS

Title 29, United States Code, Section 501 makes it a crime to embezzle funds from a labor union. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was an officer or employee of a labor organization;
- Second, that the labor organization was engaged in an industry affecting

[309] *United States v. Phillips*, 19 F.3d 1565, 1571 (11th Cir. 1994). Congress intended to remove from the statute's prohibitions two general categories of payments to employees: wages, and payments not made specifically for work performed that are occasioned by reason of the fact that the employee has performed or will perform work for the employer. "[A]ll payments given by an employer to a former employee must be for past service actually rendered by the former employee while employed by the employer to qualify for an exception under section 186(c)(1)." *Id*. at 1576.

commerce;[310]

- Third, that the defendant embezzled, stole, or unlawfully and willfully abstracted or converted to his own use or the use of another, moneys, funds, or other assets of the labor organization; and
- Fourth, that the defendant intended to deprive the organization of the use of its funds.

"Industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act [29 U.S.C. § 141 et seq.] or the Railway Labor Act [45 U.S.C. § 151 et seq.]. [§ 402 (c)]

"Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of [federal law]. [§ 402(f)]

"Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof. [§ 402(e)]

"Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint counsel so engaged which is subordinate to a national or international labor organization, other than a state or local central body. [§ 402(i)]

"Labor dispute" includes any controversy concerning terms, tenure, or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. [§ 402(g)]

Embezzle means to take or convert willfully the property of another which came into the wrongdoer's possession lawfully by virtue of his office, employment, or position of trust.[311]

Embezzlement requires knowledge that the appropriation is contrary to the wishes of the owner of the property. A defendant who exercises dominion over property in the good-faith belief that the property is his own, or that the appropriation is otherwise authorized, is not guilty of embezzlement. An appropriation or expenditure of union funds

[310] *United States v. Silverman*, 430 F.2d 106 (2d Cir. 1970).

[311] *United States v. Stockton*, 788 F.2d 210, 218 (4th Cir. 1986).

is unauthorized if it is done without the permision of the union, even if it is approved by a superior union official.[312]

The defendant must occupy a fiduciary role with respect to the labor organization. This encompasses a duty to hold the organization's property solely for the benefit of the organization and to expend those funds only in accordance with its constitution, by-laws and resolutions. Thus, if you find either that the labor organization did not benefit from the expenditure or that the expenditure was not properly authorized, you may conclude that the funds were embezzled or converted. Moreover, when there is no possible benefit to the labor organization from the use of the funds, it makes no difference whether the use was authorized.[313]

Embezzlement is not excused by restitution of goods or services of equivalent value.[314]

To convert means to apply without authorization the moneys or properties of a labor organization to the temporary or permanent use, benefit, or profit of a person not legally entitled to them.[315]

The government must prove that the defendant intended to appropriate the property in question.[316]

[See separate instruction on CONVERSION.]

NOTE

In *United States v. Silverman*, 430 F.2d 106 (2d Cir. 1970), the defendant was convicted of converting union funds paid to a printing company for the benefit of a political campaign. The jury was charged that a political contribution per se by a union is not unlawful. The issue is rather whether the contribution was properly authorized and made for the benefit of the union. *Id*. at 113.

29 U.S.C. §§ 1021, 1131 REPORTING AND DISCLOSURE REQUIREMENTS UNDER ERISA

Title 29, United States Code, Section 1131 makes it a crime to violate the reporting and disclosure requirements of the Employee Retirement Income Security Act (ERISA). Part 1 of ERISA, § 1021, requires the administrator of a pension plan to notify the Department of Labor and the plan's participants and beneficiaries of any material modifications in the terms of the pension plan, such as the creation of a new class of pension beneficiaries. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1021(a)

- First, that the defendant was an administrator of an employee benefit plan;
- Second, that the defendant either failed to furnish, or furnished materially false information to participants covered under the plan and/or to beneficiaries receiving benefits under the plan; and
- Third, that the defendant did so willfully.

[312] *Id.* at 217.

[313] *United States v. Silverman*, 430 F.2d 106, 114 (2d Cir. 1970).

[314] *Stockton*, 788 F.2d at 219.

[315] *Id.* at 218.

[316] *United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986).

☞ **The plan administrator is required to furnish a summary plan description, an annual report, and information about total benefits accrued and nonforfeitable pension benefits.**
§ 1021(b)

- First, that the defendant was an administrator of an employee benefit plan;
- Second, that the defendant either failed to file an annual report and/or supplemental reports, or filed an annual report and/or supplemental reports with the Secretary of Labor which contained false material statements or omissions of material fact; and
- Third, that the defendant did so willfully.

The word "willfully" means that the defendant knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidently or by some mistake. The word "knowingly" means knowledge of the existence of the facts in question. It does not require that there be any knowledge or awareness that such act or omission is prohibited by law. The government is not required to prove a specific intent by the defendant to violate this Taft-Hartley statute or a particular part of it in order to establish the federal criminal offense charged.[317]

A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the agency or fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made.[318]

"Employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care of benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions). [§1002(1)]

The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or
(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the

[317] Charge approved in *United States v. Phillips*, 19 F.3d 1565, 1582-84 (11th Cir. 1994) ("willfully" in § 1131 requires a finding of only general intent, and not a specific intent to violate the law, that is, acting with a bad purpose to disobey or disregard the law).

[318] *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998).

plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution. [§ 1002(2)]

"Employee benefit plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan. [§ 1002(3)]

"Employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan. [§ 1002(4)]

"Employer" means any person acting directly as an employer or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity. [§ 1002(5)]

"Employee" means any individual employed by an employer. [§ 1002(6)]

"Participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. [§ 1002(7)]

"Beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder. [§ 1002(8)]

"Person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization. [§ 1002(9)]

"Industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act [29 U.S.C. § 141 et seq.] or the Railway Labor Act [45 U.S.C. § 151 et seq.]. [§ 1002 (12)]

☞ **Fiduciary duties are set forth in § 1104, including the prudent man standard of care.**

☞ **A good faith defense is set forth in § 1108.**

_____NOTE_____

This statute is designed:

1. to require the disclosure of significant information about employee benefit plans and all transactions engaged in by those who control the plans;
2. to provide specific data to plan participants and beneficiaries about the rights and benefits to which they are entitled and the circumstances that may result in a loss of those rights and benefits; and
3. to set forth the responsibilities and proscriptions applicable to persons occupying a fiduciary relation to employee benefit plans.

United States v. Phillips, 19 F.3d 1565, 1583 (11th Cir. 1994). Congress codified a

"prudent man" standard for evaluating the conduct of all fiduciaries. *Id.* at 1584.

31 U.S.C. § 5324 STRUCTURING CURRENCY TRANSACTIONS

Title 31, United States Code, Section 5324 makes it a crime to fail to file currency transactions reports, file false currency transaction reports, or structure currency transactions to evade the reporting requirements. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 5324(a)(1)

- First, that the defendant engaged in a transaction in currency in excess of $10,000 cash with a domestic financial institution as defined in the statute;
- Second, that the domestic financial institution involved was required to file a currency transaction report;
- Third, that the defendant knew that the domestic financial institution was required to file a currency transaction report;
- Fourth, that the defendant caused or attempted to cause the financial institution to fail to file the required report;
- Fifth, that the defendant did so for the purpose of evading the reporting requirement; and
- Sixth, the defendant knew that it was unlawful to cause the financial institution to fail to file the required report.[319]

§ 5324(a)(2)

- First, that the defendant engaged in a transaction in currency in excess of $10,000 cash with a domestic financial institution as defined in the statute;
- Second, that the domestic financial institution involved was required to file a currency transaction report;
- Third, that the defendant knew that the domestic financial institution was required to file a currency transaction report;
- Fourth, that the defendant caused or attempted to cause the financial institution to file the required report with a material omission or misstatement of fact;
- Fifth, that the defendant did so for the purpose of evading the reporting requirement; and
- Sixth, the defendant knew that it was unlawful to cause the financial institution to fail to file the required report.

§ 5324(a)(3)

- First, that the defendant structured, assisted in structuring, or attempted to structure or assist in structuring, a currency transaction with one or more domestic financial institutions;[320]
- Second, that the domestic financial institution involved was required to file a currency transaction report;

[319] *See United States v. Rockson*, No. 95-5116, 1996 WL 733945 (4th Cir. Oct. 30, 1996), where the Fourth Circuit stated the "district court erred by failing clearly to instruct the jury that it was required to determine whether [First African Forex Bureau, a money transmittal business] was a financial institution." 1996 WL 733945 at *4.

[320] *See id.*

- Third, that the defendant knew that the domestic financial institution was required to file a currency transaction report; and
- Fourth, that the defendant did so for the purpose of evading the reporting requirement.[321]

§ 5324(b)(1)

- First, that the defendant engaged in a transaction in currency in excess of $10,000 cash with a nonfinancial trade or business as defined in the statute;
- Second, that the nonfinancial trade or business involved was required to file a currency transaction report;
- Third, that the defendant knew that the nonfinancial trade or business was required to file a currency transaction report;
- Fourth, that the defendant caused or attempted to cause the nonfinancial trade or business to fail to file the required report;
- Fifth, that the defendant did so for the purpose of evading the reporting requirement; and
- Sixth, the defendant knew that it was unlawful to cause the nonfinancial trade or business to fail to file the required report.

§ 5324(b)(2)

- First, that the defendant engaged in a transaction in currency in excess of $10,000 cash with a nonfinancial trade or business as defined in the statute;
- Second, that the nonfinancial trade or business involved was required to file a currency transaction report;
- Third, that the defendant knew that the nonfinancial trade or business was required to file a currency transaction report;
- Fourth, that the defendant caused or attempted to cause the nonfinancial trade or business to file the required report with a material omission or misstatement of fact;
- Fifth, that the defendant did so for the purpose of evading the reporting requirement; and
- Sixth, the defendant knew that it was unlawful to cause the nonfinancial trade or business to file the required report with a material omission or misstatement of fact.

§ 5324(b)(3)

- First, that the defendant structured, assisted in structuring, or attempted to structure or assist in structuring, a currency transaction with one or more nonfinancial trades or businesses;
- Second, that the nonfinancial trades or businesses involved were required to file a currency transaction report;
- Third, that the defendant knew that the nonfinancial trades or businesses were required to file a currency transaction report; and
- Fourth, that the defendant did so for the purpose of evading the reporting requirement.

§ 5324(c)(1)

- First, that the defendant, or an agent of the defendant, transported, was

[321] *United States v. McPherson*, 424 F.3d 183, 189 (2d Cir. 2005).

about to transport, or had transported monetary instruments of more than $10,000 from a place in the United States to or through a place outside the United States, or to a place in the United States from or through a place outside the United States;

OR

- First, that the defendant, or an agent of the defendant, received monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States;
- Second, that the defendant or his agent did so knowingly;
- Third, that the defendant was required to file a currency transaction report;
- Fourth, that the defendant failed to file or caused or attempted to cause a person to fail to file the required report; and
- Fifth, that the defendant did so for the purpose of evading the reporting requirement.

§ 5324(c)(2)

- First, that the defendant, or an agent of the defendant, transported, was about to transport, or had transported monetary instruments of more than $10,000 from a place in the United States to or through a place outside the United States, or to a place in the United States from or through a place outside the United States;

OR

- First, that the defendant, or an agent of the defendant, received monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States;
- Second, that the defendant or his agent did so knowingly;
- Third, that the defendant was required to file a currency transaction report;
- Fourth, that the defendant filed or caused or attempted to cause a person to file the required report with a material omission or misstatement of fact; and
- Fifth, that the defendant did so for the purpose of evading the reporting requirement.

§ 5324(c)(3)

- First, that the defendant, or an agent of the defendant, transported, was about to transport, or had transported monetary instruments of more than $10,000 from a place in the United States to or through a place outside the United States, or to a place in the United States from or through a place outside the United States;

OR

- First, that the defendant, or an agent of the defendant, received monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States;
- Second, that the defendant or his agent did so knowingly;
- Third, that the defendant was required to file a currency transaction report;
- Fourth, that the defendant structured, assisted in structuring, or attempted to structure or assist in structuring, any importation or exportation of monetary instruments; and

- Fifth, that the defendant did so for the purpose of evading the reporting requirement.

AGGRAVATED PENALTY

1. Did the defendant commit this offense while violating another law of the United States [which law and its elements must be identified] or as part of a pattern of any illegal [identify the basis of the illegality] activity involving more than $100,000 in a 12-month period?

"Financial institution" means an insured bank; a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; any credit union; a thrift institution; a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934; a broker or dealer in securities or commodities; an investment banker or investment company; a currency exchange; an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments; an operator of a credit card system; an insurance company; a dealer in precious metals, stones, or jewels; a pawnbroker; a loan or finance company; a travel agency; a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system; a telegraph company; a business engaged in vehicle sales, including automobile, airplane, and boat sales; persons involved in real estate closings and settlements; the United States Postal Service; an agency of the United States Government or of a state or local government carrying out a duty or power of a business described in this paragraph; a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $1,000,000 which is licensed as a casino, gambling casino, or gaming establishment under the laws of any state or any political subdivision of any State, or is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than an operation which is limited to class I gaming (as defined in that Act); any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or any other business designated by the Secretary of the Treasury whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.[§ 5312(a)(2)]

A person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements .... "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition. [31 C.F.R. § 103.11(gg)]

"Nonfinancial trade or business" means any trade or business other than a financial institution that is subject to the reporting requirements of this statute. [31 U.S.C. § 5312(a)(4)]

_____NOTE_____

In 1994, Congress amended § 5322 to eliminate the willfulness requirement with respect to structuring violations under § 5324 imposed by *Ratzlaf v. United States*, 510 U.S. 135 (1994). *See United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir. 2000); *United States v. Ismail*, 97 F.3d 50, 56 (4th Cir. 1996).

The statute does not forbid the making of deposits, but structuring of a transaction. Therefore, the Seventh Circuit concluded "that the structuring itself, and not the individual deposit, is the unit of crime." *United States v. Davenport*, 929 F.2d 1169, 1172 (7th Cir. 1991). In that case, the defendant came into possession of $100,000 in cash, and made ten separate cash deposits, each less than $10,000, which totaled $81,500. The Seventh Circuit dismissed all but one of the substantive counts. In *United States v. Cassano*, 372 F.3d 868 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1109 (2005), the Seventh Circuit distinguished *Davenport*, explaining that the defendant had structured deposits of the proceeds from a single transaction. In *Cassano*, there were two separate transactions that were structured on two separate dates. "Merely because the misappropriated funds were derived from the same source does not mean they are part of a single transaction" *Cassano*, 372 F.3d at 882.

31 U.S.C. § 5332 BULK CASH SMUGGLING

Title 31, United States Code, Section 5332 makes it a crime to smuggle more than $10,000 into or out of the United States. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant concealed more than $10,000 in currency or other monetary instruments on a person, or in any conveyance, article of luggage, merchandise, or other container;
- Second, that the defendant transported or transferred, or attempted to transport or transfer the currency or monetary instruments from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States;
- Third, that the defendant did so knowingly, and
- Fourth, that the defendant did so with the intent to evade the reporting requirement.

Concealment includes concealment in any article of clothing being worn or in any luggage, backpack, or other container worn or carried by a person. [*See* 31 U.S.C. § 5332(a)(2)]

_____NOTE_____

Penalty includes forfeiture of any property, real or personal, involved in the offense, and any property traceable to such property.

See United States v. Cuellar, 553 U.S. 550 (2008), where the defendant was prosecuted for international money laundering, in violation of 18 U.S.C. § 1956(a)(2)(B). The defendant had concealed $81,000 he was attempting to transport to Mexico. The Supreme Court reversed because the government failed to prove *why* he was transporting the money, *i.e.*, that it was being transported to conceal or disguise the nature, location, source, ownership, or control of the $81,000.

33 U.S.C. §§ 401, 403, 406 RIVERS and HARBORS ACT

Title 33, United States Code, Sections 401 and 403 [§ 406 is the penalty section] make it a crime to obstruct the navigable waters of the United States. For you to find the

defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 401

- First, that the defendant constructed or commenced the construction of a bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States;
- Second, that the defendant did not obtain the consent of Congress to the building of the bridge, causeway, dam, or dike; and
- Third, that the plans for the bridge or causeway had not been submitted to and approved by the Secretary of Transportation, or the plans for the dam or dike had not been submitted to and approved by the Chief of Engineers and Secretary of the Army.

§ 403

- First, that the defendant created an obstruction to the navigable capacity of any waters of the United States; and
- Second, that the obstruction was not affirmatively authorized by Congress.

OR

- First, that the defendant built or commenced the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines had been established; and
- Second, the defendant did so without authorization from the Secretary of the Army.

OR

- First, that the defendant excavated or filled, or in any manner altered or modified the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor, or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States; and
- Second, the defendant did so without authorization from the Secretary of the Army.

Whether a waterway is navigable is simply a question of whether the waterway in its natural and ordinary condition affords a channel for useful commerce.[322]

Any filling of navigable waters that reduces the navigable capacity of the waterway creates an obstruction within the meaning of § 403.[323]

"Structures" encompasses land fills.

The government is not required to prove that the defendant knew permits were available or required.[324]

33 U.S.C. § 1319 CLEAN WATER ACT

Title 33, United States Code, Section 1319 makes it a crime to discharge

[322] *United States v. Joseph G. Moretti, Inc.*, 478 F.2d 418, 428 (5th Cir. 1973) (civil action for injunctive relief).

[323] *Id*. at 429.

[324] *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997).

pollutants into the navigable waters of the United States without a permit. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1319(c)(1)(A)

- First, that the defendant discharged a pollutant;
- Second, that the pollutant was discharged from a point source;
- Third, that the pollutant was discharged into a navigable water of the United States;
- Fourth, that the defendant did so without, or in violation of, a National Pollution Discharge Elimination System permit; and
- Fifth, that the defendant did so negligently.[325]

§ 1319(c)(1)(B)

- First, that the defendant introduced into a sewer system or into a publicly owned treatment works a pollutant or hazardous substance;
- Second, that the defendant knew or reasonably should have known that the pollutant or hazardous substance could cause personal injury or property damage, or which caused the treatment works to violate a permit issued to the treatment works; and
- Third, that the defendant did so negligently.

§ 1319(c)(2)(A)

- First, that the defendant discharged a pollutant;
- Second, that the pollutant was discharged from a point source;
- Third, that the pollutant was discharged into a navigable water of the United States;
- Fourth, that the defendant did so without, or in violation of, a National Pollution Discharge Elimination System permit; and
- Fifth, that the defendant did so knowingly.[326]

§ 1319(c)(2)(B)

- First, that the defendant introduced into a sewer system or into a publicly owned treatment works a pollutant or hazardous substance;
- Second, that the defendant knew or reasonably should have known that the pollutant or hazardous substance could cause personal injury or property damage, or which caused the treatment works to violate a permit issued to the treatment works; and
- Third, that the defendant did so knowingly.

AGGRAVATED PENALTY [§ 1319(c)(3)]

1. Did the defendant know at the time that he thereby placed another person in imminent danger of death or serious bodily injury?

The term "navigable waters" means the waters of the United States, including the territorial seas. [§ 1362(7)]

The phrase 'the waters of the United States' includes interstate waters and their tributaries. [*See* lengthy definition at 40 C.F.R. § 122.2]

In other words, waters of the United States includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. It does not include channels through which water flows intermittently or ephemerally, or channels

[325] *See id.* at 260. *See also United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992).

[326] *See Wilson*, 133 F.3d at 260l; *Law*, 979 F.2d at 978.

that periodically provide drainage for rainfall.[327]

The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. [§ 1362(6)][*See also* 40 C.F.R. § 122.2]

The term "discharge of a pollutant" and the term "discharge of pollutants" each means any addition of any pollutant to navigable waters from any point source, any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.. [§ 1362(12)][*See also* 40 C.F.R. § 122.2]

The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring. [§ 1362(13)][*See also* 40 C.F.R. § 122.2]

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. [§ 1362(14)][*See also* 40 C.F.R. § 122.2]

"Permit" means an authorization, license, or equivalent control document issued by EPA or "an approved State" to implement the requirements of [the CWA]. "Permit"includes an NPDES "general permit." (40 C.F.R. § 122.28) Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit." [40 C.F.R. § 122.2] Wetlands generally include swamps, marshes, bogs and similar areas.[328] [33 C.F.R. § 323.2 and 328.3][*See also* 40

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[327] *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (civil enforcement proceeding under the CWA).

[328] In 1975, the Army Corps of Engineers construed the Act to cover all "freshwater wetlands" that were adjacent to other covered waters. In 1977, the Corps defined "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 323.2(c) (1978). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the defendant was prosecuted for discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries without a permit issued by the Corps. The Supreme Court said that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." 474 U.S. at 133. The Court held that Congress had obviously deferred to the Corps' definition, and thus "waters" includes adjacent wetlands. 474 U.S. at 138.

In *SWANCC v. Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court held that the Corps' jurisdiction does not extend to ponds that are not adjacent to open water. The Solid Waste Agency of Northern Cook County contacted the Corps to determine if a permit was required to dispose of baled nonhazardous waste in permanent and seasonal ponds including an abandoned sand and gravel pit. The Corps denied a permit, citing the "Migratory Bird Rule," which extended the Corps'

C.F.R. § 122.2, included in definition of "waters of the United States"]

Wetlands are adjacent to "waters of the United States" only when they have a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between waters and wetlands.[329]

To establish that the wetlands in question are covered by the statute, the government must prove first, that the adjacent channel contains a "water of the United States," that is, a relatively permanent body of water connected to traditional navigable waters; and, second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and wetland begins.[330]

Wetlands with only an intermittent, physically remote hydrologic connection to waters of the United States are not covered by the statute.[331]

The government must prove that the pollutant was discharged into a water of the United States, but the government does not have to prove that the defendant knew the body of water was a water of the United States.[332]

The government is not required to prove that the defendant knew permits were available or required.[333]

_____NOTE_____

Many CWA definitions are in 40 C.F.R. § 1122.2, including "contiguous zone," and "discharge of a pollutant."

The Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) puts in question all previous cases dealing with navigable waters, as well as putting in question the regulations of the Corps of Engineers defining and involving navigable waters.

In *United States v. Law*, 979 F.2d 977 (4th Cir. 1992), the defendant purchased a water treatment system which was subject to an NPDES permit, but he never applied for or obtained a permit. Pollutants were discharged into two creeks. Law argued that the CWA imposes liability only upon generators of pollutants, not upon persons over whose property preexisting pollutants are passed along. The district court instructed the jury that it is not a defense that the water discharged from the point source came from some other place or places before its discharge from the point source, or that some or all of the pollutants discharged from a point source originated at places not on the defendant's property. The Fourth Circuit held the instruction to be without prejudicial error because waste treatment systems are not waters of the United States and therefore the origin of pollutants in the treatment and collection ponds was irrelevant. According to the Fourth Circuit, the proper focus is upon the discharge.

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jurisdiction to intrastate waters which are or would be used as habitat by migratory birds, endangered species, or used to irrigate crops sold in interstate commerce. The Supreme Court concluded that this rule was not "fairly supported" by the Clean Water Act. 531 U.S. at 167. The Court rejected the request for administrative deference and held that the migratory bird rule exceeded the authority granted to the Corps under the CWA.

[329] *Rapanos*, 547 at 742.

[330] *Id*.

[331] *Id.*

[332] *See United States v. Cooper*, 482 F.3d 658, 668 (4th Cir. 2007) (the status of the waterway "as a 'water of the United States' is simply a jurisdictional fact, the objective truth of which the government must establish but the defendant's knowledge of which it need not prove").

[333] *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997).

In *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Fourth Circuit held that the government must prove the defendant's knowledge of facts meeting each essential element "but need not prove that the defendant knew his conduct to be illegal." 133 F.3d at 262. Thus, there is no mistake-of-law defense, but there is a mistake of fact defense. The court listed what the government must prove:

1. that the defendant knew that he was discharging a substance, eliminating a prosecution for accidental discharges;
2. that the defendant correctly identified the substance he was discharging, not mistaking it for a different, unprohibited substance;
3. that the defendant knew the method or instrumentality used to discharge the pollutants;
4. that the defendant knew the physical characteristics of the property into which the pollutant was discharged that identified it as a wetland, such as the presence of water and water-loving vegetation;
5. that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States; and
6. that the defendant knew he did not have a permit.

133 F.3d at 264. The government is not required to prove that the defendant knew permits were available or required. *Id.*

In *United States v. Cooper*, 482 F.3d 658 (4th Cir. 2007), the court stated that "[o]nly in that limited context [the defendant had a basis for not knowing that the parcels of land into which they discharged material were, in fact, wetlands] ... [T]he government bore the burden of proving, among other things, 'that the defendant was aware of the facts establishing the required link between the wetland [into which he discharged the fill material] and waters of the United States.'" 482 F.3d at 667 (quoting *United States v. Wilson*, 133 F.3d 251, 264 & n.* (4th Cir. 1997)).

33 U.S.C. § 2602 VESSEL PERMITS

Title 33, United States Code, Sections 2602 and 2609 makes it a crime to transport municipal or commercial waste in a vessel without a permit. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant transported [or aided, abetted, authorized, or instigated the transportation of] municipal or commercial waste in a vessel in coastal waters of the United States;
- Second, that the vessel did not have a permit from the Secretary of Transportation and did not display a number or other marking prescribed by the Secretary of Transportation; and
- Third, that the defendant did so knowingly.

"Coastal waters" means the territorial sea of the United States, the Great Lakes and their connecting waters, the marine and estuarine waters of the United States up to the head of tidal influence, and the Exclusive Economic Zone as established by Presidential Proclamation Number 5030. [§ 2601(2)]

"Municipal or commercial waste" means solid waste, that is, any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural

operations, and from community activities.[§ 2601(3), but see exceptions in that section and 42 U.S.C. § 6903]

38 U.S.C. § 6101 VETERANS' BENEFITS FRAUD (FIDUCIARY)

Title 38, United States Code, Section 6101 makes it a crime for a fiduciary to embezzle veterans' benefits. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was a fiduciary, that is, a guardian, curator, conservator, committee, or person appointed in a representative capacity to receive money for, or legally vested with the responsibility or care of a minor, incompetent, or other beneficiary of veterans' benefits;
- Second, that money or property came into the defendant's control in any manner whatever in the execution of his fiduciary trust, or under color of his fiduciary office or service as a fiduciary;
- Third, that the defendant lent, borrowed, pledged, hypothecated, used, or exchanged for other funds or property, embezzled, or misappropriated that money or property in whole or in part; and
- Fourth, that the defendant did so willfully and intentionally, and not by inadvertence or by carelessness.[334]

You may consider the willful neglect or refusal to make and file proper accountings or reports concerning the money or property as required by law to be evidence of embezzlement or misappropriation. [§ 6101(b)]

Misuse of benefits by a fiduciary occurs when the fiduciary receives payment for the use and benefit of a beneficiary and uses such payment, or any part thereof, for a use other than for the use and benefit of the beneficiary or that beneficiary's dependents. [§ 6106(b)]

Embezzle means to fraudulently appropriate a thing to one's own use and beneficial enjoyment, or an unauthorized assumption and exercise of dominion or right of ownership over it in defiance of, or exclusion of, the owner's right.[335]

Embezzlement also means fraudulently withholding, converting, or applying property that is lawfully in one's possession to or for one's own use and benefit, or to the use and benefit of any person other than the one to whom the money or property belongs.[336]

A fiduciary may not lend to himself.[337]

It is no defense that the defendant intended to return the money he embezzled, or even that he did return it.[338]

NOTE

In *United States v. Lewis*, 161 F.2d 683 (2d Cir. 1947), the Second Circuit determined that the statute

> appears to have in mind two kinds of offenses: first, pledging the property, second, converting it unconditionally. The words 'lend, borrow, pledge, hypothecate' are apt for the first offense; 'exchange . . . embezzle

[334] *See United States v. Young*, 955 F.2d 99, 103 (1st Cir. 1992) (language used by district court).

[335] *Id.* at 102.

[336] *Id.* at 102-03.

[337] *Id.* at 103.

[338] *See United States v. Young*, 955 F.2d 99, 103 (1st Cir. 1992).

> . . . misappropriate' for the second; 'use' is not a word of art in any case, and may cover either. [P]ledging consists of encumbering the property so as to make unavailable for the veteran's support so much of it as must answer the loan.

161 F.2d at 684.

Each verb is "an affirmative act of dominion" and is not a continuing offense for purposes of statute of limitations. *Id.*

38 U.S.C. § 6102 VETERANS' BENEFITS FRAUD

Title 38, United States Code, Section 6102 makes it a crime to fraudulently accept veterans' benefits. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 6102(a)

- First, that the defendant was entitled to veterans' monetary benefits;
- Second, that the defendant's right to those benefits ceased upon the happening of any contingency;
- Third, that after the happening of that contingency, the defendant accepted payments; and
- Fourth, that the defendant did so fraudulently.

§ 6102(b)

- First, that the defendant obtained or received any veterans' monetary benefits;
- Second, that the defendant was not entitled to those benefits; and
- Third, that the defendant did so with intent to defraud the United States or any beneficiary of the United States.

42 U.S.C. § 262 BIOLOGICAL PRODUCTS

Title 42, United States Code, Section 262 makes it a crime to introduce into interstate commerce biological products without a biologics license and without the package being plainly marked as required. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant introduced or delivered for introduction into interstate commerce biological products; and
- Second, that the defendant did so without a biologics license in effect for the biological products and without the package being plainly marked with the following:
  1. the proper name of the biological product;
  2. the name, address, and license number of the manufacturer; and
  3. the expiration date of the biological product.

42 U.S.C. § 408 SOCIAL SECURITY FRAUD

Title 42, United States Code, Section 408 makes it a crime to make false statements in connection with Social Security cards [etc]. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 408(a)(1)

- First, that the defendant made or caused to be made a false statement or representation;
- Second, that the false statement or representation concerned whether wages were paid or received for employment [as defined], or whether net earnings from self-employment [as defined] were derived, or whether a

person entitled to benefits had earnings in or for a particular period; and
- Third, that the defendant did so for the purpose of causing an increase in any [Social Security] payment, or for the purpose of causing any payment to be made where no payment was authorized.

§ 408(a)(2)
- First, that the defendant made a false statement or representation;
- Second, that the defendant knew the statement or representation was false;
- Third, that the false statement or representation was material; and
- Fourth, that the statement or representation related to an application for any [Social Security] payment or for a disability determination.

§ 408(a)(3)
- First, that the defendant made a false statement or representation;
- Second, that the defendant knew the statement or representation was false;
- Third, that the false statement or representation was material; and
- Fourth, that the statement or representation related to determining rights to any [Social Security] payment.

§ 408(a)(4)
- First, that the defendant had knowledge of the occurrence of an event;
- Second, that the event affected the defendant's initial or continued right to any [Social Security] payment, or the initial or continued right to any payment of any other individual in whose behalf the defendant had applied for or was receiving a [Social Security] payment;
- Third, that the defendant concealed or failed to disclose such event; and
- Fourth, that the defendant did so with fraudulent intent to obtain payment either in a greater amount than was due or when no payment was authorized.

§ 408(a)(5)
- First, that the defendant had applied to receive [Social Security] payments for the use and benefit of another, and had received such payment[s];
- Second, that the defendant converted those payments, or any portion of those payments, to a use other than for the use and benefit of that other person; and
- Third, that the defendant did so knowingly and willfully.

§ 408(a)(6)
- First, that the defendant furnished or caused to be furnished false information to the Commissioner of Social Security;
- Second, that the false information was furnished with respect to information required by the Commissioner in connection with establishing and maintaining records required by law; and
- Third, that the defendant did so willfully, knowingly, and with intent to deceive the Commissioner as to his true identity or the true identity of any other person.

§ 408(a)(7)(A)
- First, that the defendant used a social security number assigned by the Commissioner of Social Security on the basis of false information furnished to the Commissioner by the defendant or by any other person;
- Second, that the defendant did so knowingly, willfully, and with the intent to deceive; and

- Third, that the defendant did so for the purpose of causing an increase in any [Social Security] payment, or for the purpose of causing a [Social Security] payment when no payment was authorized, or for the purpose of obtaining for himself or any other person any payment or benefit to which the defendant or another person was not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose.

§ 408(a)(7)(B)

- First, that the defendant falsely represented a number to be the social security number assigned by the Commissioner of Social Security to him or to another person;
- Second, that the defendant did so knowingly, willfully, and with the intent to deceive; and
- Third, that the defendant did so for the purpose of causing an increase in any [Social Security] payment, or for the purpose of causing a [Social Security] payment when no payment was authorized, or for the purpose of obtaining for himself or any other person any payment or benefit to which the defendant or another person was not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose.[339]

§ 408(a)(7)(C)

- First, that the defendant altered a social security card issued by the Commissioner of Social Security, or bought or sold an altered social security card, or counterfeited a social security card;
- Second, that the defendant did so knowingly, willfully, and with the intent to deceive; and
- Third, that the defendant did so for the purpose of causing an increase in any [Social Security] payment, or for the purpose of causing a [Social Security] payment when no payment was authorized, or for the purpose of obtaining for himself or any other person any payment or benefit to which the defendant or another person was not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose.

OR

- First, that the defendant possessed a social security card issued by the Commissioner of Social Security, or a counterfeit social security card;
- Second, that the defendant did so with intent to sell or alter the social security card;
- Third, that the defendant did so knowingly, willfully, and with the intent to deceive; and
- Fourth, that the defendant did so for the purpose of causing an increase in any [Social Security] payment, or for the purpose of causing a [Social Security] payment when no payment was authorized, or for the purpose of obtaining for himself or any other person any payment or benefit to which the defendant or another person was not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose.

§ 408(a)(8)

- First, that the defendant disclosed, used, or compelled the disclosure of the social security number of any person; and

[339] *See United States v. Sparks*, 67 F.3d 1145, 1152 (4th Cir. 1995); *United States v. Bales*, 813 F.2d 1289, 1297 (4th Cir. 1987).

- Second, that the defendant did so in violation of [a law of the United States, which must be specified, identifying the elements].

42 U.S.C. § 1320a-7b ANTI-KICKBACK STATUTE

Title 42, United States Code, Section 1320a-7b makes it a crime to make false statements in any application for benefits under a Federal health care program, or to ask for or receive, or pay or offer to pay any remuneration in connection with referring patients, or arranging for services for which payments may be made under a Federal health care program. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1320a-7b(a)(1)

- First, that the defendant made or caused to be made a false statement or representation in an application for any benefit or payment under a Federal health care program;
- Second, that the false statement or representation was material; and
- Third, that the defendant did so knowingly and willfully.[340]

§ 1320a-7b(a)(2)

- First, that the defendant made or caused to be made a false statement or representation for use in determining rights to any benefit or payment under a Federal health care program;
- Second, that the false statement or representation was material; and
- Third, that the defendant did so knowingly and willfully.

§ 1320a-7b(a)(3)

- First, that the defendant knew of an event which affected his initial or continued right to any benefit or payment under a Federal health care program for himself or for any other individual in whose behalf he had applied for or was receiving any benefit or payment under a Federal health care program;
- Second, that the defendant concealed or failed to disclose such event; and
- Third, that the defendant did so with intent fraudulently to secure that benefit or payment either in a greater amount or quantity than was due or when no such benefit or payment was authorized.

§ 1320a-7b(a)(4)

- First, that the defendant had made application for and received benefits or payments under a Federal health care program for the use and benefit of another;
- Second, that the defendant converted such benefits and payments or any part thereof to a use other than for the use and benefit of that person; and
- Third, that the defendant did so knowingly and willfully.

§ 1320a-7b(a)(5)

- First, that the defendant presented or caused to be presented a claim for a physician's service for which payment may be made under a Federal health care program; and
- Second, that the defendant knew that the individual who furnished the service was not licensed as a physician.

§ 1320a-7b(a)(6)

- First, that the defendant counseled or assisted an individual to dispose of

[340] *See United States v. Lipkis*, 770 F.2d 1447 (9th Cr. 1985).

assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance from a state plan under a Federal health care program, if disposing of the assets resulted in the imposition of a period of ineligibility for such assistance;

- Second, that the defendant did so for a fee; and
- Third, that the defendant did so knowingly and willfully.

AGGRAVATED PENALTY for § 1320a-7b(a)

1. Was the offense in connection with the furnishing by the defendant of items or services for which payment was or may be made under a Federal health care program?

§ 1320a-7b(b)(1)(A) and (B)

- First, that the defendant asked for or received any remuneration (including any kickback, bribe, or rebate) directly or indirectly, openly or secretly, in cash or in kind;
- Second, that the payment asked for or received was in return for one of the following:
  1. referring an individual to a person for the furnishing or arranging for the furnishing of an item or service that could be paid for, in whole or in part, by a Federal health care program; or
  2. for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering, any good, facility, service, or item that could be paid for, in whole or in part, by a Federal health care program; and
- Third, the defendant did so knowingly and willfully.[341]

§ 1320a-7b(b)(2)(A) and (B)

- First, that the defendant offered or paid any remuneration (including any kickback, bribe, or rebate) directly or indirectly, openly or secretly, in cash or in kind;
- Second, that the payment (or offer) was made to a person to induce that person to do one of the following:
  1. to refer an individual to a person for the furnishing or arranging for the furnishing of an item or service that could be paid for, in whole or in part, by a Federal health care program; or
  2. to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering, any good, facility, service, or item that could be paid for, in whole or in part, by a Federal health care program; and
- Third, the defendant did so knowingly and willfully.[342]

§ 1320a-7b(c)

- First, that the defendant made or caused to be made, or induced or sought to induce the making of, a false statement or representation with respect to the conditions or operation of any institution, facility, or entity;
- Second, that the false statement or representation was material;
- Third, that the false statement or representation was made in order that the institution, facility, or entity might qualify as a hospital, critical access hospital, skilled nursing facility, nursing facility, intermediate care

[341] *See United States v. Kats*, 871 F.2d 105 (9th Cir. 1989).

[342] *See United States v. Miles*, 360 F.3d 472, 479-80 (5th Cir. 2004).

facility for the mentally retarded, home health agency, or other entity for which certification is required, or with respect to information required to be proved under § 1320a-3a; and

- Fourth, that the defendant did so knowingly and willfully.

§ 1320a-7b(d)(1)

- First, that the defendant charged, for any service provided to a patient under an approved state plan, money or other consideration at a rate in excess of the rates established by the state (or in excess of the rate permitted under a contract for services provided to an individual enrolled with a medicaid managed care organization under subchapter XIX); and
- Second, that the defendant did so knowingly and willfully.

§ 1320a-7b(d)(2)

- First, that the defendant charged, asked for, accepted, or received, in addition to any amount otherwise required to be paid under an approved state plan, any gift, money, donation, either as a precondition of admitting a patient to a hospital, nursing facility, or intermediate care facility for the mentally retarded, or as a requirement for the patient's continued stay in a hospital, nursing facility, or intermediate care facility for the mentally retarded;
- Second, when the cost of the services was paid for in whole or in part under the state plan; and
- Third, that the defendant did so knowingly and willfully.

§ 1320a-7b(e)

- First, that the defendant accepted assignments or agreed to be a participating physician or supplier;
- Second, that the defendant repeatedly violated the terms of such assignments or agreement; and
- Third, that the defendant did so knowingly and willfully.

The government must show that the relevant decisionmaker's judgment was improperly influenced by the payments he received.[343]

The government must prove that a purpose of the remuneration was to induce the referring of patients or ordering of services.[344]

The government must prove beyond a reasonable doubt that one of the purposes of the remuneration [either the asking for or the payment of] was for the referral of individuals, such as patients, or the ordering or services, such as laboratory services, which may be paid in whole or in part by a federal health care program. It is not a defense that there might have been other reasons for the remuneration, if you find beyond a reasonable doubt that one of the material purposes for the remuneration was for the referral of individuals or ordering of services to be paid for by a federal health care

[343] In *United States v. Miles*, 360 F.3d 472, 481 (5th Cir. 2004), the issue was whether the defendants' activities constituted referrals. The defendants paid a public relations firm to distribute to doctors information regarding their home health services. After a doctor decided to send a patient to the defendants, the doctor's office contacted the public relations firm which supplied the necessary billing information to the defendants and collected payment. There was no evidence that the public relations firm had any authority to act on behalf of a physician in selecting the particular home health care provider. Thus, the payments from the defendants to the public relations firm were not made to the relevant decisionmaker as an inducement or kickback for sending patients to the defendants.

[344] *See United States v. Greber*, 760 F.2d 68, 71 (3d Cir. 1985).

program.[345]

The government must prove beyond a reasonable doubt that the defendant asked for or received the remuneration with specific criminal intent that the remuneration be in return for referrals. To ask for or receive remuneration in return for referrals means to ask for or receive remuneration with intent to allow the remuneration to influence the reason and judgment behind one's [patient] referral decisions. The intent to be influenced must, at least in part, have been the reason the remuneration was asked for or received.

On the other hand, the defendant cannot be convicted merely because he received remuneration wholly in return for services and also decided to refer patients to the hospital. Likewise, mere referral of patients because of oral encouragement or because of a belief that the place to which the patients are to be referred is attractive does not violate the law. There must be an asking for or receipt of remuneration in return for referrals.[346]

The government must prove beyond a reasonable doubt that the defendant offered or paid remuneration with the specific criminal intent to induce referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, at least in part, have been the reason the remuneration was offered or paid.

On the other hand, the defendant cannot be convicted merely because he hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law. There must be an offer or payment of remuneration to induce.[347]

"Federal health care program" means:

1. any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under Title 5, chapter 89); or
2. any state health care program, as defined in section 1320a-7(h).

"Remuneration" includes not only sums for which no actual service was performed but also those amounts for which some professional time was expended. Thus, remuneration under this statute covers any payment, as long as one purpose of the payment was to induce the physician to refer patients or use services, even if the payments were also intended to compensate for professional services.[348]

The term "kickback" does not mean only the secret return of a sum of money received. "Kickback" also includes a payment for granting assistance to one in a position to control a source of income, unless such payment is wholly and not incidentally attributable to the delivery of goods or services.[349]

"Knowingly" means the act was done voluntarily and intentionally, not because

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[345] *See United States v. Kats*, 871 F.2d 105, 108 n.1 (9th Cir. 1989). The "one purpose" instruction has been repeatedly approved. *See*, *e.g.*, *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000); *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998).

[346] Instruction approved in *United States v. LaHue*, 261 F.3d 993, 1003 n.11 (10th Cir. 2001).

[347] *Id.* at 1003 n.10.

[348] *Greber*, 760 F.2d at 71-72.

[349] Instruction approved in *Kats*, 871 F.2d at 108 n.2.

of mistake or accident.[350]

An act is done willfully if it is done voluntarily and purposely and with the specific intent to do something the law forbids, that is, with the bad purpose either to disobey or disregard the law. A person acts willfully if he or she acts unjustifiably and wrongly while knowing that his or her actions are unjustifiable and wrong. Thus, in order to act willfully, a person must specifically intend to do something the law forbids, purposely intending to violate the law.[351]

"Willfully" means unjustifiably and wrongfully, known to be such by the defendant.[352]

A person need not have actual knowledge of this statute or specific intent to commit a violation of this statute.[353]

_____NOTE_____

There are certain "safe harbors" to § 1320a-7b(b) enumerated in subsection (b)(3). Good faith is a defense. *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996).

Regarding § 1320a-7b(a), the defendant in *United States v. Lipkis*, 770 F.2d 1447 (9th Cr. 1985), argued that his conduct was an omission, covered by subsection (a)(3), rather than a false statement, covered by subsection (a)(1). The Ninth Circuit rejected his argument. "Filing a claim for payment is an affirmative act. The false statement is the claim of entitlement to payment where the services have already been paid for." 770 F.2d at 1452.

42 U.S.C. § 1973i VOTING FRAUD

Title 42, United States Code, Section 1973i makes it a crime to commit certain acts which adversely affect the integrity of the election process. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 1973i(c) false information

- First, that the defendant gave false information as to his name, address, or period of residence in the voting district for the purpose of establishing eligibility to register or vote;

OR

- First, that the defendant conspired with another individual for the purpose of encouraging his false registration to vote or illegal voting;
- Second, that the defendant did so knowingly or willfully; and
- Third, there must be a candidate for federal office on the ballot.

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[350] *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998).

[351] *United States v. McClatchey*, 217 F.3d 823, 829 (10th Cir. 2000) ("Neither party quarrels with this instruction.").

[352] In *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), the district court adopted a middle ground between the traditional definition in *Cheek v. United States*, 498 U.S. 192 (1991), and the heightened *mens rea* in *Ratzlaf v. United States*, 510 U.S. 135 (1994). The Eighth Circuit agreed with the district court that the government must meet a heightened *mens rea* burden. But that did not mean "that the specific instruction adopted in *Ratzlaf* and the criminal tax cases is appropriate" either. *Id.* at 441. *But c.f. United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) ("willfully means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.").

[353] Section 1320a-7b(h) was added March 23, 2010.

The government does not have to prove that false information actually affected a federal contest.[354]

The government does not have to prove that the information was given without the voter's permission. To sign someone else's name, with or without permission, is to give false information.[355]

§ 1973i(c) vote-buying

- First, that the defendant paid, offered to pay, or accepted payment, either for registration to vote or for voting;
- Second, the defendant must do so knowingly or willfully; and
- Third, there must be a candidate for federal office on the ballot.

Payment is not limited to cash. The term includes items of monetary value offered or given directly to an individual voter in exchange for his individual vote.[356]

The government does not have to prove that the payment was made on behalf of a candidate for federal office, or that the voter was paid to vote for a candidate for federal office, or that the voter in fact voted for the candidate on whose behalf he was paid. The government must prove that a person was paid to vote in an election in which specified candidates for federal office were listed on the ballot, but the government does not have to prove a specific intent to corruptly influence the federal race.[357]

The government does not have to prove that the vote-buying activities actually affected a federal election.[358]

A violation of § 1973i(c) is established when the evidence shows, beyond a reasonable doubt, that the defendant bought or offered to buy a vote and that such activity exposed the federal aspects of the election to the possibility of corruption, whether or not the actual corruption took place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption.[359]

§ 1973i(e) voting more than once [360]

- First, that a federal candidate was on the ballot;
- Second, that the defendant voted more than once for some candidate on the ballot; and
- Third, that the defendant did so knowingly and willfully for the specific purpose of having his vote count more than once.[361]

"Vote" or "voting" includes all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration or other action required by law prerequisite to voting, casting a ballot, and having such ballot

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[354] *See United States v. Carmichael*, 685 F.2d 903, 908 (4th Cir. 1982).

[355] *United States v. Smith*, 231 F.3d 800, 814, 815 (11th Cir. 2000).

[356] *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983).

[357] *United States v. Bowman*, 636 F.2d 1003, 1008, 1012 (5th Cir. 1981).

[358] *Carmichael*, 685 F.2d at 908.

[359] *United States v. Carmichael*, 685 F.2d 903, 908 (4th Cir. 1982).

[360] The Sixth Circuit held § 1973i(e) unconstitutionally void for vagueness as applied to the facts in *United States v. Salisbury*, 983 F.2d 1369 (6th Cir. 1993). The Seventh Circuit declined to follow *Salisbury*. *See United States v. Cole*, 41 F.3d 303, 308 (7th Cir. 1995).

[361] *United States v. Hogue*, 812 F.2d 1568, 1576 (11th Cir. 1987). In *United States v. Smith*, 231 F.3d 800, 817 n.20 (11th Cir. 2000), the Eleventh Circuit explained that "nothing in our *Hogue* opinion says that lack of knowledge and consent of the voter is a necessary element of a § 1973i(e) violation."

counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.[362]

Voting more than once does not include casting an additional ballot if all prior ballots of that voter were invalidated. It does not include voting in two jurisdictions, to the extent two ballots are not cast for an election to the same candidacy or office. [§ 1973i(e)(3)]

The government does not have to prove that voting more than once actually affected a federal contest.[363]

The government does not have to prove that the voters in whose names ballots were submitted did not consent to the ballots being cast.[364]

NOTE

Section 1973i is designed to protect two aspects of the federal election: the actual results of the election and the integrity of the process of electing federal officials. *United States v. Cole*, 41 F.3d 303, 307 (7th Cir. 1995).

In *Cole*, the Seventh Circuit held that the district court had jurisdiction even though the only two federal candidates on the ballot were running unopposed.

Section 1973i(c)'s prohibitions include absentee ballot applications. *United States v. Boards*, 41 F.3d 303, 589 (8th Cir. 1993).

Section 1973i(c) does not require using false names. Using a real voter's name on a fraudulent ballot application violates § 1973i(c). *Id.*

Each document containing false information, such as an application for absentee ballot and affidavit of absentee voter, would be a "unit of prosecution." *United States v. Smith*, 231 F.3d 800, 815 (11th Cir. 2000).

Only a single form of conspiracy is proscribed by the statute, *i.e.*, "conspir[ing] with another individual for the purpose of encouraging his false registration to vote or illegal voting." 42 U.S.C. § 1973i(c). Thus, a conspiracy with more than one other individual would fall outside the scope of § 1973i(c). Likewise, an individual who is encouraged to participate in false registration or voting and agrees to become part of such a conspiracy would escape conviction for conspiracy under § 1973i(c). *United States v. Olinger*, 759 F.2d 1293,1299 (7th Cir. 1985).

42 U.S.C. § 6928 RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) – HAZARDOUS WASTE

Title 42, United States Code, Section 6928 makes it a crime to mishandle hazardous waste, etc. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 6928(d)(1)

- First, that the defendant transported or caused to be transported any hazardous waste;
- Second, to a facility which did not have a permit; and
- Third, that the defendant did so knowingly.

[362] 42 U.S.C. § 1973*l*(c)(1). *See also United States v. Cole*, 41 F.3d 303, 308 (7th Cir. 1995).

[363] *See Carmichael*, 685 F.2d at 908.

[364] *United States v. Smith*, 231 F.3d 800, 817 (11th Cir. 2000).

§ 6928(d)(2) [365]

- First, that the defendant knowingly treated, stored, or disposed of a hazardous waste;
- Second, that the defendant knew that the hazardous waste had the potential to pose a substantial[366] present or potential hazard to human health or the environment; and
- Third, that the defendant did so:
  1. without a permit, or
  2. in knowing violation of any material condition or requirement of such permit, or
  3. in knowing violation of any material condition or requirement of any applicable interim status regulations.[367]

§ 6928(d)(3)

- First, that the defendant omitted information, or made a false statement or representation;
- Second, in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator;
- Third, that the information omitted, or false statement made was material; and
- Fourth, that the defendant did so knowingly.

§ 6928(d)(4)

- First, that the defendant generated, stored, treated, transported, disposed of, exported, or otherwise handled any hazardous waste;
- Second, that the defendant destroyed, altered, concealed, or failed to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator; and
- Third, that the defendant did so knowingly.

§ 6928(d)(5)

- First, that the defendant transported, or caused to be transported a hazardous waste without a manifest; and
- Second, that the defendant did so knowingly.

§ 6928(d)(6)

- First, that the defendant exported a hazardous waste;
- Second, without the consent of the receiving country, or not in conformance with an international agreement between the United States and the government of the receiving country; and

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[365] It might be necessary for the court to identify the elements of a particular regulation. *See United States v. Baytank (Houston), Inc.,* 934 F.2d 599 (5th Cir. 1991), where the defendant was charged with violating safe storage conditions set forth in 40 C.F.R. § 262.34(a).

[366] *United States v. Laughlin*, 10 F.3d 961, 967 (2d Cir. 1993).

[367] *See United States v. Freter*, 31 F.3d 783, 787 n. 4 (9th Cir. 1994); *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988). In *Greer*, the district court instructed the jury that one of the elements the government had to prove was that the substance in the chemical waste "was listed or identified ... as a hazardous waste."850 F2d at 1450. However, in *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993), the district court told the jury that the substance involved was a hazardous waste as defined under RCRA and the Second Circuit held that the district court did not err in declining to charge that the statute required knowledge that the substance was identified or listed under RCRA. 10 F.3d at 965.

- Third, that the defendant did so knowingly.

§ 6928(d)(7)

- First, that the defendant stored, treated, transported, or caused to be transported, disposed of, or otherwise handled any hazardous waste;
- Second, that the defendant did so:
  1. in knowing violation of any material condition or requirement of the permit, or
  2. in knowing violation of any material condition or requirement of any applicable regulations; and
- Third, that the defendant did so knowingly.

AGGRAVATED PENALTY [§ 6928(e)]

1. Did the defendant knowingly place another person in imminent danger of death or serious bodily injury [which is defined in § 6928(f)(6)]?

"Hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. [§ 6903(5)]

"Sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects. [§ 6903(26A)]

"Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits [under 33 U.S.C. § 1342], or source, special nuclear, or byproduct material [as defined in 42 U.S.C. § 2014(e)]. [§ 6903(27)]

"Manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage. [§ 6903(12)]

The government does not have to prove that the defendant knew that violating the Resource Conservation and Recovery Act was a crime, or that regulations existed listing and identifying substances as hazardous wastes.[368]

However, the government must prove that the defendant knew that the substance was hazardous, in other words, that it had the potential to pose a substantial present or potential hazard to human health or the environment.[369]

AFFIRMATIVE DEFENSE [§ 6928(f)(3)]

The conduct charged was consented to by the person endangered and the danger

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[368] *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990); *United States v. Laughlin*, 10 F.3d 961, 965-66 (2d Cir. 1993); *United States v. Baytank (Houston), Inc.,* 934 F.2d 599, 613 (5th Cir. 1991).

[369] *See Dee*, 912 F.2d at 745; *Laughlin*, 10 F.3d at 967; *Baytank*, 934 F.2d at 611.

and conduct were reasonably foreseeable hazards of an occupation, business, profession, or medical treatment, etc.

NOTE

See also United States v. Greer, 850 F.2d 1447, 1450 (11th Cir. 1988).

In *United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991), the Fifth Circuit concluded that "'knowingly' means no more than that the defendant knows factually what he is doing–storing what is being stored, and that what is being stored factually has the potential for harm to others or the environment, and that he has no permit–and it is not required that he know that there is a regulation which says what he is storing is hazardous under the RCRA." 934 F2d at 613.

The district court may inform the jury that the substance involved is a hazardous waste as defined under RCRA. *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993).

42 U.S.C. § 7413 CLEAN AIR ACT

Title 42, United States Code, Section 7413 makes it a crime to make false statements in, or fail to file documents required by the Clean Air Act. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 7413(c)(2)(A)

- First, that the defendant made a false material statement, representation, or certification in, or omitted material information from, any notice, application, record, report, plan, or other document;
- Second, that the notice, application, record, report, plan, or other document was required pursuant to the Clean Air Act to be either filed or maintained; and
- Third, that the defendant did so knowingly.

OR

- First, that the defendant altered, concealed, or failed to file or maintain any notice, application, record, report, plan, or other document;
- Second, that the notice, application, record, report, plan, or other document was required pursuant to the Clean Air Act to be either filed or maintained; and
- Third, that the defendant did so knowingly.[370]

§ 7413(c)(2)(B)

- First, that the defendant was required to notify or report under the Clean Air Act; and
- Second, that the defendant failed to do so.

§ 7413(c)(2)(C)

- First, that the defendant falsified, tampered with, rendered inaccurate, or failed to install a monitoring device or method; and
- Second, that the monitoring device or method was required to be maintained or followed under the Clean Air Act.

42 U.S.C. § 9603 CERCLA

[370] *See United States v. Ellis*, No. 98-4150, 1999 WL 92568 (4th Cir. Feb. 22, 1999).

Title 42, United States Code, Section 9603 makes it a crime to fail to notify the government of the release of a hazardous substance. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 9603(b)

- First, that the defendant was in charge of:
  1. a vessel from which a hazardous substance was released into or upon navigable waters of the United States; or
  2. a vessel from which a hazardous substance was released which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States, and was otherwise subject to the jurisdiction of the United States at the time of the release; or
  3. a facility from which a hazardous substance was released, other than a federally permitted release;
- Second, that a reportable quantity of hazardous substance was released into the environment [the court may want to specify the hazardous substance];
- Third, that the defendant knew of the release; and
- Fourth, that the defendant failed to notify immediately the appropriate agency of the United States Government or submitted notification which the defendant knew was false and misleading information.[371]

The government does not have to prove that the defendant knew of the regulatory requirements.[372]

AFFIRMATIVE DEFENSE (Permitted Release – 42 U.S.C. § 9601(10))

The defendant has presented evidence that the release was federally permitted.[373] The government must prove, beyond a reasonable doubt, that the exception does not apply.[374]

46 U.S.C. § 70503 MARITIME DRUG LAW ENFORCEMENT ACT

[Last Updated: 7/1/14]

Title 46, United States Code, Section 70503 makes it a crime to manufacture, distribute or possess with intent to manufacture or distribute a controlled substance on board a vessel. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was one of the following:

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[371] *See United States v. Freter*, 31 F.3d 783, 787 n.4 (9th Cir. 1994); *United States v. Laughlin*, 10 F.3d 961, 967 (2d Cir. 1993); *United States v. Greer*, 850 F.2d 1447, 1453 (11th Cir. 1988).

[372] *Laughlin*, 10 F.3d at 967.

[373] "Federally permitted release" is defined at 42 U.S.C. § 9601(10) and includes releases authorized under ten separate federal statutory provisions or state laws. *Freter*, 31 F.3d at 788.

[374] *Id.* at 789 n.6.

1. on board a vessel of the United States;
2. on board a vessel subject to the jurisdiction of the United States;
3. a citizen of the United States or a resident alien of the United States
   on board any vessel;

- Second, that the defendant manufactured or distributed [or attempted or conspired to manufacture or distribute] the amount of controlled substance alleged in the indictment;
- Third, that the defendant knew that the substance manufactured or distributed was a controlled substance under the law at the time of the manufacture or distribution; and
- Fourth, that the defendant did so knowingly or intentionally.

OR

- First, that the defendant was one of the following:

1. on board a vessel of the United States;
2. on board a vessel subject to the jurisdiction of the United States;
3. a citizen of the United States or a resident alien of the United States
   on board any vessel;

- Second, that the defendant possessed [or attempted or conspired to possess] the amount of controlled substance alleged in the indictment;
- Third, that the defendant knew that the substance possessed was a controlled substance under the law at the time of the possession; and
- Fourth, that the defendant did so with the intent to manufacture or distribute the controlled substance.[375]

AGGRAVATED PENALTY[376]

1. Did death or serious bodily injury result from the use of the controlled substance?
2. [Specific threshold quantities].[377]

Distribute means to deliver a controlled substance. [§ 802(11)] [Definitions in 21 U.S.C. § 802 apply to this statute, § 1903(i).]

Deliver means the actual, constructive, or attempted transfer of a controlled substance. [§ 802(8)]

Thus, distribution includes a range of conduct broader than selling controlled substances and is not limited to just selling controlled substances.[378]

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[375] *See United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*); *United States v. Collins,* 412 F.3d 515, 519 (4th Cir. 2005).

[376] *See* 21 U.S.C. § 960.

[377] *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*).

[378] *United States v. Washington*, 41 F.3d 917, 919 (4th Cir. 1994) ("Sharing drugs with another constitutes 'distribution.'").

Possession means to voluntarily and intentionally exercise dominion and control over an item or property.

Possession may be either sole, by the defendant himself, or joint, that is, it may be shared with other persons, as long as the defendant exercised dominion and control over the item or property.

Possession may be either actual or constructive.

Actual possession is defined as physical control over property.

Constructive possession occurs when a person exercises or has the power and the intention to exercise dominion and control over an item or property.[379]

Constructive possession can be established by evidence, either direct or circumstantial, showing ownership, dominion, or control over the item or property itself, or the premises, vehicle, or container in which the item or property is concealed, such that a person exercises or has the power and intention to exercise dominion and control over that item or property.[380]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[381]

Multiple persons possessing a large quantity of drugs and working in concert would be evidence of constructive possession.[382]

Intent to distribute may be inferred from a number of factors, including but not limited to: (1) the quantity of the drugs is greater than would be used for personal consumption; (2) the packaging; (3) where the drugs are hidden; and (4) the amount of cash seized with the drugs.[383]

The government must prove that the defendant possessed the controlled substance

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[379] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005).

[380] *Id.* at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*); United States v. Pearce, 65 F.3d 22, 26 (4th Cir. 1995) (citing *United States v. Blue*, 957 F.2d 106, 108 (4th Cir. 1992)).

[381] *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[382] *Burgos*, 94. F.3d at 873.

[383] *See Collins*, 412 F.3d 515. *See also Burgos*, 94 F.3d 849.

reasonably near the "on or about" date specified in the indictment.[384]

"Vessel of the United States" means

(1) a vessel documented under [§ 12103] or numbered as provided in [§ 12301];

(2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless –

(A) the vessel has been granted the nationality of a foreign nation under the 1958 Convention on the High Seas; and

(B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law;

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation. [§ 70502(b)]

"Vessel subject to the jurisdiction of the United States" includes

(1) a vessel without nationality;

(2) a vessel assimilated to a vessel without nationality under the 1958 Convention on the High Seas;

(3) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(4) a vessel in the customs waters of the United States;

(5) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(6) a vessel in the contiguous zone of the United States [as defined in Presidential Proclamation 7219 of September 2, 1999] that is entering the United States, has departed the United States, or is a hovering vessel [as defined in 19 U.S.C. § 1401]. [§ 70502(c)

"Vessel without nationality" includes

(1) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;

(2) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(3) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality. [§ 70502(d)]

The government does not have to prove any connection between the defendant's

[384] *United States v. Smith*, 441 F.3d 254, 261 (4th Cir. 2006) ("time is not an element of possession with the intent to distribute").

alleged criminal conduct and the United States.[385]

"'Custom waters' means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the *1152 case of every other vessel, the waters within four leagues of the coast of the United States [i.e. within the twelve mile limit]."[386]

☞ **For narcotics-laden vessels**

The jury may consider any of the following factors in determining whether the defendant violated this statute:

1. the probable length of the voyage;
2. the size of the contraband shipment;
3. the relationship between the captain and the crew;
4. the obviousness of the contraband;
5. other factors, such as suspicious behavior or diversionary maneuvers before apprehension, attempts to flee, inculpatory statements made after apprehension, witnessed participation of the crew, absence of supplies or equipment necessary to the vessel's intended use.[387]

_____NOTE_____

See United States v. Burgos, 94 F.3d 849 (4th Cir. 1996) (*en banc*); *United States v. Randall*, 171 F.3d 195 (4th Cir. 1999).

See *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir. 1982), discussing predecessor statute, codified at 21 U.S.C. § 955a. Section 70503 now includes citizens and resident aliens. The statute does not require proof of intent to distribute the illegal drugs within the United States. 679 F.2d at 372.

Section 70504(a) states that "[j]urisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense." The Eleventh Circuit confirmed that the jurisdictional requirement is not an element of the offense. *United States v. Tinoco*, 304 F.3d 1088, 1109 (11th Cir. 2002).

Drug quantity is a substantive element of the offense. *United States v. Alvarado*, 440 F.3d 191, 199 (4th Cir. 2006) (citing *United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (*en banc*)).

If attempt or conspiracy are charged, § 70506(b), the jury should be instructed on the elements of attempt and conspiracy.

Venue lies in the district where the defendant enters the United States, or the District of Columbia. 46 U.S.C. § 70504(b)

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[385] *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003).

[386] *United States v. Romero-Galue*, 757 F.2d 1147, 1151-52 (11th Cir. 1989).

[387] *United States v. Tinoco*, 304 F.3d 1088, 1123 (11th Cir. 2002).

Possession is a lesser included offense of possession with intent to distribute, "unless, as a matter of law, the evidence would rule out the possibility of a finding of simple possession, because the quantity of drugs found was so huge as to require that the case proceed on the theory that the quantity conclusively has demonstrated an intent to distribute." *United States v. Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993) (quotations, citations, and alternations in original omitted). *See also United States v. Wright*, 131 F.3d 1111 (4th Cir. 1997) (fact that defendant found in possession of 3.25 grams of crack cocaine insufficient alone to require the lesser-included offense instruction requested).

In *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), the Second Circuit held that where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse–simple joint possession, without any intent to distribute the drug further. The Fourth Circuit Court of Appeals has declined to reach whether *Swiderski* is good law in the Fourth Circuit. *United States v. Washington*, 41 F.3d 917, 920 n. 2 (4th Cir. 1994).

See *United States v. Ramos*, 462 F.3d 329 (4th Cir. 2006), for the court's "contribut[ion] to the ongoing discussion among the circuits regarding the definition of 'cocaine base' under 21 U.S.C. § 841." 462 F.3d at 331. The substance was referred to as both cocaine base and crack in the indictment, trial, and jury instructions. "We are of opinion that no further inquiry is necessary than a reference to the statutory text." *Id.* at 333. Congress did not use the term "crack." The Fourth Circuit agrees with the Second Circuit that while Congress probably contemplated that cocaine base would include crack, Congress did not limit the term to that form. Congress used the chemical term cocaine base without explanation or limitation. *Id.* at 333-34 (citing *United States v. Jackson*, 968 F.2d 158, 162 (2d Cir. 1992)).

47 U.S.C. § 553 THEFT OF CABLE SERVICE

Title 47, United States Code, Section 553 makes it a crime to assist in the intercepting or receiving of communications services offered over a cable system without authorization. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 553(b)(1) and (2)

- First, that the defendant did assist in the intercepting or receiving of communications services offered over a cable system without authorization;
- Second, that the defendant did so willfully and knowingly; and
- Third, that the defendant did so for purposes of commercial advantage or private financial gain.[388]

To "assist in intercepting or receiving" includes the manufacture or distribution of equipment intended by the manufacturer or distributor for unauthorized reception of any communications service offered over a cable system. [§ 553(a)(2)]

Thus, if you find that it was the defendant's intent to modify and distribute for sale equipment intended by him for the unauthorized reception of communication services

[388] *See United States v. Gardner*, 860 F.2d 1391 (7th Cir. 1988). The court instructed the jury "commercial advantage and private financial gain" in the third element. 860 F.2d 1398.

offered over a cable system, then the defendant would have assisted in the intercepting or receiving of communication services without authorization.[389]

The government does not have to prove that the equipment involved was sold for the sole and specific purpose of cable television theft, or that the equipment was actually used illegally. The government must prove that the defendant intended the equipment involved to be used for unauthorized reception of cable service, or that he acted with specific knowledge that the equipment involved would be so used.[390]

_____NOTE_____

Proof of the third element concerning commercial advantage or private financial gain elevates the crime to a felony under Section 553(b)(2).

In *United States v. Gee*, 226 F.3d 885, (7th Cir. 2000), the defendants were charged with conspiracy and substantive counts. The Seventh Circuit reversed, because the district court failed to give a buyer-seller instruction. (See instruction on "Buyer-Seller defense" in 21 U.S.C. § 846.)

49 U.S.C. §§ 32703 through 32705 ODOMETER FRAUD

Title 49, United States Code, Sections 32703 through 32705 make it a crime to tamper with odometers. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 32703(1)

- First, that the defendant advertised for sale, sold, used, installed, or had installed;
- Second, a device that makes an odometer of a motor vehicle register a mileage different from the mileage the vehicle was driven, as registered by the odometer within the designed tolerance of the manufacturer of the odometer; and
- Third, that the defendant did so knowingly and willfully.

§ 32703(2)

- First, that the defendant disconnected, reset, or altered, or had disconnected, reset, or altered, the odometer of any motor vehicle;
- Second, that the defendant did so with intent to change the mileage registered by the odometer; and
- Third, that the defendant did so knowingly and willfully.[391]

§ 32703(3)

- First, that the defendant operated a motor vehicle on a street, road, or

[389] Instruction modified, based on *Gardner*, 860 F.2d at 1396.

[390] Instruction approved in *United States v. Gee*, 226 F.3d 885, 897 (7th Cir. 2000).

[391] *See Schmuck v. United States*, 489 U.S. 705, 721 (1989), a mail fraud prosecution, where the Supreme Court stated that "[t]he offense of odometer tampering [§ 1984] includes the element of knowingly and willfully causing an odometer to be altered."

highway;

- Second, that the defendant knew the odometer of the vehicle was disconnected or not operating; and
- Third, the defendant did so with intent to defraud.

§ 32703(4)

☞ **A separate conspiracy provision which applies to all of the above offenses.**

§ 32704(b)

- First, that the defendant removed or altered;
- Second, a written notice attached to the left door frame of the vehicle specifying the mileage before service, repair, or replacement of the odometer, and the date of the service, repair, or replacement; and
- Third, that the defendant did so with intent to defraud.

§ 32705(a)(2)

- First, that the defendant transferred ownership of a motor vehicle;
- Second, that when transferring ownership, the defendant did one of the following:

  1. failed to give the transferee a written disclosure of the cumulative mileage registered on the odometer;

  2. failed to give the transferee a written disclosure that the actual mileage was unknown, if the defendant knew that the odometer reading was different from the number of miles the vehicle had actually traveled; or

  3. gave the transferee a false statement; and
- Third, that the defendant did so knowingly and willfully.

_____NOTE_____

The criminal penalty is set forth in § 32709(b).

In *United States v. Studna*, 713 F.2d 416 (8th Cir. 1983), the Eighth Circuit discussed 18 U.S.C. § 1984, the predecessor statute, and held that it did not require intent to defraud, unlike the civil remedy in § 1989, which provided a private right of action and specifically required intent to defraud. However, in recodifying § 1984, Congress has obviously added intent to defraud as an element for some of the offenses.

49 U.S.C. § 46502 AIRCRAFT PIRACY

Title 49, United States Code, Section 46502 makes aircraft piracy a crime. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 46502(a)

- First, that the defendant seized or exercised control over an aircraft [or attempted to or conspired to do so];

- Second, that the defendant did so by means of force, violence, threat of force or violence, or any form of intimidation;
- Third, that the defendant did so with wrongful intent; and
- Fourth, that at the time the aircraft was within the special aircraft jurisdiction of the United States.[392]

AGGRAVATED PENALTY

1. Did the death of another individual result from the defendant's conduct [or attempt]?

§ 46502(b)

- First, that the defendant seized or exercised control over an aircraft [or attempted to or conspired to do so];
- Second, that the defendant did so by means of force, violence, threat of force or violence, or any form of intimidation;
- Third, that the defendant did so with wrongful intent; and
- Fourth, that at the time, there was a national of the United States on the aircraft, the defendant was a national of the United States, or afterwards, the defendant was found in the United States.

AGGRAVATED PENALTY

1. Did the death of another individual result from the defendant's conduct [or attempt]?

"Aircraft in flight" means an aircraft from the moment all external doors are closed following boarding through the moment when one external door is opened to allow passengers to leave the aircraft, or until, if a forced landing, competent authorities take over responsibility for the aircraft and individuals and property on the aircraft. [§ 46501(1)]

"Special aircraft jurisdiction of the United States" includes any of the following aircraft in flight:

(a) a civil aircraft of the United States;

(b) an aircraft of the armed forces of the United States;

(c) another aircraft in the United States;

(d) another aircraft outside the United States

(1) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States;

(2) on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft)[393] if the aircraft lands in the United States with the individual still on the aircraft; or

[392] *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1176 (11th Cir. 2006).

[393] That is, unlawfully seizes, exercises control of, or attempts to seize or exercise control of an aircraft in flight by any form of intimidation or assists such an individual.

(3) against which an individual commits an offense (as defined in subsection (d) or (e) of article I, section I of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation)[394] if the aircraft lands in the United States with the individual still on the aircraft; and

(e) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States. [§ 46501(2)]

"National of the United States" means a citizen of the United States, or a person, who though not a citizen of the United States, owes permanent allegiance to the United States. [8 U.S.C. § 1101(a)(22)]

"Assault" means the willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm. An assault may be committed without actual touching, or striking, or doing bodily harm, to the person of another.[395]

For intimidation to occur, the defendant's conduct must be reasonably calculated to produce fear. Intimidation occurs when an ordinary person in the victim's position reasonably could infer a threat of bodily harm from the defendant's acts. Thus, the subjective courageousness or timidity of the victim is not relevant; the acts of the defendant must constitute intimidation to an ordinary, reasonable person.[396] The government does not have to prove that the defendant intended to intimidate.[397]

The government does not have to prove that the victim was in fact frightened for his own physical safety. It is sufficient that the conduct and words of the accused would place an ordinary, reasonable person in fear of bodily harm.[398]

The government does not have to prove that the defendant intended to harm the victim personally.[399]

_____NOTE_____

On the authority of *United States v. Compton*, 5 F.3d 358 (9th Cir. 1993), it appears that § 46504, interfering with flight crew, can be a lesser included offense of air piracy, although *Compton* dealt with the predecessor statutes, §§ 1472(i) and (j).

49 U.S.C. § 46503 INTERFERING WITH SECURITY SCREENING

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[394] That is, unlawfully seizes, exercises control of, or attempts to seize or exercise control of an aircraft in flight by any form of intimidation or assists such an individual.

[395] *United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991) (§ 1472(j)).

[396] *United States v. Wagstaff*, 865 F.2d 626, 627-28 (4th Cir. 1989), an 18 U.S.C. § 2113 case.

[397] *United States Woodrup*, 86 F.3d 359, 363-64 (4th Cir. 1996).

[398] *Tabacca*, 924 F.2d at 911; *United States v. Alsop*, 479 F.2d 65, 67 n.4 (9th Cir. 1973)(§ 2113(a) bank robbery prosecution).

[399] *Tabacca*, 924 F.2d at 911 n.6.

PERSONNEL

Title 49, United States Code, Section 46503 makes it a crime to interfere with security screening personnel. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant interfered with, or lessened the ability of a Federal, airport, or air carrier employee who has security duties to perform their respective duties within an airport;
- Second, that the defendant did so by assaulting the employee; and
- Third, that the assault occurred within a commercial service airport.

AGGRAVATED PENALTY

1. Did the defendant use a dangerous weapon in assaulting the employee?

"Assault" means the willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm. An assault may be committed without actual touching, or striking, or doing bodily harm, to the person of another.[400]

For intimidation to occur, the defendant's conduct must be reasonably calculated to produce fear. Intimidation occurs when an ordinary person in the victim's position reasonably could infer a threat of bodily harm from the defendant's acts. Thus, the subjective courageousness or timidity of the victim is not relevant; the acts of the defendant must constitute intimidation to an ordinary, reasonable person.[401] The government does not have to prove that the defendant intended to intimidate.[402]

The government does not have to prove that the victim was in fact frightened for his own physical safety. It is sufficient that the conduct and words of the accused would place an ordinary, reasonable person in fear of bodily harm.[403]

The government does not have to prove that the defendant intended to harm the victim personally.[404]

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. An object need not be inherently dangerous to be a dangerous weapon. Innocuous objects or instruments may become capable of inflicting injury when put to assaultive use. Tennis shoes can be dangerous weapons when used to stomp on a victim's head, and a stapler can be a dangerous weapon when used as a bludgeon. Teeth may also be a dangerous weapon if they are employed as such.[405]

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[400] *Id*. at 911.

[401] *United States v. Wagstaff*, 865 F.2d 626, 627-28 (4th Cir. 1989) (18 U.S.C. § 2113 case).

[402] *United States v. Woodrup*, 86 F.3d 359, 363-64 (4th Cir. 1996)

[403] *Tabacca*, 924 F.2d at 911; *United States v. Alsop*, 479 F.2d 65, 67 n.4 (9th Cir. 1973) (§ 2213(a) bank robbery prosecution).

[404] *Tabacca*, 924 F.2d at 911 n.6.

[405] *See United States v. Sturgis*, 48 F.3d 784, 787-88 (4th Cir. 1995).

49 U.S.C. § 46504 INTERFERING WITH FLIGHT CREW

Title 49, United States Code, Section 46504 makes it a crime to interfere with flight crew members or flight attendants. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was on an aircraft that was within the special aircraft jurisdiction of the United States;
- Second, that the defendant assaulted or intimidated a flight crew member or flight attendant; and
- Third, that in doing so, the defendant interfered with, or lessened the ability of the flight crew members or flight attendants to perform their respective duties on the flight.[406] [or attempted or conspired to do so]

AGGRAVATED PENALTY

1. Was a dangerous weapon used in assaulting or intimidating the flight crew member or flight attendant?

"Special aircraft jurisdiction of the United States" includes any of the following aircraft in flight:

(a) a civil aircraft of the United States;

(b) an aircraft of the armed forces of the United States;

(c) another aircraft in the United States;

(d) another aircraft outside the United States

(1) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States;

(2) on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft)[407] if the aircraft lands in the United States with the individual still on the aircraft; or

(3) against which an individual commits an offense (as defined in subsection (d) or (e) of article I, section I of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation)[408] if the aircraft lands in the United States with the individual still on the aircraft; and

(e) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States. [§ 46501(2)]

"Aircraft in flight" means an aircraft from the moment all external doors are closed following boarding through the moment when one external door is opened to allow passengers to leave the aircraft, or until, if a forced landing, competent authorities take over responsibility for the aircraft and individuals and property on the aircraft.

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[406] *United States v. Naghani*, 361 F.3d 1255, 1262 (9th Cir. 2004).

[407] That is, unlawfully seizes, exercises control of, or attempts to seize or exercise control of an aircraft in flight by any form of intimidation or assists such an individual.

[408] That is, unlawfully seizes, exercises control of, or attempts to seize or exercise control of an aircraft in flight by any form of intimidation or assists such an individual.

[§ 46501(1)]

"Assault" means the willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm. An assault may be committed without actual touching, or striking, or doing bodily harm, to the person of another.[409]

A defendant intimidates a flight attendant or flight crew member if the words and conduct of the defendant would place an ordinary reasonable person in fear [of bodily harm]. The government does not need to prove that the flight attendant or flight crew member was in fact frightened for his or her own [physical] safety.[410]

This statute does not require a one-on-one type confrontation. One person in a group can be intimidated by threats directed at the group in general.[411]

The government does not have to prove that the defendant intended to harm the victim personally.[412]

The government does not have to prove that the defendant intended to interfere with the performance of the flight crew or flight attendants.[413]

The government does not have to prove that the defendant endangered the safety of the aircraft.[414]

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. An object need not be inherently dangerous to be a dangerous weapon. Innocuous objects or instruments may become capable of inflicting injury when put to assaultive use. Tennis shoes can be dangerous weapons when used to stomp on a victim's head, and a stapler can be a dangerous weapon when used as a bludgeon. Teeth may also be a dangerous weapon if they are employed as such.[415]

NOTE

Section 46504 does not require any showing of specific intent. It is a general intent crime. *United States v. Grossman*, 131 F.3d 1449, 1452 (11th Cir. 1997).

Concerning venue, the First Circuit interpreted 49 U.S.C. § 1472, the predecessor statute, to say that "the offense continues for at least as long as the crew are responding directly, and in derogation of their ordinary duties, to the defendant's behavior." *United*

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[409] *United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991)(§ 1472(j)).

[410] District court instruction from *United States v. Naghani*, 361 F.3d 1255, 1260 n.3 (9th Cir. 2004). Bracketed inserts from *Tabacca*, 924 F.2d at 911. The test for intimidation is an objective one, on the same footing as "force and violence" under 18 U.S.C. § 2113(a). The Ninth Circuit had "no hesitancy in applying the test for intimidation under section 2113(a) when interpreting section 1472(j)[predecessor statute]." *United States v. Meeker*, 527 F.2d 12, 15 n.3 (9th Cir. 1975).

[411] *Naghani*, 361 F.3d at 1262.

[412] *Tabacca*, 924 F.2d at 911 n.6.

[413] *United States v. Meeker*, 527 F.2d 12, 14 (9th Cir. 1975).

[414] *United States v. Tabacca*, 924 F.2d 906, 912 (9th Cir. 1991).

[415] *See United States v. Sturgis*, 48 F.3d 784, 787-88 (4th Cir. 1995).

States v. Hall, 691 F.2d 48, 50 (1st Cir. 1982).

49 U.S.C. § 46505 CARRYING A WEAPON ON AN AIRCRAFT

Title 49, United States Code, Section 46505 makes it a crime to carry a weapon or explosive on an aircraft. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 46505(b)(1)

- First, that the defendant was on, or attempted to get on, an aircraft in, or intended for operation in, air transportation or intrastate air transportation;
- Second, that the defendant had in his possession a concealed dangerous weapon which would be accessible to him in flight; and
- Third, that the defendant acted knowingly.

§ 46505(b)(2)

- First, that the defendant placed, attempted to place, or attempted to have placed, a loaded firearm on an aircraft in, or intended for operation in, air transportation or intrastate air transportation;
- Second, that the loaded firearm was in property not accessible to passengers during flight; and
- Third, that the defendant did so knowingly.

"Loaded firearm" means a starter gun or a weapon designed or converted to expel a projectile through an explosive, that has a cartridge, a detonator, or powder in the chamber, magazine, cylinder, or clip. [§ 46505(a)]

§ 46505(b)(3)

- First, that the defendant had in his possession, or had placed, attempted to place, or attempted to have placed on an aircraft in, or intended for operation in, air transportation or intrastate air transportation;
- Second, an explosive or incendiary device; and
- Third, that the defendant did so knowingly.

§ 46505(e)

- First, that two or more persons agreed to [commit one of the above violations, with or without the aggravated penalty];
- Second, that the defendant knew of the conspiracy and willfully joined the conspiracy; and
- Third, at some time during the existence of the conspiracy or agreement, one of the members of the conspiracy knowingly performed one of the overt acts charged in the indictment in order to accomplish the object or purpose of the agreement.

AGGRAVATED PENALTY [§ 46505(c)]

1. Did the defendant act willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life?

2. Did death result to any person from the defendant's conduct?

_____NOTE_____

See United States v. Arias-Izquierdo, 449 F.3d 1168, 1186 (11th Cir. 2006).

49 U.S.C. § 46507 FALSE INFORMATION AND THREATS

Title 49, United States Code, Section 46504 makes it a crime to give false information about, or threaten to violate, certain federal laws concerning aircraft. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

§ 46507(1)

- First, that the defendant gave or caused to be given false information about an alleged attempt being made or to be made to [violate § 46502(a), 46504, 46505, or 46506, and the court should instruct on the elements of the appropriate section];
- Second, that the defendant did so under circumstances in which the information reasonably might be believed;
- Third, that the defendant knew the information was false; and
- Fourth, that the defendant did so willfully and maliciously or with reckless disregard for the safety of human life.

§ 46507(2)

- First, that the defendant threatened, or caused a threat, to [violate § 46502(a), 46504, 46505, or 46506 and the court should instruct on the elements of the appropriate section]; and
- Second, that the defendant had the apparent determination and will to carry out the threat.

50 U.S.C. § 783(a) COMMUNICATION OF CLASSIFIED INFORMATION [LAST UPDATED: 9/30/11]

Title 50, United States Code, Section 783(a) makes it a crime for a federal employee to communicate classified information to an agent of a foreign government without authorization. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that the defendant was an officer or employee of the United States or some department or agency of the United States;
- Second, that the defendant communicated, in any manner or by any means, any information of a kind which had been classified as affecting the security of the United States;
- Third, that the defendant knew or had reason to know that the information had been so classified;
- Fourth, that the defendant communicated the information to an agent or representative of any foreign government; and

- Fifth, that the defendant knew or had reason to know that the person to whom the information was communicated was an agent or representative of a foreign government.[416]

The government does not have to prove that documents involved were properly classified as "affecting the security of the United States."[417]

"The term 'agent or representative of a foreign government' means an individual who operates subject to the direction or control of a foreign government or official. There is no requirement that the defendant know the identity of the particular foreign government on whose behalf the agent or representative to whom the defendant communicated classified information was acting. The government need only prove that the defendant knew or had reason to believe that the person to whom he communicated classified information was an agent or representative of any foreign government."[418]

_____NOTE_____

Section 783(a) sets forth an exception for disclosure which is "specifically authorized," which might be construed as affirmative defenses. *See United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) (the existence of "just cause or excuse" for an assault in violation of 18 U.S.C. § 113(a)(3) is an affirmative defense, and the government does not have the burden of pleading or proving its absence).

[416] *See United States v. Fondren*, 417 F. App'x 327, 332 (4th Cir. 2011).
[417] *Scarbeck v. United States*, 317 F.2d 546, 558 (D.C. Cir. 1962).
[418] *Fondren*, 417 F. App'x at 332.

V. DEFINITIONS

"A trial court need not define specific statutory terms unless they are outside the common understanding of a juror or are so technical or specific as to require a definition." *United States v. Chenault*, 844 F.2d 1124, 1131 (5th Cir. 1988).

A. Agency

[As used in Title 18] the term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense. [18 U.S.C. § 6][1]

B. Assault

"Assault" has three meanings. First, a battery; second an attempt to commit a battery; and third, an act that puts another in reasonable apprehension of receiving immediate bodily harm.[2]

An assault is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.[3]

_____NOTE_____

Assault had two meanings at common law: attempt to commit a battery, and an act putting another in reasonable apprehension of bodily harm. Battery did not require proof that the defendant intended to injure another or to threaten the person with harm. The slightest willful offensive touching of another constituted a battery regardless of whether the defendant harbored an intent to do physical harm. *United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000).

C. Attempt

For you to find the defendant guilty of an attempt, the government must prove each of the following beyond a reasonable doubt:

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[1] In *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006), the defendant was charged with bank fraud, in violation of 18 U.S.C. § 1344, and requested the following instruction:

> An agent is one who is authorized to act on behalf of or in the place of another. That authority may be express or may be implied by circumstance. Third parties dealing with an agent are entitled to rely on statements and representations to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to acts and representations done on his behalf by the person purporting to act for him.

455 F.3d 1326. The district court gave a "good faith" instruction instead. The Eleventh Circuit held that this instruction was an accurate statement of agency law as applied to civil contract disputes, but it would have been misleading to a jury in a bank fraud case.

[2] *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999).

[3] *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (citing *United States v. Bell*, 505 F.2d 539 (7th Cir. 1974)).

- First, that the defendant intended to commit the crime alleged [this will necessitate instructing the jury on the elements of the crime charged, especially the requisite intent];
- Second, that the defendant undertook a direct act in a course of conduct planned to culminate in the commission of the crime;
- Third, that the act was substantial, in that it was strongly corroborative of the defendant's criminal purpose; and
- Fourth, that the act fell short of the commission of the intended crime due to intervening circumstances.[4]

A substantial step is more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.[5]

A verbal agreement alone, without more, is insufficient to prove attempt.[6]

Examples of conduct which may constitute a substantial step include the following: lying in wait, searching for or following the contemplated victim of the crime; enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; reconnoitering the place contemplated for the commission of the crime; unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; possession of materials to be used in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the defendant under the circumstances; possession, collection, or making of materials to be employed in the commission of the crime at or near the place contemplated for its commission, if such possession, collection, or making serve no lawful purpose under the circumstances; and soliciting an innocent agent to engage in conduct constituting an element of the crime.[7]

NOTE

"Congress' use of the term 'attempt' in a criminal statute manifested a requirement of specific intent to commit the crime attempted, even when the statute did not contain an explicit intent requirement." *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (*en banc*). According to the Ninth Circuit, attempt requires specific intent.

In *Osborn v. United States*, 385 U.S. 323, 333 (1966), the Supreme Court questioned the "continuing validity [of] the doctrine of 'impossibility,' with all its subtleties, ... in the law of criminal attempt." Osborn was convicted of endeavoring to obstruct justice, which, by its nature, is an attempt.

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[4] *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003). "[A]n indictment alleging attempted illegal reentry under § 1326(a) need not specifically allege a particular overt act or any other 'component par[t]' of the offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007).

[5] *United States v. Sutton*, 961 F.2d 476, 478 (4th Cir. 1992). "But if preparation comes so near to the accomplishment of the crime that it becomes *probable* that the crime will be committed absent an outside intervening circumstance, the preparation may become an attempt." *Pratt*, 351 F.3d at 136.

[6] *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996) (quoting *United States v. Delvecchio*, 816 F.2d 859, 862 (2d Cir. 1987)).

[7] *Pratt*, 351 at 135-36; *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984).

"Factual impossibility refers to those situations in which a circumstance or condition, unknown to the defendant, renders physically impossible the consummation of his intended criminal conduct." *United States v. Frazier*, 560 F.2d 884, 888 (8th Cir. 1977). An example of this is when someone tries to pick an empty pocket. "Legal impossibility refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime. Thus, attempt is not unlawful where success is not a crime, and this is true even though the defendant believes his scheme to be criminal." *Id.*

"Factual impossibility exists where the objective is proscribed by the criminal law but a factual circumstance unknown to the actor prevents him from bringing it about." *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) (*en banc*). Factual impossibility is not a defense to an attempt crime or conspiracy. *Id.*

D. Battery

Battery is defined as inflicting injury upon the person of another.[8]

Battery may also be defined as the slightest willful offensive touching of another, regardless of whether the defendant had an intent to do physical harm.[9]

In the case of an attempted battery, the victim need not have experienced reasonable apprehension of immediate bodily harm.[10]

E. Conspiracy

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

- First, that there was an agreement between two, or more, persons, to [the court must identify the elements of the object of the conspiracy];
- Second, that the defendant knew of the conspiracy; and
- Third, that the defendant knowingly and voluntarily became a part of this conspiracy.[11]

F. Conversion

Conversion is the act of control or dominion over the property of another that seriously interferes with the rights of the owner. The act of control or dominion must be without authorization from the owner. The government must prove both that the defendant knew the property belonged to another and that the taking was not authorized.[12]

Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any

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[8] See *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991), for a full definition of common law assault.

[9] *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999) ("Intention to do bodily harm is not a necessary element of battery.").

[10] *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982).

[11] *United States v. Yearwood*, 518 F.3d 220, 225-26 (4th Cir. 2008).

[12] *See United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986).

intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and in tact.[13]

G. Corruptly

"Corruptly" means to act knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of a proceeding.[14]

H. Crime of Violence [LAST UPDATED: 7/18/14]

The term "crime of violence" means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. [18 U.S.C. § 16][15]

I. Dangerous Weapon

What constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict serious physical harm. Almost any weapon, as used or attempted to be used, may endanger life or inflict bodily harm; as such, in appropriate circumstances, it may be a dangerous and deadly weapon. Thus, an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use.[16]

J. Department

The term "department" means one of the executive departments enumerated in [5 U.S.C. § 101], unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government. [18 U.S.C. § 6]

K. Embezzle

Embezzle means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.[17]

L. False

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[13] *Morissette v. United States*, 342 U.S. 246, 271-72 (1952).

[14] *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

[15] Physical force has been defined as violent force, that is force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. 133 (2010); *United States v. White*, 606 F.3d 144, 153 (4th Cir. 2010).

[16] *United States v. Sturgis*, 48 F.3d 784, 787 (4th Cir. 1995), an inmate who was HIV positive bit two correctional officers. The Fourth Circuit surveyed "dangerous weapon" cases, and concluded that the "test of whether a particular object was used as a dangerous weapon ... must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury." *Id.* at 788 (citations omitted).

[17] *See United States v. Smith*, 373 F.3d 561, 564-65 (4th Cir. 2004). Lawful possession need not be acquired through a relationship of trust. *Moore v. United States*, 160 U.S. 268, 269-70 (1895). "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Id.* at 269.

"False" means more than merely untrue or incorrect.[18]

To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct.[19]

M. Financial Institution

[As used in Title 18], the term "financial institution" means

(1) an insured depository institution [as defined in 12 U.S.C. § 1813];

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member [as defined in 12 U.S.C. § 1422] of the Federal home loan bank system;

(4) a System institution of the Farm Credit System [as defined in 12 U.S.C. § 2271(3)];

(5) a small business investment company [as defined in 15 U.S.C. § 622];

(6) a depository institution holding company [as defined in 12 U.S.C. § 1813];

(7) a Federal Reserve bank or a member bank of the Federal Reserve System [Title 12, United States Code];

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act [Title 12, United States Code];

(9) a branch or agency of a foreign bank [as defined in 12 U.S.C. § 3101]; or

(10) a mortgage lending business or any person or entity that makes in whole or in part a federally related mortgage loan [as defined in 12 U.S.C. §§ 2601 et seq.]. [18 U.S.C. § 20]

N. Fraud or Fraudulent

Fraud is a broad term, which includes false representations, dishonesty, and deceit. It may result from reckless and needless representations, even not made with a deliberate intent to deceive.[20]

Fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent the other party from acquiring material information.[21]

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[18] *United States v. Snider*, 502 F.2d 645, 655 (4th Cir. 1974). In *Snider*, the district court instructed that a statement is false "if it were untrue when made, and was then known to be untrue by the person making it, or causing it to be made." 502 F.2d at 650. *Snider* was a 26 U.S.C. § 7205 prosecution, where the defendant claimed 3 billion exemptions. The Fourth Circuit held that "for a taxpayer to be convicted of supplying 'false or fraudulent' information contrary to § 7205 the information must either be (1) supplied with an intent to deceive, or (2) false in the sense of deceptive–of such a nature that it could reasonably affect withholding to the detriment of the government." *Id.* at 655.

[19] *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980) (citing *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978)).

[20] *United States v. Grainger*, 701 F.2d 308, 311 (4th Cir. 1983).

[21] *United States v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000) (18 U.S.C. § 1344 case).

Susceptibility of the victim of the alleged fraud is not relevant. It makes no difference whether the persons the defendant intended to defraud are gullible or skeptical, dull or bright.[22]

NOTE

The common law distinguished between concealment and nondisclosure. Concealment is "characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter." *United States v. Colton*, 231 F.3d 890, 899 (4th Cir. 2000). Nondisclolsure is characterized by "mere silence." *Id.* In *Colton*, the court concluded that fraud could be proven by evidence of active concealment of material information, and rejected the defendant's arguments that to prove a fraudulent scheme, the government had to establish one of the following: "(1) affirmative misrepresentations of existing fact, (2) false promises as to the future, (3) the failure of a fiduciary to make disclosure, and (4) the failure to make disclosure under an independent statutory duty." *Id.* at 900 (quoting *United States v. Coyle*, 943 F.2d 424, 426 (4th Cir. 1991)).

O. Health Care Benefit Program

[As used in Title 18], the term "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service for which payment may be made under the plan or contract. [18 U.S.C. § 24(b)]

P. Intent to Defraud

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead.[23]

Q. Intentionally

To commit an act intentionally is to do so deliberately and not by accident.[24]

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. The jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.[25] Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.[26]

R. Interstate or Foreign Commerce

"Interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the

[22] *See id*. at 903.

[23] *United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003).

[24] *United States v. Fuller*, 162 F.3d 256, 260 (4th Cir. 1998).

[25] *See United States v. Silva*, 745 F.2d 840, 850-51, 852 (4th Cir. 1984).

[26] Approved in *United States v. Arthur*, 544 F.2d 730, 737 (4th Cir. 1976).

District of Columbia. [18 U.S.C. § 10]

"Foreign commerce" includes commerce with a foreign country. [18 U.S.C. § 10]

S. Kickback

The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [an enumerated person] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [an enumerated circumstance]. *See* 41 U.S.C. § 52(2).

T. Knowingly

To act knowingly is to act with knowledge of the facts that constitute the offense but not necessarily with knowledge that the facts amount to illegal conduct.[27] Expressed another way, an act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that a defendant knew that his acts or omissions were unlawful.[28]

A person acts knowingly as to the result of his conduct when he knows that the result is practically certain to follow from his conduct.[29]

A person who causes a particular result is said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.[30]

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. The jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.[31] Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.[32]

NOTE

See Bryan v. United States, 524 U.S. 184 (1998) for discussion of "knowing" and "willful."

A mistake of fact is a cognizable defense to an offense requiring knowledge. *United States v. Fuller*, 162 F.3d 256, 262 (4th Cir. 1998).

"[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). The Court cited *Morissette v. United States*,

[27] *Fuller*, 162 F.3d at 260.

[28] *United States v. Evans*, 272 F.3d 1069, 1086 (8th Cir. 2001).

[29] *United States v. Carr*, 303 F.3d 539, 546 (4th Cir. 2002).

[30] *United States v. Bailey*, 444 U.S. 394, 404 (1980) (citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978)).

[31] *See United States v. Silva*, 745 F.2d 840, 850-51, 852 (4th Cir. 1984).

[32] Approved in *United States v. Arthur*, 544 F.2d 730, 737 (4th Cir. 1976).

342 U.S. 246 (1952) (18 U.S.C. § 641, theft of government property); *Liparota v. United States*, 471 U.S. 419 (1985) (7 U.S.C. § 2024, food stamps); and *Staples v. United States*, 511 U.S. 600 (1994) (26 U.S.C. § 5861, possession of unregistered machine gun). *But see United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (*en banc*), where the Fourth Circuit said that "the reasonable expectations of felons are wholly distinct from the reasonable expectations of ordinary citizens." 62 F.3d at 607. In *X-Citement*, the Supreme Court pointed out that knowledge of "jurisdictional facts" is not generally required. "Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." *X-Citement Video, Inc.*, 513 U.S. at 72 n.3.

U. Materiality

A statement (or claim) is material if it has a natural tendency to influence, or is capable of influencing, the decision of the body to which it was addressed. It is irrelevant whether the false statement (or claim) actually influenced or affected the decision-making process. The capacity to influence must be measured at the point in time that the statement (or claim) was made.[33]

V. Mortgage Lending Business

[In Title 18], the term "mortgage lending business" means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce. [18 U.S.C. § 27]

[33] *United States v. Sarihifard*, 155 F.3d 301, 306, 307 (4th Cir. 1998).

W. Motive

Intent and motive should never be confused. Motive is what prompts a person to act, or not to act. Intent refers to the state of mind with which an act is done or omitted. Personal advancement and financial gain are two well-recognized motives for much of human conduct. These motives may prompt one person to voluntary acts of good, and another person to voluntary acts of crime.[34]

Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the defendant is immaterial, except insofar as evidence of motive may aid you in your determination of state of mind or intent.[35]

X. Obligation or Other Security of the United States

The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps. [18 U.S.C. § 8]

Y. Pass or Utter

To "pass or utter" means to offer the obligation or security, such as, to another person or to a bank, with intent to defraud. It is not necessary to prove that anything of value was actually received in exchange. In other words, it is not necessary that the instrument be accepted.[36]

Z. Possession

Possession means to exercise dominion and control over an item or property, voluntarily and intentionally.

Possession may be either sole, by the defendant himself, or joint, that is, it may be shared with other persons, as long as the defendant exercised dominion and control over the item or property.

Possession may be either actual or constructive.

Actual possession is defined as physical control over property.

Constructive possession occurs when a person exercises or has the power and the intention to exercise dominion and control over an item of property.[37]

Constructive possession can be established by evidence, either direct or

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[34] *See United States v. Perl*, 584 F.2d 1316, 1322 n.6 (4th Cir. 1978) (so-called "Berrigan charge").

[35] *See United States v. Pomponio*, 528 F.2d 247, 249 (4th Cir. 1975), *reversed on other grounds*, 429 U.S. 10 (1976).

[36] *See United States v. Jenkins*, 347 F.2d 345, 347 (4th Cir. 1965) (citing *United States v. Rader,* 185 F.Supp. 224, 230 (W.D. Ark. 1960)).

[37] To prove constructive possession under § 922(g)(1), the government must prove that the defendant "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm. Constructive possession of the firearm must also be voluntary." *United States v. Scott*, 424 F.3d 431, 435-36 (4th Cir. 2005).

circumstantial, showing ownership, dominion, or control over the item or property itself, or the premises, vehicle, or container in which the item or property is concealed, such that a person exercises or has the power and intention to exercise dominion and control over that item or property.[38]

A defendant's mere presence at, or joint tenancy of, a location where an item is found, or his mere association with another person who possesses that item, is not sufficient to establish constructive possession. However, proximity to the item coupled with inferred knowledge of its presence may be sufficient proof to establish constructive possession. Constructive possession does not require proof that the defendant actually owned the property on which the item was found.[39]

_____NOTE_____

"When multiple items of contraband are seized on a single occasion ... [there is] ... only a single act of possession." *United States v. Leftenant*, 341 F.3d 338, 348 (4th Cir. 2003).

Multiple persons possessing a large quantity of drugs and working in concert sufficiently establish constructive possession. *United States v. Burgos*, 94 F.3d 849 (4th Cir. 1996) (*en banc*).

See also United States v. Chorman, 910 F.2d 102 (4th Cir. 1990).

AA. Possession of Recently Stolen Property

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession [participated in some way in the theft of the property[40] or] knew the property had been stolen. [The same inference may reasonably be drawn from a false explanation of such possession.][41] However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. The term "recently" is a relative term, and

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[38] *Id.* at 435-36; *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003) (quoting *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997)); *United States v. Gallimore*, 247 F.3d 134, 137 (4th Cir. 2001). *See also United States v. Pearce*, 65 F.3d 22, 26 (4th Cir. 1995) (citing *United States v. Blue*, 957 F.2d 106, 108 (4th Cir. 1992), and *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (*en banc*)).

[39] The definitive case in the Fourth Circuit on "mere proximity" is *United States v. Herder*, 594 F.3d 352 (4th Cir. 2010), in which the court reiterated the legal principle that proximity of a defendant to an item establishes accessibility only, not dominion and control. *See Shorter*, 328 F.3d 167 (contraband found in defendant's residence permitted inference of constructive possession; inference bolstered by evidence that contraband was in plain view or material associated with contraband found in closet of bedroom where defendant's personal papers located). *See also United States v. Rusher*, 966 F.2d 868, 878 (4th Cir. 1992) (mere presence on the premises or association with the possessor is insufficient to establish possession).

[40] *United States v. Long*, 538 F.2d 580, 581 n.1 (4th Cir. 1976).

[41] *Id.*

has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the defendant need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the defendant.[42]

You may infer that the defendant knew the property was stolen from circumstances that would convince a person of ordinary intelligence that such was the fact. In deciding whether the defendant knew the property was stolen, you should consider the entire conduct of the defendant that you deem relevant and which occurred at or near the time the offenses are alleged to have been committed. Sale and purchase at a substantially discounted price permits, but does not require, an inference that the defendant knew the property was stolen.[43]

The law never imposes on a defendant the burden of testifying or of explaining possession, and it is the jury's province to draw or reject any inference from possession.[44]

BB. Put in Jeopardy

"Putting in jeopardy" means putting the life of a person in an objective state of danger.[45] Therefore, "to put in jeopardy" means to expose a person to a risk of death.[46]

CC. Reckless

A person acts recklessly when he consciously disregards a substantial and unjustifiable risk of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in that person's situation.[47]

DD. Special Maritime and Territorial Jurisdiction

"Special maritime and territorial jurisdiction of the United States" includes lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction of the United States, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the land is situated, for the building of a fort, arsenal, dock, or other needed building. [See other definitions in

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[42] Instruction approved in *Barnes v. United States*, 412 U.S. 837, 840 n.3 (1973) (defendant was convicted of possessing stolen mail, 18 USC § 1708).

[43] *United States v. Gallo*, 543 F.2d 361, 368 n. 6 (D.C. Cir. 1976).

[44] *See United States v. Chorman*, 910 F.2d 102, 108 (4th Cir. 1990).

[45] In *United States v. Newkirk*, 481 F.2d 881 (4th Cir. 1973), the Fourth Circuit held the following instruction did not constitute plain error: "To put in jeopardy the life of a person by the use of a dangerous weapon or device means, then, to expose such person to a risk of death or to the fear of death, by the use of such dangerous weapon or device." 481 F.2d at 883 n.1. However, because jeopardy "is commonly defined as referring to an objective state of danger, not to a subjective feeling of fear," *United States v. Donovan*, 242 F.2d 61, 63 (2d Cir. 1957), "fear of death" language is not included.

[46] *Newkirk*, 481 F.3d 881.

[47] *See United States v. Carr*, 303 F.3d 539, 546 (4th Cir. 2002).

18 U.S.C. § 7.][48]

NOTE

For cases discussing special jurisdiction, especially pertaining to Fort Jackson, see the following: *United States v. Lovely*, 319 F.2d 673 (4th Cir. 1963); *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979); *United States v. Benson*, 495 F.2d 475 (5th Cir. 1974); *State v. Zeigler*, 274 S.C. 6, 260 S.E.2d 182 (S.C. 1979), *overruled on other grounds*, *Joseph v. State*, 351 S.C. 551, 571 S.E.2d 280 (S.C. 2002).

EE. Steal

Steal means the wrongful and dishonest taking of property with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.[49]

FF. Willfulness – Specific Intent

A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. The person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.[50]

A willful act is one undertaken with a bad purpose. In other words, in order to establish a willful violation of a statute, the government must prove that the defendant acted with knowledge that his conduct was unlawful.[51]

A person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his

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[48] *See* 18 U.S.C. § 7 (listing other definitions). In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), the Fourth Circuit construed § 7(9) as reaching only fixed locations. An inexhaustive list of factors relevant in determining whether a particular location qualifies as the premises of a United States mission include "the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States." 577 F.3d at 214. In *Passaro*, the court found that Asadabad Firebase in Afghanistan came within the statutory definition, such that Passaro, a civilian contractor, could be prosecuted for assaulting a prisoner, in violation of 18 U.S.C. § 113.

[49] In *United States v. Turley*, 353 U.S. 407, 411 (1957), the Supreme Court held that "the meaning of the federal statute should not be dependent on state law" and defined "stolen" to include "all felonious takings of [property] with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417. *See also Morissette v. United States*, 342 U.S. 246, 271 (1952).

[50] This charge was tacitly approved in *Bryan v. United States*, 524 U.S. 184, 188 (1998), where the defendant was convicted of willfully dealing in firearms without a federal license in violation of 18 U.S.C. § 922(a)(1)(A). The Supreme Court discussed at length the difference between "knowing" and "willful" and held that the government had to prove that the appellant knew his conduct was unlawful, but did not have to prove that he knew of the federal licensing requirement. *See also United States v. Gilbert*, 430 F.3d 215, 218-19 (4th Cir. 2005) (citing *Bryan*, 524 U.S. at 191, 193)).

[51] *Bryan*, 524 U.S. at 191-92.

conduct.[52]

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. The jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.[53] Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.[54]

☞ **For tax cases**:

Willfulness requires the government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.[55]

_____NOTE_____

In *United States v. Morrison*, 32 F. App'x 669 (4th Cir. 2002), the Fourth Circuit said that "bad motive" and "evil motive" are not separate and distinct elements of willfulness. According to *Morrison*, the evil motive referred to in *United States v. Bishop*, 412 U.S. 346, 360 (1973), is nothing more than the intentional violation of a known legal duty, and the court cited *Cheek v. United States*, 498 U.S. 192 (1991).

"In the absence of an explicit statement that a crime requires specific intent, courts often hold that only general intent is needed." *United States v. Lewis*, 780 F.2d 1140, 1142-43 (4th Cir. 1986).

Defenses such as diminished mental capacity and voluntary intoxication negate specific intent. *United States v. Darby*, 37 F.3d 1059, 1064 (4th Cir. 1994). *See also United States v. Kurka*, 818 F.2d 1427, 1432 (9th Cir. 1987).

Regarding the defendant's entitlement to a charge on good faith, see *Cheek v. United States*, 498 U.S. 192 (1991). Cheek was a tax protester, and the district court charged that his good faith had to be objectively reasonable. After setting out the definition of willfulness above, the Supreme Court said if the government proves actual knowledge of the legal duty, the prosecution satisfies the knowledge component. But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. One cannot be aware that the law imposes a duty and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. Cheek claimed that the Internal Revenue Code did not purport to treat wages as income. Cheek was entitled to a good faith charge based on this belief, however unreasonable the court might deem such a belief. Cheek also argued that the tax code was unconstitutional. Cheek was not entitled to a good faith charge on this basis, because his position revealed full knowledge of the tax provisions and a studied conclusion that they

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[52] *United States v. Bailey*, 444 U.S. 394, 404 (1980) (citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978)).

[53] *See United States v. Silva*, 745 F.2d 840, 850-51, 852 (4th Cir. 1984).

[54] Approved in *United States v. Arthur*, 544 F.2d 730, 737 (4th Cir. 1976).

[55] *Cheek v. United States*, 498 U.S. 192, 201 (1991).

were invalid, but Cheek had refused to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts.

GG. Willful Blindness

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.

Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.

A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

It is entirely up to you as to whether you find any deliberate closing of the eyes and inferences to be drawn from any such evidence.[56]

_____NOTE_____

United States v. Chorman, 910 F.2d 102 (4th Cir. 1990); *United States v. Martin*, 773 F.2d 579 (4th Cir. 1985); *United States v. Callahan*, 588 F.2d 1078, 1082 (5th Cir. 1979).

A willful blindness instruction is proper when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance. If the evidence supports such an inference, then the willful blindness instruction allows the jury to impute the element of knowledge to the defendant. Furthermore, a willful blindness instruction is proper where the evidence presented in the case supports both actual knowledge on the part of the defendant and deliberate ignorance. *See United States v. Ruhe*, 191 F.3d 376, 384 (4th Cir. 1999); *United States v. Abbas*, 74 F.3d 506 (4th Cir. 1996); *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991).

[56] *See United States v. Cogdell*, 844 F.2d 179, 181 (4th Cir. 1988), *abrogated on other grounds by Brogan v. United States*, 522 U.S. 398 (1998) ("exculpatory no" doctrine).

VI. DEFENSES

A. Abandonment or Renunciation [1]

It is a complete defense that the defendant renounced or abandoned his effort to commit the crime charged, or otherwise prevented its commission. Such abandonment or renunciation must be complete and voluntary. Renunciation is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the defendant's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim. The government has the burden to prove beyond a reasonable doubt that the defendant's renunciation or abandonment of the crime was not voluntary or not complete. If you find that the defendant voluntarily and completely renounced or abandoned an effort to commit the crime charged in the indictment then you must find the defendant to be not guilty. If you find that his abandonment or renunciation was not voluntary or complete and that the government has proven the elements of the offense as they have been explained to you then you should find the defendant to be guilty.[2]

NOTE

Police presence which causes a defendant to forego completion of the crime does not establish an abandonment of the attempt. *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996).

Withdrawal from a conspiracy is an affirmative defense. *United States v. Wooten*,

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[1] There is a conflict among the Circuits as to whether abandonment is a defense to an attempt prosecution. *See United States v. Buttrick*, 432 F.3d 373, 377 (1st Cir. 2005) (assuming *arguendo* that the defense is available); *United States v. Crowley*, 318 F.3d 401, 410-11 (2d Cir. 2003) (unnecessary to decide the question, although an excellent discussion of the issue); *United States v. Shelton*, 30 F.3d 702, 706 (6th Cir. 1994) ("[W]ithdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime."); *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982); *United States v. Bussey*, 507 F.2d 1096, 1098 (9th Cir. 1974) ("A voluntary abandonment of an attempt which has proceeded well beyond preparation, as here, will not bar a conviction for the attempt."); *United States v. McDowell,* 705 F.2d 426, 428 (11th Cir. 1983) (assuming renunciation is a valid defense).

In *United States v. Desena*, 287 F.3d 170 (2d Cir. 2002), the defendant was charged with violating 18 U.S.C. § 1959 by committing assault in violation of New York state law, under which abandonment is an affirmative defense. However, under New York Penal Law § 40.13(3), "the renunciation of criminal purpose must be 'voluntary and complete,' meaning it cannot be motivated by '(a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose, or (b) a decision to postpone the criminal conduct until another time.'" 287 F.3d at 179 (quoting statute).

It does not appear that the Fourth Circuit has specifically addressed the issue of whether abandonment is a defense to an attempt crime.

[2] This instruction is based on Model Penal Code § 5.01(4). *But see United States v. Buttrick*, 432 F.3d 373 (1st Cir. 2005) (18 USC § 2423(b) prosecution; court held instruction misallocated burden of proof in light of § 2423(g)).

688 F.2d 941, 946 (4th Cir. 1982).

B. Alibi

The defendant has offered evidence for the purpose of showing that he was not present at the place where, and at the time when, the offense charged [in the indictment] was committed. This defense is called an alibi. If after impartially considering, weighing and comparing all the evidence, the jury or any member of the jury has a reasonable doubt of the presence of the defendant at the place where and time when the alleged offense was committed, you cannot find the defendant guilty.[3]

C. Authorization

You have heard evidence that the defendant followed instructions from a superior. You may consider that evidence in deciding whether the defendant acted willfully and with knowledge.

If the defendant was directed by a superior to act contrary to the law, you may weigh this authorization along with other facts in determining his specific intent. However, authorization must be specific, not simply a general admonition or vague expression of preference. A person's general impression that a type of conduct was expected, that it was proper because others were doing the same, or that the challenged act would help someone or avoid political consequences, does not satisfy the defense of authorization. Finally, if an authorization can be satisfied by two different courses of action, and a person chooses the illegal or dubious course when other, legal action would comply, then the authorization defense is not available to that person.[4]

Following orders, without more, cannot transform an illegal act into a legal act.[5]

NOTE

See United States v. Duggan, 743 F.2d 59, 84 (4th Cir. 1984).

This defense can negate subjective specific intent.

Authorization permits "the jury to acquit *only* if the jurors find that the defendant did not know his *conduct* was illegal." *United States v. North*, 910 F.2d 843, 888 (D.C. Cir. 1990).

Authorization from one's superiors cannot convert illegal activity into legal, yet it surely can affect a defendant's belief that his conduct was lawful. *Id.* at 885. Thus, even an unreasonable belief that one's conduct was not unlawful would seem properly to preclude conviction for a crime requiring knowledge of unlawfulness (such as food stamp fraud, certain tax violations, possession of a machine gun).

D. Diminished Capacity

The defendant is charged with a crime which requires that the government prove, beyond a reasonable doubt, that the defendant acted with a certain specific intent. You

[3] *Holdren v. Legursky*, 16 F.3d 57, 63 n. 4 (4th Cir. 1994).

[4] *See United States v. North*, 910 F.2d 843, 885 (D.C. Cir. 1990).

[5] *Id.* at 881.

must take all of the evidence into consideration and determine if at the time when the crime was allegedly committed, the defendant had the specific intent required, or whether the defendant suffered from some abnormal mental or physical condition which prevented him from forming the specific intent required.[6]

If you find that the defendant did not form the specific intent required, or, if you have a reasonable doubt that the defendant formed the specific intent required, you should find the defendant not guilty.

NOTE

The Insanity Defense Reform Act (18 U.S.C. § 17) "does not prohibit psychiatric evidence of a mental condition short of insanity when such evidence is offered purely to rebut the government's evidence of specific intent, although such cases will be rare." *United States v. Worrell*, 313 F.3d 867, 874 (4th Cir. 2002).

The defense of diminished capacity is not an excuse. It is directly concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime. It is generally only a defense when specific intent is at issue. *United States v. Twine*, 853 F.2d 676, 678, 679 (9th Cir. 1988).

District courts should admit evidence of mental abnormality on the issue of *mens rea* only when, if believed, it would support a legally acceptable theory of lack of *mens rea*. In deciding such a question, courts should evaluate the testimony outside the presence of the jury. *United States v. Pohlot*, 827 F.2d 889, 905-06 (3d Cir. 1987).

The defense of diminished capacity is not recognized in South Carolina state courts. *Gill v. State*, 552 S.E.2d 26, 32 (S.C. 2001).

E. Duress or Justification[7]

The defendant is excused from committing a crime if the defendant committed the crime because of some justification [or duress or compulsion or coercion]. To establish this defense, the defendant must show by a preponderance of the evidence each of the following:

- First, that the defendant or someone else was under an unlawful and present threat of death or serious bodily injury;[8]

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[6] *See United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988), where a variation of the above instruction, requested by the defendant, was not given. The Eighth Circuit concluded that a "detailed instruction drawing attention to the issue of whether Bartlett's mental condition rendered him incapable of forming the requisite mental state would have been preferable," 856 F.2d at 1079 n.10, but the instructions, taken as a whole, adequately and correctly apprized the jury of the defendant's theory of the case, and therefore failing to give a separate and specific instruction on whether the defendant's mental condition rendered him incapable of forming the requisite specific intent was harmless. *Id*. at 1082, 1083.

[7] "At common law, self-defense was a type of duress defense, which, as a class of defenses, was distinct from 'necessity' defenses. More recent cases have grouped the defenses of duress, self-defense, and necessity 'under a single, unitary rubric: justification.'" *United States v. Gore*, 592 F.3d 489, 491 n.1 (4th Cir. 2010) (citation omitted).

[8] Generalized fears do not support the defense of justification. *United States v. Crittendon*,

(continued...)

- Second, that the defendant did not recklessly place himself in the situation where he would be forced to engage in criminal conduct;
- Third, that the defendant had no reasonable legal alternative that would avoid both the criminal conduct and the threatened harm; and
- Fourth, that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.[9]

The defendant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.[10]

_____NOTE_____

In *United States v. Crittendon*, 883 F.2d 326 (4th Cir. 1989), the court set forth the elements of the defense of justification, without ruling on its general availability in firearms prosecutions. In *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995), the court "continue[d] to construe the justification defense for possession of a firearm by a felon very narrowly." 45 F.3d at 875.

There is no federal statute defining the elements of the duress defense, and the Supreme Court has not specified the elements. In *Dixon v. United States*, 548 U.S. 1 (2006), the Supreme Court presumed the following description of the elements by the District Court for the Northern District of Texas was accurate:

> First, that the defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
>
> Second, that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to perform the criminal conduct;
>
> Third, that the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and
>
> Fourth, that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.

548 U.S. at 4 n.2.

Duress normally does not controvert any of the elements of the offense itself. *Id.* at 6.

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[8] (...continued)
883 F.2d 326, 330 (4th Cir. 1989).

[9] *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir. 1995).

[10] *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007) (citing *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982)).

The defense of duress "does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to avoid liability because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Id*. at 7.

The duress defense is limited to very narrow circumstances. Fear of reprisal does not justify criminal conduct. *United States v. King*, 879 F.2d 137, 138, 139 (4th Cir. 1989).

"Under any definition of these defenses [duress and necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail." *United States v. Bailey*, 444 U.S. 394, 410 (1980).

F. Entrapment [11]

The defendant has raised the defense of entrapment. A defendant may not be convicted of the crime charged if that person was entrapped by the government.

A person is entrapped when that person has no previous intent or disposition or willingness to commit the crime charged and is induced or persuaded by law enforcement officers to commit the offense.

Thus, the defense of entrapment has two elements: (1) whether the defendant was predisposed to commit the crime, and (2) whether the defendant was induced or pursuaded by a law enforcement officer to commit the crime.

A person is not entrapped when that person has a previous disposition or willingness or intent to commit the crime charged and a law enforcement officer merely provides what appears to be a favorable opportunity to commit the offense.[12]

Predisposition refers to the defendant's state of mind before government agents make any suggestion that he commit a crime. The government does not entrap a defendant, even if he does not specifically contemplate the criminal conduct prior to this suggestion, if the defendant's decision to commit the crime is the product of his own preference and not the product of government persuasion.[13]

It is not entrapment for the government merely to solicit a person to commit a crime.

Inducement requires more than merely soliciting a person to commit a crime. Mild forms of persuasion do not amount to inducement. However, pleas based on need,

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[11] *See United States v. Squillacote*, 221 F.3d 542, 565-73 (4th Cir. 2000). Before giving an entrapment instruction, the district court must make a threshold inquiry as to whether sufficient evidence exists for a reasonable jury to determine there was entrapment. Mere solicitation of a crime is insufficient to merit an entrapment instruction, as solicitation alone would not persuade an otherwise innocent person to commit a criminal act. "When government agents merely offer an opportunity to commit the crime and the defendant promptly avails himself of that opportunity, an entrapment instruction is not warranted." *United States v. Ramos*, 462 F.3d 329, 334-35 (4th Cir. 2006).

[12] An entrapment defense fails if the defendant was predisposed to commit the crime. *Squillacote*, 221 F.3d at 569.

[13] *Id*.

sympathy, or friendship may constitute inducement. Inducement necessitates government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party. [14]

In determining the question of entrapment, you should consider all of the evidence received in this case concerning the intentions and disposition of the defendant before contact with law enforcement, as well as the nature and the degree of the inducement provided by the law enforcement officer.

The burden is on the government to prove beyond a reasonable doubt that the defendant had a previous disposition or willingness or intent to commit the crime charged prior to first being contacted by law enforcement officers. If the government satisfies that burden, there is no entrapment.[15]

_____NOTE_____

A defendant may deny committing the crime and still claim entrapment thereby entitling him to an instruction on entrapment, as long as there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

Entrapment is an affirmative defense. *United States v. Blevins*, 960 F.2d 1252, 1257 (4th Cir. 1992). The initial burden is on the defendant to go forward with evidence beyond a mere scintilla that the government induced him to commit an offense he was not otherwise predisposed to commit. The district judge has the duty of determining whether or not the defendant has met this initial burden. The defendant must produce some evidence of unreadiness on his part, or of actual persuasion by the government. *United States v. Osborne*, 935 F.2d 32, 38-39 (4th Cir. 1991).

"[T]o be entitled to an entrapment instruction, a defendant must produce 'more than a scintilla' of evidence of 'inducement,' defined as solicitation *plus* some overreaching or improper conduct on the part of the government." *United States v. Hsu*, 364 F.3d 192, 200 (4th Cir. 2004). In setting forth this standard, the court said it was not announcing a new rule but disavowing some confusing dicta and adhering to the approach it had followed for several decades.

Predisposition "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime. *Mathews*, 485 U.S. at 63.

Even if the government did induce the defendant to commit a crime, the defense of entrapment fails if the government can prove predisposition. *United States v. Squillacote*, 221 F.3d 542, 569 (4th Cir. 2000).

Entrapment is generally for the jury because it raises the issue whether the criminal intent originated with the defendant or with the government's agents. Entrapment centers inquiry on the issue of the defendant's predisposition to commit the crime in question. If the defendant's predisposition is established, the defense of entrapment may not be based on government misconduct. Predisposition refers to the defendant's state of

[14] *See United States v. Hsu*, 364 F.3d 192, 198 (4th Cir. 2004); *Squillacote*, 221 F.3d at 569.

[15] *See United States v. Jones*, 976 F.2d 176, 179 (4th Cir. 1992).

mind before government agents make any suggestion that he commit a crime. Entrapment can prevail only where the government's deception actually implanted the criminal design in the defendant's mind. *United States v. Osborne*, 935 F.2d 32, 38-39 (4th Cir. 1991).

The defense of "derivative entrapment" is not available in the Fourth Circuit. *United States v. Squillacote*, 221 F.3d at 573-74. Derivative entrapment is when a government agent directs a private party to bring a specific person into a criminal scheme or when a defendant is induced to commit a crime by an intermediary who had been induced by a government agent, even if the government agent did not direct the intermediary to bring the defendant into the scheme. "[A] defendant cannot claim an entrapment defense based upon the purported inducement of a third party who is not a government agent if the third party is not aware that he is dealing with a government agent." *Id.* at 574.

In *United States v. Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995), the appellants argued that venue was improper because the government manipulated events to create venue in the Eastern District of Virginia. Even though the government is not allowed to manipulate events to create federal jurisdiction, the Fourth Circuit said "[t]here is no such thing as 'manufactured venue' or 'venue entrapment.'"

Outrageous Government Conduct

"Cases may exist where the conduct of law enforcers is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, but they are rare indeed." *United States v. Daniel*, 3 F.3d 775, 779 (4th Cir. 1993) (citing *United States v. Russell*, 411 U.S. 423, 431-32 (1973)). In order to constitute a due process violation, the government's conduct must be so outrageous as to shock the conscience of the court. *United States v. Osborne*, 935 F.2d 32, 36 (4th Cir. 1991). *See also United States v. Dyess*, 478 F.3d 224, 234 (4th Cir. 2007); *United States v. Jones*, 18 F.3d 1145, 1154 (4th Cir. 1994).

G. Entrapment by Estoppel

To establish the defense of entrapment by estoppel, the defendant must prove the following by a preponderance of the evidence:

- First, that a government official told the defendant that certain criminal conduct was legal;
- Second, that the defendant actually relied on the government official's statements; and
- Third, that a criminal prosecution based upon that conduct ensued.[16]

In other words, the defendant must demonstrate that there was active misleading in the sense that the government actually told the defendant that the proscribed conduct was permissible.[17]

The defendant's reliance is reasonable and in good faith only where a person truly desirous of obeying the law would have accepted the information as true, and would not

[16] *United States v. Aquino-Chacon*, 109 F.3d 936, 938-39 (4th Cir. 1997). *See also United States v. Marshall*, 332 F.3d 254, 262 (4th Cir. 2003); *United States v. Clark*, 986 F.2d 65, 69 (4th Cir. 1993).

[17] *Aquino-Chacon*, 109 F.3d at 939.

have been put on notice to make further inquiries.[18]

The government official must be acting with either actual or apparent authority.[19] Statements made by a person who is not a federal government official cannot establish the defense of entrapment by estoppel.[20]

_____NOTE_____

"Entrapment by estoppel is a defense applicable only to crimes that do not require fraudulent intent, because the establishment of entrapment by estoppel would also negate the intent requirement of such crimes." *United States v. George*, 386 F.3d 383, 400 (2d Cir. 2004).

In *United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990), the Eleventh Circuit held that the defense of entrapment by estoppel "rests upon principles of fairness rather than the defendant's mental state and thus it may be raised even in strict liability offense cases."

H. Factual Impossibility

The defendant has raised the defense of factual impossibility. Factual impossibility can serve as a defense when circumstances unknown to the defendant prevent his commission of the crime. Thus, for you to find the defendant not guilty because of factual impossibility, you must find the following:

- First, that a factual circumstance prevented the defendant from committing the crime with which he is charged; and
- Second, that the defendant did not know about that particular factual circumstance.[21]

_____NOTE_____

Factual impossibility is not a defense to attempt or conspiracy crimes. *See United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) (*en banc*) (attempt); *United States v. Joiner*, 418 F.3d 863, 869 (8th Cir. 2005) (conspiracy).

"Factual impossibility refers to those situations in which a circumstance or condition, unknown to the defendant, renders physically impossible the consummation of his intended criminal conduct." *United States v. Frazier*, 560 F.2d 884, 888 (8th Cir. 1977). An example of this is when someone tries to pick an empty pocket. "Legal impossibility refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime. Thus, attempt is not unlawful where success is not a crime, and this is true even though the defendant believes his scheme to be criminal." *Id.*

I. First Amendment [LAST UPDATED: 7/2/14]

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[18] *United States v. West Indies Transport, Inc.*, 127 F.3d 299, 313 (3d Cir. 1997).

[19] *Aquino-Chacon*, 109 F.3d at 939.

[20] *Clark*, 986 F.2d at 69.

[21] *See United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) (*en banc*).

The defendant has claimed that he engaged in an activity protected by the First Amendment.

Expression is protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur.[22]

Therefore, you must determine whether the defendant performed the alleged offense with the intent to violate the law or merely for the purpose of engaging in an activity protected by the First Amendment. In doing so, you must determine if the purpose of the speaker or the tendency of his words were directed to ideas or consequences remote from the commission of a criminal act. However, if the defendant's actions move far beyond advocacy to participation in the unlawful activity, the First Amendment is no defense.[23]

_____NOTE_____

"[I]t is a violation of the First Amendment to punish an individual for mere membership in an organization that has legal and illegal goals. Any statute prohibiting association with such an organization must require a showing that the defendant specifically intended to further the organization's unlawful goals." *United States v. Hammoud*, 381 F.3d 316, 328 (4th Cir. 2004) (prosecution for providing material support to designated foreign terrorist organization in violation of 18 U.S.C. § 2339B).

"[C]onstitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violations except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Thus, a speech which merely advocates law violation is protected, a speech which incites imminent lawless activity is not protected. *See United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978).

"Speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *United States v. White*, 670 F.3d 498, 514-15 (4th Cir. 2012) (citation and quotation omitted).

"A First Amendment defense is warranted if there is evidence that the speaker's purpose or words are mere abstract teaching of the moral propriety of opposition to the income tax law. 'The cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listener to commit violations of current law.'" *United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996) (citation omitted).

"Where there is some evidence ... that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury's consideration." *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1982).

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[22] *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1982).

[23] *See United States v. Aguilar*, 883 F.2d 662, 684-85 (9th Cir. 1989), *superceded by statute*, 8 U.S.C. § 1324.

"The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose." *United States v. Barnett,* 667 F.2d 835, 842 (9th Cir. 1982). The court listed aiding and abetting, a bank robbery note, a forged check, and a false statement to a government official as examples of using words to carry out an illegal purpose.

The First Amendment protects statements that constitute political hyperbole. *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007).

True threats of violence, statements made by a speaker who means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group, are outside First Amendment protection. *Id.* at 458.

Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *United States v. Williams*, 553 U.S. 285, 297 (2008).

Moreover, offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. *Id*. at 298-300.

A statute is facially invalid if it prohibits a substantial amount of protected speech, according to the First Amendment overbreadth doctrine. *Id*. at 292, 298.

J. Good Character

When a defendant has offered evidence of good general reputation [for truth and veracity] [for honesty and integrity] [as a law-abiding citizen], you should consider such evidence along with all the other evidence in the case. Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.[24]

You should always bear in mind however, that the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

Reputation of the defendant's good character, when put in evidence, is a fact which you should consider with the other facts in the case, and further, that reputation for good character is a fact which, when considered in connection with all the other evidence in the case, may, like other facts, generate a reasonable doubt.[25]

_____NOTE_____

See Michelson v. United States, 335 U.S. 469 (1948). *See also Hoback v. United States*, 284 F. 529, 533 (4th Cir. 1922); *United States v. Callahan*, 588 F.2d 1078, 1086 n.1 (5th Cir. 1979).

In *Mannix v. United States*, 140 F.2d 250 (4th Cir. 1944), the Fourth Circuit admitted it had not yet spoken definitely on the appropriate wording for this jury instruction. The defendant requested "reputation for good character would alone create a reasonable doubt." 140 F.2d at 253. The Fourth Circuit rejected that language, as not a

[24] *See United States v. John*, 309 F.3d 298, 302 (5th Cir. 2002).

[25] *Mannix v. United States*, 140 F.2d 250, 254 (4th Cir. 1944).

correct statement of the rule, because it unduly stressed the evidence of good character, when it should be considered in conjunction with other evidence.

In *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), the appellant argued that good character *alone* could create reasonable doubt. "We need not hold that an 'alone' instruction could in no circumstances be a matter of right to find it not required in this case. Here defendants did not rely on character evidence alone for their defense." 598 F.2d at 1336-37.

When considered with other evidence, good character evidence "may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." *Edgington v. United States*, 164 U.S. 361, 366 (1896).

Evidence of good character is admissible whether or not the defendant testifies. *Id.* at 364.

However, a character instruction is warranted only if the defendant first introduces admissible character evidence. An accused may offer evidence of a pertinent character trait to prove action in conformity with that trait. A pertinent character trait is one that is relevant to the offense charged. Proof of character may be made by testimony as to the defendant's reputation or by testimony in the form of an opinion. *United States v. John*, 309 F.3d 298, 303 (5th Cir. 2002).

In *United States v. Moore*, 27 F.3d 969, 974 (4th Cir. 1994), the court stated that once the defendant introduced evidence of his trustworthiness and dependability in business matters, his claim was open to rebuttal by the government under Federal Rule of Evidence 404(a)(1), either by direct testimony of reputation, or by inquiry on cross-examination into relevant instances of conduct. *See* Fed. R. Evid. Rule 405(a).

Character witnesses may be asked "Have you heard?" but not "Do you know?" *Michelson*, 335 U.S. at 221.

A character witness may be cross-examined as to an arrest, whether or not it culminated in a conviction. *Id.*

A witness to good character may be asked, on cross-examination, whether he has heard particular and specific charges, or rumors, against an accused, of acts inconsistent with the trait of character about which the witness has testified. The purpose of this cross-examination is not to establish such acts as facts, or to prove the truth of the rumors or charges inquired about, but to test the credibility of the character witness, by ascertaining his good faith, information and accuracy. *Mannix*, 140 F.2d at 252.

In *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 614 n.26 (5th Cir. 1991), the Fifth Circuit observed that "we have not found or been cited to any authority indicating that a corporate or institutional defendant ... is even entitled to consideration of character evidence."

A defendant's own testimony can be considered character evidence. *See John*, 309 at 303 n.9.

K. Good Faith[26] [LAST UPDATED: 7/18/14]

The defendant has raised the defense of good faith.

☞ **As to misunderstanding of the law**

The defendant's conduct would not be willful if you find that the defendant acted in accordance with a good faith misunderstanding of the law. The defendant's views need not be legally correct, just as long as the defendant honestly and in good faith really and truly believed and acted upon them. A good faith misunderstanding of the law, as distinct from disagreement [with] the law, is a defense.[27]

☞ **As to willfulness and intent to defraud**

Good faith is a complete defense, because good faith on the part of the defendant is inconsistent with [intent to defraud or willfulness] that is an essential element of the charge in the indictment.[28]

While the term "good faith" has no precise definition, it means, among other things, an honest belief, a lack of malice, and the intent to perform all lawful obligations. A person who acts on a belief or on an opinion honestly held is not punishable under the law merely because that honest belief turns out to be incorrect or wrong.[29]

The burden is on the government to prove [fraudulent intent and] the lack of good faith beyond a reasonable doubt.[30]

_____NOTE_____

In fraud cases, a separate instruction on a good faith defense is not required if the court gives an adequate instruction on specific intent. *United States v. Fowler*, 932 F.2d 306, 317 (4th Cir. 1991).

The intent to repay eventually is irrelevant to the question of guilt for fraud. No amount of honest belief that the corporate enterprise would eventually succeed can excuse the willful misrepresentations by which the investors' funds were obtained. An investor may be defrauded if his reliance is induced by deliberately false statements of fact, and

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[26] There is an issue as to whether the good faith is subjective or objective. The subjective standard seems to apply in tax and fraud cases. *See*, *e.g.*, *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985) (tax evasion); *United States v. Hirschfeld*, 964 F.2d 318, 322 (4th Cir. 1992) (tax fraud); and *Cheek v. United States*, 498 U.S. 192 (1991) (tax evastion). However, in *United States v. Hurwitz*, 459 F.3d 463 (4th Cir. 2006), the Fourth Circuit held that the objective standard must be applied in determining whether a doctor acted outside the bounds of medical practice in prescribing controlled substances.

[27] Instruction given in *United States v. Snyder*, 766 F.2d 167, 169-70 (4th Cir. 1985) (quoting instruction given by district court in tax evasion prosecution, noting"the trial judge did give a very fair and complete charge as to the defendant's good faith misunderstanding of the law.").

[28] "[T]he district court's good faith instruction adequately and correctly charged the jury regarding the key legal question with respect to Appellants' theory of defense." *United States v. Hamaker*, 455 F.3d 1316, 1326 (4th Cir. 2006).

[29] *United States v. Hirschfeld*, 964 F.2d 318, 322 (4th Cir. 1992).

[30] *United States v. Santoli*, No. 97-4290, 1999 WL 102134 (4th Cir. Feb. 12, 1999).

the defendant's optimism as to the future is no defense. Where a defendant deliberately supplies false information to obtain a bank loan, but plans to pay back the loan and therefore believes that no harm will ultimately accrue to the bank, the defendant's good-faith intention to pay back the loan is no defense because he intended to inflict a genuine harm upon the bank. *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006).

Good faith reliance on the advice of counsel is not a complete defense to an allegation of willful misconduct, but is merely one factor the jury may consider when determining the defendant's state of mind. *United States v. United Medical and Surgical Supply Corp.*, 989 F.2d 1390, 1403 (4th Cir. 1993).

L. Insanity (*See* 18 U.S.C. § 17)

M. Intoxication

The defendant is not guilty of a crime if the defendant lacked the intent necessary to commit the crime. The defendant has introduced evidence that he was [under the influence of an intoxicating substance] when he committed the crime alleged in the indictment.

To establish this defense, the defendant must show each of the following:

- First, that he was intoxicated when he committed the alleged crime; and
- Second, that he was so intoxicated that he could not form the intent required to commit the crime alleged.

The government must prove the defendant's guilt beyond a reasonable doubt. To do so, the government must prove beyond a reasonable doubt either one of the two following elements:

- First, that the defendant was not intoxicated when he committed the crime; or
- Second, that he was still capable of having, and did have, the required intent.

_____NOTE_____

Voluntary intoxication is not a defense to a general intent crime. *United States v. Lewis*, 780 F.2d 1140, 1143 (4th Cir. 1986). *See also Guthrie v. Warden, Md. Penitentiary*, 683 F.2d, 820, 822-23 (4th Cir. 1982).

Voluntary intoxication may be a defense to a specific intent crime. *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990). Thus, voluntary intoxication may not be a defense to the completed substantive offense, but it may be a defense to a charge of attempting to commit the substantive offense, such as aggravated sexual abuse and attempted aggravated sexual abuse, 18 U.S.C. § 2241, which requires a heightened *mens rea*.

"It is well established that intoxication, whether voluntary or involuntary, may preclude the formation of specific intent and thus serve to negate an essential element of certain crimes." *United States v. Newman*, 889 F.2d 88, 92 (6th Cir. 1989). *See also United States v. Johnston*, 543 F.2d 55, 57 (8th Cir. 1976) (intoxication may be used to prove lack of intent).

N. Literally True [LAST UPDATED: 4/30/14]

The defendant has raised the defense that the alleged false statement was true. This defense applies only where a defendant's allegedly false statement was undisputably literally true.[31] Therefore, you must determine whether the defendant's statement was undisputably true. Remember, the burden is on the government to prove beyond a reasonable doubt that the statement was false.

_____NOTE_____

The literal truth defense does not apply in cases in which the focus is on the ambiguity of the question asked. Nor does it apply to an answer that would be true on one construction of an arguably ambiguous question but false on another. *United States v. Sarwari*, 669 F.3d 401 (4th Cir. 2012). In *Sarwari*, the court made clear that the defense applies only if the defendant's statement is literally true, thereby disavowing the *dicta* in *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980) (false statement conviction could not stand if a defendant's statement accords "with a reasonable construction" of the information sought).

Nevertheless, "[t]he answer to a fundamentally ambiguous question may not, as a matter of law, form the basis of a false statement.... A question is fundamentally ambiguous only when it 'is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." *Sarwari*, 669 F.3d at 407 (quotation and citation omitted).

When a question is merely "susceptible to multiple interpretations, and a defendant's answer is true under one understanding of the question but false under another," the jury must determine whether the defendant knew his statement was false. *Id*.

"[I]f a party does not understand the question and gives a non-responsive answer, such an answer is not perjurious, nor can a charge of perjury be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows." *United States v. Paolicelli*, 505 F.2d 971, 973 (4th Cir. 1974) (quotation and citation omitted).

See also United States v. Hairston, 46 F.3d 361, 376 (4th Cir. 1995) (Section 1623 conviction reversed because the term "prepare" was susceptible of several meanings, and "the prosecutor did not use the requisite specificity in questioning, despite [the defendant's] apparent confusion or evasion[.]"); *United States v. Good*, 326 F.3d 589 (4th Cir. 2003) (Section 1001 conviction reversed); *United States v. Earp*, 812 F.2d 917 (4th Cir. 1987) (Section 1623 conviction reversed; defendant had not burned crosses at residences of interracial couples given than defendant stood watch while others tried and failed to light the cross).

O. Mere Presence

The government must prove that the defendant participated in the crime charged.

The mere presence of a defendant where a crime is being committed even coupled with knowledge by the defendant that a crime is being committed or the mere acquiescence by a defendant in the criminal conduct of others even with guilty knowledge

[31] *United States v. Sarwari*, 669 F.3d 401 (4th Cir. 2012).

is not sufficient to establish guilt.[32]

However, the jury may find knowledge and voluntary participation from evidence of presence when the presence is such that it would be unreasonable for anyone other then a knowledgeable participant to be present.[33]

P. Necessity [34]

The defendant is excused from committing a crime if the defendant committed the crime because of necessity. To establish this defense, the defendant must show by a preponderance of the evidence[35] each of the following:

- First, that the defendant was faced with a choice of evils and chose the lesser evil;
- Second, that the defendant acted to prevent imminent harm;
- Third, that the defendant reasonably anticipated a causal relation between his conduct and the harm to be avoided; and
- Fourth, that there were no other legal alternatives to violating the law.[36]

Imminent means ready to take place, near at hand, likely to occur at any moment, impending.[37]

_____NOTE_____

Defense of duress "does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to avoid liability because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Dixon v. United States*, 548 U.S. 1, 7 (2006).

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[32] Instruction given by the district court in *Moye v. United States*, 422 F.3d 207, 217 (4th Cir. 2005), *rev'd on other grounds*, 454 F.3d 390 (4th Cir. 2006) (*en banc*).

[33] *See United States v. Gallardo-Trapero*, 185 F.3d 307, 322 (5th Cir. 1999).

[34] "At common law, self-defense was a type of duress defense, which, as a class of defenses, was distinct from 'necessity' defenses. More recent cases have grouped the defenses of duress, self-defense, and necessity 'under a single, unitary rubric: justification.'" *United States v. Gore*, 592 F.3d 489, 491 n. 1 (4th Cir. 2010) (citation omitted).

[35] This would appear to be a logical extension of the holding in *Dixon v. United States*, 548 U.S. 1 (2006), that the defendant bears the burden of proving the defense of duress by a preponderance of the evidence because this defense does not negate any element of the offense. "In the context of the firearms offenses at issue [18 U.S.C. §§ 922(a)(6) and (n)] --- as will usually be the case, given the long-established common-law rule --- we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence." 548 U.S. 17.

[36] *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *superceded by statute*, 8 U.S.C. § 1324..

[37] *United States v. Hua*, No. 05-4947, 2006 WL 3456372 at *1 (4th Cir. Nov. 30, 2006) (citing *Buczek v. Continental Cas. Ins. Co.*, 378 F.3d 284, 291 (3d Cir. 2004)).

"Under any definition of these defenses [duress and necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail." *United States v. Bailey*, 444 U.S. 394, 410 (1980).

Q. Public Authority

The defendant asserts that he was authorized to engage in criminal acts. To establish this affirmative defense, the defendant must show the following:

- First, that the defendant relied on a government official;
- Second, that the government official had the actual authority to engage the defendant in covert activity; and
- Third, that the defendant's reliance on that authority was objectively reasonable.[38]

_____NOTE_____

Federal Rule of Criminal Procedure 12.3 does not in any way alter the substantive legal standards with regard to the public authority defense. *United States v. Fulcher*, 250 F.3d 244, 254 n.5 (4th Cir. 2001).

In *United States v. Kelly*, 718 F.2d 661 (4th Cir. 1983), the appellant argued that he acted on a mistake of fact — his belief that Ray, a DEA informant, had the requisite authority to enlist his assistance in apprehending a drug dealer. The Fourth Circuit stated that "[i]f that were a mistake of fact, it possibly could have comprised a defense to the charge against Kelly" of conspiring to distribute. 718 F.2d at 665. But, it was a mistake of law. The court found that Kelly knew Ray was at most an informant, "not an agent or government employee. His alleged state of mind, ... resulted from a misconception of the legal prerogatives attached to that status. As a mistake of law, Kelly's alleged belief is no defense to his criminal act." *Id.*

R. Reliance/Advice of Counsel or Other Expert

You have heard evidence that the defendant relied on advice from an expert [such as a lawyer]. You may consider that evidence in deciding whether the defendant acted willfully and with knowledge.

The mere fact that the defendant may have received expert advice does not necessarily constitute a complete defense.

The reliance defense has two essential elements:

- First, the defendant must fully disclose all pertinent facts to an expert; and
- Second, the defendant must rely in good faith on the advice of the expert.[39]

In short, you should consider whether, in seeking and obtaining advice from an expert, the defendant intended that his acts would be lawful. If he did so, the defendant

[38] *See United States v. Fulcher*, 250 F.3d 244, 252-54 (4th Cir. 2001).

[39] *United States v. Butler*, 211 F.3d 826, 833 (4th Cir. 2000).

cannot be convicted of a crime which involves willful and unlawful intent, even if the expert's advice was inaccurate. On the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences of his conduct by pleading that he followed the advice of an expert.[40]

Whether or not the defendant fully disclosed all pertinent facts to the expert and whether or not the defendant relied in good faith on the expert's advice is for you to determine.[41]

NOTE

To establish the defense of reliance, the Fourth Circuit requires (1) full disclosure of all pertinent facts to an expert, and (2) good faith reliance on the expert's advice. *See United States v. Butler*, 211 F.3d 826, 833 (4th Cir. 2000)(citing *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981)).

In *United States v. Urfer*, 287 F.3d 663 (7th Cir. 2002), the district court "instructed the jury that it could not convict the defendants if they 'honestly believed their attorney's advice and acted in honest ignorance of their legal duties.'" 287 F.3d at 664. The Seventh Circuit stated that "the reasonableness of a lawyer's advice is indeed relevant to a determination of willfulness." *Id*.

The advice must pertain to "the lawfulness of his *possible future conduct." United States v. Polytarides*, 584 F.2d 1350, 1352 (4th Cir. 1978) (emphasis in original).

Good faith reliance on the advice of counsel is not a complete defense to an allegation of willful misconduct, but is merely one factor the jury may consider when determining the defendant's state of mind. *United States v. United Medical and Surgical Supply Corp.*, 989 F.2d 1390, 1403 (4th Cir. 1993).

S. Self-Defense[42]

The defendant has asserted that he acted in self-defense.

If the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using [such force as was necessary] against his assailant, he had the right to employ [that] force in order to defend himself.

In order for the defendant to have been justified in the use of force in self-defense, he must not have provoked the assault on him or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.

The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated the reasonable belief that the other

[40] *See Williamson v. United States*, 207 U.S. 425, 453 (1908); *United States v. Nordbrock*, 38 F.3d 440, 446 (9th Cir. 1994).

[41] *See United States v. Traitz*, 871 F.2d 368, 382 (3d Cir. 1989).

[42] "At common law, self-defense was a type of duress defense, which, as a class of defenses, was distinct from 'necessity' defenses. More recent cases have grouped the defenses of duress, self-defense, and necessity 'under a single, unitary rubric: justification.'" *United States v. Gore*, 592 F.3d 489, 491 n. 1 (4th Cir. 2010) (citation omitted).

person was then about to kill him or to do him [serious] bodily harm. In addition, the defendant must have actually believed that he was in imminent danger of death or [serious] bodily harm.

If evidence of self-defense is present, the government must prove beyond a reasonable doubt that the defendant did not act in self defense. If you find that the government has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

If the defendant had reasonable grounds to believe and actually did believe that he was in imminent danger of death or [serious] bodily harm, and that [force] was necessary to repel such danger, he would be justified in using force in self-defense, even though it may afterwards have turned out that the appearances were false. If these requirements are met, he could use force even though there was, in fact, neither purpose on the part of the person to kill him or to do him [serious] bodily harm, nor imminent danger that it would be done, nor actual necessity that force be used in self-defense.

If the defendant had reasonable grounds to believe and actually did believe that he was in imminent danger of death or [serious] bodily harm, and that force was necessary to repel such danger, he was not required to retreat or to consider whether he could safely retreat. He was entitled to stand his ground and use such force as reasonably necessary under the circumstances to save his life or protect himself from [serious] bodily harm.

However, if the defendant could have safely retreated but did not do so, his failure to retreat is a circumstance which you may consider, together with all other circumstances, in determining whether he went farther in repelling the danger, real or apparent, than he was justified in doing so under the circumstances.[43]

NOTE

In *Brown v. United States*, 256 U.S. 335, 342 (1921), the district court gave the following instruction: "The person assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." The Supreme Court reversed, because the district court included "unless 'retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm' the defendant was not entitled to stand his ground." *Id.* The Court wrote that "it is not a condition of immunity that one in that situation should pause to consider whether a

[43] District court instruction from *United States v. Black,* 692 F.2d 314, 317 n. 7 (4th Cir. 1982). The instruction has been modified to eliminate references to using "deadly force," as the Fourth Circuit ruled that including such language was "inappropriate in a case involving no more than a threat to use force." *Id.* at 318. "The quantum of force which one may use in self-defense is proportional to the threat which he reasonably apprehends. *** [T]he amount of force which he may justifiably use must be reasonably related to the threatened harm which he seeks to avoid. One may justifiably use nondeadly force against another in self-defense if he reasonably believes that the other is about to inflict unlawful bodily harm upon him ....*** He may justifiably use deadly force against the other in self-defense, however, only if he reasonably believes that the other is about to inflict unlawful death or serious bodily harm upon him and also that it is necessary to use deadly force to prevent it." *Id.* at 318. Thus, the Fourth Circuit adopted the rule of proportionality.

reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him." *Id.* at 343.

In *United States v. Deon*, 656 F.2d 354 (8th Cir. 1981), the Eighth Circuit approved the following instruction:

> A person who has a reasonable ground for believing, and does believe, that another person is about to inflict bodily injury upon him, need not retreat, but may stand his ground and defend the integrity of his person; and where in such self-defense of his person he injures his assailant, the law holds there is legal justification, provided he used no more or greater force or means than he in fact believed to be reasonably necessary, and would appear to a reasonable person, under like circumstances, to be necessary in order to prevent bodily injury to himself.

656 F.2d at 356.

One who is attacked may repel the attack with whatever force he reasonably believes is necessary under the circumstances, but only if he has not provoked the fight. One cannot provoke a fight and then rely on a claim of self-defense when that provocation results in a counterattack, unless he has previously withdrawn from the fray and communicated this withdrawal. *Harris v. United States*, 364 F.2d 701, 702 (D.C. Cir. 1966).

In *United States v. Gore*, 592 F.3d 489 (4th Cir. 2010), the Fourth Circuit held that "a prisoner charged with a violation of 18 U.S.C. § 111 must, to succeed on the affirmative defense of self-defense, demonstrate that he responded to an unlawful and present threat of death or serious bodily injury." 592 F.3d at 495. In that case, the district court had properly instructed the jury that the defendant "could rely on justification based on self-defense only when he was under an unlawful present or imminent threat of serious bodily injury or death." *Id.* at 490 (quotation omitted). The district court elaborated as follows:

> A present or imminent threat of serious bodily injury or death must be based on a reasonable fear that a real and specific threat existed at the time of the defendant's assault, resistance, opposition, or impediment. This is an objective test that does not depend on the defendant's perception. If the defendant unlawfully assaulted, resist, or impeded a correctional officer when no reasonable fear of a present or imminent threat of serious bodily injury or death actually existed, his self-defense justification must fail.

Id.

> In South Carolina,
>
> There are four elements required by law to establish a case of self-defense:
>
> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant

> actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Curry, 752 S.E.2d 263, 266 n.4 (S.C. 2013).

T. Statute of Limitations (18 U.S.C. § 3282)

For you to find the defendant guilty, the government must prove beyond a reasonable doubt that the offense charged was committed reasonably near the date alleged.

_____NOTE_____

The statute of limitations is not jurisdictional. It is an affirmative defense that may be waived if not raised by the defendant. *See United States v. Williams*, 684 F.2d 296, 299 (4th Cir. 1982).

"Where the defenses of time-bar or improper venue are squarely interposed, they must be submitted to a properly instructed jury for adjudication." *United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980).

The statute of limitations begins to run when the crime is complete. Congress has declared that the statute of limitations should not be extended except as otherwise expressly provided by law. Therefore, the doctrine of continuing offenses, which has the effect of extending the statute of limitations, should be applied in only limited circumstances, where the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing offense. *Toussie v. United States*, 397 U.S. 112, 115 (1970).

A crime is complete as soon as every element in the crime occurs. *United States v. Vebeliunas*, 76 F.3d 1283, 1293 (2d Cir. 1996).

Occasionally the date is an essential element of the offense, as in a failure to file, in violation of 26 U.S.C. § 7203. *United States v. Bourque*, 541 F.2d 290, 293 (1st Cir. 1976).

U. Statutory Exceptions

_____NOTE_____

"It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception." *United States v. Vuitch*, 402 U.S. 62, 70 (1971).

However, an exception set forth in a distinct clause or provision should be construed as an affirmative defense and not as an essential element of the crime. *United States v. Szantos-Riviera*, 183 F.3d 367, 370-71 (5th Cir. 1999).

V. Withdrawal [44]

If the government proves that a conspiracy existed, and that the defendant willfully joined the conspiracy, you may conclude that the conspiracy continued unless or until the defendant shows that the conspiracy was terminated or the defendant withdrew from it. The defendant must show affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach his co-conspirators.[45]

A member of a conspiracy remains in the conspiracy unless he can show that at some point he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient. The defense of withdrawal requires the defendant to make a substantial showing that he took some affirmative step to terminate or abandon his participation in the conspiracy. In other words, the defendant must demonstrate some type of affirmative action which disavowed or defeated the purpose of the conspiracy. This would include, for example, voluntarily going to the police and telling them about the conspiracy; telling the other conspirators that he did not want to have anything more to do with the agreement; or any other affirmative act that was inconsistent with the object of the conspiracy which was communicated to other members of the conspiracy.[46] Withdrawal requires that a defendant completely abandon the conspiracy and that he do so in good faith.[47]

The defendant has the burden of proving that he withdrew from the conspiracy, by a preponderance of the evidence. To prove something by a preponderance of the evidence means that when all the relevant evidence is considered, the fact alleged is more likely so than not so.[48] The government must prove beyond a reasonable doubt that the defendant did not withdraw from the conspiracy.[49]

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[44] Withdrawal is a complete defense to the crime of conspiracy only when it is coupled with the defense of the statute of limitations. A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981). Otherwise, by definition, the defendant is criminally responsible for acts committed by the conspiracy prior to his withdrawal.

Withdrawal would limit the defendant's responsibility for substantive offenses committed after his withdrawal, and would impact the defendant's culpability for drug amounts under *United States v. Collins*, 415 F.3d 304 (4th Cir. 2005).

[45] *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986).

[46] "These acts or statements need not be known or communicated to all other co-conspirators as long as they are communicated in a manner reasonably calculated to reach some of them." *United States v. Read*, 658 F.2d 1225, 1231 (7th Cir. 1981).

[47] *Read*, 658 F.2d at 1231.

[48] *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978); *Hyde v. United States*, 225 U.S. 347, 369 (1912); *United States v. Cardwell*, 433 F.3d 378 (4th Cir. 2005); *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986).

[49] *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989). The Seventh Circuit expressed the defendant's burden in terms of "going forward." "[O]nce he advances sufficient evidence, the burden of persuasion is on the prosecution to disprove the defense of withdrawal beyond a reasonable

NOTE

See generally United States v. United States Gypsum Co., 438 U.S. 422, 464-65 (1978); *Hyde v. United States*, 225 U.S. 347, 369 (1912); *United States v. Cardwell*, 433 F.3d 378 (4th Cir. 2005); *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986).

"Good faith may also be required to withdraw. The defendant must put forth some evidence of good faith." *United States v. Read*, 658 F.2d 1225, 1239 (7th Cir. 1981).

Withdrawal is not a defense to mail fraud [or any "scheme to defraud" offense], because membership in the scheme is not an element of the offense. *Id.* at 1240.

doubt." *Read*, 658 F.2d at 1236.

VII. FINAL INSTRUCTIONS

A. Admissions by Defendant/Credibility

Where a defendant, by his earlier statement or other conduct, admits some fact against his interest, then such statement or other conduct, if any there be and if knowingly made or done, may be considered as evidence of the truth of the facts so admitted. Any such statement or conduct, if any there be, may also be considered for purposes of judging the credibility of a defendant as a witness.[1]

If you find that the defendant made statements regarding the matters under inquiry and pertinent to the matters under inquiry, and that those statements were contrary to the proven facts, and that the defendant did so willingly and with knowledge of the falsity, you are at liberty to consider that circumstance as evidence of the defendant's guilty conscience regarding the matter under inquiry. Now what is pertinent and whether it was contrary to proven facts or done willingly and with knowledge, or whether you consider it or not, is for you as triers of the facts to determine from all the evidence before you.[2]

B. "Allen" Charge [3]

In order to return a verdict, each juror must agree to it.

You have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to the individual judgment of each juror.

Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors.

In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it was erroneous.

Each juror who finds himself in the minority should reconsider his views in light of the opinions of the majority, and each juror who finds himself in the majority should give equal consideration to the views of the minority.

No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

_____NOTE_____

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[1] *United States v. Gullett*, 75 F.3d 941, 946 (4th Cir. 1996). The appellant did not object at trial. The Fourth Circuit did not resolve whether the district court committed error, because Gullett did not satisfy the third requirement that the error affected his substantial rights.

[2] Instruction approved in *Rizzo v. United States*, 304 F.2d 810, 830 (8th Cir. 1962) ("It has long been settled that the fact that a defendant has made false statements in explanation of the conduct which is the subject of a criminal charge against him is admissible as tending to indicate his guilt.").

[3] *Allen v. United States*, 164 U.S. 492 (1896). This instruction should be given before the jury retires. *United States v. Sawyers*, 423 F.2d 1335, 1342 n.7 (4th Cir. 1970). *See also United States v. Hudgins*, No. 97-4276, 1997 WL 759271 (4th Cir. Dec. 10, 1997).

It is coercive to inform the jury "you have got to reach a decision in this case." *Jenkins v. United States*, 380 U.S. 445, 446 (1965).

C. Chain of Custody

The government [and/or the defendant] has the burden of proving that the evidence offered is what the government [and/or the defendant] claims it is.[4]

_____NOTE_____

The "chain of custody" rule is a variation of the principle that evidence must be authenticated prior to its admission into evidence. *See* Fed.R.Evid. 901. "[S]o long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect," it may be admitted. Resolution of this question rests with the sound discretion of the trial judge ...." *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982) (citation omitted). *See also United States v. Ricco*, 52 F.3d 58, 61-62 (4th Cir. 1995).

D. Communications with Court

Any communications from you, the jury, to the court should be in writing or made in open court.

_____NOTE_____

United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986). The district court should preserve written questions as part of the record.

E. Confession[5] [LAST UPDATED: 8/12/14]

You have heard that the defendant made a statement to law enforcement officials. Whether such a statement was voluntarily given and, if so, what weight to give it is entirely up to you. In other words, these are questions of fact which are up to a jury to decide.

In determining whether the statement was voluntary and what weight to give it, if any, you should consider what we call "the totality of the circumstances."

You may consider, for example, whether the statement was induced by any promise or threat. You may also consider any other factor which your common sense tells you is

[4] *See United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009).

[5] "[T]he final appraisal of the confession [must] be left to the jury." *United States v. Inman*, 352 F.2d 954, 956 (4th Cir. 1965), *overruled on other grounds by United States v. Johnson*, 495 F.2d 378 (4th Cir. 1974). Additionally, if evidence of the confession is admitted before the jury, the district court should instruct the jury specifically on the law governing the use of a confession, whether or not the defendant requests the court to do so. *United States v. Sauls*, 520 F.2d 568, 570 (4th Cir. 1975); *Inman*, 352 F.2d at 956.

relevant to the issue of voluntariness.[6]

NOTE

Miranda v. Arizona, 384 U.S. 436 (1966), governs the admissibility of statements made during custodial interrogation. Moreover, *Miranda* is a constitutional rule that Congress may not supersede with 18 U.S.C. § 3501. *Dickerson v. United States*, 530 U.S. 428, 432, 444 (2000). Nevertheless, once the trial judge has decided to admit the evidence, § 3501 unequivocally requires a specific charge on the issue of voluntariness.

The prosecution bears the burden of proving voluntariness by a preponderance of the evidence. *United States v. Johnson*, 495 F.2d 378, 383 (4th Cir. 1974). *See also United States v. Braxton*, 112 F.3d 777, 781 (4th Cir. 1997) (*en banc*).

Failure to instruct the jury on the law governing the use of a confession is clear error. *United States v. Sauls*, 520 F.2d 568, 570 (4th Cir. 1975); *United States v. Inman*, 352 F.2d 954, 956 (4th Cir. 1965), *overruled on other grounds by United States v. Johnson*, 495 F.2d 378 (4th Cir. 1974). However, failure to instruct jury specifically on "an issue upon which there was no evidence before them" is reviewed under the harmless error standard. *See Sauls*, 520 F.2d at 570 (quoting *United States v. Goss*, 484 F.2d 434, 438 (6th Cir. 1973)).

Even though the court admits a confession, the defendant is free to argue to the jury that it was involuntary. *Crane v. Kentucky*, 476 U.S. 683, 691 (1986).

The district court's ruling on voluntariness "should not be disclosed to the jury by the court or by counsel." *Inman*, 352 F.2d at 956.

See United States v. Yousef, 327 F.3d 56, 130 (2d Cir. 2003) (quoting district court's instruction to jury) (statements can only be used against the defendant who made the statements and not as proof against any other defendant).

F. Consciousness of Guilt

You may consider evidence that the defendant did, or attempted to, fabricate or suppress evidence, as showing consciousness of guilt. This evidence alone is not sufficient to establish guilt, and the significance to be attached is a matter for you, the jury, to determine.[7]

You may consider, as evidence of consciousness of guilt, a specific statement made by the defendant denying guilt or involvement, if you find that the statement was not

[6] "To determine whether a statement or confession was obtained involuntarily, in violation of the Fifth Amendment, the proper inquiry is whether the defendant's will has been overborne or his capacity for self-determination critically impaired. To make this determination, [a court] consider[s] the totality of the circumstances, including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." *United States v. Umana*, 750 F.3d 320, 344 (4th Cir. 2014) (internal citations and quotation marks omitted).

[7] *See United States v. Billups*, 692 F.2d 320, 329-30 (4th Cir. 1982).

true.[8]

Conduct of a defendant, including statements knowingly made and acts knowingly done, upon being informed of the crime that has been committed or upon being confronted with criminal charges may be considered by the jury in light of all the evidence in the case in determining the guilt or innocence of the defendant. When a defendant voluntarily and intentionally offers an explanation and makes some statement tending to show his innocence and the explanation of the statement later is shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt.

Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or a statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance to be attached to any such evidence are matters exclusively within the province of the jury.

A statement or an act is knowingly made or done if made voluntarily and intentionally and not because of mistake or accident or other innocent reason.[9]

_____NOTE_____

A defendant's pattern of false explanations and fabrication of evidence may be considered by a jury in determining guilt. *United States v. Young*, 248 F.3d 260, 273 (4th Cir. 2001) (citing *United States v. Hughes*, 716 F.2d 234 (4th Cir. 1983)).

Testimony concerning an attempted fabrication of an alibi is itself some affirmative evidence of guilt. *United States v. Abney*, 508 F.2d 1285, 1286 (4th Cir. 1975).

False exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt. *United States v. Nusraty*, 867 F.2d 759, 765 (2d Cir. 1989).

In *Rizzo v. United States*, 304 F.2d 810, 830 (8th Cir. 1962), the Eighth Circuit approved the following instruction:

> If you find that the defendant [ ] made statements to investigating officers regarding the matters under inquiry and pertinent thereto which were contrary to the proven facts and did so willingly and with knowledge of the falsity, you are at liberty to consider that circumstance as evidence of the defendant's guilty conscience regarding the matter under inquiry. Now what is pertinent and whether [it] was contrary to proven facts or done willingly and with knowledge, or whether you consider [it] or not, is for you as triers of the facts to determine from all the evidence before you.

G. Corporation Liability

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[8] *See United States v. McDougald*, 650 F.2d 532, 533 (4th Cir. 1981). However, general denials of guilt later contradicted are not considered exculpatory statements. *Id.*

[9] *United States v. Cogdell*, 844 F.2d 179, 181 (4th Cir. 1988), *abrogated on other grounds by Brogan v. United States*, 522 U.S. 398 (1998) ("exculpatory no" doctrine) (instruction taken from Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions* § 15.12 (3d ed. 1987).

A corporation may be held criminally responsible for criminal conduct committed by its employee or agent if the employee or agent was acting within the scope of his authority, or apparent authority, and for the benefit of the corporation, even if such conduct was against corporate policy or express instructions.[10]

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

- First, that the crime charged [here, the court must identify the elements of the crime charged] was committed by an employee or agent of the corporation;
- Second, that, in committing the crime charged, the employee or agent was acting within the scope of his employment and within his apparent authority; and
- Third, that, in committing the crime charged, the employee or agent was acting on behalf of or for the benefit of the corporation.[11]

The term "scope of employment" is defined to include all those acts falling within the employee's or agent's general line of work, when they are motivated, at least in part, by an intent to benefit the corporation.[12]

When the act of an employee or agent is within the scope of his employment or within the scope of his apparent authority, the corporation is held legally responsible for it. This is true even though the actions of the employee or agent may be unlawful, and contrary to the corporation's actual instruction.

A corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instruction, or contrary to the corporation's stated position.

However, the existence of such instruction and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.[13]

An agent may act for his own benefit while also acting for the benefit of the corporation.[14]

The fact that the act was unlawful and contrary to corporate policy does not absolve the corporation of legal responsibility for the act.

It is not necessary for the government to prove that the action of the agent or employee actually benefitted the corporation. You must determine whether the agent or employee acted with the intent to benefit the corporation.

If, however, you determine that the act of the employee or agent was contrary to the interests of the corporation, or that the act was undertaken solely to advance the interests

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[10] *See United States v. Basic Const. Co.*, 711 F.2d 570, 573 (4th Cir. 1983).

[11] *Federal Criminal Jury Instructions of the Seventh Circuit* § 5.03 (1999).

[12] *See United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008).

[13] *Basic Const.*, 711 F.2d at 572.

[14] *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985).

of the employee or agent, then the corporation is not responsible, because the employee or agent would be acting outside the scope of his employment.[15]

☞ **Where there is an individual, possibly a co-defendant, who may be considered the "alter ego" of the entity:**

A corporation may also be found guilty of a criminal offense if the individual actually performing the act is the alter ego of the corporation. Taken literally alter ego means "second self;" it is the legal theory whereby the separate legal personalities of an individual and a corporation are disregarded, because they are considered to be merged as a matter of law. Before you could find that the individual was the alter ego of the corporation and the acts of one are the acts of the other, you would have to find beyond a reasonable doubt that the individual was a controlling stockholder of the corporation, that he disregarded its separate corporate entity, that he utilized the corporation as a conduit for his personal business, and that the separate personality of the individual and the corporation ceased to exist *when the crimes charged in the indictment allegedly occurred*. If you determine beyond a reasonable doubt that the individual was the alter ego of the corporation as a question of fact, then you may attribute the acts and knowledge of the individual to the corporation.[16]

_____NOTE_____

"[T]he only way in which a corporation can act is through the individuals who act on its behalf." *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

In *United States v. Singh*, 518 F.3d 236, 251 n.20 (4th Cir. 2008), the Fourth Circuit did not reach the government's contention that, from a legal standpoint, there is no independent contractor exception to corporate criminal liability, although the government made "a compelling argument" that "a court may be unconcerned with technical distinctions between agents and independent contractors."

The jury may disregard the corporate entity when the controlling shareholder uses the corporation purely as a conduit for personal business. This is the so-called "alter ego." *United States v. Thevis*, 665 F.2d 616, 645-46 (5th Cir. 1982).

H. Credibility[17]

You are the sole judges of the believability of each witness, and of the importance the testimony of each witness deserves. You should carefully scrutinize all of the testimony of each witness, the circumstances under which the witness testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief.[18]

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[15] *See id.*

[16] This charge did not constitute plain error, and it has been modified to correct the district court's failure to specifically pinpoint the crucial time at which the alter ego relationship had to exist. *United States v. Thevis*, 665 F.2d 616, 645-46 (5th Cir. 1982).

[17] "This court has long held that the instruction that a witness is presumed or assumed to tell the truth is improper." *United States v. Love*, 767 F.2d 1052, 1060 (4th Cir. 1985).

[18] *See United States v. Dorsey*, 45 F.3d 809, 818 (4th Cir. 1995).

Consider each witness' intelligence, motive to testify falsely, state of mind, and appearance and manner while on the witness stand.[19]

Consider the witness' ability to observe the matters about which the witness has testified and consider whether the witness impresses you as having an accurate memory of the matters about which the witness testified.[20]

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon human experience. In weighing the effect of a discrepancy, however, always consider whether the discrepancy pertains to a matter of importance or to an insignificant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.[21]

Consider also any relation each witness might have to or be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. Credibility is not merely choosing between one witness or another. As to each witness you are free to reject all that testimony, accept all that testimony, or as a third alternative reject some part and accept some other part of his or her testimony.[22]

The weight of the evidence is not necessarily to be determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to a fact is more persuasive than that of a greater number of witnesses, or you may find that they are not persuasive at all.[23]

1. Law Enforcement

In considering the testimony of a witness who is a police officer or agent of the government, you may not give more weight to the testimony of a police officer or agent of the government than you give to the testimony of other witnesses for the mere reason that the witness is a police officer or an agent of the government.[24]

. **2. Other Witnesses**

a. Accomplice

You have heard testimony from an accomplice, someone who said he or she participated in the commission of a crime.

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[19] *See United States v. Lancaster*, 78 F.3d 888, 895 (4th Cir. 1996), *vacated on other grounds*, 96 F.3d 734 (4th Cir. 1996) (*en banc*).

[20] *See Lancaster*, 78 F.3d at 895.

[21] *See id.*

[22] *See Dorsey*, 45 F.3d 809.

[23] *United States v. Moss*, 756 F.2d 329, 334 (4th Cir. 1985). However, district courts should refrain from giving a number of witnesses instruction when the defendant has no witnesses. *Id.* at 335.

[24] Instruction given in *United States v. N-Jie*, No. 06-4908, 2008 WL 2001316, n.2 (4th Cir. May 9, 2008).

The testimony of an accomplice should be received with great care and caution.[25]

You should consider whether the particular accomplice is testifying truthfully or falsely in order to obtain a favorable recommendation by the government in the sentencing in his own case.[26]

You should not convict the defendant on the uncorroborated testimony of an accomplice, unless you believe that testimony beyond a reasonable doubt.[27]

b. Addict [28]

You have heard testimony from an addict.

There is nothing improper about calling, as a witness, a person who was using or addicted to [any substance] at the time the witness observed the events at issue [or] who is now using drugs. However, that witness' testimony must be examined with greater [care and caution] than the testimony of an ordinary witness. The testimony of a witness who was using addictive substances at the time of the events about which he is testifying, or who is presently using addictive substances, may be less believable because of the effect the substances may have on his ability to perceive or to relate the events in question.[29]

In addition, an addict may have a special interest or motive to lie.[30]

Consider any matter in evidence which tends to indicate whether the witness is worthy of belief.[31]

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[25] *See United States v. Safley*, 408 F.2d 603, 605 (4th Cir. 1969).

[26] Cautionary instruction given by the district court in *United States v. Howard*, 590 F.2d 564, 570 (4th Cir. 1979).

[27] *Safley*, 408 F.2d at 605. "The settled law of this circuit recognizes that the testimony of a defendant's accomplices, standing alone and uncorroborated, can provide an adequate basis for conviction." *United States v. Burns*, 990 F.2d 1426, 1439 (4th Cir. 1993). "[I]t [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." *Caminetti v. United States*, 242 U.S. 470, 495 (1917).

[28] The leading case in the Fourth Circuit is *United States v. Gregorio*, 497 F.2d 1253 (4th Cir. 1974), *overruled on other grounds by United States v. Rhodes,* 32 F.3d 867 (4th Cir. 1994).

In *United States v. Kinnard*, 465 F.2d 566 (D.C. Cir. 1972), the D.C. Circuit was concerned about narcotics addicts who are paid informants with criminal charges pending against them. The court observed that several courts had commented that the pressure on an addict-informer to produce results made his testimony inherently unreliable. Judges on the panel disagreed about when a charge should be given regarding the reliability of such a witness's testimony. Regardless, extrinsic evidence must be admitted to refute a denial of addiction.

[29] *See United States v. McCarty*, No. 89-5065, 1989 WL 153159 (6th Cir. Dec. 18, 1989).

[30] *See Kinnard*, 465 F.2d at 571-72, where the court was concerned about the pressure on addict-informers to produce results.

[31] In *United States v. Howard*, 590 F.2d 564, 569 (4th Cir. 1979), the defendant requested

(continued...)

c. Co-Defendant or Immunized Witness

The government has presented testimony from a witness who has [entered into a plea agreement with the government or received immunity]. The testimony of such a witness must be considered by you and weighed with greater care and caution, more so than the testimony of an ordinary witness.[32]

You should not concern yourself with why the government made such an agreement with the witness. Your concern is whether the witness has given truthful testimony.

You must determine if the witness' testimony has been affected by [the plea agreement or immunity]. Such a witness has a motive to testify falsely.[33]

You should not convict the defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.[34]

You should not draw any conclusion or inference of any kind about the guilt of the defendant on trial from the fact that a witness [pled guilty to/received immunity for] a similar crime. It may not be used by you in any way as evidence against the defendant on trial here.[35]

d. Informant

The testimony of an informant, someone who provides evidence against someone else for money or for other personal reason or advantage, must be examined and weighed by you with greater care than the testimony of a witness who is not so motivated. You must determine whether the informant's testimony has been affected by self-interest, or by the agreement he has with the government, or his own interest in the outcome of this case, or by prejudice against the defendant.[36]

The testimony of a paid informant must be subjected to a higher degree of scrutiny as to both weight and credibility. This is true because you, the jury, must decide if such a witness has a greater motive to testify truthfully or falsely. If you conclude that the

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[31] (...continued)
an instruction that addicts are of questionable reliability because of their fear of being deprived of the substance they crave and therefore their testimony should be considered with caution. Instead, the district court gave the instruction quoted above. The Fourth Circuit found the instruction given was sufficient, because there was no evidence that the witnesses were still addicted to narcotics at the time of the trial.

[32] *United States v. Pupo*, 841 F.2d 1235, 1240 (4th Cir. 1988) (*en banc*).

[33] *United States v. Sullivan*, 455 F.3d 248, 258-59 (4th Cir. 2006) (Widener, J., concurring and dissenting). *See also United States v. Herrera*, 832 F.2d 833, 836 (4th Cir. 1987).

[34] *Pupo*, 841 F.2d at 1240.

[35] *See United States v. Prawl*, 168 F.3d 622, 625 (2d Cir. 1999) ("A limiting instruction is justified when evidence — such as the guilty plea of a testifying co-defendant — is admissible for a limited purpose but might also be considered for a purpose that is impermissible."). *See also United States v. Pitt*, 193 F.3d 751, 763 n.16 (3d Cir. 1999).

[36] *United States v. Anty*, 203 F.3d 305, 307, 310 (4th Cir. 2000) (court rejected the argument that paying informants violated 18 U.S.C. § 201(c)).

payment to the informant was fully or partially contingent upon the content of his testimony at trial or upon a finding of guilt, then you should subject his testimony to an even higher degree of scrutiny.[37]

e. Perjurer

The testimony of an admitted perjurer should always be considered with caution and weighed with great care.[38]

_____NOTE_____

In *United States v. Allemand*, 34 F.3d 923 (10th Cir. 1994), the Tenth Circuit held it was not error to allow testimony about the details of a witness's guilty plea, but the trial judge "should specially instruct the jury about the permissible purposes of such evidence and that the plea cannot form the basis of any inference of the guilt of the defendant." *Id*. at 929.

See also United States v. Jones, 542 F.2d 186, 214 n. 60 (4th Cir. 1976).

A prosecutor may neither vouch for nor bolster the testimony of a government witness in arguments to the jury. Vouching occurs when the prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury. *United States v. Sullivan*, 455 F.3d 248, 259 (4th Cir. 2006).

Evidence of a plea agreement containing a provision that the government's witness has agreed to take a polygraph test to verify trial testimony constitutes impermissible bolstering of the witness's credibility. *United States v. Porter*, 821 F.2d 968, 974 (4th Cir. 1987).

I. Defendant's Testimony

☞ **If the defendant does not testify:**

18 U.S.C. § 3481

The defendant has a right not to testify, and the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.[39]

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[37] *United States v. Levenite*, 277 F.3d 454, 463 (4th Cir. 2002).

[38] In *United States v. Wong*, 886 F.2d 252, 257 (9th Cir. 1989), the Ninth Circuit held the failure to give this requested instruction was not reversible where other instructions adequately cautioned the jury that the credibility of the perjurer is open to question.

[39] In *Bruno v. United States*, 308 U.S. 287 (1939), the Supreme Court held that the district court erred in refusing to give the substance of the following requested instruction:

> The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

308 U.S. at 292. The Supreme Court also addressed the concern of not drawing the jury's attention to the fact that the defendant did not testify. The Court cited § 3481 as the will of Congress and that

(continued...)

The defendant does not have to prove any evidence whatever.[40]

☞ **If the defendant testifies:**

If a defendant elects to take the witness stand and testify in his own defense, as the defendant has done in this case, then he becomes as any other witness, and you the jury must determine his credibility and give his testimony such credence and belief as you may think it deserves. You should judge and determine the defendant's believability as you would any other witness in this case.[41]

When an accused voluntarily takes the stand, and fails to explain incriminating circumstances, you may consider that with all the other circumstances in reaching your conclusion as to guilt or innocence. A fabricated explanation naturally and properly gives rise to an inference of guilty knowledge.[42]

☞ **If the defendant has a criminal record**:

You may consider the defendant's criminal past when you evaluate his believability, but you cannot consider it as evidence of his guilt in this case.[43]

_____NOTE_____

See United States v. Sahadi, 292 F.2d 565, 568 (2d Cir. 1961).

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[39] (...continued)
jurors would follow the court's instructions that not testifying would "create any presumption against him."

"[T]he Fifth Amendment requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction *when requested by a defendant to do so*." *Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (emphasis added).

Giving such an instruction over the defendant's objection does not violate the Fifth Amendment. *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

However, the instruction should not be given if opposed by the defendant. *United States v. Smith*, 392 F.2d 302 (4th Cir. 1968).

[40] *United States v. Safley*, 408 F.2d 603, 605 (4th Cir. 1969).

[41] *United States v. Varner*, 748 F.2d 925, 927 n.1 (4th Cir. 1984).

[42] When a defendant voluntarily and intentionally offers an explanation and makes some statement tending to show his innocence and his explanation later is shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. *United States v. Cogdell*, 844 F.2d 179, 181 (4th Cir. 1988). When a defendant voluntarily testifies, "he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." *Caminetti v. United States*, 242 U.S. 470, 494 (1917).

A defendant's pattern of false explanations and fabrication of evidence may be considered by the jury. *See United States v. Young*, 248 F.3d 260, 273 (4th Cir. 2001).

[43] *United States v. Williams*, 461 F.3d 441 (4th Cir. 2006); *United States v. Weil*, 561 F.2d 1109, 1111 (4th Cir. 1977).

"[A] physical demonstration performed before the jury ["if it does not fit, you must acquit"] is not, without more, 'testimony' that subjects the demonstrator to cross-examination under Rule 611(b)." *United States v. Williams*, 461 F.3d 441, 448 (4th Cir. 2006).

"Firmly rooted in our judicial history is the principle that a defendant ... cannot prescribe and impose limitations upon his waiver of his privilege against self-incrimination when he voluntarily takes the witness stand." *Carpenter v. United States*, 264 F.2d 565, 569 (4th Cir. 1959). In *Carpenter*, the defendant refused to answer questions about occurrences inside a tavern in the District of Columbia, because he was then under indictment for homicides committed in the tavern. "So long as the inquiry was relevant to the issue in the case then being tried and the answers were within his knowledge, the inquiry was within the compass of the waiver of his privilege when he voluntarily became a witness, and his refusal to answer became a proper subject of comment and consideration." *Id.* at 569-70.

J. Deliberations

In order to return a verdict, each juror must agree to it.

You have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to the individual judgment of each juror.

Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors.

In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it was erroneous.

Each juror who finds himself in the minority should reconsider his views in light of the opinions of the majority, and each juror who finds himself in the majority should give equal consideration to the views of the minority.

No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict. [44]

Your deliberations will be secret; you will never have to explain your verdict to anyone.

_____NOTE_____

See Rizzo v. United States, 204 F.2d 810, 814-15 (8th Cir. 1962).

It is coercive to inform the jury "you have got to reach a decision in this case." *Jenkins v. United States*, 380 U.S. 445, 446 (1965).

In *United States v. D'Anjou*, 16 F.3d 604 (4th Cir. 1994), the Fourth Circuit set out the procedure for the district court to follow if the jury, or an individual juror, is exposed to prejudicial material. The court directed that

the [district] court should inquire of the jury whether any jurors have read or heard the prejudicial material, and if any has, that juror should be examined individually and

[44] *United States v. Sawyers*, 423 F.2d 1335, 1342 n.7 (4th Cir. 1970).

outside the presence of the other jurors. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further.

16 F.3d at 611. *See also United States v. Jones*, 542 F.2d 186 (4th Cir. 1976); *United States v. Hankish*, 502 F.2d 71 (4th Cir. 1974).

"[W]henever a claim of in-trial prejudicial publicity arises, the threshold question ... is whether the publicity rises to the level of substantial prejudicial material." *Jones*, 542 F.2d at 104. Absent such a level, which is determined by the court, the trial court has no duty to question the jury. The scope of this judicial discretion includes "the responsibility of determining the extent and type of investigation requisite to a ruling on the motion." *Id*. The *Jones* case gives examples of substantially prejudicial material. "[A]bsent consent of all counsel, *in camera* examinations of jurors should not be conducted by a trial judge without the presence of counsel." *Id*. at 214.

The decision to provide a set of written instructions to the jury is within the sound discretion of the trial court. *United States v. Moncrieffe*, 319 F. App'x 249 (4th Cir. 2009); *Garst v. United States*, 180 F. 339, 345 (4th Cir. 1910).

When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. Yet, by the same token, the court must be careful not to invade the jury's province as fact finder. The court's obligation is not open-ended, but is limited to clarifying questions of law. *United States v. Ellis*, 121 F.3d 908, 925 (4th Cir. 1997).

K. Expert Witness [LAST UPDATED: 12/15/14]

A witness has testified as an expert.

The law permits expert testimony if it concerns (1) scientific, technical, or other specialized knowledge that (2) will aid you, the jury, to understand or resolve a fact at issue.

An expert witness is allowed to give his opinion about a certain matter.

You should evaluate this testimony as you do the testimony of any other witness.

In addition, you should consider whether the expert's opinion is based on adequate education or experience or that his professed [field of expertise] is sufficiently reliable, accurate, and dependable. You need not accept the opinion of the witness if you believe the reasons supporting the opinion are unsound or if contradictory evidence casts doubt on it.[45]

_____NOTE_____

Expert testimony is admissible under Federal Rule of Evidence 702 if it concerns (1) scientific, technical, or other specialized knowledge that (2) will aid the trier of fact to understand or resolve a fact at issue. The first prong of this inquiry necessitates an examination of whether the reasoning or methodology underlying the expert's proffered opinion is reliable — that is, whether it is supported by adequate validation to render it

[45] *See United States v. Baller*, 519 F.2d 463, 467 (4th Cir. 1975) (dealing with voiceprint identification).

trustworthy. The second prong of the inquiry requires an analysis of whether the opinion is relevant to the facts at issue. A district court considering the admissibility of expert testimony exercises a gatekeeping function to assess whether the proffered evidence is sufficiently reliable and relevant. The inquiry to be undertaken by the district court is a flexible one focusing on the principles and methodology employed by the expert, not on the conclusions reached. In evaluating the admissibility of the testimony, the court should consider a variety of factors, including whether the method used is generally accepted in the scientific community; the rate of error, if known; the existence and maintenance of standards; and whether the expert's work has been subjected to peer review. The court need not determine that the proffered expert testimony is irrefutable or certainly correct. As with all other admissible evidence, expert testimony is subject to testing by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden or proof. *United States v. Moreland*, 437 F.3d 424, 431 (4th Cir. 2006) (citations omitted), *overruled on other grounds by Gall v. United States*, 552 U.S. 38 (2007)).

The testimony must be based on sufficient facts or data and must be the product of reliable principles and methods applied reliably to the facts of the case. Fed. R. Evid. 702.

See United States v. Crisp, 324 F.3d 261 *(*4th Cir. 2003) for an excellent discussion of admissibility *post-Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579 (1993).

Experts who also testify as fact witnesses present a difficult issue. "[S]uch a manner of proceeding is only acceptable where the district court [takes] adequate steps to make certain that [the witness's] dual role [does] not prejudice or confuse the jury." *United States v. Garcia*, 752 F.3d 382, 392 (4th Cir. 2014) (internal quotation marks and ellipses omitted). Safeguards

> might include requiring the witness to testify at different times, in each capacity; giving a cautionary instruction to the jury regarding the basis of the testimony; allowing for cross-examination by defense counsel; establishing a proper foundation for the expertise; or having counsel ground the question in either fact or expertise while asking the question.

Id.

Additionally, "[a]llowing a witness simply to parrot out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion would provide an end run around *Crawford* [*v. Washington*, 541 U.S. 36 (2004)]." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). In *Crawford*, the Supreme Court held that the Confrontation Clause of the Sixth Amendment bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). "An expert witness's reliance on evidence that Crawford would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." *Johnson*, 587 F.3d at 635.

In *Johnson*, the Fourth Circuit determined that the police officer expert's decoding of telephone conversations based, in part, on "informant information" did not present a *Crawford* problem. *Id*. at 636. The experts "never made direct reference to the content of those interviews or stated with any particularity what they learned from those interviews." *Id*. at 635.

In *Garcia*, however, the Fourth Circuit determined that the Government's expert witness was not exercising her reasoned, independent judgment when she "used her personal knowledge of the investigation to form (not simply to 'confirm') her 'expert' interpretations...." *Garcia*, 752 F.3d at 393. The Fourth Circuit found that the expert "simply substituted information gleaned from her participation in the investigation (including post-indictment debriefings of participants in the conspiracy) for ostensible expertise." *Id*.

L. Felony Conviction

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is a factor you may consider in deciding whether you believe his testimony.[46]

M. Flight

The flight of the defendant after he knows he is to be accused of a crime may tend to prove that the defendant believed that he was guilty. It may be weighed by you in this connection, together with all other evidence.

However, flight may not always reflect feelings of guilt. Feelings of guilt which are present in many innocent people do not necessarily reflect actual guilt. You are specifically cautioned that evidence of the flight of a defendant may not be used by you as a substitute for proof of guilt. Flight does not create a presumption of guilt. Whether or not evidence of flight does show that the defendant believed that he was guilty and the significance, if any, to be given to the defendant's feelings on this matter are for you to determine.[47]

_____NOTE_____

The jury's consideration of evidence of flight requires that it be able, from the evidence, to link flight to consciousness of guilt of the crime for which the defendant is charged. This requires evidence supporting all the inferences in the causative chain between flight and guilt. To establish this causal chain, there must be evidence that the defendant fled or attempted to flee and that supports inferences that (1) the defendant's flight was the product of consciousness of guilt, and (2) his consciousness of guilt was in relation to the crime with which he was ultimately charged and on which the evidence is offered. In the absence of evidence to support any single link in the causative chain, it is error to give a flight instruction. *United States v. Obi*, 239 F.3d 662, 665-66 (4th Cir. 2001). *See also United States v. Beahm*, 664 F.2d 414, 419-20 (4th Cir. 1981)(inference of consciousness of guilt unfounded where defendant flees after commencement of an investigation unrelated to the crime charged, or of which the defendant was unaware).

The following instruction was given by the district court in *United States v. Hawkes*, 753 F.2d 355, 359 (4th Cir. 1985), but the conviction was reversed because the instruction was not supported by the evidence:

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[46] *See United States v. Reynolds*, 185 F. App'x 315 (4th Cir. 2006).

[47] Charge given by district court in *United States v. Obi*, 239 F.3d 662, 665 (4th Cir. 2001).

> The intentional flight of a defendant immediately after the commission of a crime, or at the time criminal conduct is discovered, is not sufficient in itself to establish that defendant's guilt, but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury. In your consideration of the evidence of flight, you should consider that there may be reasons for that which are fully consistent with innocence. Those may include fear of being apprehended, unwillingness to confront the police, or reluctance to appear as a witness. Let me suggest also that a feeling of guilt does not necessarily reflect actual guilt.

Rather than a charge, it may be preferable to allow the government to argue in closing that flight was evidence of consciousness of guilt. *See United States v. Moye*, 454 F.3d 390, 396, n.7 (4th Cir. 2006)(*en banc*).

N. Judicial Notice [LAST UPDATED: 7/18/14]

The court has taken judicial notice of the following fact: _____

When the court declares it will take judicial notice of some fact or event, you may accept the court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judge of the facts.[48]

_____NOTE_____

A district court may at any time during the trial proceeding judicially notice a fact that is generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

However, in a criminal case, when the trial court takes notice of an adjudicative fact the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. Fed. R. Evid. 201(g).

Thus, Rule 201(f), authorizing judicial notice at the appellate level, has no effect in criminal cases. *United States v. Jones*, 580 F.2d 219, 224 (6th Cir. 1978).

Judicial notice does not apply to the trial judge's personal knowledge of a particular fact. *Gov't of Virgin Islands v. Gereau*, 523 F.2d 140, 147 (3d Cir. 1975).

O. Identification[49] [LAST UPDATED: 12/10/14]

An issue in this case is the identification of the defendant as the perpetrator of the crime. The government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his

[48] *United States v. Deckard*, 816 F.2d 426, 428 (8th Cir. 1987).

[49] Verbatim from *United States v. Holley*, 502 F.2d 273, 277-78 (4th Cir. 1974).

statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had occasion to see or know the person in the past.

(In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight — but this is not necessarily so, and he may use other senses.)[50]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification.

(You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.)

(3) You may take into account any occasions in which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with his identification at trial.)

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the

[50] Sentences in brackets (( )) to be used only if appropriate. Instructions to be inserted or modified as appropriate to the proof and contentions.

accuracy of the identification, you must find the defendant not guilty.

NOTE

The so-called *Holley - Telfaire* (*United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)) cautionary instruction should be given in cases where the only evidence of the defendant's culpability is eyewitness identification testimony. *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974). The *Holley - Telfaire* rule "is a flexible one and not a rigid requirement on trial courts." *United States v. Greene*, 704 F.3d 298, 313 (4th Cir. 2013) (citation omitted). This instruction "is not required to be given, *sua sponte*, in a case where other independent evidence, whether direct or circumstantial, or both, is presented to the trier of fact which is corroborative of the guilt of the accused." *Id*. (quoting *United States v. Revels*, 575 F.2d 74, 76 (4th Cir. 1978)).

The cautionary instruction should be given under the following circumstances: (1) there is a strong likelihood of misidentification, (2) there was uncertainty or qualification in the identification testimony, or (3) there were any special difficulties in the identification testimony. *See United States v. Brooks*, 928 F.2d 1403, 1409 (4th Cir. 1991).

In *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Supreme Court endorsed a two-step process to determine the admissibility of identification testimony. "First, the court must consider whether the identification procedure was unnecessarily suggestive. Second, if the procedure was unnecessarily suggestive, a court must look at several factors to determine if the identification testimony is nevertheless reliable under the totality of the circumstances." *Greene*, 704 F.3d at 305 (quotation marks and citation omitted). The factors include the following:

(1) the witness' opportunity to view the perpetrator at the time of the crime;

(2) the witness' degree of attention at the time of the offense;

(3) the accuracy of the witness' prior description of the perpetrator;

(4) the witness' level of certainty when identifying the defendant as the perpetrator at the time of the confrontation; and

(5) the length of time between the crime and the confrontation.

Id. at 308 (quotation marks and citations omitted). In *Greene*, the Fourth Circuit examined the background of so-called "resemblance evidence" as opposed to identification testimony. The court held it was error to admit the testimony of the bank robbery victim for two reasons: first, the procedure used to obtain her testimony was suggestive and unnecessarily so, because the prosecutor asked the victim to describe how the defendant was similar to the bank robber when the witness testified that she "intentionally declined to look at Greene during her entire time on the witness stand," and second, the identification was unreliable under the five factors set out above. *Id*. at 310.

P. Inconsistency

In determining whether to believe a witness, you may consider whether a witness said or did something that is inconsistent with what the witness said while testifying in the

courtroom.[51]

Q. Investigative Techniques [LAST UPDATED: 7/3/14]

There is no legal requirement that the government use any specific investigative technique to prove its case. You should consider all the evidence, or lack of evidence, in deciding whether the government has proven its case. Your concern is whether the evidence which was admitted proves, beyond a reasonable doubt, that the defendant is guilty.[52]

NOTE

"When the government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the government does not track down relevant leads furnished by the taxpayer — leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the government's case insufficient to go to the jury." *Holland v. United States*, 348 U.S. 121, 135-36 (1954).

R. Multiple Counts

A separate crime or offense is charged in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately.[53]

You must consider each count and the evidence relating to it separate and apart from every other count. You should return a separate verdict as to each count. Your verdict on any count should not control your verdict on any other count.[54]

S. Multiple Defendants

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted

[51] *See United States v. Ricketts*, 317 F.3d 540 (6th Cir. 2003).

[52] *See United States v. Mason*, 954 F.2d 219, 222 (4th Cir. 1992) (approvingly quoting district court jury instruction).

[53] This instruction was approved in *United States v. Cardwell*, 433 F.3d 378, 388 (4th Cir. 2005), where a solicitation to commit murder, 18 U.S.C. § 373 , was joined with a felon in possession charge, 18 U.S.C. § 922(g), even though the firearm was not linked to the solicitation. What saved the joinder was the defendant's post-*Miranda* statement to the arresting officer about using the firearm rather than go to jail.

[54] *See United States v. Mims*, 92 F.3d 461, 467 (7th Cir. 1996); *United States v. Fernandez*, 388 F.3d 1199, 1243 (9th Cir. 2004).

solely against some other defendant or defendants.[55]

_____NOTE_____

When evidence which is admissible as to one party ... but not admissible as to another party ... is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. F. R. Evid. 105.

See also United States v. Fernandez, 388 F.3d 1199, 1243 (9th Cir. 2004), where the following instruction was approved:

> A separate crime is charged against each defendant in each count. The charges have been joined for trial. You must decide the case on each crime charged against each defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count.

T. Number of Witnesses

The weight of the evidence is not necessarily to be determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to a fact is more persuasive than that of a greater number of witnesses, or you may find that they are not persuasive at all.[56]

U. On or About

The indictment alleges that certain illegal activity happened on or about a certain date, dates, or time frame.

The government need not prove with certainty the exact date of the alleged offense. It is sufficient if the illegal activity happened during a period of time reasonably near the date alleged in the indictment.[57]

_____NOTE_____

"Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required." *United States v. Smith*, 441 F.3d 254, 261 (4th Cir. 2006) (internal citation and quotation omitted).

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[55] *United States v. Beasley*, 495 F.3d 142 (4th Cir. 2007).

[56] *United States v. Moss*, 756 F.2d 329, 334 (4th Cir. 1985). However, district courts should refrain from giving a number of witnesses instruction when the defendant has no witnesses. *Id*. at 335.

[57] *See United States v. Queen*, 132 F.3d 991, 999 n. 5 (4th Cir. 1997). *See also United States v. Smith*, 441 F.3d 254, 261 (4th Cir. 2006) (noting that if date not element of offense, specificity or accuracy not required).

V. "Pinkerton" — Liability for Acts of Co-Defendants[58]

☞ **If the defendant has been charged with substantive offenses in connection with the alleged conspiracy, then a *Pinkerton* charge is appropriate**.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that the defendant was one of the members, then the statements knowingly made thereafter and acts knowingly done thereafter by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and the acts may have occurred in the absence of and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.[59]

Therefore, in order for you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

- First, that a conspiracy existed as charged in the indictment;
- Second, that the defendant was a member of the conspiracy;
- Third, that the criminal offense [instruct on the elements of the offense, or reference them elsewhere in the instructions] was knowingly committed by a member of the conspiracy;
- Fourth, that the criminal offense was committed in furtherance of the conspiracy;
- Fifth, that the offense fell within the scope of the unlawful project; and
- Sixth, that the offense was reasonably foreseeable as a necessary or natural consequence of the unlawful agreement.[60]

_____NOTE_____

In *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946), the Supreme Court stated the following:

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[58] *Pinkerton v. United States*, 328 U.S. 640 (1946)

[59] This *Pinkerton* charge was approved in *United States v. Chorman*, 910 F.2d 102 (4th Cir. 1990). While other circuits have approved instructions that state clearly that the defendant can be convicted of a substantive crime committed by his co-conspirator in furtherance of the conspiracy, the Fourth Circuit has specifically approved this charge holding the defendant responsible for statements and acts of co-conspirators, without referring to substantive crimes. *Id*. 110-11. The substantive offense need not be a charged object of the conspiracy. *Id*. at 112.

United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996), cited *Chorman* and held that the district court did not abuse its discretion in omitting "reasonably foreseeable" language from the *Pinkerton* instruction. *Id*. at 1381.

[60] *See Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

W. Punishment

The question of possible punishment should not concern you. If the defendant is found guilty, it then becomes my responsibility, as the judge, to impose an appropriate sentence. Your function is to weigh the evidence and determine if the government has proved that the defendant is guilty beyond a reasonable doubt. You cannot allow a consideration of possible punishment to influence your verdict in any way.[61]

_____NOTE_____

In *United States v. Muse*, 83 F.3d 672 (4th Cir. 1996), the district court also instructed the jury not to consider the "lack of punishment as to others." The Fourth Circuit said that the instruction might have been error, had it not been provoked by defense counsel's closing argument that it was unfair for Muse to stand trial while others were given a free ride. *Id*. at 676-77.

X. Questioning by the Judge

During the trial, I asked questions of one or more of the witnesses who testified. You should not infer anything whatsoever from any questions that I asked any of the witnesses in this case. Do not assume that I hold any opinion regarding any part of this case. You are the sole judges of the facts in this case.

_____NOTE_____

Federal Rule of Evidence 614(b) provides that "[t]he court may interrogate witnesses, whether called by itself or by a party."

In a federal court the judge has the right, and often an obligation, to interrupt the presentations of counsel in order to clarify misunderstandings or otherwise insure that the trial proceeds efficiently and fairly. *United States v. Morrow*, 925 F.2d 779, 781 (4th Cir. 1991).

It is within the province of the trial court to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence. *United States v. Lozano*, 839 F.2d 1020, 1024 (4th Cir. 1988).

The role of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by

[61] *See United State v. Muse*, 83 F.3d 672, 676 (4th Cir. 1996); *United States v. Payne*, 954 F.2d 199, 204 (4th Cir. 1992).

himself. A federal trial judge should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. He has no more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury. He should take particular care that his participation during trial — whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct — never reaches the point at which it appears clear to the jury that the court believes the accused is guilty or partakes of the heat and partisanship of the advocate, or gives the appearance of bias or partiality in any way or becomes so pervasive in his interruptions and interrogations that he may appear to usurp the role of either the prosecutor or the defendant's counsel. *United States v. Parodi*, 703 F.2d 768, 775-76 (4th Cir. 1983).

The trial judge may express his opinion upon the facts, provided he maintains his judicial demeanor and makes it clear to the jury that all matters of fact are submitted to their determination. *United States v. Fuller*, 162 F.3d 256, 260 (4th Cir. 1998)(specifically disapproving giving an opinion on the guilt or innocence of the defendant).

See also United States v. Smith, 452 F.3d 323, 333 (4th Cir. 2006); *United States v. Villarini*, 238 F.3d 530, 536-37 (4th Cir. 2001); and *United States v. Martin*, 189 F.3d 547, 555 (7th Cir. 1999).

Y. Reasonable Doubt

The government must prove the defendant's guilt beyond a reasonable doubt and this burden remains with the government throughout the trial.[62]

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any reasonable doubt concerning the defendant's guilt.[63]

A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence.[64]

_____NOTE_____

The Fourth Circuit has consistently and vigorously condemned the attempts of trial courts to define reasonable doubt unless requested to do so by the jury. *United States v. Quinn*, 359 F.3d 666, 676 (4th Cir. 2004).

In *United States v. Walton*, 207 F.3d 694 (4th Cir. 2000), the jury specifically requested a definition of reasonable doubt. The Fourth Circuit "remain[s] convinced that attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves." *Id.* at 698. The court decided to

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[62] *United States v. Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988).

[63] Instruction approved in *United States v. Adkins*, 937 F.2d 947, 949-50 (4th Cir. 1991).

[64] *United States v. Higginbotham*, 451 F.2d 1283, 1286 n.2 (8th Cir. 1971).

"continue to leave the final decision of whether to acquiesce to a jury's request and define reasonable doubt to the district court's discretion. Given the inherent risks, however, we refuse to require such a practice." *Id*. at 699 (citation omitted).

The court may restrict counsel from defining reasonable doubt. *United States v. Smith*, 441 F.3d 254, 270 (4th Cir. 2006). In *United States v. Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988), the court said it was not an abuse of discretion to refuse to allow counsel to define reasonable doubt in the closing argument.

Z. Rebuttal

Once the government has presented sufficient evidence of the crime to support a finding of guilty, it has no duty to present further evidence after the defense rests.[65]

AA. Responsible Corporate Officer

The defendant is liable for the corporation's violations if he is a responsible corporate officer. To be a responsible corporate officer, the government must prove that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation alleged, and that he failed to do so. The government does not have to prove that the defendant brought about the alleged violation through some wrongful action. The question is not whether the defendant had a particular title, but whether he bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the violation alleged.[66]

BB. Rule 404(b) Evidence of Other Bad Acts [LAST UPDATED: 7/18/14]

You are about to hear [have heard] evidence that the defendant committed certain acts which may be similar to acts charged in the indictment. You may not consider this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited purposes, such as the following:

- to prove that the defendant had a motive or the opportunity to commit the crime charged in the indictment;
- to prove that the defendant had the state of mind or the intent necessary to commit the crime charged in the indictment;
- to prove that the defendant acted according to a plan or in preparation to commit the crime charged in the indictment;
- to prove that the defendant knew what he was doing when he committed the crime charged in the indictment;

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[65] *Id.*

[66] *United States v. Hong*, 242 F.3d 528, 531 (4th Cir. 2001) (defendant responsible for Clean Water Act violations, 33 U.S.C. § 1319).

- to prove the defendant's identity;
- to prove that the defendant did not commit the crime charged in the indictment by mistake or accident.

Do not conclude from this evidence that the defendant has bad character in general or that because the defendant may have committed other similar acts that it is more likely that he committed the crime with which he is currently charged.[67]

_____NOTE_____

The Fourth Circuit subscribes to the view that Rule 404(b) is "an 'inclusionary rule' which 'admits all evidence of other crimes relevant to an issue in a trial except that which tends to prove only criminal disposition.'" *United States v. Mark*, 943 F.2d 444, 447 (4th Cir. 1991) (quoting *United States v. Masters*, 622 F.2d 83, 85 (4th Cir. 1981)). In *United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997), the Fourth Circuit held the following:

> [T]hat evidence of prior acts becomes admissible under Rules 404(b) and 403 if it meets the following criteria: (1) The evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant. In this regard, the more similar the prior act is (in terms of physical similarity or mental state) to the act being proved, the more relevant it becomes. (2) The act must be necessary in the sense that it is probative of an essential claim or an element of the offense. (3) The evidence must be reliable. And (4) the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the factfinding process. Also, additional protection against pitfalls the rule protects against may be provided by (1) a limiting jury instruction, when requested by a party, explaining the purpose for admitting evidence of prior acts, and (2) the requirement in a criminal case of advance notice, when so requested, of the intent to introduce prior act evidence.

"[A]cts intrinsic to the crimes charged do not fall under Rule 404(b)'s limitations on admissible evidence." *United States v. Chin*, 83 F.3d 83, 87-88 (4th Cir. 1996). Other criminal acts are intrinsic when they are "inextricably intertwined" or both acts are part of a single criminal episode or the other acts were "necessary preliminaries" to the crime charged. *Id*. at 88.

"For evidence to be relevant, it must be sufficiently related to the charged offense. The more closely that the prior act is related to the charged conduct in time, pattern, or state of mind, the greater the potential relevance of the prior act.... [T]he fact that a defendant may have been involved in drug activity in the past does not in and of itself provide a sufficient nexus to the charged conduct where the prior activity is not related in time, manner, place, or pattern of conduct." *United States v. McBride*, 676 F.3d 385, 397 (4th Cir. 2012) (quotations and citations omitted). In *McBride*, the defendant was charged

[67] *See United States v. Bradshaw*, No. 282 F. App'x 264 (4th Cir. 2008).

with possession of cocaine with intent to distribute and two firearms charges (§§ 922(g) and 924(c)) based upon evidence seized from a vehicle on August 12, 2009. With a limiting instruction, the district court allowed an informant to testify about attempting to procure crack cocaine from the defendant at his house on January 14, 2008. The Fourth Circuit found the 404(b) evidence "was unrelated in time, place, pattern, or manner to the conduct for which McBride was indicted" and therefore its admission was error. *Id*. at 397.

See also United States v. Rawle, 845 F.2d 1244 (4th Cir. 1988).

In *United States v. King*, 225 F. App'x 125 (4th Cir. 2007), the district judge admitted a certified copy of the defendant's prior conviction, and instructed the jury as follows:

> Ladies and gentlemen of the jury, the government just offered evidence tending to show that on different occasions the defendant engaged in conduct similar to that charged in the indictment. In that connection, I want to remind you that the defendant is not on trial for committing any crime not alleged in the indictment. Accordingly, you may not consider this evidence of a similar act as a substitute for proof that the defendant committed the crimes he is charged with.
>
> ... If you determine the defendant committed the acts alleged in furtherance of the conspiracy charge, you may, but you need not, consider such evidence in determining whether or not the government has proved the conspiracy alleged in the indictment and the defendant's participation in it beyond a reasonable doubt.
>
> Specifically, you may not use this evidence to conclude that because the defendant committed the other act alleged, he must also have committed the acts alleged in the indictment.

225 F. App'x at 226. The Fourth Circuit concluded that the district court Norton did not abuse its discretion in admitting the evidence. Given the curative instruction and the substantial testimony concerning the defendant's role in the conspiracy, the evidence was not unduly prejudicial. *Id*.

Rule 404(b) evidence should be offered during the government's case in chief, rather than being held for rebuttal under Rule 608(b). *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 531 (4th Cir. 1985).

CC. Stipulations

The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved.[68]

[68] *United States v. Muse*, 83 F.3d 672, 680 (4th Cir. 1996).

_____NOTE_____

By stipulating, a defendant waives the requirement that the government produce evidence (other than the stipulation itself) to establish the facts stipulated to beyond a reasonable doubt. But the defendant may not argue that the stipulation is insufficient to prove beyond a reasonable doubt the facts or elements to which he has stipulated. *United States v. Muse*, 83 F.3d 672, 678-79 (4th Cir. 1996).

A stipulation does not render evidence tending to prove the underlying stipulation irrelevant under Federal Rule of Evidence 401 or 402. *Old Chief v. United States*, 519 U.S. 172, 178-79 (1997); *United States v. Dunford*, 148 F.3d 385, 394-95 (4th Cir. 1998). The stipulation does not render evidence inadmissible as irrelevant. Exclusion must rest on F.R.E. 403. In *Old Chief*, at 185, the Supreme Court held that Rule 403 prohibited the government from introducing the name or nature of a prior felony conviction in a § 922(g)(1) case when such information would tend to "lure a juror into a sequence of bad character reasoning" regarding a defendant who had stipulated to his felon status.

DD. Summary Charts (Rule 1006)

A summary chart has been [introduced in evidence].

This chart is merely to aid you in understanding the underlying documents and records.[69]

What is important is the evidence and not what is on the chart. The chart is being offered merely to assist you in organizing some of the evidence.[70]

You should keep in mind that the summary chart presents only the view of the party which introduced it.[71]

A summary chart is not evidence and has no significance if you do not believe the evidence which it purports to summarize.[72]

You are free to exercise your untrammeled judgment upon the worth and weight of the [information] given in the chart.[73]

EE. Sympathy

You are not to be swayed by sympathy. You are to be guided solely by the evidence in this case. The question you must ask yourselves is: Has the government proved the guilt of the defendant beyond a reasonable doubt?[74]

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[69] *United States v. Lawhon*, 499 F.2d 352, 357 (5th Cir. 1974).

[70] *See United States v. Downen*, 496 F.2d 314, 319 (10th Cir. 1974).

[71] *Lawhon*, 499 F.2d at 357.

[72] *See United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1969).

[73] *See Epstein v. United States*, 246 F.2d 563, 570 (6th Cir. 1957).

[74] *See United States v. Shamsideen*, 511 F.3d 340, 343 (2d Cir. 2008).

FF. Tapes and Transcripts

A tape recording of [a/certain] conversation[s] has/have been admitted into evidence. A transcript of the conversation[s] has/have been prepared. The tape and not the transcript is the evidence, and therefore the transcript is not in evidence. The transcript is to be used only as a guide in following the tape. Your understanding of the tape, rather than the transcript, is to govern your deliberations.[75]

The transcripts are not evidence but merely aids to follow the voices on the tape and you are bound by your own recollection of what [you heard on the tape, and not what you read in the transcript.][76] If you detect any discrepancy between the transcript and the tape, you are to consider as evidence only what you hear on the tape.[77]

You are free to strike out on your copy of the transcript any statements you personally do not hear when the tape is played. [The transcript might be inaccurate and you are not to rely heavily upon its accuracy.][78]

_____NOTE_____

The best procedure is for the judge to play the tape out of the presence of the jury so that objections can be ruled on before the jury hears the recording. *United States v. Bryant*, 480 F.2d 785, 789 (2d Cir. 1973).

GG. Unanimity

Your verdict must be unanimous and represent the considered judgment of each juror. In order to return a verdict on any aspect of this case it is necessary that each juror agree to the verdict.

[You must be unanimous in agreeing on the act of the defendant which constitutes the violation of law.]

☞ **Regarding multiple false statements**

Each juror must agree with each of the other jurors that the same statement or representation, alleged to be false, fictitious, or fraudulent, is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but, in order to convict, must unanimously agree upon at least one such statement as false, fictitious or fraudulent when knowingly made or used by the defendant.[79]

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[75] *United States v. Meredith*, 824 F.2d 1418, 1428 (4th Cir. 1987); *United States v. Collazo*, 732 F.2d 1200, 1203 (4th Cir. 1984).

[76] *Collazo*, 732 F.2d at 1203. This repeated cautionary instruction cured any prejudice that might have resulted from discrepancies between the tape and the transcript.

[77] *United States v. Long*, 651 F.2d 239, 243 (4th Cir. 1981).

[78] *United States v. Bryant*, 480 F.2d 785, 791 (2d Cir. 1973).

[79] O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, § 40.15 (5th ed. 2000).

NOTE

In a routine case, a general unanimity instruction is sufficient. However, where "there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts," the court should instruct the jury that they must be unanimous in agreeing on what act the defendant committed, or what statement was false, etc. *United States v. Tucker*, 345 F.3d 320 (5th Cir. 2003).

In *United States v. Tipton*, 90 F.3d 861, 885 (4th Cir. 1996), the Fourth Circuit said a special unanimity instruction should be given when multiple false statements are charged in a single count.

See United States v. Holley, 942 F.2d 916, 925-29 (5th Cir. 1991), where the Fifth Circuit concluded that the indictment was duplicitous for charging in one count multiple false statements which could be proven only by showing distinct facts. The Court reversed because the district court did not give a special unanimity instruction. In *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998), the trial judge did instruct the jury that "each member had to agree unanimously on one of the instances of conduct." In *United States v. Adams*, 335 F. App'x 338 (4th Cir. 2009), the district court instructed the jury as follows:

> The government is not required to prove that all of these statements that are alleged in Counts Five and Six as false are in fact false. Each juror must agree, however, with each of the other jurors that the same statement or representation is in fact false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but in order to convict, must unanimously agree upon at least one such statement as false, fictitious, or fraudulent when knowingly made or used by the defendant.

335 F. App'x at 347.

In *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998), a §§ 1001 and 1623 prosecution, the trial judge did instruct the jury that each member had to agree unanimously on one of the instances of conduct. In affirming, the Fourth Circuit reiterated that often a trial judge will have to provide a special unanimity instruction in order to prevent confusion.

In a fraud case, there is no requirement that the jury be instructed to agree unanimously on the intended victim. *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996).

In *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir. 1995), the district court gave the following instruction concerning the identity and extent of the scheme to defraud:

> In order to find the defendants responsible for participating in the fraudulent scheme as alleged in the indictment, each of you must find that the defendants participated in the same single scheme to defraud and that the scheme to defraud in which the defendants are found to have participated is substantially the same scheme as the overall fraudulent

> scheme alleged in the indictment. To sustain its burden of proof, however, the government is not required to prove all of the components of the scheme to defraud that are alleged in the indictment. If the government proves beyond a reasonable doubt a scheme to defraud that contains some or all of the components in the indictment, but is simply more narrow than the scheme to defraud as defined in the indictment, then the government has carried its burden of proof. You must unanimously agree, however, on the components of the scheme to defraud.

In a multi-object conspiracy case, the court may also consider submitting to the jury a special verdict form which would require the jury to identify which object of the conspiracy the jury found. This would be especially helpful, in light of U.S.S.G. § 1B1.2(d) ("A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."). *See Griffin v. United States*, 502 U.S. 46 (1991), where the appellant had requested special interrogatories asking the jury to identify the object or objects of the conspiracy of which she had knowledge. The Supreme Court reiterated the prevailing rule that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged. Justice Blackmun, concurring, recommended using special interrogatories in complex conspiracy prosecutions.

HH. Unavailable Witness [LAST UPDATED 4/30/14]

If a party has it peculiarly within its power to produce a witness whose testimony would shed light on the transaction, the fact that the party does not do it creates an [inference] that the testimony, if produced, would be unfavorable.[80]

To qualify for such a "missing witness" instruction,

> two requirements must be met. First, it must be shown that the party failing to call the witness has it peculiarly within its power to produce the witness. This requirement can be satisfied by showing either (1) that the witness is physically available only to the other party, or (2) that, because of the witness's relationship with the other party, the witness "pragmatically" is only available to that party. Second, the witness's testimony must elucidate issues important to the trial, as opposed to being irrelevant or cumulative.[81]

No unfavorable inference arises from the government's failure to call a witness who is equally available to the defendant.[83]

_____NOTE_____

[80] *United States v. Brooks,* 928 F.2d 1403, 1412 (4th Cir. 1991) (citing *United States v. Rollins*, 862 F.2d 1282, 1297 (7th Cir. 1988)).

[81] *United States v. Graves*, 545 F. App'x 230, 241 (4th Cir. 2013) (citations omitted).

[83] *United States v. Chase*, 372 F.2d 453, 467 (4th Cir. 1967).

See also United States v. Fisher, 484 F.2d 868, 870 (4th Cir. 1973).

II. Venue [LAST UPDATED 4/30/14]

The defendant has a right to be tried in the district where the offense was committed. The government bears the burden of proving venue by a preponderance of the evidence as to each individual count.[84]

_____NOTE_____

Submitting the venue question to the jury is an appropriate procedure for resolving a factual dispute relating to venue. *United States v. Ebersole*, 411 F.3d 517, 526 n.10 (4th Cir. 2005).

In *Ebersole*, the Fourth Circuit expressly reserved the question of whether there was a foreseeability requirement for establishing venue. 411 F.3d at 528. In *United States v. Johnson*, 510 F.3d 521, 527 (4th Cir. 2007), the court declined to engraft a mens rea requirement onto a venue provision, 15 U.S.C. § 78aa, which does not have one, especially in light of the fact that it is well settled that mens rea requirements typically do not extend to the jurisdictional elements of a crime.

"Where the defenses of time-bar or improper venue are squarely interposed, they must be submitted to a properly instructed jury for adjudication." *United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980).

For episodic crimes, venue is proper in the district where an essential element of the crime occurred. In continuing crimes, such as conspiracy, venue is proper in the location of any of the acts. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279, 282 (1999). Further, in continuing offenses that are based upon some underlying criminal offense, venue for the continuing offense is proper in any district where venue lies for the underlying offense. *United States v. Robinson*, 275 F.3d 371, 379 (4th Cir. 2001).

However, when Congress defines the essential conduct elements in terms of their particular effects (such as affecting interstate commerce), venue will be proper where those proscribed effects are felt. *United States v. Bowens*, 224 F.3d 302, 313 (4th Cir. 2000).

The government must present some evidence and may not rely on presumptions. *See United States v. Evans*, 318 F.3d 1011 (10th Cir. 2003), where the record was void of any evidence that the methamphetamine lab was located in the District of Kansas. The government was not allowed to rely on a presumption that police of a certain jurisdiction only investigate crimes within their jurisdiction, and the court cited its own case of *Jenkins v. United States*, 392 F.2d 303 (10th Cir. 1968), that a defendant's possession in Oklahoma of property recently stolen in Kansas did not support venue in Kansas.

An aider and abettor may be prosecuted in the district in which the principal acted in furtherance of the substantive crime. *United States v. Kibler*, 667 F.2d 452, 455 (4th Cir. 1982). In other words, it does not matter where the aider and abettor acted, venue depends on where the principal acted. However, venue might be improper if the defendant

[84] *United States v. Robinson*, 275 F.3d 371, 378 (4th Cir. 2001).

is not charged as an aider and abettor. *See United States v. Cabrales*, 524 U.S. 1, 7 (1998).

Venue may be proven by mere preponderance of the evidence. *United States v. Burns*, 990 F.2d 1426, 1436 (4th Cir. 1993).

"[W]hether an offense occurred within particular geographical boundaries is an appropriate subject for judicial notice." *United States v. Wilkerson*, 444 F. App'x 708, 709 (4th Cir. 2011) (citing *United States v. Kelly*, 535 F.3d 1229, 1235-36 (10th Cir. 2008)).

JJ. Judicial Notice [LAST UPDATED: 7/18/14]

The court has taken judicial notice of the following fact: _____

When the court declares it will take judicial notice of some fact or event, you may accept the court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judge of the facts.[85]

_____NOTE_____

A district court may at any time during the trial proceeding judicially notice a fact that is generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

However, in a criminal case, when the trial court takes notice of an adjudicative fact the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. Fed. R. Evid. 201(g).

Thus, Rule 201(f), authorizing judicial notice at the appellate level, has no effect in criminal cases. *United States v. Jones*, 580 F.2d 219, 224 (6th Cir. 1978).

Judicial notice does not apply to the trial judge's personal knowledge of a particular fact. *Gov't of Virgin Islands v. Gereau*, 523 F.2d 140, 147 (3d Cir. 1975).

Nor does judicial notice apply to matters falling within the common fund of information supposed to be possessed by jurors. However, this doctrine is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life. *Jones*, 580 F.2d at 222. In *Jones*, the Sixth Circuit held that whether South Central Bell Telephone Company was a common carrier providing or operating facilities for the transmission of interstate or foreign communications was not such a matter of elemental experience, and because that fact had been neither proved nor judicially noticed during the trial, the judgment of acquittal was affirmed.

A court may take judicial notice of court records, including an indictment, and a guilty plea. *See United States v. Kane*, 434 F. App'x 175 (4th Cir. 2011) (citing cases).

[85] *United States v. Deckard*, 816 F.2d 426, 428 (8th Cir. 1987).

VIII. PRACTICE NOTES

A. Aggregation

A series of takings over a period of time may constitute a single larceny when each taking is the result of a continuing larcenous impulse or intent on the part of the thief, or has been carried out under a single plan or scheme. 53 A.L.R.3d 398.

The leading case on aggregation is *United States v. Billingslea*, 603 F.2d 515 (5th Cir. 1979), cited by the Fourth Circuit in *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (a § 641 prosecution where the defendant "embezzled" his dead mother's Social Security checks). See discussion under 18 U.S.C. § 641. In *Billingslea*, the court found that

> [o]f critical importance is the state of mind or intent of the actor prior to and simultaneously with the first taking. Closely related, and of equal importance, is evidence of acts done by the accused, either in preparation for the several takings or as integral part of the first taking, which facilitate the subsequent takings or in some way aid the defendant in accomplishing them. Under this approach, therefore, the formulation of a plan or scheme or the setting up of a mechanism which, when put into operation, will result in the taking or diversion of sums of money on a recurring basis, will produce but one crime. Conversely, if all that can be attributed to the accused is an original intent to purloin and the evidence merely shows that this intent was acted on from time to time, the nature of the acts must be measured by the separate takings.

Billingslea, 603 F.2d at 520.

B. Bolstering

Bolstering is an implication that the testimony of a witness is corroborated by evidence known to the party but not known to the jury. Bolstering is always inappropriate. *United States v. Sanchez*, 118 F.3d 192, 197 (4th Cir. 1997).

C. Defendant's Request [LAST UPDATED: 8/18/14]

The defendant is entitled to have the jury instructed on a theory of defense if the requested instruction is accurate as a statement of law and there was a foundation in the evidence for the instruction. The district court should include the substance of the requested instruction in language sufficiently precise to instruct the jury on the defendant's theory of defense. *United States v. Mitchell*, 495 F.2d 285, 288 (4th Cir. 1974).

The Eleventh Circuit would have the jury instructed even though the evidence supporting the defendant's theory is weak, insufficient, inconsistent, or of doubtful credibility. *United States v. Hedges*, 912 F.2d 1397, 1406 (11th Cir. 1990).

"A district court's refusal to provide an instruction requested by a defendant constitutes reversible error only if the instruction (1) was correct, (2) was not substantially covered by the court's charge to the jury, and (3) seriously impaired the defendant's ability to conduct his defense." *United States v. Queen*, 132 F.3d 991, 1000 (4th Cir. 1997). However, as a threshold for applying this test, a defendant must present an adequate evidentiary foundation supporting the instruction. *United States v. Lewis*, 53 F.3d 29, 33 n.8 (4th Cir. 1995).

"If ... an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense." *United States v. Bailey*, 444 U.S. 394, 416 (1980); *United States v. Sarno*, 24 F.3d 618, 621 (4th Cir. 1994) (quoting *Bailey*).

D. Disjunctive [LAST UPDATED: 4/7/14]

"Where a statute is worded in the disjunctive, federal pleading requires the government to charge in the conjunctive. The district court, however, can instruct the jury in the disjunctive." *United States v. Rhynes*, 206 F.3d 349, 384 (4th Cir. 1999), *overruled on other grounds*, 218 F.3d 310 (4th Cir. 2000) (*en banc*).

E. Dual-Role Witness

A dual witness, one who testifies as both a fact and expert witness, can confuse the jury. *United States v. Wilson*, 484 F.3d 267, 278 n.5 (4th Cir. 2007).

The Fourth Circuit has set out safeguards to prevent confusion. In *Wilson*, "the district court took adequate steps — including having [the witness] testify first as a fact witness[85] and issuing a cautionary instruction[86] to the jury — to make certain that [the witness's] dual role did not prejudice or confuse the jury." 484 F.3d at 278 n.5.

In *United States v. Baptiste*, 596 F.3d 214 (4th Cir. 2010), the district court had permitted the lay and expert witness testimony simultaneously. The Fourth Circuit looked to *United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008), which set out the safeguards implemented by the district court in that case. First, the district court gave the appropriate cautionary instruction regarding expert testimony, reminding the jury that it could give the testimony whatever weight the jury thought it deserved. Second, defense counsel cross-examined the witness about his expert opinion, which further clarified the testimonial capacities for the jury. Third, the district court required the government to establish a proper foundation for the witness's expertise. Fourth, the government prefaced the witness's expert testimony by asking him to testify based on his expertise. *Baptiste*, 596 F.3d at 224.

F. Duplicitous

Duplicity is joining in a single count two or more distinct and separate offenses. *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993).

G. Fifth Amendment [LAST UPDATED: 9/11/13]

If a defense witness refuses to testify on the basis of Fifth Amendment privilege, the

[85] That is, have the witness take two separate trips to the witness stand.

[86] That is, the standard cautionary instruction regarding expert testimony.

district court "must make a proper and particularized inquiry into the legitimacy and scope of the witness's assertion of the privilege." *United States v. Allen*, 491 F.3d 178, 191 (4th Cir. 2007) (quotation and citation omitted). The privilege operates on a question-by-question basis, but "a witness may be totally excused if the court finds that he could legitimately refuse to answer any and all relevant questions." *Id*. *See also United States v. Castro*, 129 F.3d 226, 229 (1st Cir. 1997) (court must make particularized inquiry).

H. Improper Prosecutorial Remarks [LAST UPDATED: 4/7/14]

It is improper for a prosecutor to express his or her opinion on the veracity of a witness. When a prosecutor comments on the truthfulness of a witness, comments present "two discrete risks: (1) of improperly suggesting to the jury that the prosecutor's personal opinion has evidentiary weight; and (2) of improperly inviting the jury to infer that the prosecutor had access to extra-judicial information not available to the jury." *United States v. Woods*, 710 F.3d 195, 203 (4th Cir. 2013) (quotation and citation omitted).

It is plain error for a prosecutor to state that a defendant has lied under oath. *See United States v. Moore*, 710 F.2d 157, 159 (4th Cir. 1983). An appellate court will review whether the improper remarks so prejudiced the defendant's substantial rights that he or she was denied a fair trial. In assessing prejudice, the reviewing court will consider: (1) the degree to which the prosecutor's remark had a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters; (5) whether the prosecutor's remarks were invited by improper conduct of defense counsel; and (6) whether curative instructions were given to the jury. *See United States v. Wilson*, 624 F.3d 640, 656-57 (4th Cir. 2010).

I. Mailbox Rule

Proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Hagner v. United States*, 285 U.S. 427, 429 (1932).

J. Marital Privilege

There are two types of marital privilege: the privilege against adverse spousal testimony and the privilege protecting confidential marital communications.

The adverse spousal privilege is vested in the witness-spouse, who may neither be compelled to testify nor foreclosed from testifying.

The "marital communication privilege" is with the defendant and prevents a spouse from testifying against the defendant regarding confidential communications between the spouses.

The party asserting the marital communications privilege bears the burden of establishing all of the essential elements involved. The first element is a valid marriage. *United States v. Acker*, 52 F.3d 509, 514-15 (4th Cir. 1995). In *United States v. Byrd*, 759

F.2d 585 (7th Cir. 1984), the Seventh Circuit referred to the three conditions of the communications privilege, as a communication made in confidence in a valid marriage. The Court then held that communications made during a permanent separation are not privileged. *Id.* at 594.

The marital privilege generally extends only to utterances and not to acts. If the conduct was not intended to convey a confidential message then it is not covered by the privilege. Nor does the mere fact that an act has been performed in the presence of a spouse make it a communication. When dealing with a verbal communication, the presence of a third party negatives the presumption of privacy. Finally, the marital privilege does not apply when communications have to do with the commission of a crime in which both spouses are participants. *United States v. Parker*, 834 F.2d 408, 411(4th Cir. 1987).

K. Merger [LAST UPDATED: 9/30/11]

Merger occurs when the facts or transactions alleged to support one offense are also the same used to support another. Merger has double jeopardy implications. See *United States v. Halstead*, 634 F.3d 260 (4th Cir. 2011); *United States v. Cioni*, 649 F.3d 276 (4th Cir. 2011).

In *Cioni*, the defendant was convicted of violating § 1030(a)(2)(C), in furtherance of a violation of 18 U.S.C. § 2701(a), which elevated the offense from a misdemeanor to a felony. The Fourth Circuit held that the offense was improperly elevated, and vacated the felony convictions, because of "merger."

L. Multiplicitous

Multiplicity is charging a single offense in several counts. *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993).

An indictment is multiplicitous when it charges a single offense multiple times, in separate counts, when, in law and fact, only one crime has been committed. To determine whether separate counts charge the same offense more than once, apply the test set out by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932), whether one offense requires proof of a fact which the other offense does not. *United States v. Finley*, 245 F.3d 199, 205 (2d Cir. 2001).

M. Nullification

The district court should not instruct the jury that it may disregard the law as declared by the judge.

Although a jury is entitled to acquit on any ground, a defendant is not entitled to inform the jury that it can acquit him on grounds other than the facts in evidence, i.e. a jury has the power of nullification but defense counsel is not entitled to urge the jury to exercise this power. *United States v. Muse*, 83 F.3d 672, 677 (4th Cir. 1996). In *Muse*, defense counsel argued that it was unfair for Muse to be standing trial when others received a free ride.

In *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), a Vietnam war protest case, the Fourth Circuit acknowledged

> the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge.

417 F.2d at 1006. However, the jury should not be encouraged in its lawlessness.

"A defendant is not entitled to a jury nullification instruction." *United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978).

N. Polling the Jury, Fed. R. Crim. Proc. 31(d) [LAST UPDATED: 9/30/11]

It is plain error for a trial judge to inquire as to the numerical division of a jury. *Brasfield v. United States*, 272 U.S. 448, 450 (1926).

In *United States v. Penniegraft*, 641 F.3d 566 (4th Cir. 2011), the Fourth Circuit held that in conducting a poll of the jury at the defendant's request, after a lack of unanimity is revealed, "absent an objection by the defendant, 'reversible error occurs only when it is apparent that the judge coerced the jurors into prematurely rendering a decision, and not merely because the judge continued to poll the jury.'" 641 F.3d at 579-80 (quoting *United States v. Gambino*, 951 F.2d 498, 501 (2d Cir. 1991)).

O. Polygraph

The Fourth Circuit has a *per se* rule that polygraph examination results, or even the reference to the fact that a witness has taken a polygraph examination, are not admissible. *United States v. Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir. 2003). "The rule of this circuit is that polygraph evidence is never admissible to impeach the credibility of a witness. This is so whether the government or the defendant is seeking to introduce the evidence." *United States v. Sanchez*, 118 F.3d 192, 197 (4th Cir. 1997).

However, testimony concerning a polygraph examination is admissible where it is not offered to prove the truth of the polygraph result, but instead is offered for a limited purpose such as rebutting a defendant's assertion that his confession was coerced. *United States v. Blake*, 571 F.3d 331, 346 (4th Cir. 2009) (citing *United States v. Allard*, 464 F.3d 529, 534 (5th Cir. 2006)).

In *United States v. Nelson*, 207 F. App'x 291 (4th Cir. 2006), the Fourth Circuit upheld the exercise of discretion the district court limiting the scope of cross-examination as to the polygraph provision of a witness' plea agreement, citing the *per se* rule.

P. Rule 31(c) Lesser-Included Offense [LAST UPDATED: 4/7/14]

Federal Rule of Criminal Procedure 31(c) provides that a defendant may be found guilty of "an offense necessarily included in the offense charged."

"A defendant is not entitled to a lesser-included offense instruction as a matter of

course. *See United States v. Walker*, 75 F.3d 178, 179 (4th Cir. 1996), *abrogated by Carter v. United States*, 530 U.S. 255 (2000). In order to receive a lesser-included offense instruction, 'the proof of the element that differentiates the two offenses must be sufficiently in dispute that the jury could rationally find the defendant guilty of the lesser offense, but not guilty of the greater offense.' *Id.* at 180. For an element to be placed 'sufficiently in dispute' so as to warrant a lesser-included offense instruction, one of two conditions must be satisfied. Either 'the testimony on the distinguishing element must be sharply conflicting, or the conclusion as to the lesser offense must be fairly inferable from the evidence presented.' *Id.*" *United States v. Wright*, 131 F.3d 1111, 1112 (4th Cir. 1997).

In *Walker*, the Fourth Circuit indicated that

> a defendant may present evidence that is weak in the sense that it is implausible or uncorroborated, but yet he still may be entitled to a lesser included jury instruction because the evidence either sharply conflicts with the Government's evidence on an element of the offense, or because the lesser included offense is fairly inferable if the defendant's 'weak' evidence is believed.

75 F.3d at 181 n.1.

The district court has no discretion to refuse to give a lesser-included instruction if the evidence warrants the instruction and the defendant requests it. *United States v. Baker*, 985 F.2d 1248, 1258-59 (4th Cir. 1993). On the other hand, *Baker* does not suggest "that the defendant is entitled to veto the prosecution's request for a proper instruction on a lesser-included offense." *United States v. Lespier*, 725 F.3d 437, 450 (4th Cir. 2013). Rule 31 can be invoked by either the prosecution or defense. *Keeble v. United States*, 412 U.S. 205, 208 (1973).

In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court rejected the "inherent relationship" approach, i.e., the greater and lesser offenses must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily, invariably proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. Instead, the court adopted the "elements" test. "Under this test, one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Id.* at 716.

"To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Id*. at 719.

Regardless of the test, "the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Id.* at 716 n. 8.

"A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone v. United States*, 380 U.S. 343, 349-50 (1965).

A court may submit an uncharged lesser-included offense to the jury. *United States*

v. Walkingeagle, 974 F.2d 551, 553 (4th Cir. 1992). Walkingeagle was charged with assault with a dangerous weapon, an enumerated offense under 18 U.S.C. § 1153. The district court acquitted on the felony charge, but instructed the jury on the lesser-included offense of assault by striking, now 18 U.S.C. § 113(a)(4), a petty offense, of which he was convicted. On appeal, Walkingeagle argued that the court lost jurisdiction, because assault by striking is not an enumerated offense in § 1153. The Fourth Circuit, in a 2-1 decision, rejected his argument. *See United States v. Goodwin*, No. 92-5828, 1993 WL 168933 (4th Cir. May 20, 1993), where the district court dismissed the felony assault charge and then, on the government's motion, discharged the jury before finding Goodwin guilty of the lesser-included petty offense. Goodwin appealed, arguing that the court erred in discharging the jury. The Fourth Circuit affirmed, as Goodwin had no right to a jury trial on the petty offense charge.

Q. Special Verdict

There is no provision in the Federal Rules of Criminal Procedure authorizing special verdicts, or special interrogatories. Regardless of nomenclature, they resemble what Federal Rules of Civil Procedure 49(b) describes as "general verdict with answers to written questions."

In *Black v. United States*, 561 U.S. 465, 468 (2010), the Supreme Court held that a criminal defendant "need not request special interrogatories, nor need he acquiesce in the Government's request for discrete findings by the jury, in order to preserve in full a timely raised objection to jury instructions on an alternative theory of guilt."

As a general matter, there has been a presumption against special verdicts in criminal cases. However, whether to use a special verdict form is a matter of discretion for the district court. In *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008), the court said a special verdict form was justified because in the uncertainty between *Blakely* and *Booker*, it was reasonable to assume that sentencing enhancements had to be pled in the indictment and the facts supporting those enhancements found by the jury beyond a reasonable doubt. *See also United States v. Robinson*, 213 F. App'x 221 (4th Cir. 2007).

"[I]t is a better practice to submit the general verdict and special verdict forms separately." *Udeozor*, 515 F.3d at 268.

A special verdict is the exception; however, "there may be cases in which it is appropriate. It is counsel's duty, though, to request a special verdict in order to record the jury's thinking for purposes of appeal. Failure to make a request to the trial court waives any error (except plain error) premised on the lack of a special verdict." *United States v. Aguilar*, 883 F.2d 662, 690-91 (9th Cir. 1989), *superceded by statute*, 8 U.S.C. § 1324.

R. Supplementary Instructions

When a jury has retired to consider its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. *See Shields v. United States*, 273 U.S. 583 (1927); *Rice v. United*

States, 356 F.2d 709, 716 (8th Cir. 1966).

S. Unlawfully

"Unlawfully" may or may not be an element of the crime. Nevertheless, it is often included in the charging language of an indictment.

In *United States v. King*, 270 F. App'x 261 (4th Cir. 2008), the indictment alleged that the defendants had "unlawfully" violated 18 U.S.C. §§ 924(c) and (o), although "unlawfully" is not an element of either statute. The district court did not instruct the jury on "unlawfully." The Fourth Circuit said the term "unlawfully" in the indictment "was a descriptive term characterizing the actions of King and Murray as 'unlawful' in possessing firearms in furtherance of the (unlawful) crimes charged in the indictment." 270 F. App'x at 267. Therefore, the term was "mere surplusage ... and the subsequent failure to instruct the jury about this term, did not impermissibly broaden the charges ...." *Id*. at 267-68.

T. Variance

"When the government, through its presentation of evidence and/or its argument, or the district court, through its instructions to the jury, or both, broadens the bases for conviction beyond those charged in the indictment, a constructive amendment — sometimes referred to as a fatal variance — occurs." *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999). "A constructive amendment is a fatal variance because the indictment is altered 'to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment.'" *Id.* (quoting *United States v. Scnabel*, 939 F.2d 197, 203 (4th Cir. 1991)). "Thus, a constructive amendment violates the Fifth Amendment right to be indicted by a grand jury, is error *per se,* and must be corrected on appeal even when the defendant did not preserve the issue by objection." *Id.*

"However, not all differences between an indictment and the proof offered at trial, rise to the 'fatal' level of a constructive amendment." *Id.* "As long as the proof at trial does not add anything new or constitute a broadening of the charges, then minor discrepancies between the government's charges and the facts proved at trial generally are permissible." *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996).

U. Vouching

Vouching is indicating a personal belief in the credibility or honesty of a witness. Vouching is always inappropriate. *United States v. Sanchez*, 118 F.3d 192, 197 (4th Cir. 1997). *See also United States v. Johnson*, 587 F.3d 625, 632 (4th Cir. 2009); *United States v. Jones*, 471 F.3d 535, 543 (4th Cir. 2006).