INTRODUCTION

As part of the role of the Fifth Circuit District Judges Association, a committee of district judges of this circuit has continued to review and revise the Fifth Circuit District Judges Association Pattern Jury Instructions (Criminal Cases), 1997 edition. Time brings new statutes, new interpretations of old statutes, and new directions of prosecutions. The Committee's research and drafting are intended to be current through Spring 2001.

When the United States Supreme Court announced its decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), years of "settled" law were discarded. In each circuit including our own, what had previously been sentencing factors became elements of the offense when they had the capacity to increase a defendant's maximum possible punishment. A major focus of our effort in this edition has been to alert the judge to those circumstances when an instruction needs an *Apprendi* element.

We have continued to decline the temptation to define "willfully" with one single definition adequate to all instructions. The Committee has attempted to define the mental state required by each particular statute.

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

The Committee was able to enlist the services of Susan R. Klein, Assistant Professor of Law at the University of Texas in Austin. Her efforts have been very beneficial to our task. We acknowledge the special efforts of many of our clerks and office staff whose work has been significant during the years of our work, including Stacy Bruton, J. Scott Hacker, Mark A. J. Fassold, and Amy Livsey. Alice Simons, legal secretary to Judge Head, has spent many hours proofreading and coordinating our work with West Group.

Our predecessors' work is the foundation of our effort. Those district judges—Dan M. Russell, Jr. (S.D.Miss.), Jack M. Gordon (E.D.La.), Anthony A. Alaimo (S.D.Ga.), Wm. Terrell Hodges (M.D.Fla.), James Hughes Hancock (N.D.Ala.), Tom Stagg (W.D.La.), and William S. Sessions (W.D.Tex.)—deserve our continued thanks.

Hayden W. Head, Jr., Chairman
Southern District of Texas
1990, 1997, 2001 Editions

Ginger Berrigan
Eastern District of Louisiana
1997, 2001 Editions

Adrian G. Duplantier, Senior Judge
Eastern District of Louisiana
1990, 1997, 2001 Editions

Harry Lee Hudspeth, Chief Judge
Western District of Texas
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George P. Kazen, Chief Judge
Southern District of Texas
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I. GENERAL AND PRELIMINARY INSTRUCTIONS

1.01

PRELIMINARY INSTRUCTION

Members of the Jury:

You are now the jury in this case. I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial I will give you more detailed instructions. You must follow all of my instructions in doing your job as jurors.

This criminal case has been brought by the United States government. I may sometimes refer to the government as the prosecution. The government is represented at this trial by an assistant United States attorney, _____. The defendant, _____, is represented by an attorney, _____.

The defendant has been charged by the government with a criminal violation of a federal law, [e.g., having intentionally sold heroin]. The charge against the defendant is contained in the indictment. The indictment is simply the description of the charge made by the government against the defendant, but it is not evidence that the defendant committed a crime. The defendant pleaded not guilty to the charge. A defendant is presumed innocent and may not be found guilty by you unless all twelve of you unanimously find that the government has proved defendant's guilt beyond a reasonable doubt. [Addition for multidefendant cases: The defendants are being tried together. But you will have to give separate consideration to the case against each defendant. Each is entitled to your separate consideration. Do not think of them as a group.]

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence which it intends to put before you, so that you will have an idea of what the government's case is going to be. Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose is only to help you understand what the evidence will be and what the government will try to prove.

After the government's opening statement, the defendant's attorney may make an opening statement. [Change if the defendant reserves his statement until later or omit if the defendant has

decided not to make an opening statement.] At this point in the trial, no evidence has been offered by either side.

Next, the government will offer evidence that it claims will support the charges against the defendant. The government's evidence may consist of the testimony of witnesses as well as documents and exhibits. Some of you have probably heard the terms "circumstantial evidence" and "direct evidence." Do not be concerned with these terms. You are to consider all the evidence given in this trial.

After the government's evidence, the defendant's lawyer may [make an opening statement and] present evidence in the defendant's behalf, but the lawyer is not required to do so. I remind you that the defendant is presumed innocent and that the government must prove the guilt of the defendant beyond a reasonable doubt. The defendant does not have to prove his innocence. If the defendant decides to present evidence, the government may introduce rebuttal evidence.

After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments. I just told you that the opening statements by the lawyers are not evidence. The same applies to closing arguments. They are not evidence either, but you should pay close attention to them.

The final part of the trial occurs when I instruct you about the rules of law which you are to use in reaching your verdict. After hearing my instructions, you will leave the courtroom together to make your decision. Your deliberations will be secret. You will never have to explain your verdict to anyone.

Now that I have described the trial itself, let me explain the jobs that you and I are to perform during the trial.

I will decide which rules of law apply to this case, in response to questions or objections raised by the attorneys as we go along, and also in the final instructions given to you after the evidence and arguments are completed. You must follow the law as I explain it to you whether you agree with it or not.

You, and you alone, are judges of the facts. Therefore, you should give careful attention to the testimony and exhibits, because based upon this evidence you will decide whether the government has proved, beyond a reasonable doubt, that the defendant has committed the crime(s) charged in the indictment. You must base that decision only on the evidence in the case and my instructions about the law. You will have the exhibits with you when you deliberate.

[If desired, insert here instruction entitled "Note-Taking by Jurors."]

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

The defendant is charged with _____. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence I will now give you a brief summary of the elements of the offense which the government must prove to make its case. [It is suggested that a discussion of the elements of the offense be inserted here.]

During the course of the trial, do not talk with any witness, or with the defendant, or with any of the lawyers in the case. Please do not talk with them about any subject at all. You may be unaware of the identity of everyone connected with the case. Therefore, in order to avoid even the appearance of impropriety, do not engage in any conversation with anyone in or about the courtroom or courthouse. It is best that you remain in the jury room during breaks in the trial and not linger in the halls. In addition, during the course of the trial do not talk about the trial with anyone else– not your family, not your friends, not the people with whom you work. Also, do not discuss this case among yourselves until I have instructed you on the law and you have gone to the jury room to make your decision at the end of the trial. Otherwise, without realizing it, you may start forming opinions before the trial is over. It is important that you wait until all the evidence is received and you have heard my instructions on rules of law before you deliberate among yourselves. Let me add that during the course of the trial you will receive all the evidence you properly may consider to decide

the case. Because of this, do not attempt to gather any information on your own which you think might be helpful. Do not engage in any outside reading on this case, do not attempt to visit any places mentioned in the case, and do not in any other way try to learn about the case outside the courtroom.

Now that the trial has begun, you must not read about it in the newspapers or watch or listen to television or radio reports of what is happening here. The reason for these rules, as I am certain you will understand, is that your decision in this case must be made solely on the evidence presented at the trial.

At times during the trial, a lawyer may make an objection to a question asked by another lawyer, or to an answer by a witness. This simply means that the lawyer is requesting that I make a decision on a particular rule of law. Do not draw any conclusion from such objections or from my rulings on the objections. These relate only to the legal questions that I must determine and should not influence your thinking. If I sustain an objection to a question, the witness may not answer it. Do not attempt to guess what answer might have been given had I allowed the question to be answered. Similarly, if I tell you not to consider a particular statement, you should put that statement out of your mind, and you may not refer to that statement in your later deliberations. If an objection is overruled, treat the answer like any other.

During the course of the trial I may ask a question of a witness. If I do, that does not indicate that I have any opinion about the facts in the case. Nothing I say or do should lead you to believe that I have any opinion about the facts, nor be taken as indicating what your verdict should be.

During the trial I may have to interrupt the proceedings to confer with the attorneys about the rules of law which should apply here. Sometimes we will talk here, at the bench. Some of these conferences may take time. So, as a convenience to you, I will excuse you from the courtroom. I will try to avoid such interruptions as much as possible and will try to keep them short, but please be patient, even if the trial seems to be moving slowly. Conferences outside your presence are sometimes unavoidable.

Finally, there are three basic rules about a criminal case which you should keep in mind.

First, the defendant is presumed innocent until proven guilty. The indictment against the defendant brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

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

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

Thank you for your attention.

Note

This is but one of a number of preliminary instructions which can be utilized for the same purposes. See, e.g., *Bench Book for United States District Judges* and *Pattern Criminal Jury Instructions*, both published by the Federal Judicial Center, the *Manual of Model Criminal Jury Instructions* for the Eighth and Ninth Circuits, and the *Pattern Jury Instructions* (Criminal Cases) for the Eleventh Circuit, all published by West.

1.02

NOTE-TAKING BY JURORS

(Optional Addition to Preliminary Instruction)

ALTERNATIVE A

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

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

ALTERNATIVE B

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

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

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

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

Note

Whether the jurors take notes is a matter of discretion with the judge. See *United States v. Rhodes*, 631 F.2d 43, 45 (5th Cir. 1980).

1.03

INTRODUCTION TO FINAL INSTRUCTIONS

Members of the Jury:

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

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

1.04

DUTY TO FOLLOW INSTRUCTIONS

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

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

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

Note

See *United States v. Meshack*, 225 F.3d 556, 580-81 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 834 (2001), *amended on reh'g in part* 244 F.3d 367 (5th Cir. 2001), *petition for cert. filed*, (U.S. June 25, 2001) (No. 00-10499) (instructing jury that "[i]t is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy" is not plain error).

1.05

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify]. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

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

Note

Delete bracketed material if defendant testifies.

This instruction was approved in *United States v. Williams*, 20 F.3d 125, 129 n. 1 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 239 (1994). The use of this instruction has been affirmed, but has been criticized in *dictum*. *United States v. Shaw*, 894 F.2d 689 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 85 (1990); *United States v. Walker*, 861 F.2d 810 (5th Cir. 1988). But see *United States v. Castro*, 874 F.2d 230 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 138 (1989), and *United States v. Stewart*, 879 F.2d 1268 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 256 (1989), both of which question *Walker's dictum*.

1.06

EVIDENCE—EXCLUDING WHAT IS NOT EVIDENCE

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

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

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

Note

See *United States v. Rocha*, 916 F.2d 219, 235 (5th Cir. 1990), *cert. denied,* 111 S.Ct. 2057 (1991).

1.07

EVIDENCE—INFERENCES—DIRECT AND CIRCUMSTANTIAL

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

ALTERNATIVE A

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

ALTERNATIVE B

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of events and circumstances indicating that something is or is not a fact. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Note

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

1.08

CREDIBILITY OF WITNESSES

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

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses [including the defendant] who testified in this case. You should decide whether you believe all or any part of what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

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

Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point.

Note

Obviously, the language in brackets should be used only if the defendant has testified. The last two sentences of the instruction are not intended for use when the defendant has not presented any testimony.

1.09

CHARACTER EVIDENCE

Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or 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.

You will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Note

United States v. Callahan, 588 F.2d 1078 (5th Cir. 1979), *cert. denied,* 100 S.Ct. 49 (1979), approved this instruction. However, it is generally not error to refuse this instruction. *United States v. Baytank*, 934 F.2d 599, 614 (5th Cir. 1991).

1.10

IMPEACHMENT BY PRIOR INCONSISTENCIES

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

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

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

Note

A limiting instruction on the use of prior inconsistent statements is required upon request. Even in the absence of a request, failure to give a limiting instruction can sometimes be plain error. See *United States v. Livingston*, 816 F.2d 184 (5th Cir. 1987); *United States v. Miller*, 664 F.2d 94 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 121 (1982); *United States v. Garcia*, 530 F.2d 650 (5th Cir. 1976). The limiting instruction would not be necessary if the prior statement "was given under oath subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition." Rule 801(d)(1)(A), Fed. R. Evid.; *United States v. Bigham*, 812 F.2d 943 (5th Cir. 1987), *reh'g denied*, 816 F.2d 677 (5th Cir. 1987) (grand jury testimony). Similarly, the prior statement of the defendant would be covered by Rule 801(d)(2)(A), Fed. R. Evid.

1.11

IMPEACHMENT BY PRIOR CONVICTION
(DEFENDANT'S TESTIMONY)

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

Note

This charge should be given when the prior conviction is used for impeachment only (Fed. R. Evid. 609). If the conviction was admitted as a similar offense (Fed. R. Evid. 404(b)), then see Instruction No. 1.30, Similar Acts.

1.12

IMPEACHMENT BY PRIOR CONVICTION (WITNESS OTHER THAN DEFENDANT)

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

Note

The last sentence addresses the issue raised in *United States v. West*, 22 F.3d 586 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 584 (1994).

1.13

IMPEACHMENT BY EVIDENCE OF UNTRUTHFUL CHARACTER

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

Note

See *United States v. Pipkin,* 114 F.3d 528, 535 (5th Cir. 1997) (refusal to give this instruction not grounds for reversal when jury was given general credibility instruction).

1.14

ACCOMPLICE—INFORMER—IMMUNITY

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

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

Note

United States v. Garcia Abrego, 141 F.3d 142, 153 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 182 (1998), *reh'g denied*, 119 S.Ct. 582 (1998), *United States v. Goff*, 847 F.2d 149, 161 n. 13 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 324 (1988), and *United States v. D'Antignac*, 628 F.2d 428, 435-36 n.10 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 1485 (1981), all approved this instruction. See also *Wilkerson v. United States*, 591 F.2d 1046 (5th Cir. 1979), *reh'g denied*, 595 F.2d 1221 (5th Cir. 1979), approving an instruction that testimony of a co-conspirator must be weighed with caution.

"[T]he credibility of the compensated witness, like that of the witness promised a reduced sentence, is for a properly instructed jury to determine." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 749 (1988). It is not error to refuse to give a specific instruction as to the suspect credibility of a compensated witness where the jury is given an instruction substantially similar to the first sentence of this instruction, *United States v. Narviz-Guerra*, 148 F.3d 530, 538 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 601 (1998); but the district court must give specific instructions to the jury about the credibility of paid witnesses, *United States v. Villafranca*, No. 99-40593, 2001 WL 838867, at *2 (5th Cir. July 25, 2001).

1.15

ACCOMPLICE—CO-DEFENDANT—PLEA AGREEMENT

In this case the government called as one of its witnesses an alleged accomplice, named as a co-defendant in the indictment, with whom the government has entered into a plea agreement providing for the dismissal of some charges and a lesser sentence than the co-defendant would otherwise be exposed to for the offense to which the co-defendant plead guilty. Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this court.

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

Note

The phrase "in and of itself" has been deleted from the last sentence of the 1997 version of this instruction. The Fifth Circuit and Eleventh Circuit have approved that language. *United States v. Pettigrew*, 77 F.3d 1500, 1518 (5th Cir. 1996); *United States v. Prieto*, 232 F.3d 816, 823 (11th Cir. 2000). However, the First Circuit discouraged as "potentially misleading" the use of such "in and of itself" language. *United States v. Gonzalez-Gonzalez*, 136 F.3d 6, 10-11 (1st Cir. 1998). Pattern jury instructions for the Sixth, Seventh, Eighth, and Ninth Circuits do not contain the "in and of itself" language.

Portions of this instruction were approved in the following cases: *United States v. Posada-Rios*, 158 F.3d 832, 872-73 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1280 (1999); *United States v. Pettigrew*, 77 F.3d 1500, 1518 (5th Cir. 1996); *United States v. Pierce*, 959 F.2d 1297, 1304 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 621 (1992); and *United States v. Abravaya*, 616 F.2d 250, 251 (5th Cir. 1980).

1.16

WITNESS'S USE OF ADDICTIVE DRUGS

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

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

Note

United States v. Gadison, 8 F.3d 186 (5th Cir. 1993) (fact that witness is recovering drug addict raises an issue of credibility not admissibility); *United States v. Garner*, 581 F.2d 481 (5th Cir. 1978) (witness's use of heroin raises a credibility issue for the jury; testimony to be weighed with caution; no specific instruction quoted or approved). See also *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980); *United States v. Gentry*, 839 F.2d 1065 (5th Cir. 1988).

1.17

EXPERT WITNESS

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

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

Note

This instruction does not refer to the witness as an "expert." When a court so refers to a witness, the jury may be inclined to give undue weight to that witness's testimony. When the judge gives written instructions to the jury, the judge may wish to delete the title "Expert Witness."

1.18

ON OR ABOUT

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

Note

"Generally speaking, proof of any date before the return of the indictment and within the statute of limitations is sufficient." *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986).

See also *United States v. Powers*, 168 F.3d 741, 746 (5th Cir. 1999), *cert. denied,* 120 S.Ct. 360 (1999); *United States v. Morris*, 46 F.3d 410, 419 (5th Cir. 1995), *cert. denied,* 115 S.Ct. 2595 (1995).

If the defendant has raised an alibi defense dependent upon a particular day, this instruction should be coordinated with the "Alibi" instruction. See *United States v. King*, 703 F.2d 119 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 148 (1983).

1.19

CAUTION–CONSIDER ONLY CRIME CHARGED

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

Note

See *United States v. Fotovich*, 885 F.2d 241 (5th Cir. 1989), *cert. denied,* 110 S.Ct. 754 (1990), approving a substantially similar instruction.

The exception in the last sentence of this instruction is intended to avoid possible jury confusion in cases where the guilt of another person could have some relevance, e.g., deciding whether defendant was a member of a criminal conspiracy even when the other alleged conspirators are not also being tried.

1.20

CAUTION—PUNISHMENT

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

1.21

SINGLE DEFENDANT—MULTIPLE COUNTS

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

Note

In some cases, such as prosecutions under 18 U.S.C. § 1862 (RICO) and 21 U.S.C. § 848 (Continuing Criminal Enterprise), a conviction on one or more counts ("predicate offenses") is necessary to support a conviction on another count. In such cases, the last sentence of the instruction should be modified.

1.22

MULTIPLE DEFENDANTS—SINGLE COUNT

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

Note

See *United States v. Hass*, 150 F.3d 443, 449 n.1 (5th Cir. 1998) (undue prejudice resulting from admission of evidence relevant to co-defendant but having only a tenuous relationship to another defendant cured by limiting instruction that "evidence pertaining to each defendant should be considered separately and individually"). See also *United States v. Gallardo-Trapero*, 185 F.3d 307, 316 n.2 (5th Cir. 1999), *cert. denied,* 120 S.Ct. 961 (2000); *United States v. Manges*, 110 F.3d 1162 (5th Cir. 1997), *cert. denied,* 118 S.Ct. 1675 (1998).

1.23

MULTIPLE DEFENDANTS—MULTIPLE COUNTS

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

Note

United States v. Dillman, 15 F.3d 384 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 183 (1994), approved this charge.

In some cases, such as prosecutions under 18 U.S.C. § 1862 (RICO) and 21 U.S.C. § 848 (Continuing Criminal Enterprise), a conviction on one or more counts ("predicate offenses") is necessary to support a conviction on another count. In such cases, the fourth sentence of the instruction should be modified.

1.24

DUTY TO DELIBERATE—VERDICT FORM

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

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

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

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

A form of verdict has been prepared for your convenience.

[Explain verdict form.]

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

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

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

Note

Concerning the admonition against disclosure of the numerical division of the jury, see *Brasfield v. United States*, 47 S.Ct. 135 (1926); *United States v. Chanya*, 700 F.2d 192, 193 (5th Cir. 1983), *appeal after remand*, 723 F.2d 374 (5th Cir. 1984), *cert. denied*, 104 S.Ct. 1925 (1984), *reh'g denied*, 104 S.Ct. 2693 (1984).

1.25

UNANIMITY OF THEORY

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

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

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

Note

The first paragraph of the instruction reflects that indictments often state different means of committing the crime in the conjunctive.

This instruction should be used when the alternative means are conceptually separate and distinct, and there are special circumstances creating a genuine risk that a conviction may occur as a result of different jurors concluding that the defendant committed different acts. See *Richardson v. United States*, 119 S.Ct. 1707 (1999); *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993), for discussion of when this instruction is required. See also *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 834 (2001), *amended on reh'g in part* 244 F.3d 367 (5th Cir. 2001), *petition for cert. filed*, (U.S. June 25, 2001) (No. 00-10499) (failure to instruct jury that it must unanimously agree as to mental state possessed by defendant charged with money laundering not plain error), *United States v. Narvez-Guerra*, 148 F.3d 530 (5th Cir.), *cert. denied*, 119 S.Ct. 601 (1998) (failure to give specific unanimity instruction in case involving conspiracy to launder money not plain error), *United States v. Dillman*, 15 F.3d 384 (5th Cir.), *cert. denied*, 115 S.Ct. 183 (1994) (district court refusal to give specific unanimity instruction on conspiracy count not error); *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991) (district court refusal to give specific unanimity instruction held to be reversible error).

1.26

CONFESSION—STATEMENT—VOLUNTARINESS (SINGLE DEFENDANT)

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

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

1.27

CONFESSION–STATEMENT–VOLUNTARINESS (MULTIPLE DEFENDANTS)

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

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

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

Note

United States v. Watson, 591 F.2d 1058 (5th Cir. 1979), *cert. denied*, 99 S.Ct. 2414 (1979), approved instruction in substantially same form. See also *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988).

1.28

ENTRAPMENT

The defendant asserts that he was a victim of entrapment.

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

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

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

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

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

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

Note

This instruction has been cited and approved in a number of cases. See, e.g., *United States v. Wise*, 221 F.3d 140 (5th Cir. 2000), *petition for cert. filed* (U.S. Dec. 4, 2000) (No. 00-7342); *United States v. Brace,* 145 F.3d 247 (5th Cir.), *cert. denied*, 119 S.Ct. 426 (1998); *United States v. Hernandez*, 92 F.3d 309 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1437 (1997); *United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 597 (1992); *United States v. Collins*, 972 F.2d 1385, 1412, n. 58 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1812 (1993); *United States v. Stowell*, 947 F.2d 1251, 1257 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1269 (1992).

In *Jacobson v. United States*, 112 S.Ct. 1535, 1540 (1992), the Supreme Court held that where the government "has induced an individual to break the law, and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." The Fifth Circuit interpreted *Jacobson* as requiring "that the government must prove at trial beyond a reasonable doubt that the defendant was actually predisposed to commit the underlying crime absent the government's role in assisting such commission." *United States v. Byrd*, 31 F.3d 1329, 1336 (5th Cir. 1994) (quoting *United States v. Aibejeris*, 28 F.3d 97, 99 (11th Cir. 1994)), *cert. denied*, 115 S.Ct. 1432 (1995). The Fifth Circuit stressed that "the crucial holding of *Jacobson* is that predisposition must be independent of government action." *Id.* In *United States v. Hernandez*, 92 F.3d 309 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1437 (1997), the Fifth Circuit affirmed the adequacy of this instruction with respect to the requirement expressed in *Jacobson.*

Post-*Jacobson*, the Seventh Circuit held that "[p]redisposition is not a purely mental state ... [i]t has positional as well as dispositional force." *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994). "Postitional predisposition" requires that the "defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so." *Id.* For a discussion of the Fifth's Circuit's view on "positional predisposition" see *United States v. Reyes*, 239 F.3d 722, 742-43 (5th Cir 2001), *cert. denied*, 121 S.Ct. 2618 (2001).

An issue may arise in a case in which a defendant denies the requisite intent to commit the crime in question or that he was involved in one or more of the acts essential to the commission of the charged crime and alternatively contends that he was in any event entrapped. In *Mathews v. United States*, 108 S.Ct. 883, 886 (1988), the Supreme Court held that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." In *United States v. Collins*, 972 F.2d 1385, 1413 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1812 (1993), the trial judge declined to give a requested instruction to the effect that the defendant has a right to deny participation in the crime and alternatively plead entrapment. The Fifth Circuit held that there was no reversible error, but stressed that "the jury repeatedly was told that the defendants were denying culpability for the crime." *Id.* Considering the unusual nature of such an alternative contention, on request of a defendant the judge should give a specific instruction to the effect that a defendant may deny that he engaged in the activity constituting the charged offense and alternatively plead entrapment.

Generally, an entrapment issue should be submitted under the general rule that a jury must be instructed on defensive theories, if there is sufficient evidence for a reasonable jury to rule in favor of the defendant on that theory. *United States v. Bradfield*, 113 F.3d 515, 520 (5th Cir. 1997).

1.29

IDENTIFICATION TESTIMONY

In any criminal case the government must prove not only the essential elements of the offense or offenses charged, as hereafter defined, but must also prove, of course, the identity of the defendant as the perpetrator of the alleged offense or offenses.

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

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

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

Note

Barber v. United States, 412 F.2d 775 (5th Cir. 1969), approved a similar instruction.

1.30

SIMILAR ACTS

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

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

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

or

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

or

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

or

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

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

Note

United States v. LeBaron, 156 F.3d 621, 626 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1074 (1999), cites this instruction with approval. See also *United States v. Chiak*, 137 F.3d 252, 257-58 n. 3 (5th Cir.), *cert. denied*, 119 S.Ct. 118 (1998) and *United States v. West*, 22 F.3d 586, 595 (5th Cir.), *cert. denied*, 115 S.Ct. 584 (1994), approving similar instructions.

United States v. Gibson, 55 F.3d 173 (5th Cir. 1995), and *United States v. Waldrip*, 981 F.2d 799 (5th Cir. 1993), discuss the use of a limiting instruction when extraneous offenses are introduced. Ordinarily, the defendant must request this instruction. Under some circumstances, the failure to

give this instruction, even in the absence of a request, may constitute plain error. *Id.* Thus, the better practice may be to give this instruction whenever Rule 404(b) evidence is introduced.

A limiting instruction need not be given each and every time a prior bad act is introduced into evidence. *United States v. Hernandez-Guevara*, 162 F.3d 863 (5th Cir. 1998), *cert. denied,* 119 S.Ct. 1375 (1999).

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

1.31

POSSESSION

Possession, as that term is used in this case, may be of two kinds: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

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

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

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

Note

The instruction on joint or constructive possession should be given only when the evidence raises the issue. See *United States v. Jones*, 185 F.3d 459 (5th Cir. 1999), *cert. denied,* 121 S.Ct. 125 (2000); *United States v. Ybarra*, 70 F.3d 362, (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1582 (1996), *United States v. Steen,* 55 F.3d 1022 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 577 (1995); *United States v. Posner*, 868 F.2d 720 (5th Cir. 1989), on constructive possession.

A number of Fifth Circuit cases have cited this instruction with approval. See *United States v. Cano-Guel*, 167 F.3d 900, 905-906 (1999); United *States v. Prudhome*, 13 F.3d 147, 149-50 (5th Cir. 1994), *cert. denied*, 114 S.Ct. 1866 (1994); *United States v. Shabazz*, 993 F.2d 431, 440 n. 14 (5th Cir. 1993); *United States v. McKnight*, 953 F.2d 898, 903-04 (5th Cir. 1992), *cert. denied*, 112 S.Ct. 2975 (1992).

When the jury is instructed that constructive possession requires proof of "dominion and control," refusal to instruct jury that "mere touching" is insufficient to establish constructive possession is not error. *United States v. DeLeon*, 170 F.3d 494, 498 (5th Cir.), *cert. denied,* 120 S.Ct. 156 (1999).

In a prosecution for possession of a controlled substance, when the substance is hidden and the defense is lack of knowledge of the presence of the substance, defendant is entitled to a "knowledge" instruction more specific than the "'Knowingly'–To Act" instruction. See *United*

States v. Pennington, 20 F.3d 593 (5th Cir. 1994). For example, if an unlawful drug is hidden from view in a vehicle, a charge such as the following should be considered:

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

1.32

ATTEMPT

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

The elements of [the substantive offense] are: [give required elements unless they are already given elsewhere in the charge].

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

First: That the defendant intended to commit [the substantive offense]; and

Second: That the defendant did an act constituting a substantial step towards the commission of that crime which strongly corroborates the defendant's criminal intent.

Note

The elements of the offense are discussed in *United States v. Crow*, 164 F.3d 229, 235 (5th Cir. 1999), *United States v. Fuller*, 974 F.2d 1474, 1478 (5th Cir. 1993), and *United States v. Contreras*, 950 F.2d 232, 236-37 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 2276 (1992).

The "requirement that the conduct be strongly corroborative of the firmness of the defendant's criminal intent also relates to the requirement that the conduct be more than 'mere preparation,' ...."" *United States v. Mandujano*, 499 F.2d 370, 377 (5th Cir. 1974), *cert. denied*, 95 S.Ct. 792 (1975) (affirming defendant's conviction of attempted distribution of a controlled substance under 21 U.S.C. § 846); see also *Contreras*, 950 F.2d at 237 (stating that a substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent).

Attempt is usually a lesser included offense of the completed crime. However, a defendant may be convicted of a substantive offense and also attempting to commit the same kind of substantive offense, so long as there is a different factual basis for the two separate crimes. *United States v. Anderson*, 987 F.2d 251, 254-56 (5th Cir.), *cert. denied*, 114 S.Ct. 157 (1993) (affirming convictions for manufacturing one batch of methamphetamine and attempting to manufacture a second batch).

1.33

LESSER INCLUDED OFFENSE

We have just talked about what the government has to prove for you to convict the defendant of the crime charged in the indictment, [*e.g.*, committing a bank robbery in which someone was exposed to risk of death by the use of a dangerous weapon]. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the defendant committed that crime. If your verdict on that is guilty, you are finished. But if your verdict is not guilty, or if after all reasonable efforts, you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of [lesser crime, *e.g.*, simple bank robbery]. You should find the defendant guilty of [lesser crime] if the government has proved, beyond a reasonable doubt, that the defendant did everything we discussed before except that it did not prove that the defendant [describe missing element, *e.g.*, exposed someone to risk of death by use of a dangerous weapon].

To put it another way, the defendant is guilty of [lesser crime] if the following things are proved beyond a reasonable doubt: [List elements]. The defendant is guilty of [greater crime] if it is proved beyond a reasonable doubt that the defendant did all those things and, in addition [describe missing element]. If your verdict is that the defendant is guilty of [greater crime], you need go no further. But if your verdict on that crime is not guilty, or if after all reasonable efforts, you are unable to reach a verdict on it, you should consider whether the defendant has been proved guilty of [lesser crime].

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

Note

See *Schmuck v. United States*, 109 S.Ct. 1443 (1989), *reh'g denied*, 109 S.Ct. 2091 (1989), on when to give a lesser included offense instruction. See also *Carter v. United* States, 120 S.Ct. 2159 (2000) (18 U.S.C. § 2113(b) is not a lesser included offense of 18 U.S.C. § 2113(a)); *United States v. Estrada-Fernandez*, 150 F.3d 491, 494 (5th Cir. 1998) (lesser included offense instruction may be given only if (1) elements of offense are a subset of the elements of the charged offense, and

(2) the evidence at trial permits a jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense).

The phrase "after all reasonable efforts" has been included in the first two paragraphs to address the concerns raised in *United States v. Buchner*, 7 F.3d 1149, 1153 n.5 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 1331 (1994).

1.34

INSANITY

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

The defendant was insane as the law defines that term only if, as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

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

Remember, then, that there are three possible verdicts in this case: guilty, not guilty, and not guilty only by reason of insanity.

Note

The Insanity Defense Reform Act of 1984, codified at 18 U.S.C. § 17, redefined the insanity defense and reallocated the burden of proof, modifying *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984) (en banc), *cert. denied*, 105 S.Ct. 323 (1984).

The Fifth Circuit affirmed a district court's use of this instruction on insanity in *United States v. Shannon*, 981 F.2d 759, 761 (5th Cir. 1993), *affirmed*, 114 S.Ct. 2419 (1994). In *Shannon*, the Fifth Circuit also held that a defendant is not entitled to a jury instruction which describes mandatory commitment procedures accompanying a verdict of not guilty by reason of insanity (NGI). *Id.* at 764.

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

The Supreme Court did recognize that an instruction "of some form may be necessary under certain limited circumstances," e.g., if a witness or prosecutor states to the jury that a defendant

would go free after an NGI verdict, a district court might need to "intervene with an instruction to counter such misstatement." *Id.*

See also *United States v. Dixon*, 185 F.3d 393 (5th Cir. 1999), and *United States v. Levine*, 80 F.3d 129 (5th Cir.), *cert. denied*, 117 S.Ct. 83 (1996), for Fifth Circuit decisions on the insanity defense.

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

1.35

ALIBI

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

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

Note

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

1.36

JUSTIFICATION, DURESS, OR COERCION

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

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

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

2. The defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; and

3. The defendant had no reasonable legal alternative to violating the law, that is, he had no reasonable opportunity to avoid the threatened harm; and

4. A reasonable person would believe that by committing the criminal action he would directly avoid the threatened harm.

Note

Two recent Fifth Circuit cases set forth the elements of this defense in essentially the same terms as this instruction. *United States v. Wyly*, 193 F.3d 289, 300 (5th Cir. 1999), *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998), *cert. denied,* 119 S.Ct. 1280 (1999). Contrary to other circuits, the Fifth Circuit places the burden of proving this affirmative defense on the defendant and requires the defendant to prove that he did not recklessly or negligently place himself in the situation. Hence, this instruction differs from the pattern instructions in those other circuits. *United*

States v. Wyly, 193 F.3d 289, 300 (5th Cir. 1999); *United States v. Willis*, 38 F.3d 170, 179 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 2585 (1995). See also *United States v. Harper*, 802 F.2d 115 (5th Cir. 1986), *Manual of Model Criminal Jury Instructions for the Ninth Circuit,* § 6.5 (West 2000); *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, Committee Comments to § 9.02, p. 496 (West 2000); *Pattern Criminal Jury Instructions Sixth Circuit,* § 6.06 (West 1991).

The test of whether or not the defense of duress exists is an objective one, not a subjective one. *United States v. Posada-Rios,* 158 F.3d 832, 873 (5th Cir. 1998), *cert. denied,* 119 S.Ct. 1280 (1999); *United States v. Willis*, 38 F.3d 170, 176 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 2585 (1995).

As with any affirmative defense, the trial court may refuse to give the justification instruction if the defendant fails to submit sufficient evidence for a reasonable juror to find duress. *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998), *cert. denied,* 119 S.Ct. 1280 (1999); *United States v. Liu*, 960 F.2d 449 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 418 (1992); *United States v Harvey*, 897 F.2d 1300 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 568 (1990), *overruled in part on other grounds, United States v. Lambert*, 984 F.2d 658 (5th Cir. 1993) (*en banc*).

1.37

"KNOWINGLY"—TO ACT

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

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

Note

United States v. Brown, 186 F.3d 661, 665 (5th Cir. 1999), held that a jury given this instruction was "properly instructed." See also *United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996), *cert. denied*, 118 S.Ct. 81 (1997); *United States v. Aggrawal*, 17 F.3d 737, 744 (5th Cir. 1994) (this instruction is "correct" definition of "knowingly").

Refusal to give this "knowingly" instruction may not be error if the substantive offense instruction adequately covers the element of knowledge. See *United States v. Cano-Guel*, 167 F.3d 900 (5th Cir. 1999); *United States v. Sanchez-Sotelo*, 8 F.3d 202 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1410 (1994).

With regard to the deliberate ignorance instruction and the appropriate occasions for its submission, see *United States v.* Peterson, 244 F.3d 385 (5th Cir.), *petition for cert. filed* (U.S. June 5, 2001) (No. 00-10428); United *States v. Sharpe*, 193 F.3d 852 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 1202 (2000); *United States v. Moreno*, 185 F.3d 465 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 835 (2000); United *States v. Threadgill*, 172 F.3d 357 (5th Cir.), *cert. denied*, 120 S.Ct. 172 (1999); *United States v. Lara-Velasquez*, 919 F.2d 946 (5th Cir. 1990). The bracketed material should be used sparingly–only when the facts and statute under which the defendant is being prosecuted justify it. See *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990). If a deliberate ignorance instruction is given, a "balancing" instruction should be considered upon request of defendant. See *United States v. Farfan-Carreon*, 935 F.2d 678 (5th Cir. 1991).

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

A judge is cautioned that, in instructing on a statute which punishes "otherwise innocent conduct," the knowledge requirement applies to each element. *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996), *reh'g and suggestion for reh'g en banc denied*, 108 F.3d 335 (5th Cir. 1997).

When a deliberate ignorance instruction is appropriate only with respect to one of a group of co-defendants, the Fifth Circuit has approved the giving of the instruction accompanied by a statement that the instruction may not apply to all of the defendants. *United States v. Reissig*, 186 F.3d 617 (5th Cir. 1999), *cert. denied,* 120 S.Ct. 832 (2000).

1.38

"WILLFULLY"—TO ACT

Note

Prosecutors frequently include the word "willfully" in the indictment, even when not required by statute or case law. This practice should be discouraged. Historically, the usual definition of that term was:

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

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

In *Cheek v. United States*, 111 S.Ct. 604 (1991), the Supreme Court defined "willful" for prosecutions under the Internal Revenue Code. Because of the complexity of the tax laws, "willful" criminal tax offenses are treated as an exception to the general rule that "ignorance of the law or a mistake of law is no defense to criminal prosecution." 111 S.Ct. at 609. "Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses." 111 S.Ct. at 609. "The standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'" 111 S.Ct. at 610 (quoting *United States v. Pomponio*, 97 S.Ct. 22, 23 (1976), and *United States v. Bishop*, 93 S.Ct. 2008, 2017 (1973)). The Court reversed a conviction because the trial court instructed the jury that the defendant's good faith belief that he was not violating the law must have been objectively reasonable. However, a good faith belief that the law is unconstitutional does not negate the willfulness requirement. Thus it is not error to instruct a jury not to consider a defendant's claims that a tax law is unconstitutional. 111 S.Ct. at 612-13. See also *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir. 1994) (stating that "[t]he U.S. Supreme Court has recognized that the term 'willfully' connotes a voluntary, intentional violation of known legal duty" in a case involving evasion of federal excise taxes), *cert. denied*, 115 S.Ct. 773 (1995); *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993) (defining willfulness as "'voluntary, intentional violation of a known legal duty'" in a gasoline excise tax evasion case). In *United States v. Masat*, the Fifth Circuit stated that in a tax evasion case, "willfulness simply means a voluntary, intentional violation of a known legal duty" and that the jury instruction defining "willfully" does not have to include any language about bad purpose or evil motive. 948 F.2d 923, 931-32 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 108 (1992).

In *Bryan v. United States*, 118 S.Ct. 1939 (1998), the Supreme Court addressed whether the term "willfully" in 18 U.S.C. §§ 922 (a)(1)(A) and 924 (a)(1)(D) requires proof that the defendant knew that his conduct was unlawful, or whether it also requires proof that the defendant knew of the

federal licensing requirement. The *Bryan* Court noted that a "willful" act, as a general matter, is one undertaken with a "bad purpose." See *id.* at 1945. For a "willful"violation of a statute, the government must prove that the defendant acted with the knowledge that his conduct was unlawful. See *id*. In this case, the defendant argued that "willfully" in the context of § 924 (a)(1)(D) required knowledge of the law because of the Court's previous interpretation of "willfully" in violations of tax laws (*Cheek,* 111 S.Ct. at 610) and in violations involving structuring of cash transactions to avoid a reporting requirement (*Ratzlaf*, 114 S.Ct. at 658 & 663). The Court distinguished these two types of cases because they involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. See *id.* at 1946-47. As a result, the Court held "that these statutes carve out an exception to the traditional rule that ignorance of the law is no excuse and require that the defendant have knowledge of the law." *Id*. at 1947. In this case, under § 924 (a)(1)(D), the danger of convicting individuals engaged in apparently innocent activity is not present because the jury found that the defendant knew that his conduct was unlawful. See *id.* Thus, the *Bryan* Court held that "the willfulness requirement of § 924 (a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required." *Id*.

The Supreme Court has cautioned that the required mental state may be different even for different elements of the same crime, and that the mental element encompasses more than just the two possibilities of "specific" and "general" intent. *Liparota v. United States*, 105 S.Ct. 2084, 2087 n.5 (1985). The Committee has therefore abandoned the indiscriminate use of the term "willfully" accompanied by an inflexible definition of that term. Instead, we have attempted to define clearly what state of mind is required, i.e., what the defendant must know and intend to be guilty of the particular crime charged. This approach finds support in *United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996), which found no error when the trial court declined to separately define "willfulness" but did give the pattern jury definition of "knowingly" and otherwise "correctly charged the jurors on the element of intent in each offense." Nevertheless, the historical definition of "willfully," quoted above, was recently given and approved in a money laundering case, *United States v. Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996), and a prosecution for unlawfully paying inducements for referrals of Medicare patients, *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998).

1.39

INTERSTATE COMMERCE—DEFINED

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

Note

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

1.40

FOREIGN COMMERCE—DEFINED

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

Note

See *United States v. Montford*, 27 F.3d 137 (5th Cir. 1994), and *United States v. De La Rosa*, 911 F.2d 985 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2275 (1991), and the Note in Instruction No. 1.39, Interstate Commerce.

1.41

COMMERCE—DEFINED

Commerce includes travel, trade, transportation and communication.

1.42

CAUTIONARY INSTRUCTION DURING TRIAL— TRANSCRIPT OF TAPE RECORDED CONVERSATION

Exhibit ____ has been identified as a typewritten transcript [and partial translation from Spanish into English] of the oral conversation which can be heard on the tape recording received in evidence as Exhibit ____. The transcript also purports to identify the speakers engaged in such conversation.

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

You are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcript, and from your own examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its own contents; and, if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Note

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

See *United States v. Murray*, 988 F.2d 518, 525-27 (5th Cir. 1993), and *United States v. Rena*, 981 F.2d 765, 767-70 (5th Cir. 1993). Under certain circumstances, including when the taped conversation is in a foreign language, a transcript (in English) may be admitted but the tape excluded. See, e.g., *United States v. Valencia*, 957 F.2d 1189 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 254 (1992). In such a case, of course, this instruction must be modified.

1.43

SUMMARIES AND CHARTS NOT RECEIVED IN EVIDENCE

Certain charts and summaries have been shown to you solely to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. These charts and summaries are not evidence or proof of any facts. You should determine the facts from the evidence.

Note

See *United States v. Winn*, 948 F.2d 145, 157-58 n.30 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1599 (1992), and *United States v. Duncan*, 919 F.2d 981, 988 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2036 (1991), approving similar instructions.

Under some circumstances, the failure to give a limiting instruction in conjunction with the government's use of a demonstrative chart may be plain error, but not when other factors suggest the permissible use of the chart. *United States v. Meshack*, 225 F.3d 556, 582 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 834 (2001), *amended on reh'g in part* 244 F.3d 367 (5th Cir. 2001), *petition for cert. filed*, (U.S. June 25, 2001) (No. 00-10499).

1.44

SUMMARIES AND CHARTS RECEIVED IN EVIDENCE

Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.

Note

This instruction is not appropriate when the summaries and charts have been introduced into evidence under Federal Rule of Evidence 1006 and the underlying documents or records have not been introduced into evidence. In such a case the charts or summaries are themselves evidence of facts in the case. See *United States v. Osum*, 943 F.2d 1394, 1405 n.9 (5th Cir. 1991).

1.45

MODIFIED "ALLEN" CHARGE

Members of the Jury:

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

This is an important case. The trial has been expensive in time, effort, and money to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and must be tried again. Obviously, another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

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

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

Remember at all times that no juror is expected to yield a conscientious opinion he or she may have as to the weight or effect of the evidence. But remember also that, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so without surrendering your conscientious opinion. You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of Not Guilty.

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

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

Note

In *United States v. Winters,* 105 F.3d 200, 203-04 (5th Cir. 1997), the Fifth Circuit rejected defendant's claim that the jury was coerced into finding him guilty by the following instruction: "[i]f you should fail to agree on a verdict as to the remaining counts the case is left open and must be tried again." See *United States v. Clayton*, 172 F.3d 347, 352 (5th Cir. 1999).

See also *United States v. Nguyen*, 28 F.3d 477, 483-84 (5th Cir. 1994), and *United States v. Pace*, 10 F.3d 1106, 1125 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 2180 (1994) (discussing the 1990 version of this instruction).

II. SUBSTANTIVE OFFENSE INSTRUCTIONS

2.01

FOOD STAMP CRIMES

7 U.S.C. § 2024(b)

Title 7, United States Code, Section 2024(b), makes it a crime for anyone knowingly to use [transfer] [acquire] [possess] United States Department of Agriculture food stamp coupons, authorization cards, or access devices in any manner not authorized by law or by Department regulations, where the food stamp coupons, cards, or devices have a value of $100 or more.

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

First: That the defendant used [transferred] [acquired] [altered] [possessed] food stamp coupons [authorization cards] [access devices] in a manner not authorized by law or by Department of Agriculture regulations, as charged;

Second: That the defendant knew he was acting unlawfully and intended to violate the law; and

Third: That the food stamp coupons [authorization cards] [access devices] had a value of $100 [$5,000] [$___] or more.

You are instructed that there is no law or departmental regulation which authorizes anyone to sell or purchase food stamp coupons, cards or access devices for cash [to use, transfer, or acquire food stamp coupons, authorization cards or access devices for clothes, drugs, cigarettes, or liquor].

For the purpose of determining the value of food stamp coupons, authorization cards or access devices, you should place a value on them equal to their face value.

Note

The third element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a value that would result in an enhanced penalty.

If a disputed issue is whether the food stamp coupons had a value of $5,000 or more, the Court should consider giving a lesser included offense instruction.

See *Liparota v. United States*, 105 S.Ct. 2084 (1985) (explaining *mens rea* requirement); *United States v. Barnes*, 117 F.3d 328, 333 (7th Cir. 1997); *United States v. Abdelkoui*, 19 F.3d. 1178 (7th Cir. 1994); *United States v. Brown*, 897 F.2d 162, 163 (5th Cir. 1990) (same). See also *United States v. Bryan*, 118 S.Ct. 1939 (1998), a firearms case discussing the meaning of "knowing" in 7 U.S.C. § 2024(b) and (c).

2.02

BRINGING IN ALIENS

8 U.S.C. § 1324(a)(1)(A)(i)

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

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

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

Second: That entry was [attempted] at a place other than at a designated port of entry;

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

Fourth: That the defendant intended to commit a criminal act by bringing an alien into the United States at a place other than a designated port of entry.

An alien is any person who is not a natural-born or naturalized citizen, or a national of the United States. The term "national of the United States" includes not only a citizen, but also a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

Note

There are no reported Fifth Circuit cases that would require the fourth element. It is included based on two cases from other circuits. See *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995); *United States v. Zayas-Moralas*, 685 F.2d 1272, 1275 (11th Cir. 1982).

The statute describes aggravating factors raising the statutory maximum penalty, which must be submitted as additional elements if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. § 1324(a)(1)(B)(i); whether the defendant caused serious bodily injury, 8 U.S.C. § 1324(a)(1)(B)(iii); or whether death resulted, 8 U.S.C. § 1324(a)(1)(B)(iv). *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2.03

UNLAWFULLY TRANSPORTING ALIENS

8 U.S.C. § 1324(a)(1)(A)(ii)

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

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

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

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

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

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

An alien is any person who is not a natural-born or naturalized citizen, or a national of the United States. The term "national of the United States" includes not only a citizen, but also a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

In order for transportation to be in furtherance of the alien's unlawful presence, there must be a direct and substantial relationship between the defendant's act of transportation and its furtherance of the alien's presence in the United States. In other words, the act of transportation must not be merely incidental to a furtherance of the alien's violation of the law.

Note

The statute does not contain the term "willfully." Nevertheless, a series of recent Fifth Circuit decisions, while reciting the elements of this offense, state that the Defendant must have acted "willfully in furtherance of the alien's violation of law." *United States v. Romero-Cruz*, 201 F.3d 374, 378 (5th Cir. 2000); *United States v. Williams*, 132 F.3d 1055, 1059 (5th Cir. 1999); *United States v. Diaz*, 936 F.2d 786, 788 (5th Cir. 1991); *United States v. Morales-Rosales*, 838 F.2d 1359, 1361 (5th Cir. 1988). However, in *United States v. Rivera*, 879 F.2d 1247, 1251 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 554 (1989), the court specifically rejected an argument that "willful transportation" was an element of this crime, explaining that the essential element was whether there is a "direct and substantial relationship between the transportation and its furtherance of the alien's presence in the United States." Moreover, the *Williams* opinion, despite reciting "willfully" as an element, approved a jury instruction "substantially the same" as the 1997 Fifth Circuit Pattern Jury Instruction, and which did not use the term "willfully" as part of the elements of the offense. 132 F.3d at 1061-62.

The statute describes aggravating factors raising the statutory maximum penalty, which must be submitted as additional elements if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. § 1324(a)(1)(B)(i); whether the defendant caused serious bodily injury, 8 U.S.C. § 1324(a)(1)(B)(iii); or whether death resulted, 8 U.S.C. § 1324(a)(1)(B)(iv). *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2.04

CONCEALING OR HARBORING ALIENS

8 U.S.C. § 1324(a)(1)(A)(iii)

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

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

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

Second: That the defendant concealed [harbored] [sheltered from detection] the alien within the United States;

Third: That the defendant either knew or acted in reckless disregard of the fact that the alien entered or remained in the United States in violation of law; and

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

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

An alien is any person who is not a natural-born or naturalized citizen, or a national of the United States. The term "national of the United States" includes not only a citizen, but also a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

Note

See note under Instruction No. 2.03, 8 U.S.C. § 1324(a)(1)(A)(ii), for the submission of required additional elements when aggravating factors are charged in the indictment. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

See *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982); *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); and *United States v. Kim*, 193 F.3d 567 (2d Cir. 1999), for the fourth element.

2.05

ILLEGAL REENTRY FOLLOWING DEPORTATION

8 U.S.C. § 1326(a)

Title 8, United States Code, Section 1326(a), makes it a crime for an alien to enter [to be found within] the United States without consent of the Attorney General to apply for readmission after being deported.

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

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

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

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

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

Note

As of April 1, 1997, arrest is no longer an element of the crime. P.L. 104-208, § 308(d)(4)(J)(i), (ii); *United States v. Ramirez-Gamez*, 171 F.3d 236 (5th Cir. 1999); per curiam *United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999). The remaining elements of proof are described in *United States v. Benitez-Villafuente*, 186 F.3d 651 (5th Cir. 1999), and *United States v. Flores-Peraza*, 58 F.3d 164, 166 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 782 (1996).

Specific intent is not an element of this crime; it is a general intent crime. *United States v. Berrios-Centeno*, 250 F.3d 294, 297-98 (5th Cir. 2001); *United States v. Guzman-Ocampo,* 236 F.3d 233 (5th Cir. 2000). The government must show that the defendant had the general intent to reenter, i.e., he is here voluntarily. *Id.; United States v. Ortegon-Uvalde*, 179 F.3d 956 (5th Cir. 1999); *United States v. Trevino-Martinez*, 86 F.3d 65 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1109. See *United States v. Tovias-Marroquin*, 218 F.3d 455 (5th Cir. 2000).

An alien within the United States is not "found in" the United States if he approaches a recognized port of entry and produces his identity seeking admission. *United States v. Angeles-Mascote*, 206 F.3d 529 (5th Cir. 2000).

The Supreme Court has held in *Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998), that proof of the defendant's commission of an aggravated felony prior to deportation is not an element of the offense but is a punishment provision in addressing recidivism. The decision is further discussed but not overruled by *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). Until *Almendarez-Torres* is overruled, the Fifth Circuit has held that it has the duty to follow it as United States Supreme Court precedent. *United States v. Nava-Perez,* 242 F.3d 277 (5th Cir. 2001); *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000). The Committee has not recommended an additional element of proof that the felony committed was an aggravated felony.

2.06

AIDING AND ABETTING (AGENCY)

18 U.S.C. § 2

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

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

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

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

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

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

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

Second: That the defendant associated with the criminal venture;

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

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

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

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

Note

Absent a showing of unfair surprise, this instruction can be given whether or not the indictment charges aiding and abetting. *United States v. Neal,* 951 F.2d 630 (5th Cir. 1992); *United States v. Botello,* 991 F.2d 189 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 886 (1994); *United States v. Casilla,* 20 F.3d 600 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 240 (1994); *United States v. Lombardi,* 138 F.3d 559 (5th Cir. 1998); *United States v. Sorrells*, 145 F.3d 744 (5th Cir. 1998).

The elements of this offense are set forth in *United States v. Garcia*, 242 F.3d 593, 596 (5th Cir. 2001); *United States v. Montgomery,* 210 F.3d 446 (5th Cir. 2000.); *United States v. De Le Rosa*, 171 F.3d 215 (5th Cir. 1999); *United States v. Reliford*, 210 F.3d 282 (5th Cir. 2000); *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 834 (2001), *amended on reh'g in part* 244 F.3d 367 (5th Cir. 2001), *petition for cert. filed*, (U.S. June 25, 2001) (No. 00-10499); and *United States v. Stewart*, 145 F.3d 273 (5th Cir. 1998). The 1997 version of this instruction was quoted with approval in *United States v. Neal, supra.*

2.07

ACCESSORY AFTER THE FACT

18 U.S.C. § 3

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

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

First: That the principal had committed the crime of _____ [the offense alleged in the indictment];

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

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

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

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

Note

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

The statute requires only commission of offense against the United States, not that offense be prosecuted or prosecutable. *United States v. Balano,* 618 F.2d 624 (10th Cir. 1979).

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

2.08

MISPRISION OF A FELONY

18 U.S.C. § 4

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

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

First: That a federal felony was committed, as charged in Count ___ of the Indictment;

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

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

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

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

Note

See for the elements of this offense: *United States V. Adams,* 961 F.2d 505 (5th Cir. 1992); *United States v. Salinas,* 956 F.2d 80 (5th Cir. 1992); and *United State v Cefalu*, 85 F.3d 964 (2nd Cir. 1996).

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

2.09

ASSAULTING A FEDERAL OFFICER

18 U.S.C. § 111

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

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

First: That the defendant forcibly assaulted the person described in the indictment;

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

Third: That the defendant did such acts intentionally.

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

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

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

You are instructed that a _____ [e.g., Special Agent of the Federal Bureau of Investigation] is one of the federal officers referred to in that law, and that it is a part of the official duty of such an officer to [e.g., execute arrest warrants issued by a judge or magistrate of this court].

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

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

Note

This statute has been interpreted as creating three separate offenses. *United States v. Ramirez*, 233 F.3d 318 (5th Cir. 2000). The Fourth element above, and the accompanying bracketed definitions, constitute a felony offense carrying a maximum penalty of ten years' confinement. Without that element, the above instruction defines the misdemeanor crime of "simple assault". The third crime is under the category of "all other cases," and carries a maximum penalty of three years' imprisonment. This third crime does not require use of a deadly weapon, nor bodily harm, nor the creation of apprehension in the victim. It does, however, require forcible physical contact. *Ramirez,* 233 F.3d at 322 (holding that hurling a cup at the victim, striking him and spilling its contents on him, fell in the intermediate category of "all other cases"). The instruction above would have to be modified accordingly to fit this category.

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

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

A state officer "acting in cooperation with and under control of federal officers" ... is considered a federal agent under U.S.C. § 111 and 1114. *United States v. Hooker,* 997 F.2d 67 (5th Cir. 1993). In that case, the third from the last paragraph would have to be changed accordingly.

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

The definitions of "deadly or dangerous weapon" and "bodily injury," are taken from Sec. 1B1.1, Application Note 1(b) and (d). Virtually any object can be a dangerous weapon depending

on the manner in which it is used. For illustrations of objects that have been used in a manner that would render them "deadly or dangerous," e.g., desk, garden rack, and wine bottle, see *United States v. Murphy*, 35 F.3d 143 (4th Cir. 1994), and cases cited therein.

2.10

BANKRUPTCY: CONCEALMENT OF ASSETS (BANKRUPTCY PROCEEDING PENDING)

18 U.S.C. § 152
(First Paragraph)

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

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

First: That there existed a proceeding in bankruptcy;

Second: That certain property or assets belonged to the bankrupt estate;

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

Fourth: That the defendant did so knowingly and fraudulently.

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

It is no defense that the concealment may have proved unsuccessful. Even though the property [document] [books] [records] in question may have been recovered for the debtor's estate, the defendant still may be guilty of the offense charged.

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

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

Note

The definitions of "conceal" and "fraudulently" would typically apply to prosecution under the other paragraphs of § 152.

With respect to jury instructions for prosecutions under the seventh paragraph of 18 U.S.C. § 152, see *United States v. West*, 22 F.3d 586 (5th Cir. 1994), *cert. denied,* 115 S.Ct. 584 (1994); *United States v. Moody*, 923 F.2d 341 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 80 (1991).

2.11

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

18 U.S.C. § 152
(Fourth Paragraph)

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

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

First: That there existed a proceeding in bankruptcy;

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

Third: That such claim was false; and

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

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

2.12

BRIBERY OF A PUBLIC OFFICIAL

18 U.S.C. § 201(b)(1)

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

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

First: That the defendant directly or indirectly gave [offered] [promised] something of value to _____ [a public official]; and

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

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

Note

"Public official" and "official act" are defined by 18 U.S.C. § 201(a)(1-3). For a useful discussion of "public official," see *United States v. Thomas*, 240 F.3d 445, 446-48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a "public official"). For a discussion of the scope of "official act" see *United States v. Parker*, 133 F.3d 322, 325-26 (5th Cir.), *cert. denied*, 118 S.Ct. 1851 (1998).

United States v. Pankhurst, 118 F.3d 345, 351 (5th Cir. 1997), *cert. denied,* 118 S.Ct. 630 (1997), describes the elements.

See *United States v. Tomblin*, 46 F.3d 1369, 1379-80 and n.16 (5th Cir. 1995) (approving the use of this instruction and encouraging the use of the Fifth Circuit Pattern Jury Instructions).

2.13

RECEIVING BRIBE BY PUBLIC OFFICIAL

18 U.S.C. § 201(b)(2)

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

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

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

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

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

Note

"Public official" and "official act" are defined by 18 U.S.C. § 201(a)(1-3). For a useful discussion of "public official," see *United States v. Thomas*, 240 F.3d 445, 446-48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a "public official"). For a discussion of the scope of "official act," see *United States v. Parker*, 133 F.3d 322, 325-26 (5th Cir.), *cert. denied*, 118 S.Ct. 1851 (1998).

"To find bribery, the jury is required to find that a public official accepted a thing of value in return for being influenced in the performance of an official act." *United States v. Bustamante*, 45 F.3d 933, 938 (5th Cir. 1995), *cert. denied,* 116 S.Ct. 473 (1995) (finding the evidence sufficient to support the conviction).

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

2.14

ILLEGAL GRATUITY TO A PUBLIC OFFICIAL

18 U.S.C. § 201(c)(1)(A)

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

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

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

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

Note

"Public official" and "official act" are defined by 18 U.S.C. § 201(a)(1-3). For a useful discussion of "public official," see *United States v. Thomas*, 240 F.3d 445, 446-48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a "public official"). For a discussion of the scope of "official act," see *United States v. Parker*, 133 F.3d 322, 325-26 (5th Cir.), *cert. denied*, 118 S.Ct. 1851 (1998).

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

2.15

RECEIVING ILLEGAL GRATUITY BY PUBLIC OFFICIAL

18 U.S.C. § 201(c)(1)(B)

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

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

First: That the defendant was a public official;

Second: That the defendant directly or indirectly demanded [sought] [received] [accepted] [agreed to receive or accept] something of value personally; and

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

Note

See note under Instruction No. 2.14, 18 U.S.C. § 201(c)(1)(A).

2.16

BRIBERY OR REWARD OF A BANK OFFICER

18 U.S.C. § 215(a)(1)

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

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

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

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

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

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

Note

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

If the prosecution seeks a felony conviction, the jury must determine that the value exceeds $1,000. If there is an issue as to whether the value exceeds $1,000, a lesser included offense instruction may have to be given.

2.17

CONSPIRACY TO DEPRIVE PERSON OF CIVIL RIGHTS

18 U.S.C. § 241)

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

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

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

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

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

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

Note

This instruction must be accompanied by an instruction on conspiracy, using the standard conspiracy instruction, 18 U.S.C. § 371, including the requirement that a conspirator commit at least one overt act. See Instruction No. 2.20, Conspiracy; *United States v. Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991), *opinion reinstated*, 968 F.2d 433 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1390 (1993); *United States v. McKenzie*, 768 F.2d 602, 605 (5th Cir. 1985).

Certain constitutional rights, e.g., those under the Fourteenth Amendment, protect an individual only against state action, not against wrongs by individuals. If these rights are the subject of the § 241 case, the instruction must also require the jury to find that the defendant acted "under

color of law." See definition under Instruction No. 2.18, Deprivation of Civil Rights, 18 U.S.C. § 242. See *United States v. Guest*, 86 S.Ct. 1170 (1966) (state action required for equal protection violation but not for violation of right to travel); *Wilkins v. United States*, 376 F.2d 552, 561 (5th Cir. 1967), *cert. denied*, 88 S.Ct. 342 (1967) (interfering with assembly to protest denial of voting rights violates § 241 even absent state action).

See also United States v. Hayes, 589 F.2d 811 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 93 (1979) (intent-death); *United States v. Barker*, 546 F.2d 940 (D.C.Cir. 1976) (specific intent).

The statute provides for enhancement of punishment if a death results from the acts committed or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill. If the indictment alleges any enhancement element, it should be submitted to the jury. See 18 U.S.C. § 241.

2.18

DEPRIVATION OF CIVIL RIGHTS

18 U.S.C. § 242

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

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

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

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

Third: That the defendant acted under color of law.

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

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

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

[The government need not prove that the defendant intended for the victim to die. The government must prove only that the victim's death was a foreseeable result of the defendant's willful deprivation of the victim's constitutional rights.]

Note

The test for determining which rights are encompassed by this statute is the same as the test for qualified immunity in civil cases, namely, whether the contours of the right are sufficiently clear that a reasonable official would understand that his or her conduct violates the right. See *United States v. Price*, 86 S.Ct. 1152 (1966); *Screws v. United States*, 65 S.Ct. 1031 (1945); *United States v. Causey*, 185 F.3d 407, 413-16 (5th Cir. 1999); *United States v. Dean*, 722 F.2d 92 (5th Cir. 1983); *United States v. Kerley*, 643 F.2d 299 (5th Cir. 1981); *United States v. Stokes*, 506 F.2d 771 (5th Cir. 1975), for examples of rights covered by this section. See also note to Instruction No. 2.17, Conspiracy to Deprive a Person of Civil Rights, 18 U.S.C. § 241.

In *United States v. Hunt*, 794 F.2d 1095 (5th Cir. 1986), a slightly different definition of "willfully" was acceptable.

The statute provides for enhancement of punishment if bodily injury or death results from the acts committed, or if such acts include the use, attempted use or threatened use of a dangerous weapon, explosives or fire, or kidnapping or attempted kidnapping, aggravated sexual abuse, or an attempt to kill. If the indictment alleges any enhancement element, it should be submitted to the jury. See 18 U.S.C. § 242.

2.19

FALSE CLAIMS AGAINST THE GOVERNMENT

18 U.S.C. § 287

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

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

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

First: That the defendant knowingly presented to an agency of the United States a false or fraudulent claim against the United States;

Second: That the defendant knew that the claim was false or fraudulent; and

Third: That the false or fraudulent claim was material.

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

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

Note

The elements of this offense are set forth in *United States v. Burns*, 162 F.3d 840, 850 (5th Cir. 1998).

This circuit has held that materiality is not an element of this offense. See *United States v. Upton*, 91 F.3d 677 (5th Cir. 1996). The continued vitality of that holding, however, is called into question by *Neder v. United States*, 119 S.Ct. 1827, 1841 (1999). Accordingly, this circuit recently recommended, in dicta, that a materiality instruction be included in the jury charge. See *United States v. Foster*, 229 F.3d 1196, 1196 n.2 (5th Cir. 2000). The committee adopts this recommendation and includes materiality as an element of the offense to be submitted to the jury.

2.20

CONSPIRACY

18 U.S.C. § 371

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

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

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

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

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

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

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

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

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly,

the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

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

Note

For the elements of the offense, see *United States v. Peterson*, 244 F.3d 385, 389 (5th Cir. 2001); *United States v. Richards*, 204 F.3d 177, 208 (5th Cir. 2000); and *United States v. Soape*, 169 F.3d 257, 264 (5th Cir.), *cert. denied*, 119 S.Ct. 2353 (1999).

The third element should be deleted for alleged conspiracies not requiring proof of overt acts. See Instruction No. 2.89, Title 21 Conspiracy, 21 U.S.C. § 846.

Conspiracy to commit a particular substantive offense requires at least the degree of criminal intent necessary to commit the substantive offense itself. See *Peterson*, 244 F.3d at 389; *Soape*, 169 F.3d at 264; *United States v. Bordelon*, 871 F.2d 491 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 121 (1989); *United States v. Massey*, 827 F.2d 995, 1001 (5th Cir. 1987). Because "(t)he two states of mind are almost always one, or tend to collapse into one," *United States v. Chagra*, 807 F.2d 398, 401 (5th Cir.1986), *cert. denied*, 108 S.Ct. 106 (1987), the proposed instruction will adequately cover the vast majority of cases. The proposed instruction also adequately addresses the requirement of a specific intent to violate the law. *United States v. Quiroz-Hernandez*, 48 F.3d 858, 866 (5th Cir.1995). If the substantive offense requires "a special state of mind (such as malice aforethought or premeditation)," further instruction on intent would be necessary. *United States v. Thomas*, 768 F.2d 611, 618 n.5 (5th Cir.1985); *United States v. Harrelson*, 754 F.2d 1153, 1171-74 (5th Cir. 1985), *rehearing denied*, 766 F.2d 186 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 277 (1985).

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

For multiple conspiracies and conspirator's liability for substantive count, see Instruction Nos. 2.21 and 2.22.

2.21

MULTIPLE CONSPIRACIES

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

Note

A multiple conspiracy instruction is generally required where the indictment charges several defendants with one overall conspiracy, but the proof at trial indicates that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment. See *United States v. Neal*, 27 F.3d 1035, 1052 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1165 (1995); *United States v. Castaneda-Cantu*, 20 F.3d 1325, 1333 (5th Cir. 1994). When evidence arguably raises a question of multiple conspiracies, a defendant, upon request, is entitled to an instruction on that theory. See *United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994); *United States v. Stowell*, 947 F.2d 1251, 1258 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1269 (1992); see also *United States v. Cyprian*, 197 F.3d 736, 741 (5th Cir. 1999), *cert. denied*, 121 S.Ct. 65 (2000) (stating that because the defendant made no request, the absence of a multiple conspiracies jury instruction is not "plain error"); *Castaneda-Cantu*, 20 F.3d at 1334 (reviewing under an abuse of discretion standard when defendant timely makes the request, but it is denied).

For a discussion of the primary factors in determining whether a single conspiracy or multiple conspiracy has been proven, see *United States v. Gallardo-Trapero*, 185 F.3d 307, 315-317 (5th Cir. 1999); *United States v. Morgan*, 117 F.3d 849, 858-59 (5th Cir. 1997); *United States v. Fields*, 72 F.3d 1200, 1210-11 (5th Cir. 1996); *United States v. Morris*, 46 F.3d 410, 415-17 (5th Cir. 1995).

In *United States v. Castillo*, 77 F.3d 1480, 1491-92 (5th Cir. 1996), this Fifth Circuit Pattern Jury Instruction was held to have adequately shielded the defendant from the risk of prejudice resulting from an alleged variance between the indictment and the evidence. Also, it is quoted with approval in *United States v. Thomas*, 12 F3d 1350, 1357 n.4 (5th Cir. 1994). A similar but longer jury charge on multiple conspiracies is quoted with approval in *United States v. Pena-Rodriguez*, 110 F.3d 1120, 1128-29 & 1129 n.9 (5th Cir. 1997), and *United States v. Puig-Infante*, 19 F.3d 929, 936-37 (5th Cir. 1994).

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

2.22

CONSPIRATOR'S LIABILITY FOR SUBSTANTIVE COUNT

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

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

Note

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

This instruction charges the jury on the *Pinkerton* principle. *Pinkerton v. United States*, 66 S.Ct. 1180, 1184 (1946). This instruction was quoted with approval in *United States v. Morrow*, 177 F.3d 272, 293 (5th Cir. 1999). See also *United States v. Quiroz-Hernandez*, 48 F.3d 858, 868 (5th Cir.1995); *United States v. Jensen*, 41 F.3d 946, 955-56 (5th Cir.1994), *cert. denied*, 115 S.Ct. 1835 (1995).

2.23

WITHDRAWAL INSTRUCTION

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

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

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

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

Note

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

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

A defendant's incarceration, by itself, does not constitute withdrawal or abandonment. *United States v. Puig-Infante*, 19 F.3d 929, 945 (5th Cir.) (discussing that the defendant is presumed to continue as conspirator unless he makes a "substantial affirmative showing of withdrawal") (citation omitted), *cert. denied*, 115 S.Ct. 180 (1994).

The defendant has the burden of proof on this affirmative defense. See *United States v. MMR Corp.*, 907 F.2d 489, 499-500 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1388 (1991); *United States v. Jimenez*, 622 F.2d 753, 755-57 (5th Cir. 1980). As with any affirmative defense, the trial court may refuse to give the withdrawal instruction if the defendant fails to submit sufficient evidence to warrant a reasonable juror finding that the defendant withdrew. See *United States v. Pettigrew*, 77 F.3d 1500, 1514-15 (5th Cir. 1996); *MMR Corp.*, 907 F.2d at 500.

2.24

COUNTERFEITING

18 U.S.C. § 471

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

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

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

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

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

Note

If there is an issue as to whether the money involved is so unlike the genuine that it may not be "counterfeit," the court should consider defining "counterfeit." The relevant Ninth Circuit pattern instruction states "[t]o be counterfeit, a bill must have a likeness or resemblance to genuine currency." Ninth Circuit Criminal Jury Instruction No. 8.22 (West 2000).

Apparently no Fifth Circuit case has defined "counterfeit" for purposes of § 471. With respect to 18 U.S.C. § 473 (dealing in counterfeit obligations or securities), the Fifth Circuit has defined counterfeit as follows:

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

United States v. Scott, 159 F.3d 916, 920-21 (5th Cir. 1998), *citing United States v Turner*, 586 F.2d 395, 397 (5th Cir. 1978). *Turner* involved an offense under 18 U.S.C. § 474 (plates or stones for counterfeiting obligations or securities). *Turner* cited *United States v. Smith*, 318 F.2d 94, 95 (4th

Cir. 1963), among other cases for the definition of "counterfeit." *Smith* involved an offense under 18 U.S.C. § 472.

2.25

PASSING COUNTERFEIT SECURITIES OR OBLIGATIONS

18 U.S.C. § 472

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

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

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

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

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

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

Note

United States v. Acosta, 972 F.2d 86 (5th Cir. 1992), describes the elements. If there is an issue as to whether the money involved is so unlike the genuine that it may not be "counterfeit," the court should consider defining "counterfeit." The relevant Ninth Circuit pattern instruction states "[t]o be counterfeit, a bill must have a likeness or resemblance to genuine currency." Ninth Circuit Criminal Jury Instruction No. 8.23 (West 2000).

Apparently no Fifth Circuit case has defined "counterfeit" for purposes of § 472. With respect to 18 U.S.C. § 473 (dealing in counterfeit obligations or securities), the Fifth Circuit has defined counterfeit as follows:

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

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

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

2.26

FORGERY AGAINST THE UNITED STATES

18 U.S.C. § 495
(First Paragraph)

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

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

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

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

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

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

Note

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

If the defendant claims to have authority to sign for another, the government must prove that the defendant lacked such authority. See *United States v. Forbes*, 816 F.2d 1006, 1012 n.9 (5th Cir. 1987).

2.27

UTTERING A FORGED WRITING TO DEFRAUD THE UNITED STATES

18 U.S.C. § 495
(Second Paragraph)

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

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

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

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

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

Note

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

2.28

FORGING ENDORSEMENT ON A TREASURY CHECK, BOND, OR SECURITY OF THE UNITED STATES

18 U.S.C. § 510(a)(1)

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

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

First: That the defendant _____ [describe conduct, e.g., wrote the signature of another on the Treasury check[s] without permission];

Second: That the defendant did so with intent to defraud, that is, intending to cheat someone. The evidence does not have to show that anyone actually received any thing of value as a result of the forged signature; and

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

Note

If a disputed issue under subsection (c) of the statute is whether the face value of the check(s) exceeds a sum of $1,000, the Court should consider giving a lesser included offense instruction.

See *United States v. Taylor*, 869 F.2d 812 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 171 (1989), on aggregation of face value.

2.29

UTTERING A FORGED TREASURY CHECK, BOND, OR SECURITY OF THE UNITED STATES

18 U.S.C. § 510(a)(2)

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

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

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

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

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

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

Note

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

2.30

SMUGGLING

18 U.S.C. § 545
(First Paragraph)

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

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

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

Second: That the defendant knew that the _____ [describe merchandise] should have been reported to customs authorities as required by law; and

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

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

Note

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

With respect to whether it must be shown that a tax or duty was owed on the merchandise, the Second Circuit, the Fourth Circuit, the Seventh Circuit and the Ninth Circuit have expressly held that 18 U.S.C. § 545 does not require as an element of the crime that the defendant specifically

intended to deprive the government of revenue. *United States v. Borello*, 766 F.2d 46 (2d Cir. 1985); *United States v. McKee*, 220 F.2d 266 (2d Cir. 1955); *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000); *United States v. Kurfess,* 426 F.2d 1017 (7th Cir. 1970); *United States v. Robinson*, 147 F.3d 851 (9th Cir. 1998). The Third Circuit, in *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994), disagreed and concluded that an intent to deprive the government of revenue is an essential element and the failure to charge the jury in this manner is plain error. The Fifth Circuit has not met the issue directly. In *United States v. One 1976 Mercedes 450 SLC*, however, the Fifth Circuit spoke of § 545 as prohibiting the smuggling of goods "that ought to have been declared or invoiced." 667 F.2d 1171, 1175 (5th Cir. 1982).

2.31

ILLEGAL IMPORTATION

18 U.S.C. § 545
(Second Paragraph)

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

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

First: That the defendant imported _____ [describe merchandise] into the United States;

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

Third: That the defendant knew the importation was contrary to law.

Note

See *Babb v. United States*, 252 F.2d 702, 707 (5th Cir. 1958) (holding that failure to follow cattle reporting requirement in 19 U.S.C. § 1484(a) subjected defendant to liability under 18 U.S.C. § 545 even where underlying cattle regulation itself contained no penalty for its violation), *cert. denied*, 78 S.Ct. 1137 (1958); *United States v. Mitchell*, 39 F.3d 465, 470-71 (4th Cir. 1994) (holding that importation of animal hides and horns contrary to reporting regulations of the Fish and Wildlife Service and Department of Agriculture subjected defendant to criminal liability under 18 U.S.C.§ 545), *cert. denied*, 115 S.Ct. 2578 (1995).

The term "law" includes not only statutes, but substantive agency regulations having the force and effect of law. *United States v. Mitchell*, 39 F.3d 465, 468-69 (4th Cir. 1995), *cert. denied*, 115 S.Ct. 2578 (1995). In instructing the jury on the "contrary to law" element, the court should specify which law or laws the defendant's act of importation is alleged to have violated. See e.g., *Babb v. United States*, 218 F.2d 538, 540 (5th Cir. 1955).

With respect to the knowledge element, it is not necessary for the defendant to have known the specific statute violated. It is enough if he acts knowing that his conduct is illegal in some respect. *Babb v. United States*, 252 F.2d 702, 708 (5th Cir. 1958).

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

With respect to the fourth paragraph of § 545, regarding the presumption of guilt from the unexplained possession of undeclared imported goods, see the discussion under Instruction No. 2.30, Smuggling.

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

2.32

EXPORTATION OF STOLEN VEHICLES

18 U.S.C. 553
(First Paragraph)

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

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

First: That the defendant knowingly exported [imported] a motor vehicle [off-highway mobile equipment] [vessel] [aircraft] as described in the indictment; and

Second: That the defendant knew the vehicle had been stolen.

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

To "steal" means the wrongful taking of property belonging to another with the intent to deprive the owner of its use and benefit either temporarily or permanently.

2.33

THEFT OF GOVERNMENT MONEY OR PROPERTY

18 U.S.C. § 641
(First Paragraph)

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

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

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

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

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

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

It is not necessary to prove that the defendant knew that the United States government owned the property at the time of the wrongful taking.

[To "embezzle" means the wrongful, intentional taking of money or property of another after the money or property has lawfully come within the possession or control of the person taking it.]

[To "steal" or "convert" means the wrongful taking of money or property belonging to another with intent to deprive the owner of its use or benefit either temporarily or permanently. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is an actual removal of it from the owner's premises.]

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

Note

See *United States v. Aguilar*, 967 F.2d 111 (5th Cir. 1992), quoting portions of the instruction. For a discussion of whether federal funds given to state programs retain their federal character, see *United States v. Long*, 996 F.2d 731 (5th Cir. 1993).

See *United States v. Sanders*, 793 F.2d 107 (5th Cir. 1986) (clothing that employee of Army and Air Force Exchange Service sought to remove from exchange premises without paying for it constituted a "thing of value of the United States within the meaning of the statute"); *United States v. Barnes*, 761 F.2d 1026 (5th Cir. 1985) (government does not have to prove that it suffered actual property loss in a § 641 prosecution, declining to follow dictum in *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 200 (1978)).

If a disputed issue is whether the property stolen had a value of more than $1,000, the court should consider giving a lesser included offense instruction.

2.34

THEFT OR EMBEZZLEMENT BY BANK OFFICER OR EMPLOYEE

18 U.S.C. § 656

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

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

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

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

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

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

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

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

To "embezzle" means the wrongful, intentional taking of money or property of another after the money or property has lawfully come within the possession or control of the person taking it. No particular type of moving or carrying away is required.

[To "willfully misapply" a bank's money or property means an intentional conversion of such money or property for one's own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.]

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

Note

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

The Fifth Circuit has held repeatedly that "intent to injure or defraud" is a necessary element of the offense. *United States v. McCord*, 33 F.3d 1434, 1448 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 2558 (1995); *United States v. Saks*, 964 F.2d 1514, 1519 (5th Cir. 1992); *United States v. Shaid*, 937 F.2d 228 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 978 (1992). In *United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983), the *en banc* Fifth Circuit rejected as improper a § 656 jury instruction that equated a "reckless disregard of the interest of the bank" with an intent to injure or defraud the bank. The Fifth Circuit viewed this as an improper lowering of the standard of intent/knowledge required for conviction. Other circuits disagree. See, e.g., *Willis v. United States,* 87 F.3d 1004 (8th Cir. 1996); *United States v. Crabtree*, 979 F.2d 1261 (7th Cir. 1992); *United States v. Hoffman,* 918 F.2d 44 (6th Cir. 1990). In *United States v. Kington,* 875 F.2d 1091 (5th Cir. 1989), the Fifth Circuit stated it was "undesirable" for a judge to instruct the jury that intent to injure/defraud exists "if the defendant acts knowingly and if the natural consequences of his conduct is or may be to injure the bank." 875 F.2d at 1097. The court cited *Adamson*, noting that the jury could make such inferences from the evidence, just as the jury could infer intent to defraud from reckless disregard. But the instruction, if taken out of context, "may appear to mean that the defendant need only know that he is voluntarily engaging in transactions for his own benefit, rather than, as *Adamson* requires, that the defendant knew he was participating in a deceptive or fraudulent transaction."

In *United States v. Meeks*, 69 F.3d 742 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1337 (1996), the Fifth Circuit discussed the meaning of "connected in any capacity" with a bank and concluded that the government does not need to prove that the defendant occupied a position of trust. See also *United States v. Hogue*, 132 F. 3d 1087 (5th Cir. 1998), regarding whether an independent contractor hired to do work at a bank may be "connected" with the bank for purposes of this statute.

If the charge involved is misapplication of funds, as opposed to embezzlement or theft, some causal connection is required between the defendant's actions as an officer, director, agent or employee of the institution and the misapplication, such as a loan. For example, misapplication requires that the defendant made, or influenced in a significant way, as an officer of the institution, the decision to extend the loan. *United States v. McCright,* 821 F.2d. 226 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 697 (1988); *United States v. Parks*, 68 F.3d. 860 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 825 (1996); *United States v. Rochester*, 898 F. 2d 971 (5th Cir. 1990), *reh'g denied*, 903 F.2d 826 (5th Cir. 1990).

If the indictment charges more than one defendant and alleges aiding and abetting, then it is not necessary to prove that each defendant had such a causal connection, as long as one did. *United States v. Parks*, 68 F.3d. 860 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 825 (1996).

The causation standard for § 656 and § 657 is the same. *United States v. Parks*, 68 F.3d. 860, 863 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 825 (1996).

If a disputed issue is whether the property stolen had a value of more than $1,000, the court should consider giving a lesser included offense instruction.

2.35

THEFT FROM LENDING, CREDIT, AND INSURANCE INSTITUTIONS

18 U.S.C. § 657

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

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

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

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

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

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

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

To "embezzle" means the wrongful, intentional taking of money or property of another after the money or property has lawfully come within the possession or control of the person taking it. No particular type of moving or carrying away is required.

[To "willfully misapply" money or property of the lending, credit, or insurance institution means an intentional conversion of such money or property to one's own use and benefit, or to the use and benefit of another, knowing that one had no right to do so.]

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

Note

The elements of the offense are set forth in *United States v. Parks,* 68 F.3d 860, 863 (5th Cir. 1995; *United States v. Tullos*, 868 F.2d 689, 693 (5th Cir.) *cert. denied*, 109 S.Ct. 3171 (1989), including the requirement of an intent to injure or defraud the institution. See the note following § 656, Instruction No. 2.34, regarding the intent requirement.

If the charge involved is misapplication of funds, as opposed to embezzlement or theft, some causal connection is required between the defendant's actions as an officer, director, agent or employee of the institution and the misapplication, such as a loan. For example, misapplication requires that the defendant made, or influenced in a significant way, as an officer of the institution, the decision to extend the loan. *United States v. McCright,* 821 F.2d. 226 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 697 (1988); *United States v. Parks*, 68 F.3d. 860 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 825 (1996); *United States v. Rochester*, 898 F. 2d 971 (5th Cir. 1990), *reh'g denied*, 903 F.2d 826 (5th Cir. 1990).

If the indictment charges more than one defendant and alleges aiding and abetting, then it is not necessary to prove that each defendant had such a causal connection, as long as one did. *United States v. Parks*, 68 F.3d. 860 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 825 (1996).

The causation standard for §656 and §657 is the same. *United States v. Parks*, 68 F.3d. 860, 863 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 825 (1996).

For a discussion of the distinction between before-the-fact authorization, which is a defense to the charge, and after-the-fact ratification, which is not, see *United States v. Mmahat*, 106 F.3d 89 (5th Cir. 1997).

If a disputed issue is whether the property stolen had a value of more than $1,000, the court should consider giving a lesser included offense instruction.

2.36

THEFT FROM INTERSTATE SHIPMENT

18 U.S.C. § 659
(First Paragraph)

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

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

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

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

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

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

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

[To "embezzle" means the wrongful, intentional taking of money or property of another after the money or property has lawfully come within the possession or control of the person taking it.]

[To "steal" or "convert" means the wrongful taking of money or property, belonging to another with intent to deprive the owner of its use or benefit either temporarily or permanently. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is actual removal of it from the owner's premises.]

An "interstate or foreign shipment" means goods or property which are moving as a part of interstate or foreign commerce.

The interstate or foreign character of a shipment begins when the property is first identified and set aside for the shipment and comes into the possession of those who commence its movement in the course of its interstate or foreign transportation; and the interstate or foreign character of the shipment continues until the shipment arrives at its destination and is there delivered.

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

Note

The eighth paragraph of the statute provides that waybills or other shipping documents "shall be prima facie evidence of the place from which and to which such shipment was made." The United States Supreme Court allows permissive presumptions when the presumed fact flows more likely than not from the proved fact on which it depends. See *County Court of Ulster County v. Allen*, 99 S.Ct. 2213, 2224 (1979); *Leary v. United States*, 89 S.Ct. 1532 (1969).

A suggested instruction on this issue is:

> "Prima facie evidence" means sufficient evidence. In other words, waybills, or bills of lading, or other shipping document such as invoices, if proved beyond a reasonable doubt, are sufficient for you to find the interstate or foreign nature of the shipment, but you need not so find.

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40, and 1.41.

If a disputed issue is whether the property stolen had a value of more than $1,000, the Court should consider giving a lesser included offense instruction.

2.37

BUYING OR RECEIVING GOODS STOLEN FROM INTERSTATE SHIPMENT

18 U.S.C. § 659
(Second Paragraph)

Title 18, United States Code, Section 659, makes it a crime for anyone knowingly to buy [receive] stolen goods that have been shipped from one state to another or to a foreign country.

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

First: That someone stole [embezzled] the property described in the indictment from a _____ [here describe location, e.g., railroad car, aircraft, motor truck], as alleged in the indictment, while such property was moving as [was a part of] an interstate shipment of freight;

Second: That the defendant thereafter bought [received] [possessed] such property knowing that it had been stolen [embezzled] as charged; and

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

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

An "interstate shipment" means goods or property which are moving as [are a part of] interstate commerce.

The interstate nature of a shipment begins when the property is first identified and set aside for the shipment, and comes into the possession of those who start its movement in the course of its interstate transportation. The interstate nature of the shipment then continues until the shipment arrives at its destination and is there delivered.

While the interstate nature of the shipment must be proved, it is not necessary to show that either the person who stole the property or the defendant knew that the goods were a part of such a shipment at the time they were stolen. But it is necessary for the government to prove that the

defendant knew the property was stolen property at the time the defendant bought, received, or possessed it.

[To "embezzle" means the wrongful, intentional taking of money or property of another after the money or property has lawfully come within the possession or control of the person taking it.]

[To "steal" or "convert" means the wrongful taking of money or property belonging to another with intent to deprive the owner of its use and benefit either temporarily or permanently. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is an actual removal of it from the owner's premises.]

Note

United States v. Daniel, 957 F.2d 162 (5th Cir. 1992), cites the elements of the offense.

With respect to the eighth paragraph of § 659 regarding "prima facie evidence," see the discussion in the Note at Instruction No. 2.36, Theft From Interstate Shipment.

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40, and 1.41.

If a disputed issue is whether the property stolen had a value of more than $1,000, the court should consider giving a lesser included offense instruction.

2.38

ESCAPE

18 U.S.C. § 751(a)

Title 18, United States Code, Section 751(a), makes it a crime for anyone to escape from federal custody.

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

First: That the defendant was in federal custody;

Second: That the defendant was in federal custody pursuant to a lawful arrest on a felony charge [at an institution or facility where the defendant was confined by direction of the Attorney General for conviction of an offense];

Third: That the defendant departed without permission; and

Fourth: That the defendant knew he did not have permission to leave federal custody.

"Custody" means the detention of an individual by virtue of lawful process or authority.

Note

The nature of the custody must be specifically proved since the statute provides for dual penalties. See *United States v. Edrington,* 726 F.2d 1029 (5th Cir. 1984). Accordingly, where a felony is charged, the second element must additionally state that the defendant was in custody by virtue of a lawful arrest on a charge of felony or confined after conviction of any offense. This instruction includes these matters.

An indictment for escape does not need to identify the specific federal offense for which the defendant was in custody at the time of the escape. *United States v. Harper*, 901 F.2d 471, 474 (1990).

A frequent issue in cases under § 751(a) is the defense of necessity. On this matter, see *United States v. Bailey,* 100 S.Ct. 624 (1980).

For a case that sets forth the elements, see *United States v. Taylor,* 933 F.2d 307, 309-10 (5th Cir. 1991), *cert. denied,* 112 S.Ct. 235 (1991).

2.39

THREATS AGAINST THE PRESIDENT

18 U.S.C. § 871)

Title 18, United States Code, Section 871, makes it a crime for anyone knowingly and willfully to make a threat to injure, kill, or kidnap the President of the United States.

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

First: That the defendant mailed [wrote] [said] the words alleged to be the threat against the President as charged in the indictment;

Second: That the defendant understood and meant the words mailed [written] [said] as a threat; and

Third: That the defendant mailed [wrote] [said] the words knowingly and willfully, that is, intending them to be taken seriously.

A "threat" is a serious statement expressing an intention to kill, kidnap, or injure the President, which under the circumstances would cause apprehension in a reasonable person, as distinguished from words used as mere political argument, idle talk, exaggeration, or something said in a joking manner.

It is not necessary to prove that the defendant actually intended to carry out the threat.

Note

On the meaning of "threat," see *United States v. Myers*, 104 F.3d 76 (5th Cir. 1997) (discussing the meaning of "threat" in the context of "threatening interstate communications," 18 U.S.C. § 875), *cert. denied*, 117 S.Ct. 1709 (1997); *United States v. Howell*, 719 F.2d 1258 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2683 (1984); *United States v. Carvin*, 555 F.2d 1303 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 523 (1977); *United States v. Bozeman*, 495 F.2d 508 (5th Cir. 1974), *cert. denied*, 95 S.Ct. 2660 (1975).

2.40

INTERSTATE TRANSMISSION OF EXTORTIONATE COMMUNICATION

18 U.S.C. § 875(b)

Title 18, United States Code, Section 875(b), makes it a crime for anyone to send [transmit] an extortionate communication in interstate or foreign commerce.

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

First: That the defendant knowingly sent [transmitted] a communication containing a threat to injure [kidnap] the person of another, as charged;

Second: That the defendant sent [transmitted] that communication with intent to extort money [something of value]; and

Third: That the communication was sent in interstate commerce.

A "threat" is a serious statement expressing an intent to injure [kidnap] any person, which under the circumstances would cause apprehension in a reasonable person, as distinguished from mere idle or careless talk, exaggeration, or something said in a joking manner.

To act with intent to "extort" means to act with the intent to obtain money or something of value from someone else, with that person's consent, but induced by the wrongful use of actual or threatened force, violence, or fear.

The term "thing of value" is used in the everyday, ordinary meaning and is not limited to money or tangible things with an identifiable price tag.

It is not necessary to prove that the defendant actually succeeded in obtaining the money or other thing of value, or that the defendant actually intended to carry out the threat made.

Note

See *United States v. Fagan*, 821 F.2d 1002, 1015 n.9 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 697 (1988) (discusses breadth of "thing of value").

See *United States v. Daughenbaugh*, 49 F.3d 171, 173 n.2 (5th Cir.) (approving this instruction on the definition of threat with respect to 18 U.S.C. § 876), *cert. denied,* 116 S.Ct. 258 (1995); *United States v. Turner*, 960 F.2d 461, 464 & n.3 (5th Cir. 1992) (same).

See also notes to instructions on 18 U.S.C. § 871 and 18 U.S.C. § 876, Nos. 2.39 and 2.41.

See note to instruction on 18 U.S.C. § 1201(a) for the definition of "kidnap," No. 2.58.

Definitions of Interstate Commerce, Foreign Commerce, and Commerce are in the general instructions at Nos. 1.39, 1.40, and 1.41.

2.41

MAILING THREATENING COMMUNICATIONS

18 U.S.C. § 876
(Second Paragraph)

Title 18, United States Code, Section 876, makes it a crime for anyone to use the mails to transmit an extortionate communication.

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

First: That the defendant knowingly deposited [caused to be deposited] in the mail, for delivery by the Postal Service, a communication containing a threat, as charged;

Second: That the nature of the threat was to kidnap [injure] any person; and

Third: That the defendant made the threat with the intent to extort money [something of value].

A "threat" is a serious statement expressing an intention to injure [kidnap] any person, which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner.

To "extort" means to wrongfully induce someone else to pay money or something of value by threatening a kidnapping or injury if such payment is not made.

The term "thing of value" is used in the everyday, ordinary meaning and is not limited to money or tangible things with an identifiable price tag.

It is not necessary to prove that any money or other thing of value was actually paid or that the defendant actually intended to carry out the threat made.

It is not necessary to prove that the defendant actually wrote the communication. What the government must prove beyond a reasonable doubt is that the defendant mailed or caused to be mailed a communication containing a "threat" as defined in these instructions.

Note

See *United States v. Stotts*, 792 F.2d 1318, 1323 (5th Cir. 1986) (proof that defendant wrote communication is not element of the offense); *United States v. Fagan*, 821 F.2d 1002, 1015 n.9 (5th Cir. 1987) (discusses breadth of "thing of value"), *cert. denied*, 108 S.Ct. 697 (1988); *United States v. DeShazo*, 565 F.2d 893 (5th Cir. 1978) (present intent to actually do injury is not required), *cert. denied,* 98 S.Ct. 1583 (1978).

See also notes to Instructions No. 2.39 and 2.40 on 18 U.S.C. § 871 and 18 U.S.C. § 875(b).

See *United States v. Daughenbaugh*, 49 F.3d 171, 173 n.2 (5th Cir.) (approving this instruction on the definition of threat), *cert. denied,* 116 S.Ct. 258 (1995); *United States v. Turner*, 960 F.2d 461, 464 & n.3 (5th Cir. 1992) (same).

See note to instruction on 18 U.S.C. § 1201(a) for the definition of "kidnap," No. 2.58.

2.42

MISREPRESENTATION OF CITIZENSHIP

18 U.S.C. § 911

Title 18, United States Code, Section 911, makes it a crime for anyone falsely and willfully to represent oneself to be a citizen of the United States.

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

First: That the defendant stated that he was a citizen of the United States;

Second: That the defendant was not a citizen of the United States at that time; and

Third: That the defendant knew he was not a citizen and deliberately made this false statement with intent to disobey or disregard the law.

Note

See *United States v. Harrell*, 894 F.2d 120 (5th Cir.), *cert. denied*, 111 S.Ct. 101 (1990), for elements. The statute requires that the false representation be willful. The Ninth Circuit requires that the statement be made to someone with good reason to inquire. *United States v. Romero-Avila*, 210 F.3d 1017 (9th Cir. 2000).

The definition of citizen is contained in the Fourteenth Amendment and in 8 U.S.C. § 1401. If the defense is that the defendant is a natural-born or naturalized citizen of the United States, a more detailed definition of "citizen" would be appropriate.

2.43

FALSE IMPERSONATION OF FEDERAL OFFICER OR EMPLOYEE— DEMANDING OR OBTAINING ANYTHING OF VALUE

18 U.S.C. § 912

Title 18, United States Code, Section 912, makes it a crime for anyone to demand money [something of value] while falsely assuming [pretending] to be an officer or employee of the United States.

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

First: That the defendant falsely assumed [pretended] to be an officer [employee] acting under the authority of the United States;

Second: That while acting in such assumed [pretended] character, the defendant demanded [obtained] money [something of value]; and

Third: That the defendant did so knowingly with intent to defraud.

To act "with intent to defraud" means to act with intent to wrongfully deprive another of property.

Note

This statute encompasses two separate offenses. This instruction pertains only to one of them, namely demanding or obtaining property through a pretended character. See *United States v. Lepowitch*, 63 S. Ct. 914 (1943). The Fifth Circuit requires allegation and proof of an intent to defraud. *United States v. Cortes*, 600 F.2d 1054 (5th Cir. 1977); *United States v. Pollard*, 491 F.2d 1387 (5th Cir.), *cert. denied*, 95 S.Ct. 92 (1974).

The other offense is merely to act in a pretended character. See *Honea v. United States*, 344 F.2d 798 (5th Cir. 1965). It requires an intent to deceive. *United States v. Randolph*, 460 F.2d 367 (5th Cir.1972). The Eleventh Circuit, noting a split of authority, no longer follows *Honea* and *Randoph*. *United States v. Gayle*, 967 F.2d 483 (11th Cir.1992) (en banc), *cert.denied*, 113 S.Ct. 1402 (1993).

2.44

DEALING IN FIREARMS WITHOUT LICENSE

18 U.S.C. § 922(a)(1)(A)

Title 18, United States Code, Sections 922(a)(1)(A) and 924(a)(1)(D), make it a crime to be in the business of dealing in firearms without a federal license.

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

First: That the defendant was a dealer in firearms on _____, [date] engaged in the business of selling firearms at wholesale or retail;

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

Third: That the defendant did so willfully, that is, that the defendant was dealing in firearms with knowledge that his conduct was unlawful.

The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

A person is "engaged in the business of selling firearms at wholesale or retail," if that person devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms. Such term does not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of that person's personal collection of firearms.

The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and

pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.

Note

"Engaged in the business" is defined at 18 U.S.C. § 921(a)(21). This statutory definition revised prior Fifth Circuit case law definition of *United States v. Berry*, 644 F.2d 1034, 1037 (5th Cir. 1981), *United States v. Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981), and *United States v. Shirling*, 572 F.2d 532, 534 (5th Cir. 1978), which held that it is enough for one to have guns on hand or be ready and able to procure them for the purpose of selling them from time to time to such persons as might be accepted as customers. For a discussion on the adequacy of a "hobby defense" instruction, see *United States v. Palmieri*, 21 F.3d 1265 (3rd Cir. 1994).

The Firearm Owners' Protection Act, Pub. L. 99-308, § 101, 100 Stat. 449, 450 (1986) (effective November 15, 1986), added § 921(a)(21), which defines "engaged in the business" to include "the principal objective of livelihood and profit." 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)(22).

Willfulness is an element of this offense. 18 U.S.C. § 924(a)(1)(D). *United States v. Bryan*, 118 S.Ct. 1939 (1998), describes the *mens rea* for the offense of dealing in firearms without a license and other firearms offenses such as 18 U.S.C. § 924(a)(2). *United States v. Bryan* deletes the necessity for proof that the defendant had actual knowledge of his obligation to obtain a license before he could sell the firearm at issue, previously required by *United States v. Rodriguez*, 132 F.2d 208 (5th Cir. 1997).

2.45

FALSE STATEMENT TO FIREARMS DEALER

18 U.S.C. § 922(a)(6)

Title 18, United States Code, Sections 922(a)(6) and 924(a)(2), make it a crime for anyone to make a false statement to a firearms dealer in order to buy a firearm.

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

First: That the defendant made a false statement while acquiring a firearm from a licensed dealer;

Second: That the defendant knew the statement was false; and

Third: That the statement was intended or was likely to deceive about a material fact, i.e., one which would affect the legality of the sale to the defendant.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

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

A false statement is "likely to deceive" if the nature of the statement, considering all of the surrounding circumstances at the time it is made, is such that a reasonable person of ordinary prudence would have been actually deceived or misled.

Note

In response to *United States v. Gaudin*, 115 S.Ct. 2310 (1995), which requires the Court to submit the issue of materiality to the jury when materiality is an element of an offense, the Committee has added language to the third element. But see *United States v. Klais*, 68 F.3d 1282, 1283 (11th Cir. 1995) (holding that *Gaudin* is not applicable to prosecutions under 18 U.S.C. § 922(a)(6)). There are no Fifth Circuit cases directly on this point, but see *United States v. Harvard*, 103 F.3d 412, 419 (5th Cir. 1997). To the extent not overruled by *Gaudin*, however, the instruction is based upon *United States v. Ortiz-Loya*, 777 F.2d 973, 979 (5th Cir. 1985), and *United States v.*

Harrelson, 705 F.2d 733, 736 (5th Cir. 1983). See also *United States v. Chapman*, 7 F.3d 66, 67 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 2713 (1994); *United States v. Williams*, 860 F. Supp. 1155 (M.D. La. 1994).

United States v. Guerrero, 234 F.3d 259 (5th Cir. 2000), holds that this statute does not intend to distinguish between acquisition and attempted acquisition and creates only one offense– the making of a false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer.

2.46

UNLAWFUL SALE OR DISPOSITION OF FIREARM

18 U.S.C. § 922(d)

Title 18, United States Code, Sections 922(d) and 924(a)(2), make it a crime for a person knowingly to sell or otherwise dispose of a firearm to [a person in a prohibited category, e.g., a convicted felon] when the seller knows or has reasonable cause to believe that such a person is [a member of a prohibited category, e.g., a convicted felon].

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

First: That the defendant knowingly sold a firearm to _____;

Second: That at the time of the sale, _____ was [a person in a prohibited category, e.g., a convicted felon]; and

Third: That at the time of the sale, that the defendant knew or had reasonable cause to believe that _____ was [a person in a prohibited category, e.g., a convicted felon].

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Note

See *United States v. Murray*, 988 F.2d 518, 521 (5th Cir. 1993) for discussion of evidence necessary to sustain conviction under 18 U.S.C. § 922(d) regarding the quantum of proof regarding defendant's knowledge of purchaser's status as a felon.

The *mens rea* requirement is set forth at 18 U.S.C. § 924(a)(2).

2.47

POSSESSION OF A FIREARM BY A CONVICTED FELON

18 U.S.C. § 922(g)(1)

Title 18, United States Code, Sections 922(g)(1) and 924(a)(2), make it a crime for a convicted felon to possess a firearm.

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

First: That the defendant knowingly possessed a firearm, as charged;

Second: That before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense; and

Third: That the possession of the firearm was in [affecting] commerce; that is, that before the defendant possessed the firearm, it had traveled at some time from one state to another.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Note

See *United States v. Ferguson*, 211 F.3d 878 (5th Cir. 2000); *United States v. Ybarra*, 70 F.3d 362, 365 (5th Cir. 1995) (setting forth elements); *United States v. Speer*, 30 F.3d 605, 612 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 603 (1995); *United States v. Wright*, 24 F.3d 732, 734 (5th Cir. 1994).

Willfulness is not an element of this offense. 18 U.S.C. § 924(a)(2). Moreover, the government need not prove that the defendant knew the firearm was in or affected interstate commerce. *United States v. Privett*, 68 F.3d 101, 104 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1862 (1996).

"Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20), *overruling Dickerson v. New Banner Institute, Inc.*, 103 S.Ct. 986 (1983) (expunction of state conviction does not void the conviction for purposes of federal firearms disability), and *United States v. Crochet*, 788

F.2d 1061, 1063 (5th Cir. 1986) (set aside and expunction of state conviction). A state's restoration of a federally convicted felon's civil rights does not remove the firearms possession disability imposed by federal law. *Beecham v. United States*, 114 S.Ct. 1669 (1994). *United States v. Dupaquier*, 74 F.3d 615 (5th Cir. 1996), describes the Fifth Circuit's test to determine if the defendant's civil rights have been restored. If the conviction is a state conviction, state statutes restoring civil rights may relieve a convicted person of the disability to possess a firearm, but not if the state pardon expressly provides such person may not possess a firearm. *United States v. Richardson*, 168 F.3d 836 (5th Cir. 1999).

For possession, see Instruction No. 1.31 and *United States v. DeLeon*, 170 F.3d 495 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 156 (1999).

2.48

USING/CARRYING A FIREARM DURING COMMISSION OF A DRUG TRAFFICKING CRIME OR CRIME OF VIOLENCE

18 U.S.C. § 924(c)(1)

Title 18, United States Code, Section 924(c)(1), makes it a crime for anyone to use or carry a firearm during and in relation to a drug trafficking crime [crime of violence] or to possess a firearm in furtherance of such a crime.

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

First: That the defendant committed the crime alleged in Count _____. I instruct you that _____ is a drug trafficking crime [crime of violence]; and

Second: That the defendant knowingly used [carried] a firearm during and in relation to [knowingly possessed a firearm in furtherance of] the defendant's alleged commission of the crime charged in Count ____.

To prove the defendant "used" a firearm in relation to a drug trafficking crime [crime of violence], the government must prove that the defendant actively employed the firearm in the commission of Count _____, such as a use that is intended to or brings about a change in the circumstances of the commission of Count _____. "Active employment" may include brandishing, displaying, referring to, bartering, striking with, firing, or attempting to fire the firearm. Use is more than mere possession of a firearm or having it available during the drug trafficking crime [crime of violence].

[To prove the defendant "carried" a firearm, the government must prove that the defendant carried the firearm in the ordinary meaning of the word "carry," such as by transporting a firearm on the person or in a vehicle. The defendant's carrying of the firearm cannot be merely coincidental or unrelated to the drug trafficking crime [crime of violence].

[To prove the defendant possessed a firearm "in furtherance," the government must prove that the defendant possessed a firearm that furthers, advances, or helps forward the drug trafficking crime [crime of violence].

"In relation to" means that the firearm must have some purpose, role, or effect with respect to the drug trafficking crime [crime of violence].

Note

In response to the decision of the United States Supreme Court in *Bailey v. United States*, 116 S.Ct. 501 (1995), Congress broadened the scope of 18 U.S.C. § 924(c)(1) to prohibit possession of a firearm in furtherance of a drug trafficking crime. 18 U.S.C. § 924(c)(1) was amended by the Criminal Use of Guns Act, Pub.L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (1998), effective November 13, 1998. Section 924(c)(1) now applies to "any person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm."

In Furtherance Of. *United States v. Ceballos-Torres*, 218 F.3d 409 (5th Cir. 2000), analyzes the meaning of "in furtherance" at length and decides that "using the dictionary definition ... is the appropriate way to construe the statutes ...." *Id.* at 415. Thus, firearm possession that furthers, advances or helps forward the drug trafficking offense violates the statute. *Id.*

Use. *Bailey v. United States*, 116 S.Ct. 501 (1995); *United States v. Jones*, 172 F.3d 381 (5th Cir. 1999); and *United States v. Brown*, 161 F.3d 256 (5th Cir. 1998), describe that active employment is necessary to prove use. See *United States v. Chavez*, 119 F.3d 342 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 615 (1997), for an approved instruction on the difference between "use" and "carrying."

Carry. *Muscarello v. United States,* 118 S.Ct. 1911 (1998), and *United States v. Brown*, 161 F.3d 256 (5th Cir. 1998), hold that "carry" includes carry on the person as well as in the trunk or glove box of an automobile. The term "carry" contemplates movement. See *United States v. Sanders*, 157 F.3d 302 (5th Cir. 1998).

During and in relation to. *Muscarello v. United States*, 118 S.Ct. 1911, 1918 (1998), notes that "Congress added these words in part to prevent prosecution where guns 'played' no part in the crime."

This instruction presumes that the predicate drug offense is charged in another count of the indictment. If the predicate drug offense is not charged, this instruction must be amended to list the elements of the uncharged drug trafficking crime. See *United States v. Mendoza*, 11 F.3d 126 (9th Cir. 1993). A drug trafficking crime is "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq*.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq*.)." 18 U.S.C. § 924 (c)(2).

What constitutes a "crime of violence" is a matter of statutory interpretation for the court. *United States v. Jennings*, 195 F.3d 795 (5th Cir.1999), *cert. denied*, 120 S.Ct. 2694 (2000)*; United*

States v. Credit, 95 F.3d 362 (5th Cir.1996), *reh'g denied*, (Oct. 10, 1996). *Apprendi v. New Jersey* was decided seven days after certiorari was denied by the Supreme Court in *Jennings*. The District Judge is cautioned that *Apprendi* may alter this holding. The underlying offense must have elements of violence. 18 U.S.C. § 924(c)(3); *United States v. Credit*, 95 F.3d 362 (5th Cir. 1996), *reh'g denied*, (Oct. 10, 1996).

The statute provides a minimum, consecutive sentence of 5 years, with various factors increasing the minimum, e.g., 7-year minimum if the firearm is brandished, 18 U.S.C. § 924(c)(1)(A)(ii); 10-year minimum if the firearm is discharged, 18 U.S.C. § 924(c)(1)(A)(iii); or 30-year minimum if the firearm is a machine gun, 18 U.S.C. § 924 (c)(1)(B)(ii).

The United States Supreme Court has held that "Congress intended the firearm type-related words it used in § 924(c)(1) to refer to an element of a separate, aggravated crime." *Castillo v. United States*, 120 S.Ct. 2090, 2096 (2000). However, that case interpreted the statute before it was amended in 1998. In *United States v. Barton*, 2001 WL 765829 (5th Cir. 2001), the Fifth Circuit held that subsections (i), (ii), and (iii) of § 924(c)(1)(A) are sentencing factors and not separate elements of different offenses. Thus, § 924(c)(1)(A) does not raise an *Apprendi* issue. Although it is not stated in *Barton*, the Fifth Circuit previously has held that the maximum sentence under this statute is life imprisonment. See *United States v. Sias*, 227 F.3d 244, 247 (5th Cir. 2000) (stating that "by implication, Congress left open the ceiling of sentences imposed under § 924(c)").

Only two circuits have addressed whether or not the provisions under § 924(c)(1)(B) are sentencing factors or elements of a crime. In *United States v. Sandoval,* 241 F.3d 549 (7th Cir. 2001), the court held "that the classification of weapon used in a § 924 (c)[(B)] prosecution is a sentencing factor." On the other hand, in *United States v. Bandy,* 239 F.3d 802 (6th Cir. 2001), that court held the § 924(c)(1)(B)(i) is an element of a crime. In *Barton*, the Fifth Circuit left open the question of whether or not the "type of weapon" in § 924(c)(1)(B) constitutes a sentencing factor or an element of a crime.

For the definition of possession, see Instruction No. 1.31.

2.49

FALSE STATEMENTS TO FEDERAL AGENCIES AND AGENTS

18 U.S.C. § 1001

Title 18, United States Code, Section 1001, makes it a crime for anyone to knowingly and willfully make a false or fraudulent statement in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.

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

First: That the defendant made a false statement to _____ [name department or agency of United States government] regarding a matter within its jurisdiction;

Second: That the defendant made the statement intentionally, knowing that it was false;

Third: That the statement was material; and

Fourth: That the defendant made the false statement for the purpose of misleading the _____ [name department or agency].

A statement is material if it has a natural tendency to influence, or is capable of influencing, a decision of [name department or agency].

It is not necessary to show that the _____ [name department or agency] was in fact misled.

Note

This instruction assumes the false statement was made to an executive agency of the government. If the false statement is made to the judicial or legislative branch, the judge should tailor the instruction. But see *United States v. Oakar*, 111 F.3d 146 (D.C. Cir. 1997), holding that an entity within the Legislative Branch cannot be a "department within this statute. A 1996 statutory amendment partially overruled *Hubbard v. United States*, 115 S.Ct. 1754 (1995), by expressly providing that this section now applies to statements within the judicial branch. However, a new subsection (b) partially preserves the so-called "judicial function exception."

Some courts have held that "reckless disregard" or "reckless indifference" may satisfy the scienter element, at least where the defendant makes a false material statement, and consciously avoids learning the true facts. See *United States v. Puente,* 982 F.2d 156 (5th Cir. 1993), *cert. denied*, 1135 S.Ct. 2934 (1993).

The "exculpatory no" doctrine exception to 18 U.S.C. § 1001 has been abolished. *Brogan v. United States,* 118 S.Ct. 805 (1998); *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994).

Materiality is a jury issue for a § 1001 offense. *United States v. Gaudin,* 115 S.Ct. 2310, 2312 (1995).

A material fact is one "having a natural tendency to influence, or being capable of affecting or influencing a government agency." The agency need not have actually been misled, but "the concealment must simply have the capacity to impair or pervert the functioning of a government agency." *United States v. Shaw,* 44 F.3d 285 (5th Cir. 1995); *United States v. Beuttenmuller*, 29 F.3d 973 (5th Cir. 1994).

2.50

FALSE STATEMENTS IN BANK RECORDS

18 U.S.C. § 1005
(Third Paragraph)

Title 18, United States Code, Section 1005, makes it a crime for anyone to make a false entry in any book [record] [statement] of a federally insured bank, knowing the entry is false, with intent to defraud the bank.

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

First: That the _____ [name bank] was a federally insured bank;

Second: That the defendant made a false entry in a book [record] [statement] of _____ [name bank];

Third: That the defendant did so knowing it was false; and

Fourth: That the defendant did so intending to injure or defraud _____ [name bank].

Note

See *United States v. Munna,* 871 F.2d 515 (5th Cir. 1989), *cert. denied,* 110 S.Ct. 871 (1990), relative to the deprivation of intangible rights as constituting bank fraud.

Specific intent to injure or defraud the bank or its public officers is an express element of paragraph three, section 1005. *United States v. Campbell,* 64 F.3d 967 (5th Cir. 1995). It is not necessary to prove intent to deceive the bank. Intent to deceive an officer, agent, auditor or examiner is sufficient; *Campbell, id. United States v. Chaney,* 964 F.2d 437 (5th Cir. 1992); *United States v. McCord*, 33 F.3d 1434 (5th Cir. 1994). If the case involves alleged injury to or deceit of an officer or other entity, the instruction must be tailored accordingly.

Materiality is not an element of this offense when the defendant is charged with a false misstatement, but would be an element if the defendant is charged with a false entry resulting from an omission of information. *United States v. Harvard,* 103 F.3d 412, 417-20 (5th Cir. 1997). In such a case, materiality would be a jury question. *United States v. Gaudin,* 115 S.Ct. 2310, 2314 (1995). [In an "omission" case, the following would be the second element: "That the defendant made a false material omission in a book [record] [statement] of _____[name bank]. A material omission is one that would naturally tend to influence, or was capable of influencing, the decision of _____ [name bank]"].

2.51

FALSE STATEMENT TO A BANK

18 U.S.C. § 1014

Title 18, United States Code, Section 1014, makes it a crime for anyone knowingly to make a false statement to a federally insured bank for the purpose of influencing the bank to make a loan.

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

First: That the defendant made a false statement to _____ [name bank];

Second: That the defendant knew the statement was false when the defendant made it;

Third: That the defendant did so for the purpose of _____ [describe purpose, e.g., convincing the bank to give the defendant a loan]; and

Fourth: That _____ [name bank] was federally insured.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendant intended to influence the lending decision of the bank by the false statement. To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party, knowing that the third party will submit the false statement to the federally insured bank.

Note

United States v. Wells, 117 S.Ct. 921 (1997), holds that materiality is not an element in a prosecution under 18 U.S.C. § 1014, partially overruling *United States v. Jobe,* 101 F.3d 1046, 1061 (5th Cir. 1996). See also *United States v. Dupre*, 117 F.3d 810 (5th Cir. 1997). Among other reasons, the Supreme Court relied on the text's "natural reading," i.e., the absence of "material" within the text of the statute, on its statutory history, and on other elements of proof required by the statute.

The statute requires only an intent to influence the bank's lending decision. *United States v. Devoll,* 39 F.3d 575, 579 (5th Cir. 1994), *cert. denied,* 115 S.Ct. 1701 (1995). An intent to harm the bank or to bring financial gain to the defendant is not required. Neither reliance by the bank nor an actual defrauding is required. *United States v. Shaid*, 730 F.2d 225, 232 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 151 (1984).

The defendant need not directly make the false statement to an institution covered by the statute. See *United States v. Gammage,* 790 F.2d 431, 433-34 (5th Cir. 1986).

If the institution involved is not a federally insured bank, this charge must be modified to reflect the particular type of institution listed in the statute, and as charged in the indictment.

United States v. Huntress, 956 F.2d 1309 (5th Cir. 1992) approves this instruction.

2.52

PRODUCTION OF FALSE DOCUMENT WITH INTENT TO DEFRAUD UNITED STATES

18 U.S.C. § 1028(a)(1)

Title 18, United States Code, Section 1028(a)(1), makes it a crime for anyone knowingly and without lawful authority to produce an identification document or a false identification document under certain specified circumstances.

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

First: That the defendant knowingly produced an identification document [a false identification document];

Second: That he did so without lawful authority; and

Third: That the identification document [false identification document] is or appears to be issued by or under the authority of the United States.

or

[*Third*: That the defendant knowingly possessed an identification document not lawfully issued for his use [a false identification] with intent that the document be used to defraud the United States.]

or

[*Third*: That the production of the document is in or affects interstate or foreign commerce.]

The term "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 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.

The term "produces" includes alter, authenticate, or assemble.

Note

This is a complex statute. Section (a) describes seven different violations and section (b) provides different maximum sentences ranging from one year to 25 years depending on various facts. The instruction must be carefully tailored, therefore, to comply with the *Apprendi* doctrine. For example, in *United States v. Villarreal*, No. 99-41095, 2001 WL 641519, at *3 (5th Cir. June 11, 2001), a sentence in excess of three years' confinement was reversed because the trial court's instructions did not ask the jury to find that the identification document in question was one listed in § 1028(b)(1)(A).

Interstate or foreign commerce may be affected even when the document transfer occurred entirely in a local venue. The focus is whether the document would have traveled in interstate or foreign commerce if the defendant had accomplished his intended goal. Thus, the commerce element is satisfied when a fraudulent document is sold to a foreign citizen who presumably desires to remain in this country and possibly travel into other states or countries. *Villarreal*, 2001 WL 641519, at *2.

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40, and 1.41.

2.53

USE OF UNAUTHORIZED ACCESS DEVICE

18 U.S.C. § 1029(a)(2)

Title 18, United States Code, Section 1029(a)(2), makes it a crime for anyone to use, with intent to defraud, one or more unauthorized access devices during any one-year period and by such conduct obtain anything of value aggregating $1,000 or more during that period.

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

First: That the defendant knowingly used one or more unauthorized access devices;

Second: That by one or more such uses during the one-year period beginning _____ [date], and ending _____ [date], the defendant obtained a thing or things, having an aggregate value of $1,000.00 or more;

Third: That the defendant acted with intent to defraud; and

Fourth: That the defendant's conduct affected interstate commerce.

The government is not required to prove that the defendant knew that his conduct would affect interstate commerce. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term "access device" means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

The term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

Note

This instruction is limited to use of an access device in § 1029(a)(2). It provides a model for drafting instructions in cases under other subsections which contain different elements and maximum punishments.

If an issue is raised that the card or plate or account is not an "access device," it may be necessary to submit that issue to the jury. See *United States v. Johnson,* 718 F.2d 1317 (5th Cir. 1983) (holding that whether a gold certificate was a security under 18 U.S.C. § 2314 (1976) is a jury issue).

The term "access device" is broad enough to encompass technological advances and includes long-distance telephone access codes. Also, "counterfeit" and "unauthorized" are not mutually exclusive terms. *United States v. Brewer*, 835 F.2d 550 (5th Cir. 1987).

A "counterfeit access device" under § 1029(a)(1) includes an otherwise legitimate device procured by the use of false information. *United States v. Soape,* 169 F.3d 257 (5th Cir. 1999), *cert denied*, 119 S.Ct. 2353 (1999).

On "affecting commerce," see *United States v. Jarrett*, 705 F.2d 198, 203 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 995 (1984), and Devitt & Blackmar, § 59.40. On "interstate or foreign commerce," see *United States v. Young,* 730 F.2d 221 (5th Cir. 1984), and *United States v. Massey,* 827 F.2d 995 (5th Cir. 1987).

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40, and 1.41.

2.54

TRANSMISSION OF WAGERING INFORMATION

18 U.S.C. § 1084

Title 18, United States Code, Section 1084, makes it a crime for anyone to transmit bets or wagers in interstate or foreign commerce.

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

First: That the defendant was in the business of betting or wagering. That is, the defendant was prepared on a regular basis to accept bets placed by others;

Second: That the defendant, as a part of that business, purposely used a wire communication facility to receive or transmit bets on _____ [describe the event];

Third: That the transmission was made between _____ and _____ [name states or state and foreign place]; and

Fourth: That the defendant knew the transmission was made from one state to another or from one state to a foreign place.

This statute is intended to reach the activities of professional gamblers who knowingly conduct their activities through the use of interstate telephone facilities, or telephone facilities between a state and a foreign place, regardless of which party sent and which received the wager.

To prove that the defendant is in the betting business, the government must show beyond a reasonable doubt that the defendant engaged in a regular course of conduct or series of transactions involving time, attention, and labor devoted to betting or wagering for profit. The government must show more than casual, isolated, or sporadic transactions. On the other hand, it is not necessary that making bets or wagers, or dealing in wagering information, constitutes a person's primary source of income. The government need not show that the defendant has made any prescribed number of bets or that the defendant has actually earned a profit.

Note

The First and Second Circuits have held that the defendant's knowledge of the interstate nature of the wire facility transmission is an element of the crime that must be proved. *United States v. Southard*, 700 F.2d 1, 24 (1st Cir.), *cert. denied*, 104 S.Ct. 89 (1983); and *United States v. Barone*, 467 F.2d 247, 249 (2d Cir. 1972). The Ninth Circuit held, without discussion, that "the knowing use of interstate facilities is not an essential element" of section 1084. *United States v. Swank*, 441 F.2d 264, 265 (9th Cir. 1971). The issue was raised, but not decided, in *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973), *cert. denied*, 94 S.Ct. 2604 (1974). The Committee has included the element of knowledge of the interstate nature of the transmission.

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40. The issue of whether the transmission was in interstate or foreign commerce must be submitted to the jury. See *United States v. Gaudin*, 115 S.Ct. 2310 (1995).

See also *United States v. Montford*, 27 F.3d 137 (5th Cir. 1994), holding that gambling ship excursions a few miles offshore of the United States coast do not amount to "foreign commerce" within the meaning of § 1084, and that "foreign commerce" requires some form of contact with a foreign state.

2.55

MURDER (FIRST DEGREE)

18 U.S.C. § 1111

Title 18, United States Code, Section 1111, makes it a crime for anyone to murder another human being with premeditation.

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

First: That the defendant unlawfully killed _____;

Second: That the defendant killed _____ with malice aforethought;

Third: That the killing was premeditated; and

Fourth: That the killing took place within the territorial [special maritime] jurisdiction of the United States.

To kill "with malice aforethought" means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed, or felt ill will toward the victim at the time.

In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument and the manner in which death was caused.

A killing is "premeditated" when it is the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the killer, after forming the intent to kill, to be fully conscious of that intent.

You should consider all the facts and circumstances preceding, surrounding, and following the killing which tend to shed light upon the condition of mind of the defendant, before and at the time of the killing. No fact, no matter how small, no circumstance, no matter how trivial, which bears upon the questions of malice aforethought and premeditation, should escape your careful consideration.

Note

This instruction applies to a premeditated killing only.

There are other methods of committing first degree murder, including a killing in the perpetration of a felony. The instruction must be adjusted accordingly in those cases.

See *Lizama v. United States Parole Commission*, 245 F.3d 503 (5th Cir. 2001) and *United States v. Lewis,* 92 F.3d 1371 (5th Cir. 1996), *affirmed in part, sentence vacated*, 118 S.Ct. 1135 (1998), for recent discussions of this statute.

In the proper case, use instructions for Lesser Included Offense, Second Degree murder, and Voluntary Manslaughter; *United States v. Browner,* 889 F.2d 549 (5th Cir. 1989).

If there is evidence that the defendant acted lawfully, e.g., in self defense, by accident, or in defense of property, a fifth element should be added and explained. For example, "The defendant did not act in self-defense." An explanation of self-defense should also be included. *United States v. Branch*, 91 F.3d 699 (5th Cir.), *cert. denied*, 117 S.Ct. 1467 (1996).

See *United States v. McRae,* 593 F.2d 700 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 128 (1979); *United States v. Shaw,* 701 F.2d 367 (5th Cir. 1983), *cert. denied,* 104 S.Ct. 1419 (1984).

2.56

MURDER (SECOND DEGREE)

18 U.S.C. § 1111

Title 18, United States Code, Section 1111, makes it a crime for anyone to murder another human being.

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

First: That the defendant unlawfully killed _____ ;

Second: That the defendant killed _____ with malice aforethought; and

Third: That the killing took place within the territorial [special maritime] jurisdiction of the United States.

To kill "with malice aforethought" means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed, or felt ill will toward the victim at the time.

In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument and the manner in which death was caused.

You should consider all the facts and circumstances preceding, surrounding, and following the killing which tend to shed light upon the condition of mind of the defendant, before and at the time of the killing. No fact, no matter how small, no circumstance, no matter how trivial, which bears upon the issue of malice aforethought should escape your careful consideration.

Note

In the proper case, use instructions at Nos. 1.33 and 2.57 for Lesser Included Offense and Voluntary Manslaughter.

"The intent required for second-degree murder is malice aforethought; it is distinguished from first-degree murder by the absence of premeditation." *United States v. Browner,* 889 F.2d 549 (5th Cir. 1989)*; United States v. Harrelson,* 766 F.2d 186 (5th Cir. 1985).

If there is evidence that the defendant acted lawfully, e.g., in self defense, by accident, or in defense of property, a fifth element should be added and explained. For example, "The defendant did not act in self-defense." An explanation of self-defense should also be included. *United States v. Branch*, 91 F.3d 699 (5th Cir.), *cert. denied*, 117 S.Ct. 1467 (1997).

For a recent discussion of this statute, see *Lizama v. United States Parole Commission*, 245 F.3d 503 (5th Cir. 2001).

See *United States v. McRae,* 593 F.2d 700 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 128 (1979); *United States v. Shaw,* 701 F.2d 367 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1419 (1984).

2.57

VOLUNTARY MANSLAUGHTER

18 U.S.C. § 1112

Title 18, United States Code, Section 1112, makes it a crime for anyone to unlawfully kill another human being, without malice.

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

First: That the defendant unlawfully killed _____;

Second: That the defendant did so without malice, that is, upon a sudden quarrel or heat of passion; and

Third: That the killing took place within the territorial [special maritime] jurisdiction of the United States.

The term "heat of passion" means a passion of fear or rage in which the defendant loses his normal self-control as a result of circumstances that would provoke such a passion in an ordinary person, but which did not justify the use of deadly force.

Note

This instruction applies only to voluntary manslaughter. 18 U.S.C. § 1112 also covers involuntary manslaughter. See *United States v. Browner,* 889 F.2d 549 (5th Cir. 1989).

For a discussion of "heat of passion," see *Lizama v. United States Parole Commission*, 245 F.3d 503 (5th Cir. 2001).

2.58

KIDNAPPING

18 U.S.C. § 1201(a)(1)

Title 18, United States Code, Section 1201(a)(1), makes it a crime for anyone to unlawfully kidnap another person and then transport that person in interstate commerce.

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

First: That the defendant, knowingly acting contrary to law, kidnapped [seized] [confined] [inveigled] the person described in the indictment, as charged;

Second: That the defendant kidnapped the person for some purpose or benefit;

Third: That the defendant willfully transported such person while so kidnapped [confined] [inveigled]; and

Fourth: That the transportation was in interstate [foreign] commerce.

To "kidnap" a person means to unlawfully hold, keep, detain, and confine the person against that person's will. Involuntariness or coercion in connection with the victim's detention is an essential part of the offense.

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

You need not unanimously agree on why the defendant kidnapped the person in question, so long as you each find that he had some purpose or derived some benefit from the kidnapping.

In the third element, the term "willfully" means that the defendant acted voluntarily and with the intent to violate the law.

The government need not prove that the defendant knew that he was crossing a state line with the victim. So long as the defendant crossed a state line while intentionally transporting the victim, the third element has been satisfied.

Note

An additional element, prompted by the *Apprendi* doctrine, is required when the indictment alleges that the kidnapping resulted in the death of a person and the prosecution is seeking the death penalty. If a disputed issue is whether a death resulted, the court should consider giving a lesser included offense instruction.

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40, and 1.41.

In *United States v. Webster*, 162 F.3d 308 (5th Cir. 1999), the court held that the phrase "for ransom, reward or otherwise" in the statute comprehends any purpose at all. There need be no jury unanimity on this point so long as each juror finds that the defendant had some purpose or derived some benefit. 162 F.3d at 328-30. In *United States v. Williams,* 998 F.2d 258 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 940 (1994), the court approved a charge using the term "for immoral purposes," stating that "some benefit" can include sexual gratification.

Under §1201(a)(1), a defendant must abduct a live person who then moves in interstate commerce. See *United States v. Davis*, 19 F.3d 166, 169-70 (5th Cir. 1994). However, the defendant need not know that the victim is alive, see *id.* at 170, or that she is crossing a national or state line. See *United States v. Barksdale-Contreras*, 972 F.2d 111, 114 (5th Cir. 1992); *United States v. Bankston*, 603 F.2d 528, 532 (5th Cir. 1979). Furthermore, a defendant does not have to transport the victim personally in interstate commerce so long as the victim is transported in interstate commerce by confederates. See *United States v. Jackson*, 978 F.2d 903, 910 (5th Cir. 1992).

Transporting a victim from a foreign country to the United States constitutes transportation in "foreign commerce" within the meaning of 18 U.S.C. § 1201(a)(1). See *United States v. De La Rosa*, 911 F.2d 985, 990-991 (5th Cir. 1990).

Section 1201(b) provides that failure to release the victim within twenty-four hours after the unlawful seizure creates a rebuttable presumption that the victim has been transported in interstate or foreign commerce. This presumption should be invoked with great caution, if at all. At least one circuit has held it to be unconstitutional. See *United States v. Moore*, 571 F.2d 76 (2d Cir. 1978). The United States Supreme Court allows permissive presumptions when the presumed fact flows more likely than not from the proved fact on which it depends. See *County Court of Ulster County v. Allen*, 99 S.Ct. 2213, 2224 (1979); *Leary v. United States*, 89 S.Ct. 1532 (1969).

Nonphysical restraint, such as by deception or fear, is sufficient under the similar Hostage Taking Act, Title 18 U.S.C. §1203. *United States v. Carrion-Caliz,* 944 F.2d 220, 225 (5th Cir. 1991). In making this determination, the Fifth Circuit relied upon decisions from other circuits interpreting the Federal Kidnapping Act, 18 U.S.C. §1201. See *id.* at 225-26 (citing *United States v. Wesson*, 779 F.2d 1443, 1444 (9th Cir. 1986), and *United States v. Hoog*, 504 F.2d 45, 50-51 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 1349)).

For a statement of the elements of this crime and for a recent discussion on an "unconsenting person" and acting "knowingly and willfully" under this statute, see *United States v. Barton*, 2001 WL 767829 (5th Cir. July 9, 2001).

2.59

MAIL FRAUD

18 U.S.C. § 1341

Title 18, United States Code, Section 1341, makes it a crime for anyone to use the mails in carrying out a scheme to defraud.

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

First: That the defendant knowingly created a scheme to defraud, that is _____ [describe scheme from the indictment];

Second: That the defendant acted with a specific intent to defraud ;

Third: That the defendant mailed something [caused another person to mail something] through the United States Postal Service [a private or commercial interstate carrier] for the purpose of carrying out the scheme; and

Fourth: That the scheme to defraud employed false material representations.

[*Fifth:* That the scheme was in connection with the conduct of telemarketing.]

or

[*Fifth:* That the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Fifth:* That the scheme affected a financial institution.]

A "scheme to defraud" includes any scheme to deprive another of money, property, or of the intangible right to honest services by means of false or fraudulent pretenses, representations, or promises.

An "intent to defraud" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, 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 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 was closely related to the scheme, in that the defendant either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do 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 the defendant did not intend or request the mails to be used.

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

Note

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1341, 2326. If a disputed issue is whether the offense involved telemarketing at all, or whether it victimized 10 or more persons over age 55 or targeted persons over age 55, or whether the scheme affected a financial institution, the court should consider giving a lesser included offense instruction at No. 1.33.

On the elements of a § 1341 offense, see *United States v. Peterson*, 244 F.3d 385, 389 (5th Cir. 2001); *United States v. Reyes*, 239 F.3d 722, 735 (5th Cir. 2001); *United States v. Sprick*, 233 F.3d 845, 853 (5th Cir. 2000); *United States v. Wyley*, 193 F.3d 289, 294 (5th Cir. 1999); *United States v. Brown*, 186 F.3d 661, 665 (5th Cir. 1999); *United States v. Powers*, 168 F.3d 741, 747 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 360 (1999).

Proof of the elements of the offense does not require precise identity of the victim of the scheme, see *United States v. Hatch*, 926 F.2d 387, 392 (5th Cir. 1991), *cert. denied*, 111 S.Ct. 2239 (1991); or that the defendant made direct misrepresentations to the victim, see *United States v. Humphrey*, 104 F.3d 65, 70 (5th Cir. 1997), and *United States v. Pepper*, 51 F.3d 469, 472 (5th Cir. 1995); or that the alleged fraudulent scheme is prohibited by state law, see *United States v. Moore*, 37 F.3d 169, 172 (5th Cir. 1994).

This statute protects both property rights and the intangible right to honest services. In property rights cases, the Government must show that the defendant contemplated or intended some harm to the property rights of the victim or a property gain to himself. See *United States v. Leonard*, 61 F.3d 1181, 1187 (5th Cir. 1995); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 115 (1993); *United States v. St. Gelais*, 952 F.2d 90, 95 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 439 (1992). State and municipal licenses in general (and Louisiana's video poker licenses in particular) are not "property" for the purposes of 18 U.S.C. § 1341. *Cleveland v. United States*, 121 S. Ct. 365, 369 (2000).

The Fifth Circuit Court of Appeals, sitting en banc, held that a scheme to deprive a governmental entity or the citizens of a State of the intangible right to honest services of public officials is subject to prosecution under this statute. See *United States v. Brumley*, 116 F.3d 728, 731 (5th Cir. 1997) (members of the Texas Industrial Accident Board and citizens of the State of Texas defrauded of intangible right to honest services). To constitute such a scheme, "the services must be owed under state law." *Id.* at 735. Fraudulent intent "contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer." *Id*. at 734.

The third element reflects the holding in *Schmuck v. United States*, 109 S.Ct. 1443, 1448 (1989), that the mailing be incident to an essential part of the scheme or a step in the plot. See *Reyes*, 239 F.3d at 736. This step in the plot may also be a "post-purchase mailing designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect." See *United States v. Richards*, 204 F.3d 177, 209 (5th Cir. 2000), *cert. denied sub nom. Braugh v. United States*, 121 S.Ct. 73 (2000). In *United States v. Evans*, 148 F.3d 477, 483 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 886 (1999), the Fifth Circuit distinguished *Schmuck* on factual grounds and held that a mailing after the scheme to defraud already "reached fruition" did not constitute mail fraud.

The statute, as amended in 1994, now applies to the use of "any private or commercial interstate carrier." Thus, use of commercial carriers may support a prosecution under this provision. See *United States v. Marek*, 238 F.3d 310, 318 (5th Cir. 2001) (Western Union). Where use of private carriers is involved, the Government need not prove that state lines were crossed, only that the carrier engages in interstate deliveries. See *id.* (citing *United States v. Photogrammetric Data Serv., Inc.*, 103 F. Supp.2d 875, 882 (E.D. Va. 2000)).

The United States Supreme Court, in *Neder v. United States*, 119 S. Ct. 1827 (1999), held that materiality is an element to be decided by the jury in cases of mail fraud, wire fraud, and bank fraud. See also *United States v. Davis*, 226 F.3d 346, 358 (5th Cir. 2000), *cert. denied,* 121 S.Ct. 1161 (2001); *United States v. Pipkin*, 114 F.3d 528, 535 (5th Cir. 1997). The definition of "materiality" in this instruction was described as the "general" definition by the United States Supreme Court in *Neder*, 119 S.Ct. at 1837. The definition was drawn from *United States v. Gaudin*, 115 S.Ct. 2310 (1995), which in turn had quoted from *Kungys v. United States*, 108 S.Ct. 2310 (1988). In *Neder*, however, the Supreme Court also noted a different definition in the Restatement (Second) of Torts §538 (1976). *Neder*, 119 S.Ct at 1840 n.5. Two recent Fifth Circuit cases have discussed both of these definitions in connection with prosecutions under the mail and wire fraud

statutes. See *United States v. Davis*, 226 F.3d 346 (5th Cir. 2000); *United States v. Richards*, 204 F.3d 177 (5th Cir. 2000).

The definition for a "false statement" is derived from *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994); *United States v. Gordon*, 876 F.2d 1113, 1120 (5th Cir. 1989); *United States v. Chavis*, 772 F.2d 100, 109-10 (5th Cir. 1985).

The Fifth Circuit has held that it is harmless error to give a deliberate ignorance instruction when the government has presented evidence that a jury could reasonably infer that the defendants had the requisite intent to defraud. See *Peterson*, 244 F.3d at 395.

Because the language of the mail fraud and wire fraud statutes are so similar, cases construing one are applicable to the other. See *Richards*, 204 F.3d at 208 n.13.

2.60

WIRE FRAUD

18 U.S.C. § 1343

Title 18, United States Code, Section 1343, makes it a crime for anyone to use interstate wire communications facilities in carrying out a scheme to defraud.

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

First: That the defendant knowingly created a scheme to defraud, that is _____ [describe scheme from the indictment];

Second: That the defendant acted with an specific intent to defraud;

Third: That the defendant used interstate wire communications facilities [caused another person to use interstate wire communications facilities] for the purpose of carrying out the scheme; and

Fourth: That the scheme to defraud employed false material representations.

[*Fifth:* That the scheme was in connection with the conduct of telemarketing.]

or

[*Fifth:* That the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Fifth:* That the scheme affected a financial institution.]

A "scheme to defraud" includes any scheme to deprive another of money, property, or of the intangible right to honest services by means of false or fraudulent pretenses, representations, or promises.

An "intent to defraud" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the material transmitted by wire was itself false or fraudulent, or that the alleged scheme actually succeeded in defrauding anyone, or that the use of interstate wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the 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 interstate wire communications facilities was closely related to the scheme because the defendant either wired something or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme. To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

Note

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1343, 2326. If a disputed issue is whether the offense involved telemarketing at all, or whether it victimized ten or more persons over age 55 or targeted persons over age 55, or whether the scheme affected a financial institution, the court should consider giving a lesser included offense instruction.

For cases that set forth the elements, see *United States v. Odiodio*, 244 F.3d 398, 402 (5th Cir. 2001); *United States v. Richards*, 204 F.3d at 207; *United States v. Sharpe*, 193 F.3d 852, 864 n.7 (5th Cir. 1999); *United States v. Powers*, 168 F.3d 741, 746 (5th Cir. 1999); *United States v. Izydore*, 167 F.3d 213, 219 (5th Cir. 1999); See also *United States v. Loney*, 959 F.2d 1332, 1334-38 (5th Cir.

1992) (holding that showing of intent includes showing of intent to harm) (discussing at length "property" for the purposes of the federal wire statute).

Once membership in a scheme to defraud is established, a knowing participant is liable for any wire communication that subsequently takes place or that previously took place in connection with the scheme. See *Izydore*, 167 F.3d at 219.

Because the language of the mail fraud and wire fraud statutes are so similar, cases construing one are applicable to the other. See *United States v. Richards*, 204 F.3d 177, 208 n.13 (5th Cir. 2000). Accordingly, the note in the Mail Fraud Instruction at No. 2.59 should also be consulted.

2.61

BANK FRAUD

18 U.S.C. § 1344(2)

Title 18, United States Code, Section § 1344(2), makes it a crime for anyone to execute or attempt to execute a scheme or artifice to obtain any money or other property of an insured financial institution by means of false or fraudulent pretenses, representations, or promises.

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

First: That the defendant knowingly executed [attempted to execute] a scheme or plan to obtain money or property from _____ [name bank] by means of false or fraudulent pretenses, representations, or promises;

Second: That the defendant acted with specific intent to defraud _____ [name bank];

Third: That the false pretenses, representations, or promises that the defendant made were material;

Fourth: That the defendant placed the financial institution at risk of civil liability or financial loss; and

Fifth: That _____ [name bank] was insured by the Federal Deposit Insurance Corporation [or name other agency as defined by 18 U.S.C. § 20].

A "scheme or plan to defraud" means any plan, pattern, or course of action involving a false or fraudulent pretense, representation, or promise intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.

A defendant acts with the requisite "intent to defraud" if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the institution to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature of the alleged scheme, or that the alleged scheme actually succeeded in defrauding someone. What must be proven beyond a reasonable doubt is that the accused knowingly executed or attempted to execute a scheme that was substantially similar to the scheme alleged in the indictment.

Note

A sixth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1344, 2326. If a disputed issue is whether the offense involved telemarketing at all, or whether it victimized ten or more persons over age 55 or targeted persons over age 55, or whether the scheme affected a financial institution, the court should consider giving a lesser included offense instruction.

For a prosecution under section 1344(1), modify the language in the first paragraph to track the statute. See *United States v. Harvard*, 103 F.3d 412, 421 (5th Cir. 1997), for the elements of § 1344(1).

For cases that set forth the elements, see *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States v. Dadi*, 235 F.3d 945, 950-51 (5th Cir. 2000); and *United States v. McCauley*, No. 00-20385, 2001 WL 630151, at *3-5 (5th Cir. June 7, 2001). While the government must prove a risk of loss, the government need not prove a substantial likelihood of risk of loss. *McCauley, supra*.

Because materiality is an element of the charged offense, the court must submit the question of materiality to the jury. *Neder v. United States*, 119 S.Ct. 1827 (1999); *United States v. Gaudin*, 115 S. Ct. 2310 (1995). The definition of "materiality" in this instruction was described as the "general" definition by the United States Supreme Court in *Neder*, 119 S.Ct. at 1837. The definition was drawn from *United States v. Gaudin*, 115 S.Ct. 2310 (1995), which in turn had quoted from *Kungys v. United States*, 108 S.Ct. 2310 (1988). In *Neder*, however, the Supreme Court also noted a different definition in the Restatement (Second) of Torts § 538 (1976). *Neder*, 119 S.Ct. at 1840 n.5. Two recent Fifth Circuit cases have discussed both of these definitions in connection with prosecutions under the mail and wire fraud statutes. See *United States v. Davis*, 226 F.3d 346 (5th Cir. 2000); *United States v. Richards*, 204 F.3d 177 (5th Cir. 2000). The definition in this instruction was also discussed in *United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995), *citing United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992). See also *United States v. Jobe*, 77 F.3d 1461,

1474 (5th Cir. 1996) (materiality is an element of section 1344(2) bank fraud), *superseding* 77 F.3d 1461, 1474 (5th Cir. 1996). The judge should be aware that *United States v. Wells*, 117 S.Ct. 921 (1997), holds that materiality is not an element in a prosecution under 18 U.S.C. § 1014, a similar statute criminalizing the making of false statements to a bank. The Fifth Circuit Court of Appeals has held that 18 U.S.C. § 1014, which prohibits making false statements to a federally insured lending institution, is not a lesser included offense of bank fraud. *United States v. Morrow*, 177 F.3d 272, 293 (5th Cir. 1999).

The "intent to defraud" and "scheme or plan to defraud" definitions are derived from *United States v. Restivo*, 8 F.3d 274, 280 (5th Cir. 1993) (citing *United States v. Saks*, 964 F.2d 1514, 1519-21 (5th Cir. 1992), *cert. denied*, 115 S.Ct. 54 (1994)).

The definition for a "false statement" is derived from *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994); *United States v. Gordon*, 876 F.2d 1113, 1120 (5th Cir. 1989); *United States v. Chavis*, 772 F.2d 100, 109-10 (5th Cir. 1985).

2.62

MAILING OBSCENE MATERIAL

18 U.S.C. § 1461

Title 18, United States Code, Section 1461, makes it a crime for anyone to use the United States mails to transmit obscene materials.

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

First: That the defendant knowingly used the mails for the conveyance [delivery] of certain materials, as charged;

Second: That the defendant knew at the time of the mailing that the materials were of a sexually oriented nature; and

Third: That the materials were obscene.

Although the government must prove that the defendant generally knew the mailed materials were of a sexually oriented nature, the government does not have to prove that the defendant knew the materials were legally obscene.

Freedom of expression has contributed much to the development and well being of our free society. In the exercise of the fundamental constitutional right to free expression which all of us enjoy, sex may be portrayed, and the subject of sex may be discussed, freely and publicly. Material is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity. However, the constitutional right to free expression does not extend to that which is obscene.

To prove a matter is "obscene," the government must satisfy a three-part test: (1) that the work appeals predominantly to prurient interest; (2) that it depicts or describes sexual conduct in a patently offensive way; and (3) that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

An appeal to "prurient" interest is an appeal to a morbid, degrading, and unhealthy interest in sex, as distinguished from a mere candid interest in sex.

The first test, therefore, is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of an average person in the community as a whole [to the prurient interest of members of a deviant sexual group]. In making this decision, you must examine the main or principal thrust of the material, when assessed in its entirety and based on its total effect, not on incidental themes or isolated passages or sequences.

The second test is whether the material depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or stimulated; masturbation; excretory functions; or lewd exhibition of the genitals.

These first two tests which I have described are to be decided by you, applying contemporary community standards. This means that you should make the decision in the light of contemporary standards that would be applied by the average person in this community, with an average and normal attitude toward—and interest in—sex. Contemporary community standards are those accepted in this community as a whole. You must decide whether the material would appeal predominantly to prurient interests and would depict or describe sexual conduct in a patently offensive way when viewed by an average person in this community as a whole, that is, by the community at large or in general. Matter is patently offensive by contemporary community standards if it so exceeds the generally accepted limits of candor in the entire community as to be clearly offensive. You must not judge the material by your own personal standards, if you believe them to be stricter than those generally held, nor should you determine what some groups of people may believe the community ought to accept or refuse to accept. Rather, you must determine the attitude of the community as a whole.

[However, the prurient-appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if the material in question was intended to appeal to the prurient interest of that group, as distinguished from the community in general.]

If you find that the material meets the first two tests of the obscenity definition, your final decision is whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value. Unlike the first two tests, this third test is not to be decided on contemporary community standards but rather on the basis of whether a reasonable person, considering the material as a whole, would find that the material lacks serious literary, artistic, political, or scientific value. An item may have serious value in one or more of these areas even if it portrays sexually oriented conduct. It is for you to say whether the material in this case has such value.

All three of these tests must be met before the material in question can be found to be obscene. If any one of them is not met, the material would not be obscene within the meaning of the law.

Note

Miller v. California, 93 S.Ct. 2607, 2615 (1973), establishes a three-pronged test to determine whether material is obscene.

For a discussion on "prurient" interest, see *Pinkus v. United States*, 98 S.Ct. 1808, 1814 (1978); *Hamling v. United States*, 94 S.Ct. 2887 (1974); *Mishkin v. New York*, 86 S.Ct. 958, 962-63 (1966); *Roth v. United States*, 77 S.Ct. 1304, 1310-11 (1957); *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

For a discussion on "patently offensive," see *Hoover v. Byrd*, 801 F.2d 740 (5th Cir. 1986), and *United States v. Easley*, 927 F.2d 1442, 1449 (8th Cir. 1991).

Although the first two prongs of the *Miller* test are to be judged by contemporary community standards, the third prong is to be judged by a "reasonable person" standard, a nationally uniform objective standard. *Pope v. Illinois*, 107 S.Ct. 1918, 1921 (1987); *United States v. Easley*, 942 F.2d 405, 411 (6th Cir. 1991).

In cases involving material designed for and primarily disseminated to a clearly defined deviant sexual group, the prurient-appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. *Mishkin,* 86 S.Ct. at 963. The Supreme Court has stated that, "[w]e adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group ...." *Id*.

United States v. Investment Enterprises, Inc., 10 F.3d 263, 267 n.5 (5th Cir. 1993), and *Hamling v. United States*, 94 S.Ct. 2887 (1974), indicate that knowledge of the sexually explicit nature of material is the required scienter for 18 U.S.C. § 1461 and § 1462. See also *United States v. Sulaiman*, 490 F.2d 78, 79 (5th Cir. 1974) (stating that proof that the defendant knew the material was sexually oriented is sufficient to establish scienter under § 1461); *United States v. Schmeltzer*, 20 F.3d 610, 612 (5th Cir. 1994) (stating that knowledge that the material is sexually oriented is the scienter requirement for conviction under § 1462). The only questions as to intent are whether the defendant knowingly sent the material through the mail, and whether the defendant was aware of the nature of the material sent through the mail. See *United States v. Shumway*, 911 F.2d 1528 (11th Cir. 1990); *Spillman v. United States*, 413 F.2d 527 (9th Cir. 1969). A specific intent to mail something known to be obscene is not required. *Hamling v. United States*, 94 S.Ct. 2887 (1974). See *United States v. Hill*, 500 F.2d 733, 740 (5th Cir. 1974) (asserting that knowledge that the material is sexually oriented is the only scienter required for conviction under § 1462 or § 1465).

2.63

INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL (By Common Carrier)

18 U.S.C. § 1462

Title 18, United States Code, Section 1462, makes it a crime for anyone to use a common carrier to transmit obscene materials in interstate commence.

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

First: That the defendant knowingly used a common carrier to transport _____ [describe materials in the indictment] in interstate commerce as charged;

Second: That the defendant knew, at the time of such transportation, the sexually oriented content of those materials; and

Third: That the materials were obscene.

[Here include definition of obscenity as stated in the pattern jury instruction for 18 U.S.C. § 1461.]

A "common carrier" includes any person or corporation engaged in the business of carting, hauling, or transporting goods and commodities for members of the public for hire.

One of the specific facts the government must prove is that the defendant knew of the sexually oriented contents of the materials which were transported in interstate commerce. The government does not have the obligation of showing that the defendant knew that such materials were in fact legally obscene, only that the defendant knew that they were sexually oriented.

Note

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40, and 1.41.

See note following instruction on 18 U.S.C. § 1461, No. 2.62.

2.64

INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL (For Purpose of Sale Or Distribution)

18 U.S.C. § 1465

Title 18, United States Code, Section 1465, makes it a crime for anyone to transport obscene materials in interstate commerce for the purpose of selling or distributing them.

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

First: That the defendant knowingly transported in interstate commerce certain materials, as charged;

Second: That the defendant transported such materials for the purpose of selling or distributing them;

Third: That the defendant knew, at the time of such transportation, of the sexually oriented content of the materials; and

Fourth: That the materials were obscene.

[Here include definition of obscenity as stated in the pattern jury instruction for 18 U.S.C. § 1461.]

To transport "for the purpose of sale or distribution" means to transport, not for personal use, but with the intent to ultimately transfer possession of the materials involved to another person or persons, with or without any financial interest in the transaction.

The transportation of more than one publication or article of the kind described in the indictment is a circumstance which may be considered by you in determining whether such publication or article may be intended for sale or distribution.

One of the facts that the government must prove is that the defendant knew of the sexually oriented contents of the materials which were transported in interstate commerce. The government

does not have the obligation of showing that the defendant knew that such materials were in fact legally obscene, only that the defendant knew that they were sexually oriented.

Note

Definitions of Interstate Commerce, Foreign Commerce, and Commerce are in the general instructions at Nos. 1.39, 1.40, and 1.41.

See note following instruction on 18 U.S.C. § 1461, No. 2.62.

2.65

CORRUPTLY OBSTRUCTING ADMINISTRATION OF JUSTICE

18 U.S.C. § 1503(a)

Title 18, United States Code, Section 1503, makes it a crime for anyone corruptly to influence [obstruct] [impede] [endeavor to influence [obstruct] [impede]] the due administration of justice in connection with a pending judicial proceeding.

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

First: That there was a proceeding pending before a federal court [grand jury];

Second: That the defendant knew of the pending judicial proceeding and influenced [obstructed] [impeded] [endeavored to influence [obstruct] [impede]] the due administration of justice in that proceeding; and

Third: That the defendant's act was done "corruptly," that is, that the defendant acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice.

[When an "endeavor" is charged, add the following:

> It is not necessary to show that the defendant was successful in achieving the forbidden objective, only that the defendant corruptly tried to achieve it in a manner which he knew was likely to [influence] [obstruct] [impede] the due administration of justice as to the natural and probable effect of defendant's actions.]

Note

Under the *Apprendi* doctrine, a fourth element is needed if the offense was committed against a petit juror in which a class A or B felony was charged.

For a discussion of the elements of this offense, see *United States v. De La Rosa,* 171 F.3d 215, 221-22 (5th Cir. 1999), and *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989), *reh'g denied*, 878 F.2d 1435 (1989).

With respect to the first element, § 1503 requires a pending judicial proceeding, as opposed to a police or agency investigation. See *United States v. Cihak,* 137 F.3d 252, 263 (5th Cir. 1998); *United States v. Casel*, 995 F.2d 1299, 1306 (5th Cir.), *cert. denied*, 114 S.Ct. 1308 (1993); *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984).

The omnibus clause of § 1503 intends to cover all proscribed endeavors, without regard to the technicalities of the law of attempt or the doctrine of impossibility. *United States v. Neal*, 951 F.2d 630, 632 (5th Cir. 1992).

In *United States v. Aguilar*, 115 S.Ct. 2357, 2362 (1995), the Supreme Court read the statute as requiring a "nexus" relationship in time, causation, or logic with the judicial proceedings so that the proscribed endeavor "must have the 'natural and probable effect' of interfering with the due administration of justice." *Accord United States v. Sharp*, 193 F.3d 852, 865 (5th Cir. 1999).

The term "administration of justice" is defined as "the performance of acts required by law in the discharge of duties such as appearing as a witness and giving truthful testimony when subpoenaed." *Sharp*, 193 F.3d at 864; *United States v. Williams*, 874 F.2d 968, 976 n.24 (5th Cir. 1989) (citing *United States v. Partine*, 552 F.2d 621 (5th Cir. 1977)).

The trial court did not commit plain error by failing to give a unanimity instruction, at least when the defendant failed to show prejudice. See *Sharp*, 193 F.3d at 870-71.

2.66

OBSTRUCTING ADMINISTRATION OF JUSTICE BY THREATS OR FORCE

18 U.S.C. § 1503(a)

Title 18, United States Code, Section 1503, makes it a crime for anyone by threats or force to influence [obstruct] [impede] [endeavor to influence [obstruct] [impede]] the due administration of justice in connection with a pending judicial proceeding.

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

First: That there was a proceeding pending before a federal court [grand jury];

Second: That the defendant knew of the pending judicial proceeding;

Third: That the defendant threatened physical force [used physical force], as charged in the indictment; and

Fourth: That the defendant's conduct influenced [obstructed] [impeded] [endeavored to influence [obstruct] [impede]] the due administration of justice in that proceeding.

[When an "endeavor" is charged, add the following:

> It is not necessary to show that the defendant was successful in achieving the forbidden objective, only that the defendant corruptly tried to achieve it in a manner which he knew was likely to [influence] [obstruct] [impede] the due administration of justice as to the natural and probable effect of defendant's actions.]

Note

See note to Corruptly Obstructing Due Administration of Justice, Instruction No. 2.65.

This offense provides for an enhanced sentence in the case of a killing, or attempted killing of the juror or court officer, or in a case "in which the offense was committed against a petit juror and in which a class A or B felony was charged." 18 U.S.C. § 1503(b). Another possible enhancement occurs when there is a use or threat of force in connection with the trial of any criminal

case. The maximum sentence becomes the higher of that provided in § 1503 or that provided for the criminal offense charged in the trial where the juror is participating. An additional element, prompted by the *Apprendi* doctrine, would be required in all such cases.

2.67

CORRUPTLY INFLUENCING A JUROR

18 U.S.C. § 1503

Title 18, United States Code, Section 1503, makes it a crime for anyone corruptly to endeavor to influence [intimidate] [impede] any petit [grand] juror in a federal court.

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

First: That _____ was a petit [grand] juror in a federal court.

Second: That the defendant endeavored to influence [intimidate] [impede] the juror in the discharge of his or her duty as a petit [grand] juror.

Third: That the defendant acted "corruptly," that is, knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of the court proceeding in which the juror served.

It is not necessary for the government to prove that the juror was in fact swayed or changed or prevented in any way, but only that the defendant corruptly tried to do so.

Note

See the discussion in the note to Corruptly Obstructing Due Administration of Justice, 18 U.S.C. § 1503, Instruction No. 2.65.

An additional element, prompted by the *Apprendi* doctrine, is required if the offense is committed against a petit juror trying a criminal case involving a class A or B felony.

2.68

INTIMIDATION TO INFLUENCE TESTIMONY

18 U.S.C. § 1512(b)(1)

Title 18, United States Code, Section 1512(b)(1), makes it a crime for anyone knowingly to use [attempt to use] intimidation [physical force] [threats] with the intent to influence [delay] [prevent] the testimony of any person in an official federal proceeding.

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

First: That the defendant used intimidation [physical force] [threats] against another person [attempted to intimidate [use physical force] [threaten] another person]; and

Second: That the defendant acted knowingly and with intent to influence [delay] [prevent] the testimony of _____ with respect to _____ [describe official proceeding named in indictment], an official proceeding.

The term "intimidation" means the use of any words or actions intended or designed to make another person timid or fearful or make that person refrain from doing something the person would otherwise do, or do something that person would otherwise not do.

To "act with intent to influence the testimony of a witness" means to act for the purpose of getting the witness to change, color, or shade his or her testimony in some way, but it is not necessary for the government to prove that the witness's testimony was, in fact, changed in any way.

Note

This crime allows for an enhancement of punishment where the violation "occurs in connection with a trial of a criminal case." Section 1512(i). In such cases, therefore, the second element of the offense should specify that the official proceeding was a trial of a criminal case.

For a general discussion of § 1512 and a particular discussion of the "intent to influence" and "official proceeding," see *United States v. Shively*, 927 F.2d 804, 810-13 (5th Cir.), *cert. denied*, 111 S.Ct. 2806 (1991).

This instruction presumes an allegation that the intent to influence was accomplished through intimidation, physical force, or threats. However, § 1512(b)(1) also can be violated if one "corruptly persuades" or uses "misleading conduct" towards another person to influence testimony. See e.g., *United States v. Gabriel*, 125 F.3d 89, 102 (2d Cir. 1997). In such a case, this instruction must be modified.

This instruction also presumes an official proceeding was pending. The statute specifically provides that an "official proceeding" need not be pending or about to be instituted at the time of the offense. See §1512(e)(1); *United States v. Greenwood*, 974 F.2d 1449, 1460 (5th Cir. 1992).

Any proceeding before a United States district judge, United States bankruptcy judge, United States magistrate judge, or a federal grand jury is an "official proceeding" within the meaning of this law.

If the case involves an attempt to intimidate, add the Attempt instruction, No. 1.32.

2.69

FALSE DECLARATION BEFORE GRAND JURY OR COURT

18 U.S.C. § 1623

Title 18, United States Code, Section 1623, makes it a crime for anyone to make a false material statement under oath to a court [grand jury].

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

First: That the statement was made while the defendant was under oath before the court [grand jury] as charged;

Second: That such statement was false in one or more of the respects charged;

Third: That the defendant knew such statement was false when the defendant made it; and

Fourth: That the false statement was material to the court proceeding [grand jury's inquiry].

A statement is "material " if it has a natural tendency to influence, or is capable of influencing, the decision of the court [grand jury].

In reviewing the statement which is alleged to have been false, you should consider such statement in the context of the sequence of questions asked and answers given, and the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.

If you should find that a particular question was ambiguous and that the defendant truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear but the answer was ambiguous, and one reasonable interpretation of such answer would be truthful, then such answer would not be false.

Note

The materiality of the alleged false statement is a question for the jury. *United States v. Gaudin*, 115 S.Ct. 2310 (1995). Earlier Fifth Circuit holdings that materiality is a legal question for determination by the court (e.g., *United States v. Abroms*, 947 F.2d 1241, 1246 (5th Cir. 1991)) should no longer be followed.

The definition of "materiality" in this instruction was described as the "general" definition by the United States Supreme Court in *Neder v. United States*, 119 S.Ct. 1827, 1837 (1999).

If the indictment charges the use of a false document, note that a violation of the use provision of § 1623 is a specific intent crime. *United States v. Dudley*, 581 F.2d 1193, 1198 (5th Cir. 1978). Modify the instruction accordingly.

2.70

THEFT OF MAIL MATTER

18 U.S.C. § 1708
(First Paragraph)

Title 18, United States Code, Section 1708, makes it a crime to steal mail from a United States mailbox [post office] [letter box] [mail receptacle] [authorized depository for mail matter].

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

First: That the letter described in the indictment was in the mail [post office] [letter box] [mail receptacle] [authorized depository for mail matter], as described in the indictment; and

Second: That the defendant stole the letter from the mail [post office] [letter box] [mail receptacle] [authorized depository for mail matter], as described in the indictment.

Mail matter is "stolen" when it has been wrongfully taken from an authorized depository for mail matter with intent to deprive the owner, temporarily or permanently, of its use and benefit. That intent must exist at the time the mail matter is taken from the mails.

Note

The first paragraph of the statute describes two offenses—theft of a letter from the mails as well as removal of the contents of a letter in the mail.

All circuits appear to agree that §1708 covers mail that has been accidently delivered by the Postal Service to an address different from that on the envelope (misdelivered mail). The circuits are split, however, on whether the statute also covers mail that has been delivered by the Postal Service to the address on the envelope, but the address is in fact incorrect, either because it was misaddressed by the sender or because the recipient has moved from that address. The question is whether someone at that address who then takes the mail for himself has violated the statute. The Fifth Circuit takes the position that §1708 does not cover such a situation, that once the mail is delivered to the address on the envelope, the custody of the Postal Service ceases. See *United States v. Davis*, 461 F.2d 83 (5th Cir. 1972). Other circuits disagree. See *State v. Coleman*, 196 F.3d 83 (2d Cir. 1999) (and cases cited therein).

The statute also includes unlawfully taking, abstracting, or obtaining mail by fraud as well as secreting, embezzling, or destroying mail. In such a case, the instruction should be so modified.

2.71

POSSESSION OF STOLEN MAIL

18 U.S.C. § 1708
(Third Paragraph)

Title 18, United States Code, Section 1708, makes it a crime to possess _____ [describe items, e.g., checks] known by the defendant to have been stolen from the United States mail.

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

First: That the _____ [e.g., checks] had been stolen from the mail [post office] [letter box] [mail receptacle] [authorized depository for mail matter];

Second: That the defendant knew the item was stolen; and

Third: That the defendant possessed the _____ [e.g., checks] described in the indictment and intended to do so unlawfully.

A private mailbox or mail receptacle is an "authorized depository for mail matter."

Mail matter is "stolen" when it has been wrongfully taken from an authorized depository for mail matter with intent to deprive the owner, temporarily or permanently, of its use and benefit.

The government does not have to prove that the defendant stole the letter, or that the defendant knew the letter was stolen from the mail, only that the defendant knew that it was stolen.

Note

United States v. Hall, 845 F.2d. 1281 (5th Cir.), *cert. denied*, 109 S.Ct. 155 (1988), cites the elements of the offense.

The statute also makes illegal the possession of mail which the defendant knows to have been unlawfully taken, embezzled, or abstracted. In such a case, the instruction should be modified.

2.72

EMBEZZLEMENT/THEFT OF MAIL MATTER BY POSTAL SERVICE EMPLOYEE

18 U.S.C. § 1709

Title 18, United States Code, Section 1709, makes it a crime for a Postal Service employee to embezzle any mail matter possessed by the employee during employment.

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

First: That the defendant was a Postal Service employee at the time stated in the indictment;

Second: That as a Postal Service employee the defendant had been entrusted with [had lawfully come into possession of] the mail matter described in the indictment, which mail matter was intended to be conveyed by mail; and

Third: That the defendant embezzled such mail matter.

A letter is "intended to be conveyed by mail" if a reasonable person who saw the letter would think it was a letter intended to be delivered through the mail.

The fact that a particular letter may have been a "decoy" letter which was not meant to go anywhere would not prevent your finding that it was intended to be conveyed by mail if a reasonable person who saw the letter would think it was a normal letter which was intended to be delivered.

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

Note

Section 1709 charges two crimes: the embezzlement of letters or articles contained therein and theft of the contents of letters, as distinguished from the letter itself. The statute does not cover stealing a letter. *United States v. Trevino*, 491 F.2d 74, 75 (5th Cir. 1974). For theft of a letter, use 18 U.S.C. § 1708 (first paragraph).

2.73

EXTORTION BY FORCE, VIOLENCE OR FEAR

18 U.S.C. § 1951(a)
(Hobbs Act)

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct commerce by extortion. Extortion means the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear.

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

First: That the defendant obtained [attempted to obtain] property from another with that person's consent;

Second: That the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: That the defendant's conduct interfered with [affected] interstate commerce.

The government is not required to prove that the defendant knew that his conduct would interfere with [affect] interstate commerce. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term "property" includes money and other tangible and intangible things of value.

The term "fear" includes fear of economic loss or damage, as well as fear of physical harm. It is not necessary that the government prove that the fear was a consequence of a direct threat; it

is sufficient for the government to show that the victim's fear was reasonable under the circumstances.

The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.

Note

Interference with or effect on interstate commerce is an element of the offense to be submitted to the jury for determination. *United States v. Parker*, 73 F.3d 48 (5th Cir.1996), *affirmed by a divided court*, *United States v. Parker*, 104 F.3d 72 (5th Cir. 1997) (en banc). Subsequent cases have implicitly accepted that the interstate commerce effect is a jury question and have dealt with instructions that a jury finding of certain specified acts beyond a reasonable doubt constitutes "an effect on interstate commerce as a matter of law." *United States v. Hebert*, 131 F.3d 514, 521-22 (5th Cir. 1997); *United States v. Miles*, 122 F.3d 235, 239-40 (5th Cir. 1997).

The effect on interstate commerce need not be substantial to satisfy the statute; the government need only show that interstate commerce was affected "in any way or degree." 18 U.S.C. § 1951(a). Even a minimal degree of interference with interstate commerce will suffice. *United States v. Jennings*, 195 F.3d 795, 801 (5th Cir. 1999). However, the defendant's conduct must be of a general type that, when viewed in the aggregate, substantially affects interstate commerce. *United States v. Robinson*, 119 F.3d 1205, 1208 (5th Cir. 1997); See also *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) (conviction affirmed by equally divided vote). Refer to *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), for a discussion of the interstate commerce requirement as it applies to individual victims rather than business victims.

Under the "depletion of assets" theory, the government need not show that any particular shipment of merchandise was obstructed or delayed by the defendant's conduct, or that the business actually purchased fewer goods because of the defendant's conduct. Rather, a showing that the business regularly buys goods from out of state allows an inference that the defendant's conduct will impair a future purchase. *United States v. Jennings*, 195 F.3d 795, 801-02 (5th Cir. 1999); *United States v. Hebert*, 131 F.3d 514, 523 n.8 (5th Cir. 1997).

The Supreme Court has held that "(t)he term 'wrongful' ... would be superfluous if it only served to describe the means used .... Rather, 'wrongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of property itself would be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States v. Enmons*, 93 S.Ct. 1007 (1973). In *Enmons*, the Court held that the Hobbs Act did not reach the use of violence to achieve legitimate union objectives. *Id*.

The government is not required to prove that the victim's fear was a consequence of a direct threat by the defendant, so long as the fear is reasonable and the defendant uses it to extort property. *United States v. Tomblin*, 46 F.3d 1369, 1384 (5th Cir. 1995); *United States v. Quinn*, 514 F.2d 1250, 1266-67 (5th Cir. 1975), *cert. denied*, 96 S.Ct. 1430 (1976).

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Nos. 1.39, 1.40, and 1.41.

2.74

EXTORTION UNDER COLOR OF OFFICIAL RIGHT

18 U.S.C. § 1951(a)
(Hobbs Act)

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct commerce by extortion. Extortion means the wrongful obtaining of or attempting to obtain property from another, with that person's consent under color of official right.

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

First: That the defendant wrongfully obtained [attempted to obtain] property from another with that person's consent;

Second: That the defendant did so under color of official right; and

Third: That the defendant's conduct interfered with [affected] interstate commerce.

The government is not required to prove that the defendant knew that his conduct would interfere with [affect] interstate commerce. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term "property" includes money and other tangible and intangible things of value.

"Wrongfully obtaining property under color of official right" is the taking or attempted taking by a public officer of property not due to him or his office, whether or not the public official employed force, threats, or fear. In other words, the wrongful use of otherwise valid official power may convert dutiful action into extortion. If a public official accepts or demands property in return for promised performance or nonperformance of an official act, the official is guilty of extortion.

This is true even if the official was already duty bound to take or withhold the action in question, or even if the official did not have the power or authority to take or withhold the action in question, if the victim reasonably believed that the official had that authority or power.

Note

See note following jury instruction No. 2.73 on Extortion by Force, Violence or Fear, 18 U.S.C. § 1951(a), for discussion of interstate commerce requirement.

Extortion under color of official right does not require proof that the public official accomplished the extortion by force, threats, or use of fear, nor is it required that the public official induced or solicited the payment by the victim. It is sufficient to prove that the public official received a payment to which he was not entitled with knowledge that the payment was made in return for the performance or nonperformance of an official act. *Evans v. United States*, 112 S.Ct. 1881, 1889 (1992); *United States v. Millet*, 123 F.3d 268, 275 (5th Cir. 1997).

An official may be guilty of extortion even if that official does not have the power or authority to take or withhold the promised action as long as the victim reasonably believed that the official had that authority or power. *United States v. Robinson*, 700 F.2d 205 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1003 (1984).

The first element of this instruction includes language on attempt because the Hobbs Act proscribes both attempted and completed extortion. 18 U.S.C. § 1951(a). See also *United States v. Quinn*, 514 F.2d 1250, 1267 (5th Cir. 1975), *cert. denied*, 96 S.Ct. 1430 (1976).

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at 1.39, 1.40, and 1.41.

2.75

ILLEGAL GAMBLING BUSINESS

18 U.S.C. § 1955

Title 18, United States Code, Section 1955, makes it a crime for anyone to conduct a gambling business that violates _____ [name state] law.

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

First: That five or more persons, including the defendant, knowingly conducted [financed] [managed] [supervised] [directed] [owned] all [part] of a gambling business, as charged;

Second: That such gambling business violated the laws of the state of _____ or some political subdivision thereof. _____ [Specify prohibited activity, e.g., Bookmaking] is against the laws of the state of _____; and

Third: That such gambling business was in substantially continuous operation for a period in excess of thirty days [had a gross revenue of $2,000 or more on any one day].

"Bookmaking" is a form of gambling, and involves the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets from customers on either side of the wagering proposition with a view toward making a profit not from betting itself, but from a percentage or commission collected from the bettors or customers for the privilege of placing the bets.

The words "finances, manages, supervises, directs, or owns" are all used in their ordinary sense and include those who finance, manage, or supervise a business. The word "conduct" is a broader term and would include anyone working in the gambling business who is necessary or helpful to it, whether paid or unpaid, or has a voice in management, or a share in profits. A mere bettor or customer, however, would not be participating in the "conduct" of the business.

While it must be proved, as previously stated, that five or more people conducted, financed, or supervised an illegal gambling business that remained in substantially continuous operation for

at least thirty days, or had a gross revenue of at least $2,000 on any single day, it need not be shown that five or more people have been charged with an offense; nor that the same five people, including the defendant, owned, financed, or conducted such gambling business throughout a thirty-day period; nor that the defendant even knew the names or identities of any given number of people who might have been so involved. Neither must it be proved that bets were accepted every day over a thirty-day period, nor that such activity constituted the primary business or employment of the defendant.

Note

See generally, *United States v. Heacock*, 31 F.3d 249 (5th Cir. 1994), and *United States v. Follin*, 979 F.2d 369 (5th Cir. 1992), *cert. denied,* 113 S.Ct. 3004 (1993).

A conviction can be sustained only on the basis of a violation of the specific state prohibition alleged in the Government's indictment. See *United States v. Truesdale*, 152 F.3d 443, 447 (5th Cir. 1998) (where indictment alleged only bookmaking under Texas gambling statute, none of provision's remaining four prohibitions could form basis of conviction).

An indictment under this section is not defective for failure to allege that the offense had a substantial effect on interstate commerce. *United States v. Threadgill*, 172 F.3d 357, 372-73 (5th Cir. 1999).

2.76

LAUNDERING OF MONETARY INSTRUMENTS

18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i)

Title 18, United States Code, Section 1956(a)(1), makes it a crime for anyone knowingly to use the proceeds of certain illegal activity to promote the carrying on of certain illegal activity [conceal or disguise the nature, location, source, ownership, or control of the proceeds].

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

First: That the defendant knowingly conducted [attempted to conduct] a financial transaction;

Second: That the financial transaction [attempted financial transaction] involved the proceeds of a specified unlawful activity, namely _____;

Third: That the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity; and

Fourth: That the defendant intended to promote the carrying on of the specified unlawful activity.

or

[*Fourth:* That the defendant knew that the transaction was designed in whole or part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds.

With respect to the second element, the government must show that in fact the property was the proceeds of _____, which is a specified unlawful activity under the statute.

With respect to the third element, the government must prove that the defendant knew that the property involved in the transaction was the proceeds of some kind of crime that is a felony under federal or state law, although it is not necessary to show that the defendant knew exactly what crime generated the funds. I instruct you that _____ is a felony.

The term "transaction" includes [select from the following, depending on the facts of the case: a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition, 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, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.]

The term "financial transaction" includes any "transaction," as that term has just been defined, which involves the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, 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.

It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term "conduct" includes initiating or concluding, or participating in initiating or concluding, a transaction.

The term "proceeds" includes any property, or any interest in property, that someone acquires or retains as a result of the commission of the underlying specified unlawful activity. Proceeds can be any kind of property, not just money.

Note

The foregoing applies to the two more frequently charged subsections of § 1956(a)(1) but would have to be adjusted for indictments charging other subsections.

The elements for an offense charged under § 1956 (a)(1)(A)(i) are discussed in *United States v. Wilson*, 249 F.3d 366, 377 (5th Cir. 2001); *United States v. Peterson*, 244 F.3d 385, 390 (5th Cir. 2001); *United States v. Wyly*, 193 F.3d 289, 295 (5th Cir. 1999); and *United States v. Brown*, 186

F.3d 661, 667-68 (5th Cir. 1999). The elements for an offense charged under § 1956 (a)(1)(B)(i) are discussed in *United States v. Odiodio*, 244 F.3d 398, 403 (5th Cir. 2001); *United States v. Wyly*, 193 F.3d 289, 295 (5th Cir. 1999); and *United States v. Burns*, 162 F.3d 840, 847 (5th Cir. 1998), *cert. denied*, *August v. United States*, 120 S.Ct. 281 (1999).

The judge must determine that the charged "specified unlawful activity" is actually one covered by 18 U.S.C. § 1956(c)(7)(A)(F), and that the charged "some form of unlawful activity" is actually a felony under federal or state law. For a case establishing that a financial transaction involved the proceeds of a specific unlawful activity, see *United States v. Westbrook*, 119 F.3d 1176, 1191 (5th Cir. 1997) (evidence that defendant's cash flow exceeded his legitimate income, together with evidence of defendant's extensive drug dealing, is sufficient to show that the transaction involves the proceeds of specified unlawful activity).

For a recent discussion of the element "knowingly attempting to conduct a financial transaction," see *United States v. Delgado*, 2001 WL 716951 (5th Cir. June 26, 2001).

For a useful discussion of the scienter element "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity," see *United States v. Carr,* 25 F.3d 1194, 1204 (3d Cir.), *cert. denied,* 115 S.Ct. 341 (1994).

For a detailed discussion of the promotion element of § 1956 (a)(1)(A)(i), see *Wilson*, 249 F.3d at 378-79; *Peterson*, 244 F.3d at 390-92; and *United States v. Brown*, 186 F.3d 661, 667-671 (5th Cir. 1999).

When the money laundering prosecution is based on a "conceal or disguise" theory, the government must show that the defendant desired to create the appearance of legitimate wealth or otherwise conceal the nature of funds so that it might enter the economy as legitimate funds. See *United States v. Powers*, 168 F.3d 741, 748 (5th Cir. 1999); see also *United States v. Tencer*, 107 F.3d 1120, (5th Cir. 1997), *cert. denied*, 118 S.Ct. 390 (1997) (stating that § 1956 (a)(1)(B)(i) does not require an attempt to conceal the identity of the defendant–only a scheme that conceals the source of the funds). For a further detailed analysis of § 1956 (a)(1)(B)(i)'s alternative fourth element, i.e., the "conceal or disguise" requirement, see *United States v. Burns*, 162 F.3d 840, 848-49 (5th Cir. 1998), *cert. denied*, *August v. United States*, 119 S.Ct. 1477 (1999).

With respect to the interstate commerce aspect of 18 U.S.C. § 1956, the Fifth Circuit in *United States v. Meshack* noted that "'the legislative history of § 1956(c)(4) indicates that the money-laundering statute is intended to reflect the full exercise of Congress's power under the Commerce Clause.'" 225 F.3d 556, 572 (5th Cir. 2000) (quoting *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1994) (citation omitted), *amended in part on rehearing*, 244 F.3d 367 (5th Cir. 2001). "Accordingly, because § 1956 regulates conduct that, in the aggregate, has a substantial effect on interstate commerce, to apply the statute constitutionally in any given case 'the link to interstate or foreign commerce need only be slight.'" *Id*. (quoting *Westbrook*, 119 F.3d at 1191).

For a case involving a transaction that does not involve a financial institution or its facilities, see *United States v. Garza*, 118 F.3d 278, 284-85 (5th Cir. 1997) (explaining that when some "transaction" does not involve a financial institution or its facilities, the government must show a "disposition" took place).

A jury instruction on conspiracy to commit money laundering, which described the substantive offense as involving both an intent to promote illegal activity and also to conceal or disguise the nature and source of the proceeds, was not plain error for failing to require the jury to

unanimously agree on which of the two mental states the defendant possessed. See *Meshack*, 225 F.3d 579-80.

For a case involving commingled funds, see *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991).

See also instructions on Attempt at No. 1.32, Interstate Commerce at 1.39, Foreign Commerce at 1.40, and Commerce at 1.41.

2.77

LAUNDERING OF MONETARY INSTRUMENTS

18 U.S.C. §§ 1956(a)(3)(A) and 1956(a)(3)(B)

Title 18, United States Code, Section 1956(a)(3), makes it a crime for anyone knowingly to use property represented to be proceeds of certain illegal activity to promote the carrying on of certain illegal activity [conceal the nature, location, source, ownership, or control of the proceeds].

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

First: That the defendant knowingly conducted [attempted to conduct] a financial transaction;

Second: That the financial transaction [attempted financial transaction] involved property represented to be the proceeds of a specified unlawful activity, namely _____; and

Third: That the defendant intended to promote the carrying on of a specified unlawful activity, namely _____.

or

[*Third:* That the defendant intended to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of a specified unlawful activity, namely _____.]

The term "transaction" includes [select from the following, depending on the facts of the case: a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition, 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, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected].

The term "financial transaction" includes any "transaction," as that term has just been defined, which involves the movement of funds by wire or other means or involving one or more

monetary instruments, which in any way or degree affects interstate or foreign commerce, 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.

It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term "conduct" includes initiating or concluding, or participating in initiating or concluding, a transaction.

The term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a federal official authorized to investigate or prosecute violations of this section. The evidence need not show that the property involved was expressly described as being the proceeds of specified unlawful activity at or before each transaction. It is sufficient if the government proves that the officers made enough representations to cause a reasonable person to understand that the property involved in the transaction(s) was the proceeds of _____, which is the specified unlawful activity named in the indictment.

The term "proceeds" includes any property, or any interest in property, that one would acquire or retain as a result of the commission of the underlying specified unlawful activity. Proceeds can be any kind of property, not just money.

Note

The foregoing applies to two subsections of § 1956(a)(3) but would have to be adjusted for indictments charging a violation of § 1956(a)(3)(C). Also, this charge contemplates a representation of "proceeds," which covers the vast majority of cases. The charge must be adjusted if the representation was that the property was "used to conduct or facilitate" specified unlawful activity.

The judge must determine that the charged "specified unlawful activity" is actually one covered by 18 U.S.C. § 1956(c)(7)(A)-(F). The charged specified unlawful activity in the second element can be different from that in the third element, at least in a § 1956(a)(3)(A) case.

When the money laundering prosecution is based on a "conceal or disguise" theory, the government must show that the defendant desired to create the appearance of legitimate wealth or otherwise conceal the nature of funds so that it might enter the economy as legitimate funds. See *United States v. Powers*, 168 F.3d 741, 748 (5th Cir. 1999); see also *United States v. Tencer*, 107 F.3d 1120, (5th Cir. 1997), *cert. denied*, 118 S.Ct. 390 (1997) (stating that § 1956 (a)(1)(B)(i) does not require an attempt to conceal the identity of the defendant–only a scheme that conceals the source of the funds). See *United States v. Dobbs*, 63 F.3d 391, 397 (5th Cir. 1995) ("government must prove that the specific transactions in question were designed, at least in part to launder money").

Concerning the requirement of circumstances which would cause a reasonable person to infer that the property was proceeds of a specified unlawful activity, see *United States v. Casteneda-Cantu*, 20 F.3d 1325, 1331 (5th Cir. 1994).

With respect to the interstate commerce aspect of 18 U.S.C. § 1956, the Fifth Circuit in *United States v. Meshack* noted that "'the legislative history of § 1956(c)(4) indicates that the money-laundering statute is intended to reflect the full exercise of Congress's power under the Commerce Clause.'" 225 F.3d 556, 572 (5th Cir. 2000) (quoting *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1994) (citation omitted). "Accordingly, because § 1956 regulates conduct that, in the aggregate, has a substantial effect on interstate commerce, to apply the statute constitutionally in any given case 'the link to interstate or foreign commerce need only be slight.'" *Id*. (quoting *United States v. Westbrook*, 119 F.3d 1176, 1191 (5th Cir. 1997).

See also instructions on Attempt at No. 1.32, Interstate Commerce at 1.39, Foreign Commerce at 1.40, and Commerce at 1.41.

2.78

RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

18 U.S.C. § 1962(c)

Title 18, United States Code, Section 1962(c), makes unlawful the crime of racketeering in the RICO statute, that is, the Racketeer Influenced Corrupt Organizations Act. It is a crime for anyone employed by or associated with an enterprise engaged in or affecting interstate or foreign commerce to conduct or to participate, directly or indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity. The defendant, _____, is charged in Count ____ with committing this crime from on or about _____, to on or about _____, in that the defendant is alleged to have _____.

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

First: That the defendant was a person employed by or associated with the enterprise charged;

Second: That the enterprise existed as alleged in the indictment. An enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity. The term enterprise includes both legal and illegal associations. The enterprise must be separate and apart from the pattern of racketeering activity in which the defendant allegedly engaged. The enterprise must be proven to have been an ongoing organization, formal or informal, that functioned as a continuing unit;

Third: That the defendant, either directly or indirectly, conducted or participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity. The defendant must have participated in the operation or management of the enterprise, but need not be a member of upper management. Racketeering activity includes the acts charged as separate crimes in Counts ___, ___, and ___. I have already instructed you on what the government must prove to establish that the defendant committed these acts. [If the predicate acts are not charged in separate counts,

instructions on the elements of each racketeering activity will need to be given as part of the racketeering charge.]

To prove a pattern of racketeering activity, the government must prove beyond a reasonable doubt that (1) the acts of racketeering activity are related to each other, and (2) they amount to or pose a threat of continued criminal activity. To prove the racketeering acts are related to one another, the government must prove that the criminal conduct charged embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

At a minimum, a pattern of racketeering activity requires at least two acts of racketeering activity within ten years of each other; provided, however, that the government proves the relationship and continuity of those acts as I have defined them for you. All of you must be unanimous as to which racketeering acts you each believe beyond a reasonable doubt that the defendant committed. Unless you are unanimous in finding beyond a reasonable doubt that the defendant committed a racketeering act charged, you must disregard that act in deciding whether the defendant is guilty or not guilty of racketeering. It is not sufficient that some of the jurors find that the defendant committed two of the acts while others of you find that the defendant committed different acts. As I have said, the government must prove that the defendant, directly or indirectly through the pattern of racketeering activity charged, conducted or participated in the conduct of the affairs of the enterprise. To do so, the government must additionally demonstrate a relationship among the defendant, the pattern of racketeering activity, and the enterprise. The defendant and the enterprise cannot be the same. To prove that the defendant conducted or participated as alleged, the government must prove that the defendant in fact committed the racketeering acts as alleged, the defendant's position in the enterprise facilitated his commission of the acts, and these acts had some effect on the enterprise; and

Fourth: That the enterprise was engaged in interstate [foreign] commerce or that its activities affected interstate [foreign] commerce.

Defendant engaged in commerce if he directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.

Defendant's conduct "affected" interstate [foreign] commerce if the conduct had a demonstrated connection or link with such commerce. It is not necessary for the government to prove that the defendant knew or intended his conduct to affect commerce. It is only necessary that the natural consequences of the defendant's conduct affected commerce in some way. Only a minimal effect on commerce is necessary.

Note

Definitions of Interstate Commerce, Foreign Commerce, and Commerce are in the general instructions at Nos. 1.39, 1.40, and 1.41.

The elements of this offense are discussed in *Salinas v. United States*, 118 S.Ct. 469 (1997). For a discussion of "pattern of racketeering" and a definition of "enterprise," see *H.J., Inc. v. Northwestern Bell Telephone Co.,* 109 S.Ct. 2893 (1989)*; Abell v. Potomac Ins. Co. of Illinois,* 946 F.2d 1160 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1944 (1992)*; In re Burzynski,* 989 F.2d 733 (5th Cir. 1993).

For a discussion of the "operation and management" test, which is applicable to the third element, see *Reves v. Ernst & Young,* 113 S.Ct. 1163 (1993).

A sole proprietorship may also be an "enterprise" under RICO so long as it is not a "one man show." See *Guidry v. Bank of LaPlace,* 954 F.2d 278 (5th Cir. 1992).

A § 1962(d) RICO conspiracy allegation may involve considerations different from the typical conspiracy. See *United States v. Cauble,* 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 104 S.Ct 996 (1984); *United States v. Faulkner,* 17 F.3d 745 (5th Cir. 1994), cert denied, 115 S.Ct. 193 (1994); *United States v. Jensen,* 41 F.3rd 946 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1835 (1995).

See *United States v. Marmolejo,* 89 F.3d 1185, 1196-97 (5th Cir. 1996), *aff'd*, *Salinas v. United States*, 118 S.Ct. 469 (1997), in which the court held that a RICO conspirator need not agree personally to commit the pattern of racketeering activities but instead must simply agree to the objective of the RICO violation.

See *United States v. Robertson*, 115 S.Ct. 1732 (1995), for definition of "engaging in" interstate commerce.

For a discussion on establishing the existence of two separate entities, a "person" and a distinct "enterprise" under § 1962(c), see *Cedric Kushner Promotions, Ltd. v. King*, 121 S.Ct. 2087 (2001). In *King*, the Supreme Court held that the "distinctness" principle under § 1962(c) requires no more than the formal legal distinction between "person" and "enterprise" (namely, corporation). See *id*. at 2091. Therefore, the RICO provision applies when a corporate employee unlawfully

conducts the affairs of the corporation of which he is the sole owner–whether he conducts those affairs within the scope, or beyond the scope, of corporate authority. See *id*.

2.79

BANK ROBBERY

18 U.S.C. § 2113
(Subsections (a) and (d) Alleged in the Same Count)

Title 18, United States Code, Sections 2113(a) and 2113(d), make it a crime for anyone to take from a person [the presence of someone] by force and violence [by intimidation] any money [property] in the possession of a federally insured bank, and in the process of so doing to assault any person [put in jeopardy the life of any person] by the use of a dangerous weapon or device.

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

First: That the defendant intentionally took from the person [the presence of the person] money [property];

Second: That the money [property] belonged to or was in the possession of a federally insured bank at the time of the taking;

Third: That the defendant took the money [property] by means of force and violence [by means of intimidation]; and

Fourth: That the defendant assaulted some person [put in jeopardy the life of some person] by the use of a dangerous weapon or device, while engaged in taking the money [property].

A "federally insured bank" means any bank with deposits insured by the Federal Deposit Insurance Corporation.

[To take "by means of intimidation" is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm. It is not necessary to prove that the alleged victim was actually frightened, and neither is it necessary to show that the behavior of the defendant was so violent that it was likely to cause terror, panic, or hysteria. However, a taking would not be by "means of intimidation" if the fear, if any, resulted from the alleged victim's own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking

of money or property accompanied by intentional, intimidating behavior on the part of the defendant.]

[An "assault" may be committed without actually striking or injuring another person. An assault occurs whenever one person makes a threat to injure someone else and also has an apparent, present ability to carry out the threat such as by brandishing or pointing a dangerous weapon or device at the other.]

[A "dangerous weapon or device" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.]

[To "put in jeopardy the life of any person by the use of a dangerous weapon or device" means to expose someone else to a risk of death by the use of a dangerous weapon or device.]

Note

United States v. Burton, 126 F.3d 666, 670 (5th Cir. 1997), and *Richardson v. United States,* 119 S.Ct. 1707, 1710 (1999), list the elements of the offense, breaking them down differently than this instruction but including the same information.

The statute creates various methods of committing the offense, e.g., force and violence or intimidation, and assaulting or jeopardizing the life of a person by use of a dangerous weapon. Care must be taken in adapting the instruction to the allegations of the indictment. See *United States v. Bizzard*, 615 F.2d 1080, 1081-82 (5th Cir. 1980). The instruction above can be tailored to either element under subsection (a). This instruction also presupposes that the indictment charges a violation of subsections (a) and (d) in the same count. If a subsection (d) violation is not alleged, the fourth element and its corresponding definitions would be deleted. Also, when a violation of subsections (a) and (d) is alleged in one count, the jury should be instructed in an appropriate case that a violation of subsection (a) alone, i.e., the first three elements above, is a lesser included offense of the alleged violation of subsections (a) and (d) combined, i.e., all four elements. See Instruction on Lesser Included Offense at No. 1.33. On the other hand, 18 U.S.C. §2113(b) is not a lesser included offense of 18 U.S.C. §2113(a). *Carter v. United States*, 120 S.Ct. 2159 (2000) (distinguishing between the elements of a §2113(a) offense and a §2113(b) offense). Likewise, possession of stolen bank property, 18 U.S.C. §2113(c), is not a lesser included offense of bank robbery. *United States v. Buchner,* 7 F.3d 1149 (5th Cir. 1993), *cert.denied*, 114 S.Ct. 1331 (1994).

Under subsection (d), both the "assault" and the "putting in jeopardy" prongs require the use of a dangerous weapon. *Simpson v. United States*, 98 S.Ct. 909, 913 n.6 (1978). According to the Fifth Circuit, a dangerous weapon for purposes of this statute includes "an object reasonably perceived to be a dangerous weapon." Furthermore, under the same case, the Fifth Circuit stated that "(a) robber who does not display a dangerous weapon or an ostensibly dangerous weapon or device cannot be found guilty of aggravated bank robbery under §2113(d) unless the evidence establishes that he had a concealed weapon and that he used it in the course of the bank robbery." *United States v. Ferguson,* 211 F.3d 878, 883 (5th Cir. 2000).

For cases dealing with "intimidation," see *United States v. Baker*, 17 F.3d 94 (5th Cir. 1994); *United States v. McCarty*, 36 F. 3d 1349 (5th Cir. 1994).

2.80

BANK THEFT

18 U.S.C. § 2113(b)

Title 18, United States Code, Section 2113(b), makes it a crime for anyone to take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to or in the care, custody, control, management, or possession of any federally insured bank.

The indictment in this case states _____ [describe allegations in the indictment].

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

First: That the defendant took and carried away money [property] [a thing of value] belonging to [in the care, custody, control, management, possession of] _____ [name bank];

Second: That at that time _____ [name bank] had its deposits insured by the Federal Deposit Insurance Corporation;

Third: That the defendant took and carried away such money [property] [thing of value] with the intent to steal; and

Fourth: That such money [property] [thing of value] exceeded $1,000 in value.

Note

A "hot" check can constitute a violation of Section 2113(b) if there is sufficient evidence, other than the bad check itself, to prove intent. *United States v. Aguilar*, 967 F.2d 111 (5th Cir. 1992).

The conduct and expectations of a defendant and his associates can be considered in determining value. *United States v. Hooten*, 933 F. 2d. 293, 297 (5th Cir. 1991).

In holding that there was sufficient evidence to convict a defendant of bank theft, *United States v. Daniels*, 252 F.3d 411 (5th Cir. 2001), the Fifth Circuit relied on *Carter v. United States*, 120 S.Ct. 2159 (2000), that § 2113(b) requires a specific intent to steal or purloin. A defendant has the requisite intent under § 2113(b) if he enters a bank with no intent to commit a crime but thereafter develops an intent to steal. *United States v. Jones*, 993 F. 2d. 58, 61 (5th Cir. 1993).

Bell v. United States, 103 S.Ct. 2398, 2402 (1983), includes false pretenses as a "taking" under 18 U.S.C. § 2113(b), and the statute is not just limited to common law larceny.

For a definition of "steal," see Instruction No. 2.33 on 18 U.S.C. § 641.

18 U.S.C. § 2113(b) is not a lesser included offense of 18 U.S.C. § 2113(a). *Carter v. United States*, 120 S.Ct. 2159 (2000) (distinguishing between the elements of a § 2113(a) offense and a § 2113(b) offense).

If a disputed issue is whether the property stolen had a value of more than $1,000, the Court should consider giving a lesser included offense instruction, No. 1.33.

2.81

CARJACKING

18 U.S.C. § 2119

Title 18, United States Code, Section 2119, makes it a crime for anyone to take [attempt to take] a motor vehicle that has been transported in interstate [foreign] commerce from a person [the presence of someone] by force and violence [by intimidation] with the intent to cause death or serious bodily harm.

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

First: That the defendant intentionally took [attempted to take] from a person [presence of another] a motor vehicle described in the indictment;

Second: That the motor vehicle had been transported in interstate [foreign] commerce;

Third: That the defendant did so by means of force and violence [intimidation]; and

Fourth: That the defendant intended to cause death or serious bodily harm.

[*Fifth:* That serious bodily injury [death] resulted.]

[Serious bodily injury means bodily injury which involves (A) a substantial risk of death; or (B) extreme physical pain; or (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.]

Note

18 U.S.C. § 2119 describes three possible separate offenses, depending on the outcome: a carjacking in which (1) neither a serious injury nor a death occurs; (2) a serious injury occurs; or (3) a death occurs. In the latter two instances, the outcomes are elements of the offense and must be charged in the indictment and presented to the jury. *Jones v. United States*, 119 S.Ct. 1215 (1999). The carjacking statute specifically refers to 18 U.S.C. § 1365 for the definition of "serious bodily injury."

The Fifth Circuit, as well as other circuits, defines "presence of another" broadly to encompass situations where the person may be some distance from their vehicle, even inside a building. *United States v. Edwards,* 231 F.3d 933 (5th Cir. 2000); *United States v. Lake*, 150 F.3d

269 (3d Cir. 1998); *United States v. Moore*, 198 F.3d 793 (10th Cir. 1999); *United States v. Kimble,* 178 F.3d 1163 (11th Cir. 1999).

With respect to the intent to cause death or serious bodily harm, the United States Supreme Court has held that the element is fulfilled even if the intent is conditional, that is, the defendant intended to do such harm only if the vehicle was not relinquished. *Holloway v. United States*, 119 S.Ct. 966 (1999).

Definitions of Interstate Commerce, Foreign Commerce, and Commerce are in the general instructions at Nos. 1.39, 1.40, and 1.41.

2.82

INTERSTATE TRANSPORTATION OF A STOLEN MOTOR VEHICLE

18 U.S.C. § 2312

Title 18, United States Code, Section 2312, makes it a crime for anyone to transport [cause to be transported] in interstate commerce a stolen motor vehicle, knowing it to have been stolen.

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

First: That the defendant transported [caused to be transported] in interstate commerce a stolen motor vehicle; and

Second: That, at the time of such transportation, the defendant knew that the motor vehicle had been stolen.

The word "stolen" as used in the indictment in this case includes all wrongful and dishonest takings of motor vehicles with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.

Note

The Fifth Circuit, in dicta, has cited with approval a broad definition of "stolen" under this statute. *United States v. Aguilar*, 967 F.2d 111, 113 (5th Cir. 1992).

Definitions of Interstate Commerce, Foreign Commerce, and Commerce are in the general instructions at Nos. 1.39, 1.40, and 1.41.

2.83

RECEIPT OF A STOLEN MOTOR VEHICLE

18 U.S.C. § 2313

Title 18, United States Code, Section 2313, makes it a crime for anyone to receive any motor vehicle which has crossed a state or United States boundary after being stolen, knowing it to have been stolen.

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

First: That the motor vehicle in question was stolen;

Second: That the motor vehicle had crossed a state or United States boundary after being stolen;

Third: That the defendant received the stolen motor vehicle; and

Fourth: That the defendant knew the motor vehicle to have been stolen at the time the defendant received it.

Before a defendant can be convicted of the offense charged, the government must prove beyond a reasonable doubt that the defendant knew that the property had been stolen, but it is not required to prove that the defendant knew that the property had crossed a state or United States boundary after being stolen.

The word "stolen" includes all wrongful and dishonest takings of motor vehicles with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.

Note

United States v. Mitchell, 876 F.2d 1178 (5th Cir. 1989), states the elements of the offense.

Although the above instruction pertains only to a "receipt" offense, an indictment often alleges that the defendant "received, possessed, concealed, sold, and disposed of" a particular motor vehicle. In such cases, it is not necessary for the government to prove that all of these acts were in fact committed, as any one of them is a violation of the statute. The Fifth Circuit has held, however, that the statute describes two conceptual types of wrongdoing–housing of the vehicle and marketing

of the vehicle–and the jury must agree unanimously upon which way the offense was committed. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977); *in apparent accord*, *United States v. Trupin*, 117 F.3d 678, 687 (2d Cir. 1997). The United States Supreme Court, however, has criticized the reasoning of *Gipson*. *Schad v. Arizona*, 111 S.Ct. 2491 (1991). The Fifth Circuit revisited the impact of *Schad* on *Gipson* in *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993). While recognizing that a plurality of the Supreme Court had "criticized" *Gipson*, the Fifth Circuit did not overrule *Gipson*, but instead decided the case before it on a different theory. Based on the *Schad* opinion, two other circuit courts have since rejected the *Gipson* analysis. See *United States v. Sanderson*, 966 F.2d 184 (6th Cir. 1992); *United States v. Harris*, 959 F.2d 246 (D.C. Cir.), *cert. denied*, 113 S.Ct. 362 (1992). See general instruction on Unanimity of Theory, No. 1.25.

2.84

INTERSTATE TRANSPORTATION OF STOLEN PROPERTY

18 U.S.C. § 2314
(First Paragraph)

Title 18, United States Code, Section 2314, makes it a crime for anyone to transport [cause to be transported] in interstate commerce stolen property having a value of $5,000 or more, knowing it to have been stolen [converted] [taken by fraud].

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

First: That the defendant transported [caused to be transported] in interstate commerce items of stolen property as described in the indictment;

Second: That at the time of such transportation, the defendant knew that the property had been stolen [converted] [taken by fraud]; and

Third: That the items had a value of $5,000 or more.

The word "stolen" includes all wrongful and dishonest takings of property with the intent to deprive the owner of the rights and benefits of ownership, temporarily or permanently.

The word "value" means the face, par, or market value, whichever is the greatest.

Note

United States v. Anderson, 174 F.3d 515 (5th Cir. 1999) sets out the elements of the offense. See also *United States v. Mackay*, 33 F.3d 489 (5th Cir. 1994). A conviction requires that the goods actually travel in interstate or foreign commerce. *United States v. Payan*, 992 F.2d 1387 (5th Cir. 1993). Since the $5,000 value is jurisdictional, the property must have that value at the time it was stolen or at some point during its receipt, transportation, or concealment. *United States v. Watson*, 966 F.2d 161 (5th Cir. 1992).

Knowledge or reasonable foreseeability of interstate transport is not required to convict. It is enough if the defendant set in motion a series of events which in the normal course led to the transportation. See *United States v. Lennon,* 751 F.2d 737 (5th Cir. 1985).

The statute references three ways the property can be illegally obtained—by stealing, conversion, *or* fraud. The Fourth Circuit reversed a § 2314 conviction because the trial judge used the general term "stolen" in the instruction when the accusation was that property had been obtained

more specifically "by fraud," *United States v. Gibson*, 924 F.2d. 1053 (4th Cir. 1991). In *United States v. Vonsteen*, 872 F.2d. 626 (5th Cir. 1989), the Fifth Circuit stated as an element of the § 2314 offense that the defendant must have knowledge that the goods were stolen, converted, or taken by fraud. If the allegation involves a conversion or taking by fraud instead of stealing, the court should delete the definition of stealing and instead give a definition of conversion or fraud, as applicable.

Definitions of Interstate Commerce, Foreign Commerce, and Commerce are in the general instructions at Nos. 1.39, 1.40, and 1.41.

If the indictment charges commission of the offense in more than one manner, see the general instruction on Unanimity of Theory at No. 1.25.

2.85

RECEIPT, POSSESSION, OR SALE OF STOLEN PROPERTY

18 U.S.C. § 2315
(First Paragraph)

Title 18, United States Code, Section 2315, makes it a crime for anyone knowingly to receive, conceal, sell, or dispose of stolen property which has a value of $5,000 or more and which has crossed a state or United States boundary.

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

First: That the property named in the indictment was stolen [converted] [unlawfully taken];

Second: That such property had crossed a state or United States boundary after being stolen [converted] [unlawfully taken];

Third: That the defendant received, concealed, sold, or disposed of items of the stolen property;

Fourth: That the defendant knew the property was stolen [converted] [unlawfully taken] at the time the defendant received, concealed, sold, or disposed of it; and

Fifth: That such items had a value of $5,000 or more.

Before a defendant can be convicted of the offense charged, the government must prove beyond a reasonable doubt that the defendant knew that the property had been stolen, but it is not required to prove that the defendant knew that the property had crossed a state or United States boundary after being stolen.

The word "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.

The term "value" means the face, par, or market value, whichever is the greatest.

Note

United States v. Anderson, 174 F.3d 515 (5th Cir. 1999) sets forth the elements of the offense.

An indictment often alleges that the defendant "received, possessed, concealed, sold, and disposed of" certain stolen property. In such cases, it is not necessary for the government to prove that all of these acts were in fact committed, as any one of them is a violation of the statute. The Fifth Circuit has held, however, that the analogous statute of §2313 describes two conceptual types of wrongdoing–harboring the stolen property and marketing the property–and the jury must agree unanimously upon which way the offense was committed. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977); *in apparent accord*, *United States v. Trupin*, 117 F.3d 678, 687 (2d Cir. 1997). The United States Supreme Court, however, has criticized the reasoning of *Gipson*. *Schad v. Arizona*, 111 S.Ct. 2491 (1991). The Fifth Circuit revisited the impact of *Schad* on *Gipson* in *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993). While recognizing that a plurality of the Supreme Court had "criticized" *Gipson*, the Fifth Circuit did not overrule *Gipson*, but instead decided the case before it on a different theory. Based on the *Schad* opinion, two other circuit courts have since rejected the *Gipson* analysis. See *United States v. Sanderson*, 966 F.2d 184 (6th Cir. 1992); *United States v. Harris*, 959 F.2d 246 (D.C. Cir.), *cert. denied*, 113 S.Ct. 362 (1992). See general instruction on Unanimity of Theory at No. 1.25.

2.86

FAILURE TO APPEAR

18 U.S.C. § 3146

Title 18, United States Code, Section 3146, makes it a crime for anyone purposely to fail to appear in court [surrender for service of sentence] on a required date.

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

First: That the defendant was previously charged with [convicted of] _____ [name crime] in this court;

Second: That the defendant had been released on bond [his own recognizance] by a _____ [specify judicial officer] on condition that the defendant appear in court [surrender for service of sentence];

Third: That the defendant thereafter failed to appear [surrender for service of sentence] as required; and

Fourth: That the defendant knew he was required to appear [surrender for service of sentence] on that date and purposely failed to do so.

Note

Under some circumstances, the fourth element of the instruction should be modified. In *United States v. Allison,* 953 F.2d 870 (5th Cir. 1992), *cert. denied*, 112 S.Ct. 2319 (1992), *modified on rehearing,* 986 F.2d 896 (5th Cir. 1993), *cert. denied,* 116 S.Ct. 405 (1995), the trial court specifically refused to give the fourth element of the pattern instruction above, and instead substituted language that the defendant did so "willfully." The Fifth Circuit said that this was appropriate under the facts of the particular case. There, the defendant never received notice because it was mailed to a certain residence from which he had already absconded. The Fifth Circuit held: "When a defendant purposefully engages in a course of conduct designed to prevent him from receiving notice to appear, the conduct will fulfill the willful requirement just as clearly as when he receives and deliberately ignores a notice to appear." *Id.* at 876.

2.87

CONTROLLED SUBSTANCES—
POSSESSION WITH INTENT TO DISTRIBUTE

21 U.S.C. § 841(a)(1)

Title 21, United States Code, Section 841(a)(1), makes it a crime for anyone knowingly or intentionally to possess a controlled substance with intent to distribute it.

_____ is a controlled substance within the meaning of this law.

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

First: That the defendant knowingly possessed a controlled substance;

Second: That the substance was in fact _____;

Third: That the defendant possessed the substance with the intent to distribute it; and

Fourth: That the quantity of the substance was at least _____.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

Note

Applicable Instruction at No. 1.31 defining "possession" should be included.

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a quantity that would result in an enhanced penalty under 21 U.S.C. §841(b). See *United States v. Clinton*, 2001 WL 721366 at *1-4 (5th Cir. June 27, 2001); *United States v. Garcia,* 242 F.3d 593, 599-600 (5th Cir. 2001); *United States v. Salazar-Flores*, 238 F.3d 672, 673-74 (5th Cir. 2001); *United States v. Keith*, 230 F.3d 784, 786-87 (5th Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000); *United States v. Meshack*, 225 F.3d 556, 575-77 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 384 (2001), *amended on reh'g in part*, 244 F.3d 367 (5th Cir. 2001), *petition for cert filed* (U.S. June 25, 2001) (No. 00-10499). Generally, the exact quantity of the controlled substance need not be determined so long as the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of § 841(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. See *United States v. DeLeon*, 247 F.3d 598, 597 (5th Cir. 2001) (holding that an indictment's allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny). However, if there is a fact dispute as to

whether the amount is above or below a particular baseline (e.g., 100 kilograms of marijuana versus 99 kilograms), the court may consider submitting the higher amount in the fourth element, accompanied by a Lesser Included Offense instruction, No. 1.33, for the lower amount. Alternatively, the court may substitute for the fourth element a special interrogatory on the verdict form asking the jury to determine the exact amount of the controlled substance.

In a marijuana case, if the indictment fails to allege a drug quantity, the default sentencing provision for a conviction is provided by § 841(b)(1)(D). See *United States v. Gonzalez*, 2001 WL 815606, at *3 (5th Cir. July 19, 2001); see also *United States v. Garcia*, 242 F.3d 593, 599-600 (5th Cir. 2001). Further, when a jury is not instructed to find the amount of cocaine base (crack cocaine), the statutory maximum is determined under § 841(b)(1)(C). See *Clinton*, 2001 WL 721366 at *2; *United States v. Thomas*, 246 F.3d 438, 439 (5th Cir. 2001).

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a serious bodily injury or death that would result in an enhanced penalty under 21 U.S.C. § 841(b). If a disputed issue is whether the serious bodily injury or resulted from the use of the substance, the court should consider giving a Lesser Included Offense instruction, No. 1.33.

If the evidence warrants, the following instruction may be added: "The government must prove beyond a reasonable doubt that the defendant knew he was possessing a controlled substance, but need not prove that the defendant knew which particular controlled substance was involved." *United States v. Cartwright*, 6 F.3d 294, 303 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 671 (1994); *United States v. Fragoso*, 978 F.2d 896, 902 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1664 (1993).

With regard to the mens rea requirement under § 841, the Fifth Circuit has held that "knowledge" and "intent" are used in their common meaning in the conspiracy and possession statutes and therefore do not require further instruction. *United States v. Cano-Guel*, 167 F.3d 900, 906 (5th Cir. 1999) ("knowledge"); *United States v. Sanchez-Sotello*, 8 F.3d 202, 212 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1410 (1994) ("knowledge" and "intent").

For a discussion on the requisite scienter of "knowledge" in "hidden compartment" cases, see *United States v. Ortega Reyna*, 148 F.3d 540, 543-47 (5th Cir. 1998).

For when to give an instruction on the lesser included offense of simple possession, see *United States v. Fitzgerald*, 89 F.3d 218, 221 (5th Cir. 1996) and *United States v. Lucien*, 61 F.3d 366, 373-74 (5th Cir. 1995).

The Fifth Circuit has noted that the statutory definition of the term "distribute" is "defined broadly enough to include acts which perhaps traditionally would have been defined as mere aiding and abetting." *United States v. Brown*, 217 F.3d 247, 255 (5th Cir. 2000).

For cases discussing when to give an instruction on deliberate ignorance, see *United States v. Moreno*, 185 F.3d 465, 476 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 835 (2000); and *United States v. Posada-Rios*, 158 F.3d 832, 875 (5th Cir. 1998), *cert. denied*, *Grajales Murga v. United States*, 119 S.Ct. 1280 (1999). A deliberate ignorance instruction is found at No. 1.37.

2.88

UNLAWFUL USE OF COMMUNICATIONS FACILITY

21 U.S.C. § 843(b)

Title 21, United States Code, Section 843(b), makes it a crime for anyone knowingly to use a communication facility to commit [facilitate the commission of] another controlled substances offense.

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

First: That the defendant knowingly used a "communication facility" as charged; and

Second: That the defendant used the "communication facility" with the intent to commit [facilitate the commission of] the offense of _____ [e.g., possession with intent to distribute a controlled substance], as that offense has been defined in these instructions.

The term "communication facility" includes mail, telephone, wire, radio, and all other means of communication.

[To "facilitate" the commission of an offense means to make easier or less difficult, or to aid or assist in the commission of that offense.]

Note

The elements of the offense are discussed in *United States v. Mankins*, 135 F.3d 946, 949 (5th Cir. 1998).

The Fifth Circuit has held that "[t]here is no statutory requirement that the indictment specify the drug involved in the offense, nor has our court imposed a jurisprudential one." *United States v. Guerra-Marez*, 928 F.2d 665, 675 (5th Cir.), *cert. denied*, 112 S.Ct. 322 (1991). The communications forming the basis of a § 843(b) violation need not specifically refer to the drug trade as long as a reasonable jury could find that the defendant was discussing matters pertaining to the drug offense. *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 922-23 (5th Cir. 1992).

For a useful discussion of the meaning of "facilitating the commission of a drug offense," see *United States v. Dixon*, 132 F.3d 192, 200-01 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1581 (1998).

2.89

CONTROLLED SUBSTANCES—CONSPIRACY

21 U.S.C. § 846

Title 21, United States Code, Section 846, makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws of the United States. In this case, the defendant is charged with conspiring to _____ [describe the object of the conspiracy as alleged in the indictment, e.g., possess with intent to distribute a controlled substance, and give elements of object crime unless they are given under a different count of the indictment].

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

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

First: That two or more persons, directly or indirectly, reached an agreement to _____ _____ [describe the object of the conspiracy];

Second: That the defendant knew of the unlawful purpose of the agreement;

Third: That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose; and

Fourth: That the overall scope of the conspiracy involved at least _____ [amount] of _____ [substance].

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

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

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

Note

This instruction is also applicable to an offense under 21 U.S.C. § 963 with appropriate modifications for a conspiracy alleging importation as the object of the conspiracy.

If the evidence warrants, the following instruction may be added: "The government must prove beyond a reasonable doubt that the defendant conspired to possess with intent to distribute some controlled substance, but need not prove that the defendant knew which particular controlled substance was involved." *United States v. Cartwright*, 6 F.3d 294, 303 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 671 (1994); *United States v. Fragoso*, 978 F.2d 896, 902 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1664 (1993).

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a quantity that would result in an enhanced penalty under 21 U.S.C. §841(b). See *United States v. Clinton*, 2001 WL 721366 at *1-4 (5th Cir. June 27, 2001); *United States v. Green*, 246 F.3d 433, 435-37 (5th Cir. 2001); *United States v. Slaughter*, 238 F.3d 580, 583 (5th Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000); *United States v. Meshack*, 225 F.3d 556, 575-77 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 834 (2001), *amended on reh'g in part* 244 F.3d 367 (5th Cir. 2001), *petition for cert. filed*, (U.S. June 25, 2001) (No. 00-10499). Generally, the exact quantity of the controlled substance need not be determined so long as the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of §841(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. See *United States v. DeLeon*, 247 F.3d 593, 597 (5th Cir. 2001) (holding that an indictment's allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny). However, if there is a fact dispute as to whether the amount is above or below a particular baseline (e.g., 100 kilograms of

marijuana versus 99 kilograms), the court may consider submitting the higher amount in the fourth element, accompanied by a Lesser Included Offense instruction, No. 1.33, for the lower amount. Alternatively, the court may substitute for the fourth element a special interrogatory on the verdict form asking the jury to determine the exact amount of the controlled substance. Whatever approach is used, the jury's finding as to the scope of the overall conspiracy establishes the maximum sentencing range.

However, in a drug conspiracy, two separate findings are required. One is the quantity involved in the entire conspiracy, and the other is the quantity which each particular defendant knew or should have known was involved in the conspiracy. *United States v. Ruiz*, 43 F.3d 985, 990 (5th Cir. 1995); *United States v. Maseratti*, 1 F.3d 330, 340 (5th Cir. 1993). It is the Committee's view that the second finding, i.e., determining each particular defendant's liability, should continue to be made by the sentencing judge according to the principles discussed at § 1B1.3 of the Sentencing Guidelines. The *Apprendi* doctrine affects only the potential maximum sentence. It does not affect any statutory minimum sentences, see *United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000), nor sentence calculations under the sentencing guidelines, see *United States v. Clinton*, 2001 WL 721366 at *2; *United States v. Doggett*, 230 F.3d at 166.

Unlike under the general conspiracy statute, 18 U.S.C. § 371, the government need not prove an overt act by the defendants in furtherance of a drug conspiracy. See *United States v. Shabani*, 115 S.Ct. 382, 383 (1994); *accord United States v. Montgomery*, 210 F.3d 446, 449 (5th Cir. 2000).

Proof of a conspiracy will not support a conviction on substantive counts in the absence of a *Pinkerton* instruction informing the jury that the defendant could be deemed guilty of substantive counts committed by a co-conspirator in furtherance of a conspiracy in which the defendant participated. *United States v. Polk*, 56 F.3d 613, 619 (5th Cir. 1995). See Instruction No. 2.22, Conspirator's Liability for Substantive Count, following 18 U.S.C. § 371.

The foregoing instruction on the intent element was expressly approved in *United States v. Arditti*, 955 F.2d 331, 340 (5th Cir.), *cert. denied*, 113 S.Ct. 597 (1992).

Failure to instruct on the elements of the "object" crime of the conspiracy is at least "serious" error, if not plain error. *United States v. Vaglica*, 720 F.2d 388, 391 (5th Cir. 1983); see also *United States v. Smithers*, 27 F.3d 142, 146 (5th Cir. 1994).

When evidence arguably raises a question of multiple conspiracies, a defendant, upon request, is entitled to an instruction on that theory. See *United States v. Stowell*, 947 F.2d 1251, 1258 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1269 (1992); see also *United States v. Cyprian*, 197 F.3d 736, 741 (5th Cir. 1999), *cert. denied*, 121 S.Ct. 65 (2000) (stating that because the defendant made no request, the absence of a multiple conspiracies jury instruction is not "plain error"). See Instruction No. 2.21, Multiple Conspiracies, following 18 U.S.C. § 371.

So long as the jury instruction given by the trial court accurately reflects the law on conspiracy, there need not be a separate instruction on the defense of a "mere buyer-seller relationship." See *United States v. Asibor*, 109 F.3d 1023, 1034-35 (5th Cir.), *cert. denied*, 118 S.Ct. 254 (1997); *United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993).

2.90

CONTINUING CRIMINAL ENTERPRISE

21 U.S.C. § 848

Title 21, United States Code, Section 848, makes it a crime for anyone to engage in a continuing criminal enterprise.

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

First: That the defendant violated the Controlled Substances Act as charged in Counts _____ of the indictment;

Second: That such violations were part of a continuing series of violations, which means at least three violations of the Controlled Substances Act as charged in Counts_____ of the indictment. These violations must be connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts. You must unanimously agree on which of these underlying violations has been proved;

Third: That the defendant obtained substantial income or resources from the series of violations; and

Fourth: That the defendant undertook such violations in concert with five or more other persons with respect to whom the defendant occupied a position of organizer, supervisor, or manager. The five other persons need not have acted at the same time or in concert with each other. You need not unanimously agree on the identity of any other persons acting in concert with the defendant so long as each of you finds that there were five or more such persons.

The term "substantial income or resources" means income in money or property which is significant in size or amount as distinguished from some relatively insignificant, insubstantial, or trivial amount.

The term "organizer, supervisor, or manager" means that the defendant was more than a fellow worker and that the defendant either organized or directed the activities of five or more other

persons, exercising some form of managerial authority over them. The defendant need not be the only organizer or supervisor, and the "five or more persons" may include persons who are indirectly subordinate to the defendant through an intermediary.

Note

The requirement under "organizer, supervisor, or manager" that the defendant must exercise some degree of managerial authority is derived from the decision in *United States v. Garcia Abrego*, 141 F.3d 142, 166-67 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 182 (1998).

The statute does not state how many violations are required to satisfy the requirement of a "continuing series of violations," but the Fifth Circuit has determined that at least three predicate drug violations are required. See *United States v. Hicks*, 945 F.2d 107 (5th Cir. 1991); *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981). In *Richardson v. United States*, 119 S.Ct. 1707, 1710 (1999), the Supreme Court assumed, but did not decide, that three predicate violations were required. It further held that jury unanimity is required as to the predicate violations. See *id.* at 1713.

The jury need not unanimously agree, however, on the identity of the five participants in the fourth element. See *United States v. Short*, 181 F.3d 620, 623-24 (5th Cir. 1999), *cert. denied*, 120 S.Ct. (2000) (contrasting the *Richardson* case); *United States v. Brito*, 136 F.3d 397, 408 (5th Cir. 1998), *cert. denied*, 118 S.Ct. 1817 (1998); *United States v. Broussard*, 80 F.3d 1025, 1038 (5th Cir. 1996). The Fifth Circuit view is shared by a majority of the other circuits. *United States v. Hardin*, 209 F.3d 652, 659-60 (7th Cir. 2000); *United States v. Avery*, 128 F.3d 966, 973 (6th Cir. 1997); *United States v. Hall*, 93 F.3d 126, 130 (4th Cir. 1996); *United States v. Williams-Davis, et al.*, 90 F.3d 490, 509 (D.C. Cir. 1996); *United States v. Edmonds*, 80 F.3d 810, 822 (3d Cir. 1996); *United States v. Jelinek*, 57 F.3d 655, 658-59 (8th Cir. 1995); *United States v. Moorman*, 944 F.2d 801, 802-03 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1766; *United States v. Tarvers*, 833 F.2d 1068, 1074-75 (1st Cir. 1987); but see *United States v. McSwain*, 197 F.3d 472, 481-82 (10th Cir. 1999); *United States v. Jerome*, 942 F.2d 1328, 1330-31 (9th Cir. 1991). The *Richardson* opinion assumed, without deciding, that unanimity is not required on this element. 119 S.Ct. at 1713. The jury may conclude that the defendant managed at least five persons when the persons could be "considered either directly subordinate to [defendant] or indirectly subordinate through a [co-defendant]." See *United States v. Garcia Abrego*, 141 F.3d 142, 165 (5th Cir. 1998), *cert. denied*, 525 U.S. 878 (1998); *Tolliver*, 61 F.3d at 1216.

The Supreme Court has held that an § 846 drug conspiracy is a lesser included offense of the continuing criminal enterprise. See *Rutledge v. United States*, 116 S.Ct. 1241, 1250-51 (1996); *accord United States v. Brito*, 136 F.3d 397, 408 (5th Cir. 1998), *cert. denied*, 118 S.Ct. 1817 (1998). A defendant may be indicted for conspiracy and CCE, but may not be sentenced on both charges. *United States v. Tolliver*, 61 F.3d 1189, 1223 (5th Cir. 1995), *vacated on other grounds*, 116 S.Ct. 900, *cert. denied*, 116 S.Ct. 969 (1996). However, except for a drug conspiracy, predicate drug offenses are not lesser included offenses of the continuing criminal enterprise for the purposes of the Fifth Amendment's double jeopardy clause. *United States v. Devine*, 934 F.2d 1325, 1342-44 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 954 (1992).

The term "substantial income or resources," as defined in the instructions, adequately informed the jury on the factual issues presented in the case, and the district court was not required

to supplement its definition with specific monetary figures. See *United States v. Brito*, 136 F.3d 397, 407 (5th Cir. 1998), *cert. denied,* 118 S.Ct. 1817 (1998).

When the government seeks the death penalty under 21 U.S.C. § 848(e), the *Apprendi* doctrine requires the submission of additional elements. Furthermore, the statutory definition of "law enforcement officer" may need to be included. See 21 U.S.C. § 848(e)(2).

2.91

CONTROLLED SUBSTANCES— MANUFACTURING OPERATIONS

21 U.S.C. §§ 856(a)(1)

Title 21, United States Code, Section 856(a)(1), makes it a crime for anyone to knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance.

_____ is a controlled substance within the meaning of this law.

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

First: That the defendant knowingly opened [maintained] a place for the purpose of manufacturing [distributing] [using] a controlled substance.

"Maintaining" a place means that over a period of time, the defendant directed the activities of and the people in the place.

The government is not required to prove that the drug activity was the primary purpose of defendant's opening or maintaining a place, but instead must prove that drug activity was a significant reason why defendant opened or maintained the place.

Note

The elements of § 856(a)(1) are discussed in *United States v. Meshack*, 225 F.3d 556, 571 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 834 (2001), *amended on reh'g in part* 244 F.3d 367 (5th Cir. 2001), *petition for cert. filed*, (U.S. June 25, 2001) (No. 00-10499); *United States v. Morgan*, 117 F.3d 849, 855 (5th Cir. 1997), *cert. denied*, *Jackson v. United States*, 118 S.Ct. 454 (1997).

It is not required that drug distribution be the primary purpose of defendant's opening or maintaining his establishment, but only a significant purpose. *Meshack*, 225 F.3d at 571. The meaning of the phrase "the purpose" lies within the common understanding of jurors and needs no further definition. See *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995).

For a useful discussion of the meaning of "maintained," see *Morgan*, 117 F.3d at 855-58.

The Fifth Circuit has held that a deliberate ignorance instruction is inappropriate, and may constitute reversible error, if given in a section 856(a)(1) case. See *United States v. Soto-Silva*, 129 F.3d 340, 344 (5th Cir. 1997); *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990).

For a useful discussion distinguishing the "purpose" requirement between §856(a)(1) and §856(a)(2), see *United States v. Chen*, 913 F.2d at 189-191.

In a prosecution under 21 U.S.C. § 856(a)(2), a separate offense is committed each day a narcotics facility is "made available." *United States v. Cooper*, 966 F.2d 936, 945 (5th Cir.), *cert. denied*, 113 S.Ct. 461 (1992).

2.92

CONTROLLED SUBSTANCES—UNLAWFUL IMPORTATION

21 U.S.C. §§ 952(a) and 960(a)(1)

Title 21, United States Code, Sections 952(a) and 960(a)(1), make it a crime for anyone knowingly or intentionally to import a controlled substance.

_____ is a controlled substance within the meaning of this law.

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

First: That the defendant brought into the United States from a place outside the United States a substance, which in fact was _____ ;

Second: That the defendant knew the substance he was bringing into the United States was a controlled substance;

Third: That the defendant knew that the substance would enter the United States; and

Fourth: That the quantity of the substance was at least _____.

Note

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a quantity that would result in an enhanced penalty under 21 U.S.C. §841(b). See *United States v. Clinton*, 2001 WL 721366 at *1-4 (5th Cir. June 27, 2001); *United States v. Slaughter*, 238 F.3d 580, 583 (5th Cir. 2000) (21 U.S.C. § 846); *United States v. Keith*, 230 F.3d 784, 786-87 (5th Cir. 2000) (21 U.S.C. § 841); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000) (21 U.S.C. §§ 841 and 846). Generally, the exact quantity of the controlled substance need not be determined so long as the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of § 960(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. See *United States v. DeLeon*, 247 F.3d 593, 597 (5th Cir. 2001) (holding that an indictment's allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny). However, if there is a fact dispute as to whether the amount is above or below a particular baseline (e.g., 100 kilograms of marijuana versus 99 kilograms), the court may consider submitting the higher amount in the fourth element, accompanied by a Lesser Included Offense instruction, No. 1.33, for the lower amount. Alternatively, the court may substitute for the fourth element a special interrogatory on the verdict form asking the jury to determine the exact amount of the controlled substance.

Although dealing with § 841 rather than §§ 952(a) and 960(b), the cases of *United States v. Garcia*, 242 F.3d 593, 599-600 (5th Cir. 2001), and *United States v. Thomas*, 246 F.3d 438, 439 (5th Cir. 2001), are instructive in determining the default sentencing provision when the indictment fails to allege a drug quantity.

The elements of this offense are discussed in *United States v. Moreno*, 185 F.3d 465, 471 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 835 (2000), and *United States v. Medina*, 161 F.3d 867, 873 (5th Cir. 1998), *cert. denied*, 526 U.S. 1043 (1999).

If the evidence warrants, the following instruction may be added: "The government must prove beyond a reasonable doubt that the defendant knew he was possessing a controlled substance, but need not prove that the defendant knew which particular controlled substance was involved." *United States v. Cartwright*, 6 F.3d 294, 303 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 671 (1994); *United States v. Fragoso*, 978 F.2d 896, 902 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1664 (1993).

For a particular discussion of the third element, see *United States v. Ojebode*, 957 F.2d 1218, 1227 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1291 (1993) (indicating that so long as defendant knows he is bringing a controlled substance into the United States, it is not necessary to prove that defendant intended the United States to be the final destination of the substance).

2.93

EXPORTING ARMS WITHOUT A LICENSE

22 U.S.C. § 2778(c) and 22 C.F.R. § 127.1(a)

Title 22, United States Code, Section 2778, and Title 22, Code of Federal Regulations, Section 127.1(a), make it a crime for anyone willfully to export from the United States any defense article which appears on the United States Munitions List without first obtaining a license or written approval from the Department of State.

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

First: That the defendant exported articles;

Second: That the articles were listed on the United States Munitions List at the time of export;

Third: That the defendant did so without obtaining a license [written approval] from the State Department; and

Fourth: That the defendant acted "willfully," that is, that the defendant knew such license [approval] was required for the export of these articles and intended to violate the law by exporting them without such license [approval].

Note

The Fifth Circuit held in *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978), that the statute's requirement of willfulness connotes the voluntary, intentional violation of a known legal duty. See *United States v. Covarrubias*, 94 F.3d 172 (5th Cir. 1996); *United States v. Hernandez*, 662 F.2d 289 (5th Cir. 1981). See also *United States v. Ortiz-Loya*, 777 F.2d 973, 980 (5th Cir. 1985). *Covarrubias* is cited in *United States v. Rodriguez*, 132 F.3d 208 (5th Cir. 1997), for the proposition that mere awareness of general illegality is insufficient to satisfy a knowledge-of-the-law requirement. The Committee recognizes that *United States v. Bryan*, 118 S.Ct. 1939 (1998), might not require the strict scienter of *Rodriguez* for offenses under the Firearms Owners' Protection Act, but recommends that *Covarrubias* be followed for offenses under 22 U.S.C. § 2278, as being a technical statute.

2.94

RECEIVING OR POSSESSING UNREGISTERED FIREARMS

26 U.S.C. § 5861(d)

Title 26, United States Code, Section 5861(d), makes it a crime for anyone knowingly to possess certain kinds of unregistered firearms such as _____ [describe firearm in the indictment].

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

First: That the defendant knowingly possessed a firearm;

Second: That this firearm was a _____ [describe firearm under § 5845, e.g. shotgun having a barrel of less than 18 inches in length];

Third: That the defendant knew of the characteristics of the firearm [describe, e.g., that it was a shotgun having a barrel of less than 18 inches in length];

Fourth: That this firearm was [could readily have been put] in operating condition; and

Fifth: That this firearm was not registered to the defendant in the National Firearms Registration and Transfer Record. It does not matter whether the defendant knew that the firearm was not registered or had to be registered.

Note

Firearms are defined by 26 U.S.C. § 5845. This instruction assumes that the defendant is charged with possession of a shotgun less than 18 inches in barrel length. Substitute other firearm characteristics as necessary.

Section 5861 requires no specific intent or knowledge that a firearm is unregistered. *United States v. Freed*, 91 S.Ct. 1112, 1117 (1971), *reh'g denied*, 91 S.Ct. 2201 (1971); *United States v. Moschetta*, 673 F.2d 96, 100 (5th Cir. 1982).

The government must prove that the defendant knew of the features or characteristics of the firearm that are within the definition at 26 U.S.C. § 5845. *Rogers v. United States*, 118 S.Ct. 673 (1998); *Staples v. United States*, 114 S.Ct. 1793 (1994); *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (en banc) (reversing previous circuit law of *United States v. Vasquez*, 476 F.2d 730 (5th Cir. 1973), *cert. denied*, 94 S.Ct. 181 (1973)). *United States v. Reyna*, 130 F.3d 104 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1328 (1998), holds that the government is required to prove the defendant had knowledge of the characteristics of the firearm that violate the law.

See *United States v. Hooker*, 997 F.2d 67 (5th Cir. 1993), for similar treatment of 18 U.S.C. § 922(k).

It is not an element that the firearm be registerable. *United States v. Thomas*, 15 F.3d 381 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1798 (1995).

It is well-established that the government must prove that the firearm can be operated or readily restored to operating condition. See *United States v. Woods*, 560 F.2d 660, 664-65 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 1452 (1978).

2.95

TAX EVASION

26 U.S.C. § 7201

Title 26, United States Code, Section 7201, makes it a crime for anyone willfully to attempt to evade or defeat the payment of federal income tax.

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

First: That the defendant owed substantially more tax than he reported on his ____ [year] income tax return because he _____ [e.g., intentionally failed to report income];

Second: That when the defendant filed that income tax return he knew that he owed substantially more taxes to the government than he reported on that return; and

Third: That when the defendant filed his ____ [year] income tax return, he did so with the purpose of evading payment of taxes to the government.

The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but the government must prove beyond a reasonable doubt that the defendant attempted to evade or defeat payment of some substantial portion of the additional tax he knew he was required by law to pay.

Note

The government must allege and prove an affirmative act and cannot rely upon a failure to act or failure to file a tax return, even if that failure was willful. *Spies v. United States*, 63 S.Ct. 364 (1943); *United States v. Masat*, 896 F.2d 88 (5th Cir. 1990), *cert. denied*, 113 S.Ct. 108 (1992). This pattern charge deals with the most common § 7201 charge, involving an attempt that consists of the affirmative act of filing a false return. When the act element is alleged to be something other than filing a false return, the instruction must be adapted accordingly to make clear to the jury that merely failing to perform a duty under the tax laws is not an attempt to evade. *Id.*

Section 7201 requires willfulness. A willful violation of § 7201 has been defined as the voluntary, intentional violation of a known legal duty. *Cheek v. United States*, 111 S.Ct. 604, 610 (1991). The instruction defines the term as it is used in the context of tax offenses. *United States v. Pomponio*, 97 S.Ct. 22, 23 (1976); *United States v. Burton*, 737 F.2d 439 (5th Cir. 1984).

If a defendant has a good faith belief that he is not liable for a tax, he does not act willfully, even if his belief is objectively unreasonable. *Cheek v. United States*, supra; *United States v. Wisenbaker*, 14 F.3d 1022, 1025 (5th Cir.1994). It is improper for the court to instruct the jury that a defendant's misunderstanding or unreasonable belief is not a defense. *Cheek v. United States*, supra; *United States v. Burton*, supra.

The government may need to detail its theory of proof, and the jury must be instructed on it, at least where a net worth theory is employed. *Holland v. United States*, 75 S.Ct. 127, 132 (1954); *Dupree v. United States*, 218 F.2d 781 (5th Cir.1955) *reh'g denied*, 220 F.2d 748 (5th Cir. 1955) (per curiam).

2.96

FALSE STATEMENTS ON INCOME TAX RETURN

26 U.S.C. § 7206(1)

Title 26, United States Code, Section 7206(1), makes it a crime for anyone willfully to make a false material statement on an income tax return.

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

First: That the defendant signed an income tax return that contained a written declaration that it was made under penalties of perjury;

Second: That in this return the defendant falsely stated that _____ [state material matters asserted, e.g., the defendant received gross income of $_____ during the year____];

Third: That the defendant knew the statement was false;

Fourth: That the false statement was material; and

Fifth: That the defendant made the statement willfully, that is, with intent to violate a known legal duty.

A statement is "material" if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

Note

The elements of this offense are discussed in *United States v. Mann,* 161 F.3d 840, 848 (5th Cir. 1998), *cert. denied,* 119 S.Ct. 1766 (1999). If the indictment involves a statement or document other than an income tax return, then tailor the instruction accordingly.

Where the indictment charges the defendant with a material omission, the second element must be modified to show what the return failed to state.

The definition of "material" is discussed in *Neder v. United States*, 119 S.Ct. 1827, 1837 (1999). In *Neder*, the Supreme Court held that materiality is an essential element of this crime and that the defendant has a constitutional right to have that issue submitted to the jury. *Neder*, 119 S.Ct. at 1833, 1837.

Willfulness, as it relates to tax offenses, is defined as the intentional violation of a known legal duty. *Cheek v. United States*, 111 S.Ct. 604, 610 (1991); *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993).

Under certain circumstances reliance on a qualified tax preparer is an affirmative defense to a charge of willful filing of a false tax return. *United States v. Charroux,* 3 F.3d 827, 831 (5th Cir. 1993); *United States v. Wilson,* 887 F.2d 69, 73 (5th Cir. 1989). See also *United States v. Masat,* 948 F.2d 923, 930 (5th Cir. 1991), *cert. denied,* 113 S.Ct. 108 (1992) (to establish reliance as a defense, defendant must show that (1) he relied in good faith on a professional and (2) he made complete disclosures of all the relevant facts).

2.97

AIDING OR ASSISTING IN PREPARATION OF FALSE DOCUMENTS UNDER INTERNAL REVENUE LAWS

26 U.S.C.§ 7206(2)

Title 26, United States Code, Section 7206(2), makes it a crime for anyone willfully to aid or assist in the preparation under the internal revenue laws of a document which is false or fraudulent as to any material matter.

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

First: That the defendant aided in [assisted in] [procured] [counseled] [advised] the preparation [presentation] of a return [an affidavit] [a claim] arising under [in connection with any matter arising under] the internal revenue laws;

Second: That this return [affidavit] [claim] falsely stated that _____ [state material matters asserted, e.g., _____ received gross income of $_____ during the year _____];

Third: That the defendant knew that the statement in the return [affidavit] [claim] was false;

Fourth: That the false statement was material; and

Fifth: That the defendant aided in [assisted in] [procured] [counseled] [advised] the preparation [presentation] of this false statement willfully, that is, with intent to violate a known legal duty.

It is not necessary that the government prove that the falsity or fraud was with the knowledge or consent of the person authorized or required to present such return [claim] [affidavit] [document].

A statement is "material" if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

Note

See note to False Statements On Income Tax Return, Instruction No. 2.96.

The elements of this offense are discussed in *United States v. Clark,* 139 F.3d 485, 489 (5th Cir.)*, cert. denied,* 119 S.Ct. 227 (1998).

Where the indictment charges the defendant with a material omission, the second element must be modified to show what the return failed to state.

A person need not actually sign or prepare a tax return to aid in its preparation. *United States v. Coveney,* 995 F.2d 578, 588 (5th Cir. 1993). In *United States v. Bryan,* 896 F.2d 68 (5th Cir. 1990), *cert. denied,* 111 S.Ct. 76 (1990), the Fifth Circuit held that the following conduct in promoting fraudulent tax shelters was sufficient to support the defendants' convictions: speaking at seminars to generate clients for the scheme, participating in the decision to create an offshore corporation for the clients and discussing how to avoid discovery, and discussing various methods to secretly return offshore gains to clients.

2.98

REPORTS ON EXPORTING AND IMPORTING MONETARY INSTRUMENTS

31 U.S.C. § 5316(a)(1)

Title 31, United States Code, Section 5316(a)(1), makes it a crime for anyone intentionally to fail to report the exporting [importing] of monetary instruments of more than $10,000 at one time.

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

First: That the defendant knowingly transported [was about to transport] more than $10,000 in _____ [describe the alleged monetary instrument; e.g., currency] at one time from a place in the United States to or through a place outside the United States [to a place in the United States from or through a place outside the United States];

Second: That the defendant knew that he had a legal duty to file a report of the amount of currency transported; and

Third: That the defendant knowingly failed to file the report, with intent to violate the law.

[Fourth: That the defendant willfully violated this law while violating another law of the United States, specifically _____ (describe the law mentioned in the indictment) [as part of a pattern of illegal activity involving more than $100,000 in a 12-month period].]

Note

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts which would result in an enhanced penalty under 31 U.S.C. § 5322.

To convict under this statute, the government must prove that "the defendant had actual knowledge of the currency reporting requirement and voluntarily and intentionally violated that known legal duty." *United States v. O'Banion*, 943 F.2d 1422, 1426-27 (5th Cir. 1991) (citations omitted).

This offense can be committed through structuring. See 31 U.S.C. § 5324(b). Instruction No. 2.99, Structuring Transactions to Evade Reporting Requirements, must then be adjusted accordingly.

Use definitions in 31 U.S.C. § 5312 if needed in a particular case.

2.99

STRUCTURING TRANSACTIONS TO EVADE REPORTING REQUIREMENTS

31 U.S.C. § 5324(a)(3)

Title 31, United States Code, Section 5324(a)(3), makes it a crime for anyone to structure [attempt to structure] [assist in structuring] any transaction with one or more domestic financial institutions in order to evade the reporting requirements of § 5313(a) of Title 31 of the United States Code.

Section 5313(a) and its implementing regulations require the filing of a government form called a Currency Transaction Report (CTR). Those regulations require that every domestic financial institution which engages in a currency transaction of over $10,000 must file a report with the Internal Revenue Service furnishing, among other things, the identity and address of the person engaging in the transaction, the person or entity, if any, for whom he is acting, and the amount of the currency transaction. The Currency Transaction Report must be filed within 15 days of the transaction.

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

First: That the defendant knowingly structured [attempted to structure] [assisted in structuring] a currency transaction;

Second: That the defendant knew of the domestic financial institution's legal obligation to report transactions in excess of $10,000; and

Third: That the purpose of the structured transaction was to evade that reporting obligation.

[*Fourth:* That the defendant violated this law while violating another law of the United States, specifically _____ (describe the law mentioned in the indictment) [as part of a pattern of illegal activity involving more than $100,000 in a 12-month period].]

A person structures a transaction if that person, acting alone or with others, conducts one or more currency transactions in any amount, at one or more financial institutions, on one or more days,

for the purpose of evading the reporting requirements described earlier. Structuring includes breaking down a single sum of currency exceeding $10,000 into smaller sums, or conducting a series of currency transactions, including transactions at or below $10,000. Illegal structuring can exist even if no transaction exceeded $10,000 at any single financial institution on any single day.

It is not necessary for the government to prove that a defendant knew that structuring a transaction to avoid triggering the filing requirements was itself illegal. The government need prove beyond a reasonable doubt only that a defendant structured [assisted in structuring] [attempted to structure] currency transactions with knowledge of the reporting requirements and with the specific intent to avoid said reporting requirements.

Note

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts which would result in an enhanced penalty under 31 U.S.C. § 5324(c).

This instruction is based on a charge of structuring to avoid the requirements of 31 U.S.C. § 5313(a). The structuring statute can also be used with other reporting statutes, e.g., §§ 5325 and 5316, and these instructions would have to be adjusted accordingly.

Ratzlaf v. United States, 114 S.Ct. 655, 657-58 (1994), which held that the defendant must act "willfully," was effectively overruled by subsequent legislation adding § 5324(c), thereby making it unnecessary to refer to § 5322 for enforcement of the statute. The new § 5324(c), unlike § 5322, does not require that the defendant act "willfully." See Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253 (1994).

If the case involves monetary instruments other than currency, substitute appropriate term. See definition of "monetary instruments" and other pertinent definitions in 31 U.S.C. § 5312.

If the evidence is that the bank filed the CTR as required, then the judge may want to tell the jury that the defendant may be found guilty of this offense even if the bank properly filed the CTR.