ELEVENTH CIRCUIT

PATTERN JURY INSTRUCTIONS

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

(CRIMINAL CASES)

2003

JUDICIAL COUNCIL

of the

ELEVENTH CIRCUIT

RESOLUTION

Resolved that the Committee on Pattern Jury Instructions of the Judicial Council of the Eleventh Circuit is hereby authorized to distribute to the District Judges of the Circuit for their aid and assistance, and to otherwise publish, the Committee's Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (2003 revision); provided, however, that this resolution shall not be construed as an adjudicative approval of the content of such instructions which must await case by case review by the Court.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Date:_____ _____

Chief Judge
United States Court of Appeals
For the Council

Preface

These Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (2003 revision), update and extend the 1997 edition published by a predecessor committee of this Circuit whose work, in turn, built upon the Pattern Jury Instructions (Criminal Cases) first published in the former Fifth Circuit in 1978.

The objectives have remained constant. First, to simplify and to provide in words of common usage and understanding, a body of brief, uniform jury instructions, fully and accurately stating the law without needless repetition. Second, to organize the instructions in a sequential format designed to facilitate rapid assembly and reproduction of a complete jury charge in each case, suitable for submission to the jury in written form.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

As in the 1997 Edition, the instructions have been arranged in four groups:

A. Basic Instructions

B. Special Instructions

C. Offense Instructions

D. Trial Instructions.

A. The Basic Instructions cover in a logical sequence those subjects that should normally be included in the Court's instructions in every case. When necessary, alternate versions of each instruction are provided for selection depending upon the variable circumstances of the individual case, i.e., the election of a defendant to testify or not to testify; the various forms of impeachment frequently consummated during the trial; whether there was expert opinion evidence under FRE 702; whether willfulness is an essential element of any offense charged; and whether the case involves single or multiple defendants, and single or multiple counts.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

B. The Special Instructions cover a number of subjects frequently included in the charge to the jury but may not be necessary in every case. They fall into three groups: (1) Instructions dealing with specific issues concerning the jury's consideration of the evidence such as the testimony of accomplices or informers, and those testifying with grants of immunity or some form of plea agreement; the evaluation of confessions or incriminating statements; the evaluation of similar acts evidence admitted under FRE 404(b); and the evaluation of identification testimony. (2) Instructions frequently given in tandem with the pertinent Offense Instruction(s) such as the definition of

"possession;" the concept of criminal agency or aiding and abetting (18 USC § 2); special state of mind instructions such as deliberate ignorance (as proof of knowledge), and intentional violation of a known legal duty (as proof of willfulness). (3) Instructions on theories of defense such as character evidence; entrapment; alibi; insanity; coercion and intimidation; good faith defense to a charge of intent to defraud; and good faith reliance upon advice of counsel.

C. The Offense Instructions cover over 100 of the most frequently prosecuted federal offenses. They are arranged sequentially according to section number in Title 18, United States Code, beginning with 18 USC § 111, Assaulting a Federal Officer. Federal crimes in other titles are arranged sequentially by Title and section number following the instructions under Title 18. These include, primarily, immigration offenses under Title 8; controlled substances offenses under Title 21; and tax offenses under Title 26.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A separate instruction is provided for each offense beginning with a generic description of the nature of the crime followed by an enumeration of the essential elements of the offense and the definitions of the key words or phrases employed in the statement of the elements. Each instruction, when combined with the appropriate Special

Instruction applicable to the case, is designed to be a complete charge concerning the offense to which it relates.

D. The Trial Instructions also fall into three groups. (1) Alternate sets of Preliminary Instructions, to be given before opening statements, consisting of a short form designed to be used in ordinary cases of anticipated short duration, and a longer form for possible use in more complicated, protracted cases. (2) A collection of explanatory instructions frequently stated to the jury during the trial itself. (3) A modified "Allen" charge for use in appropriate circumstances during deliberations when the jury reports an impasse.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Judge Wm. Terrell Hodges	Chair
Judge James H. Hancock Chief Judge W. Harold Albritton	Alabama
Chief Judge Roger Vinson Judge Donald M. Middlebrooks	Florida
Chief Judge B. Avant Edenfield Judge Julie E. Carnes	Georgia

Directions For Use

In preparing a complete jury charge, one should first refer to the Index of the Basic Instructions and, proceeding sequentially from one instruction to the next beginning with Basic Instruction 1, select the instruction or alternative version of each instruction that fits the case. At the appropriate point in the assembly of the charge, directions are given in the Index to refer to the indices of the Special Instructions and the Offense Instructions, respectively, for selection and incorporation of the applicable charges from those sources.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

After the complete package of instructions has been assembled in that manner, the Offense Instructions included in the charge should be carefully reviewed to determine whether editing will be required to tailor the particular instruction to the case. Many of the Offense Instructions contain bracketed material consisting of examples or alternative statements that may or may not apply in a particular case. Such material must be edited and tailored to fit the case, and the brackets must be removed.

INDEX TO
BASIC INSTRUCTIONS

Instruction Number			
1		Face Page - Introduction	4
2	.1	Duty To Follow Instructions, etc.	5
	.2	Duty To Follow Instructions, etc. (When Any Defendant Does Not Testify)	6
3		Definition Of Reasonable Doubt	8
4	.1	Evidence - - Direct And Circumstantial Argument Of Counsel	9
	.2	Evidence - - Direct And Circumstantial Argument Of Counsel And Comment Of Court	11
5		Credibility Of Witnesses	13
6	.1	Impeachment - - Inconsistent Statement	14
	.2	Same - - Inconsistent Statement And Felony Conviction	15
	.3	Same - - Inconsistent Statement (Defendant Testifies With No Felony Conviction)	16

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

INDEX TO
BASIC INSTRUCTIONS
(Continued)

Instruction Number			
6	.4	Same - - Inconsistent Statement (Defendant Testifies With Felony Conviction)	17
	.5	Same - - Inconsistent Statement And Felony Conviction (Defendant Testifies With No Felony Conviction)	19
	.6	Same - - Inconsistent Statement And Felony Conviction (Defendant Testifies With Felony Conviction)	20
	.7	Same - - Bad Reputation (or Opinion) Concerning Truthfulness (May Be Used With 6.1 - 6.6)	22
7		Expert Witnesses	23

Cited in U.S. v. Chiarer, No. 06-10642, archived on January 28, 2008

[INSERT HERE SPECIAL INSTRUCTIONS 1 - 5, IF APPLICABLE]

8		Introduction To Offense Instructions (In Conspiracy Cases)	24

[INSERT HERE THE APPROPRIATE OFFENSE INSTRUCTIONS AND ADDITIONAL SPECIAL INSTRUCTIONS, IF ANY, PERTAINING TO CASE]

INDEX TO
BASIC INSTRUCTIONS
(Continued)

Instruction Number			
9	.1	On Or About - - Knowingly - - Willfully	25
	.2	On Or about - - Knowingly (Only) (When Willfulness Or Specific Intent Is Not An Element)	28
10	.1	Caution - - Punishment (Single Defendant - Single Count)	29
	.2	Same - - (Single Defendant - Multiple Counts)	30
	.3	Same - - (Multiple Defendants - Single Count)	31
	.4	Same - - (Multiple Defendants - Multiple Counts)	32
11		Duty To Deliberate	33
12		Verdict	34

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Face Page - Introduction

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____
_____ DIVISION

UNITED STATES OF AMERICA

-vs- CASE NO.

COURT'S INSTRUCTIONS
TO THE JURY

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions - - what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crime charged in the indictment.

2.1
Duty To Follow Instructions
Presumption Of Innocence

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Cited in U.S. v. Chevrer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) (The due process clause protects all criminal defendants "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see also Harvell v. Nagle, 58 F.3d 1541, 1542 (11th Cir. 1995), reh'g denied, 70 F.3d 1287 (11th Cir. 1995).

2.2
Duty To Follow Instructions
Presumption Of Innocence
(When Any Defendant Does Not Testify)

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all; and if a Defendant elects not to testify, you cannot consider that in any way during your deliberations. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Cited in U.S. v. Ohrer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Teague, 953 F.2d 1525, 1539 (11th Cir. 1992), cert. denied, 506 U.S. 842, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992), Defendant who does not testify is entitled to instruction that no inference may be drawn from that election; see also United States v. Veltman, 6 F.3d 1483, 1493 (11th Cir. 1993) (Court was "troubled" by "absence of instruction on the presumption of innocence at the beginning of the trial . . . . Although the Court charged the jury on the presumption before they retired to deliberate, we believe it extraordinary for a trial to progress to that stage with nary a mention of this jurisprudential bedrock.")

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

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

A "reasonable doubt" is a real 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. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Daniels, 986 F.2d 451 (11th Cir. 1993),opinion readopted on rehearing, 5 F.3d 495 (11th Cir. 1993), cert. denied, 114 S.Ct. 1615, 128 L.Ed.2d 342 (1994) approves this definition and instruction concerning reasonable doubt; see also United States v. Morris, 647 F.2d 568 (5th Cir. 1981); Victor v. Nebraska, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (discussing "reasonable doubt" definition and instruction).

4.1
Consideration Of The Evidence
Direct And Circumstantial
Argument Of Counsel

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

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 facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Clark, 506 F.2d 416 (5th Cir. 1975), cert. denied, 421 U.S. 967, 95 S.Ct. 1957, 44 L.Ed.2d 454 (1975) approves the substance of this instruction concerning the lack of distinction between direct and circumstantial evidence; see also United States v. Barnette, 800 F.2d 1558, 1566 (11th Cir. 1986), reh'g denied, 807 F.2d 999 (11th Cir. 1986), cert. denied, 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987) (noting that the "test for evaluating circumstantial evidence is the same as in evaluating direct evidence") (citing United States v. Henderson, 693 F.2d 1028, 1030 (11th Cir. 1983)).

United States v. Granville, 716 F.2d 819, 822 (11th Cir. 1983) notes that the jury was correctly instructed that the arguments of counsel should not be considered as evidence (citing United States v. Phillips, 664 F.2d 971, 1031 (5th Cir. 1981)); see also United States v. Siegel, 587 F.2d 721, 727 (5th Cir. 1979).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

4.2
Consideration Of The Evidence, Direct And Circumstantial - - Argument Of Counsel Comments By The Court

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

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 facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

ANNOTATIONS AND COMMENTS

United States v. Clark, 506 F.2d 416 (5th Cir. 1975), cert. denied, 421 U.S. 967, 95 S.Ct. 1957, 44 L.Ed.2d 454 (1975) approves the substance of this instruction concerning the lack of distinction between direct and circumstantial evidence; see also United States v. Barnette, 800 F.2d 1558, 1566 (11th Cir. 1986), reh'g denied, 807 F.2d 999 (11th Cir. 1986), cert. denied, 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987) (noting that the "test for evaluating circumstantial evidence is the same as in evaluating direct evidence") (citing United States v. Henderson, 693 F.2d 1028, 1030 (11th Cir. 1983)).

United States v. Hope, 714 F.2d 1084, 1087 (11th Cir. 1983) ("A trial judge may comment upon the evidence as long as he instructs the jury that it is the sole judge of the facts and that it is not bound by his comments and as long as the comments are not so highly prejudicial that an instruction to that effect cannot cure the error.") (citing United States v. Buchanan, 585 F.2d 100, 102 (5th Cir. 1978)). See also United States v. Jenkins, 901 F.2d 1075 (11th Cir. 1990).

United States v. Granville, 716 F.2d 819, 822 (11th Cir. 1983) notes that the jury was correctly instructed that the arguments of counsel should not be considered as evidence (citing United States v. Phillips, 664 F.2d 971, 1031 (5th Cir. 1981)); see also United States v. Siegel, 587 F.2d 721, 727 (5th Cir. 1979).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

5
Credibility Of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? 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 seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

6.1
Impeachment - - Inconsistent Statement

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. D'Antignac, 628 F.2d 428, 435-36 n.10 (5th Cir. 1980), cert. denied, 450 U.S. 967, 101 S.Ct. 1485, 67 L.Ed.2d 617 (1981) approved instruction (used in conjunction with Basic Instruction 5 and Special Instruction 2.1 as befitted the facts of that case). See also United States v. McDonald, 620 F.2d 559, 565 (5th Cir. 1980), and United States v. Soloman, 856 F.2d 1572, 1578 (11th Cir. 1988), reh'g denied, 863 F.2d 890 (1988), cert. denied, 489 U.S. 1070, 109 S.Ct. 1352, 103 L.Ed.2d 820 (1989).

6.2
Impeachment
Inconsistent Statement And Felony Conviction

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe that witness.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Cited in U.S. v. Ohterer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Solomon, 856 F.2d 1572, 1578 (11th Cir. 1988), reh'g denied, 863 F.2d 890 (1988), cert. denied, 489 U.S. 1070, 109 S.Ct. 1352, 103 L.Ed.2d 820 (1989) approved this instruction.

6.3
Impeachment
Inconsistent Statement
(Defendant Testifies With No Felony Conviction)

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Cited in U.S. v. Ohnerer, No. 06-10642, archived on January 28, 2008

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

6.4
Impeachment
Inconsistent Statement
(Defendant Testifies With Felony Conviction)

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Cited in U.S. v. Ohnerer, No. 06-10642, archived on January 28, 2008

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony. [Evidence of a Defendant's previous conviction of a crime is to be considered by you only in deciding whether you believe or disbelieve the Defendant as a witness, and must never be considered as evidence of guilt of the crime(s) for which the Defendant is on trial.]

ANNOTATIONS AND COMMENTS

United States v. Lippner, 676 F.2d 456, 462 n.11 (11th Cir. 1982), it is plain error not to give a limiting instruction (such as the last sentence of this instruction) when a Defendant is impeached as a witness under Rule 609, FIRE, by cross examination concerning a prior conviction) (citing United States v. Diaz, 585 F.2d 116 (5th Cir. 1978)).

If, however, evidence of a Defendant's prior conviction is admitted for other purposes under Rule 404(b), FIRE., the last sentence of this instruction should not be given. See, instead, Trial Instruction 3 and Special Instruction 4.

Similarly, the last sentence of this instruction should not be given if evidence of a Defendant's prior conviction is admitted because the existence of such a conviction is an essential element of the crime charged. See, for example, Offense Instruction 30.6, 18 USC 922(g), and the Annotations and Comments following that instruction.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

6.5
Impeachment
Inconsistent Statement And Felony Conviction
(Defendant Testifies With No Felony Conviction)

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe that witness.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

6.6
Impeachment
Inconsistent Statement And Felony Conviction
(Defendant Testifies With Felony Conviction)

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe that witness.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony. [Evidence of a Defendant's previous conviction of a crime is to be considered by you only in deciding whether you believe or disbelieve the Defendant as a

witness, and must never be considered as evidence of guilt of the crime(s) for which the Defendant is on trial.]

ANNOTATIONS AND COMMENTS

United States v. Lippner, 676 F.2d 456, 462 n.11 (11th Cir. 1982), it is plain error not to give a limiting instruction (such as the last sentence of this instruction) when a Defendant is impeached as a witness under Rule 609, FIRE., by cross examination concerning a prior conviction) (citing United States v. Diaz, 585 F.2d 116 (5th Cir. 1978)).

If, however, evidence of a Defendant's prior conviction is admitted for other purposes under Rule 404(b), FIRE., the last sentence of this instruction should not be given. See, instead, Trial Instruction 3 and Special Instruction 4.

Similarly, the last sentence of this instruction should not be given if evidence of a Defendant's prior conviction is admitted because the existence of such a conviction is an essential element of the crime charged. See, for example, Offense Instruction 30.6, 18 USC § 922(g), and the Annotations and Comments following that instruction.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

6.7
Impeachment
Bad Reputation (Or Opinion) Concerning Truthfulness
(May Be Used With 6.1 - 6.6)

There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided; or that others have an unfavorable opinion of the truthfulness of the witness.

You may consider those matters also in deciding whether to believe or disbelieve such a witness.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

> Rule 608. [FIRE.] Evidence of Character and Conduct of Witness
> (a) Opinion and reputation evidence of character. - - The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

See United States v. Watson, 669 F.2d 1374, 1381-1383 (11th Cir. 1982) distinguishing between reputation witnesses and personal opinion witnesses, and finding error in the exclusion of opinion testimony.

See also, Special Instruction 11, Character Evidence (relating to evidence of the character of the accused offered under Rule 404(a)(1), FIRE.), and the Annotations and Comments following that instruction.

7
Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Cited in U.S. v. Cherer, No 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Johnson, 575 F.2d 1347, 1361 (5th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1214, 59 L.Ed.2d 454 (1979) approved the Committee's former version of this instruction.

8
Introduction To Offense Instructions
(In Conspiracy Cases)

At this time I will explain the indictment which charges _____ separate offenses called "counts." I will not read it to you at length because you will be given a copy of the indictment for reference during your deliberations.

In summary, Count _____ charges that the Defendants knowingly and willfully conspired together to [describe alleged object(s) of the conspiracy]. Counts _____, respectively, charge the commission of what are referred to as substantive offenses, namely that the Defendants [describe alleged substantive offenses]. I will explain the law governing those substantive offenses in a moment.

Cited in U.S. v. Chorer, No. 06-10642, archived on January 28, 2008

First, however, as to Count _____, you will note that the Defendants are not charged in that Count with committing a substantive offense; rather, they are charged with having conspired to do so.

9.1
On Or About - - Knowingly - - Willfully

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term is used in the indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Creamer, 721 F.2d 342, 343 (11th Cir. 1983), "on or about" language upheld in case in which alibi defense was used by the Defendant; the court "rejected the contention that time becomes a material element of a criminal offense merely because the defense of alibi is advanced." See also United States v. Reed, 887 F.2d 1398 (11th Cir. 1989), reh'g denied, 891 F.2d 907 (1989), cert. denied, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990).

United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980), and cert. denied, 446 U.S. 912, 100 S.Ct. 1842, 64 L.Ed.2d 266 (1980) approved these definitions of knowingly and willfully as sufficient instructions on issue of intent. See also United States v. Kerley, 643 F.2d 299 (5th Cir. 1981).

United States v. Kelly, 615 F.2d 378 (5th Cir. 1980) approved refusal to amplify "willfulness" instruction for the purpose of emphasizing specific intent, criminal motive or guilty mind.

United States v. Restrepo-Granda, 575 F.2d 524 (5th Cir. 1978), reh'g denied, 579 F.2d 644 (1978), cert. denied, 439 U.S. 935, 99 S.Ct. 331, 58 L.Ed.2d 332 (1978), reh'g denied, 439 U.S. 1104, 99 S.Ct. 885, 59 L.Ed.2d 65 (1979); United States v. Batencort, 592 F.2d 916 (5th Cir. 1979), instruction on "deliberate ignorance" as equivalent of knowledge may be given as a supplement to the standard charge in an appropriate case. See Special Instruction 8.

United States v. Stone, 9 F.3d 934, 937 (11th Cir. 1993), reh'g denied, 19 F.3d 1448 (11th Cir. 1994), cert. denied, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994), "deliberate ignorance" instruction appropriate only when evidence in the record shows that the Defendant purposely contrived to avoid learning the truth. United States v. Arias, 984 F.2d 1139 (11th Cir. 1993), cert. denied, 508 U.S. 979, 113 S.Ct. 2979, 125 L.Ed.2d 676 (1993), and cert. denied, 113 S.Ct. 3062, 125 L.Ed.2d 744 (1993) approved deliberate ignorance instruction when drug couriers avoided knowledge of content of their parcels. See also United States v. Rivera, 944 F.2d 1563, 1570-72 (11th Cir. 1991); Batencort, supra, and Special Instruction 8, infra.

United States v. Corral Martinez, 592 F.2d 263 (5th Cir. 1979), Model Penal Code definition of knowledge held not to be plain error when given as an instruction, i.e., "proof that Defendant was aware of the high probability that the substance he possessed was heroin [suffices to prove knowledge] unless he actually believes it was not heroin."

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

United States v. Benson, 592 F.2d 257 (5th Cir. 1979); United States v. Warren, 612 F.2d 887 (5th Cir. 1980), cert. denied, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980) approved instruction in a tax evasion case and a currency reporting case, respectively, defining "willfulness" to mean the "voluntary and intentional violation of a known legal duty;" United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976), reh'g denied, 429 U.S. 987, 97 S.Ct. 510, 50 L.Ed.2d 600 (1976). See Special Instruction 9, infra.

Other instructions are sometimes given concerning specific types of evidence as giving rise to an inference of guilty knowledge, and some such instructions have been approved (as indicated below), but the Committee recommends that, ordinarily, those subjects should be left to the argument of counsel and should not be addressed in the Court's charge.

United States v. Stewart, 579 F.2d 356 (5th Cir. 1978), cert. denied, 439 U.S. 936, 99 S.Ct. 332, 58 L.Ed.2d 332 (1978) approved instruction on flight and concealment as justifying inference of guilty knowledge.

United States v. Barresi, 601 F.2d 193 (5th Cir. 1979) approved instruction concerning proof of falsity of Defendant's explanation as evidence of guilty knowledge; see also United States v. Broadwell, 870 F.2d 594, 601 n.17 (11th Cir. 1989), cert. denied, 493 U.S. 840, 110 S.Ct. 125, 107 L.Ed.2d 85 (1989).

United States v. Knight, 607 F.2d 1172 (5th Cir. 1979) approved instruction concerning inference which might be drawn from refusal of Defendant to obey order requiring submission of handwriting exemplar.

United States v. Castell, 584 F.2d 87 (5th Cir. 1978), cert. denied, 440 U.S. 925, 99 S.Ct. 1256, 59 L.Ed.2d 480 (1979); United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978) approved instruction concerning inference of guilty knowledge which might be drawn from possession of recently stolen property.

But, United States v. Chiantese, 560 F.2d 1244, 1255 (5th Cir. 1977) (en banc) disapproved instruction to the effect that, absent evidence to the contrary, a person is presumed to intend the natural and probable consequences of his or her acts.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

9.2
On Or About - - Knowingly (Only)
(When Willfulness Or Specific Intent Is Not An Element)

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

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

Cited in U.S. v. Cherer, No. 06-10029, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Creamer, 721 F.2d 342, 343 (11th Cir. 1983), "on or about" language upheld in case in which alibi defense was used by the Defendant; the court "rejected the contention that time becomes a material element of a criminal offense merely because the defense of alibi is advanced." See also United States v. Reed, 887 F.2d 1398 (11th Cir. 1989), reh'g denied, 891 F.2d 907 (1989), cert. denied, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990).

10.1
Caution - - Punishment
(Single Defendant - - Single Count)

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Cited in U.S. v. Scherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. McDonald, 935 F.2d 1212, 1222 (11th Cir. 1991) approved this instruction.

10.2
Caution - - Punishment
(Single Defendant - - Multiple Counts)

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

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Cited in U.S. v. Omerer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

There may be cases in which the last sentence of the first paragraph of this instruction is inappropriate and should be deleted. This may occur, for example, in prosecutions under 18 USC § 1962 (RICO offenses) or 21 USC § 848 (Continuing Criminal Enterprise offenses) where the indictment is structured so that a conviction of one count or counts (sometimes called "predicate offenses") is necessary to a conviction of another count or counts.

10.3
Caution - - Punishment
(Multiple Defendants - - Single Count)

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

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Cited in U.S. v. Ghirer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Gonzalez, 940 F.2d 1413, 1428 (11th Cir. 1991), cert. denied, 112 S.Ct. 910, 116 L.Ed.2d 810 (1992), and cert. denied, 112 S.Ct. 1194, 117 L.Ed.2d 435 (1992) states that "cautionary instructions to the jury to consider the evidence as to each defendant separately are presumed to guard adequately against prejudice." See also United States v. Adams, 1 F.3d 1566 (11th Cir. 1993), reh'g denied, 9 F.3d 1561 (1993), cert. denied, 114 S.Ct. 1310, 127 L.Ed.2d 660 (1994), and cert. denied, 114 S.Ct. 1330, 127 L.Ed.2d 667 (1994).

United States v. Watson, 669 F.2d 1374, 1389 (11th Cir. 1982) allowed use of single verdict form for multiple defendants when the form listed each defendant separately and jury was instructed that each defendant "should be considered separately and individually." See also United States v. Russo, 796 F.2d 1443, 1450 (11th Cir. 1986).

10.4
Caution - - Punishment
(Multiple Defendants - - Multiple Counts)

A separate crime or offense is charged against one or more of the Defendants in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find any one or more of the Defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offense alleged in the indictment.

Cited in U.S. v. Gherer, No. 06-10642, archived on January 28, 2008

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted the matter of punishment is for the Judge alone to determine later.

ANNOTATIONS AND COMMENTS

United States v. Morales, 868 F.2d 1562, 1572 (11th Cir. 1989) approved this instruction.

There may be cases in which the last sentence of the first paragraph of this instruction is inappropriate and should be deleted. This may occur, for example, in prosecutions under 18 USC § 1962 (RICO offenses) or 21 USC § 848 (Continuing Criminal Enterprise offenses) where the indictment is structured so that a conviction of one count or counts (sometimes called "predicate offenses") is necessary to a conviction of another count or counts.

11
Duty To Deliberate

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

ANNOTATIONS AND COMMENTS

United States v. Brokemond, 959 F.2d 206, 209 (11th Cir. 1992) approved this instruction. See also United States v. Cook, 586 F.2d 572 (5th Cir. 1978), reh'g denied, 589 F.2d 1114 (1979), cert. denied, 442 U. S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979); United States v. Dunbar, 590 F.2d 1340 (5th Cir. 1979).

12
Verdict

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

ANNOTATIONS AND COMMENTS

United States v. Norton, 867 F.2d 1354, 1365-66 (11th Cir. 1989), cert. denied, 491 U.S. 907, 109 S.Ct. 3192, 105 L.Ed.2d 701 (1989) and 493 U.S. 871, 110 S.Ct. 200, 107 L.Ed.2d 154 (1989) notes that the Court should not inquire about, or disclose, numerical division of the jury during deliberations but states that "[r]eversal may not be necessary even where the trial judge undertakes the inquiry and thereafter follows it with an Allen charge, absent a showing that either incident or a combination of the two was inherently coercive." Also, United States v. Brokemond, 959 F.2d 206, 209 (11th Cir. 1992) approved this instruction. See also United States v. Cook, 586 F.2d 572 (5th Cir. 1978), reh'g denied, 589 F.2d 1114 (1979), cert. denied, 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

INDEX TO
SPECIAL INSTRUCTIONS

Instruction
Number

SPECIAL INSTRUCTIONS 1 THROUGH 5 SHOULD BE USED, AS APPROPRIATE, AFTER BASIC INSTRUCTION 7

1	.1	Accomplice - - Informer - - Immunity	39
	.2	Accomplice - - Co-Defendant - - Plea Agreement	40
	.3	Accomplice - - Addictive Drugs - - Immunity	41
2	.1	Confession - - Statement (Single Defendant)	42
	.2	Confession - - Statement (Multiple Defendants)	43
3		Identification Testimony	44
4		Similar Acts Evidence (Rule 404(b), FRE)	46
5		Notetaking (For inclusion in final charge when notetaking has been permitted)	48

SPECIAL INSTRUCTIONS 6 THROUGH 11 SHOULD BE USED, AS APPROPRIATE, AFTER THE OFFENSE INSTRUCTIONS

6	Possession	49
7	Aiding And Abetting (Agency) (18 USC § 2)	50

Cited in U.S. v. Cloerer, No. 06-10642, archived on January 28, 2008

INDEX TO
SPECIAL INSTRUCTIONS
Continued

Instruction Number			
8		Deliberate Ignorance (As Proof Of Knowledge)	52
9		Intentional Violation Of A Known Legal Duty (As Proof Of Willfulness)	54
10		Lesser Included Offense(s) And Sentence Enhancers	55
11		Attempt(s)	57

Cited in US v. Cherer, No. 06-00642, archived on January 28, 2008

SPECIAL INSTRUCTIONS 12 THROUGH 18 OR OTHER THEORY OF DEFENSE INSTRUCTIONS, SHOULD BE USED AS APPROPRIATE AFTER THE OFFENSE INSTRUCTIONS

12		Character Evidence	59
13	.1	Entrapment	60
	.2	Entrapment - Evaluating Conduct Of Government Agents	62
14		Alibi	64
15		Insanity	65
16		Duress And Coercion (Justification Or Necessity)	67

INDEX TO
SPECIAL INSTRUCTIONS
Continued

Instruction Number		
17	Good Faith Defense To Charge Of Intent To Defraud	69
18	Good Faith Reliance Upon Advice Of Counsel	71

Note: There can be cases in which the evidence arguably supports, and the Defendant may rely upon, some specific theory of defense other than the traditional defenses covered by Special Instructions 11 through 17. In such cases, upon appropriate request, theory of defense instructions relating to material factual issues arising from the evidence must be given. United States v. Conroy, 589 F.2d 1258, 1273 (5th Cir. 1979); United States v. Lewis, 592 F.2d 1282 (5th Cir. 1979); United States v. Sirang, 70 F.3d 588 (11th Cir. 1995) (A defendant is entitled to a specific instruction on his theory of defense, not an abstract or general one). However, the court is not required to give a theory of defense instruction that merely recites a defendant's "not guilty" position and discusses the sufficiency or insufficiency of the evidence or argumentative inferences that might or might not be drawn from the evidence. United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), cert. denied, 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1978); United States v. Barham, 595 F.2d 231 (5th Cir. 1979), cert. denied, 450 U.S. 1002, 101 S.Ct. 1711, 68 L.Ed.2d 205 (1981). See also United States v. Williams, 728 F.2d 1402 (11th Cir. 1984) (citing Malatesta for the same proposition) and United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996) (citing Barham for the same proposition).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

1.1
Accomplice - - Informer - - Immunity

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government.

So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Shearer, 794 F.2d 1545, 1551 (11th Cir. 1986) approved similar instruction. See also United States v. Solomon, 856 F.2d 1572 (11th Cir. 1988), cert. denied, 489 U.S. 1070, 109 S.Ct. 1352, 103 L.Ed.2d 820 (1989) (holding that, as a general rule, a cautionary instruction regarding the credibility of accomplices should be given).

1.2
Accomplice - - Co-Defendant - - Plea Agreement

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

In this case the Government called as one of its witnesses a person named as a co-Defendant in the indictment, with whom the Government has entered into a plea agreement providing for the possibility of a lesser sentence than the witness would otherwise be exposed to. Such plea bargaining, as it's called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court. However, a witness who hopes to gain more favorable treatment may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses.

Cited in U.S. v. Chierer, No. 06-10642, archived on January 28, 2008

And, of course, the fact that a witness has plead guilty to the crime charged in the indictment is not evidence, in and of itself, of the guilt of any other person.

ANNOTATIONS AND COMMENTS

United States v. Solomon, 856 F.2d 1572, 1578-79 (11th Cir. 1988), cert. denied, 489 U.S. 1070, 109 S.Ct. 1352, 103 L.Ed.2d 820 (1989) approved similar instruction.

1.3
Accomplice - - Addictive Drugs - - Immunity

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

For example, a witness who was using addictive drugs during the time he or she testified about may have an impaired memory concerning the events that occurred during that time. Also, a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government.

So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Fajardo, 787 F.2d 1523, 1527 (11th Cir. 1986) approved this instruction. See also United States v. Solomon, 856 F.2d 1572 (11th Cir. 1988), cert. denied, 489 U.S. 1070, 109 S.Ct. 1352, 103 L.Ed.2d 820 (1989) (holding that, as a general rule, a cautionary instruction regarding the credibility of accomplices should be given).

2.1
Confession - - Statement
(Single Defendant)

When the Government offers testimony or evidence that a Defendant made a statement or admission to someone, after being arrested or detained, the jury should consider the evidence concerning such a statement with caution and great care.

It is for you to decide (1) whether the Defendant made the statement and (2) if so, how much weight to give to it. In making these decisions you should consider all of the evidence about the statement, including the circumstances under which the Defendant may have made it.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Clemons, 32 F.3d 1504, 1510 (11th Cir. 1994), cert. denied, 115 S.Ct. 1801, 131 L.Ed.2d 728 (1995) approved similar instruction.

2.2
Confession - - Statement
(Multiple Defendants)

When the Government offers testimony or evidence that a Defendant made a statement or admission to someone, after being arrested or detained, the jury should consider the evidence concerning such a statement with caution and great care.

It is for you to decide (1) whether the Defendant made the statement and (2) if so, how much weight to give to it. In making these decisions you should consider all of the evidence about the statement, including the circumstances under which the Defendant may have made it.

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

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

3
Identification Testimony

In any criminal case the Government must prove, of course, the identity of the Defendant as the person who committed the alleged crime.

When a witness points out and identifies a Defendant as the person who committed a crime, you must first decide, as with any other witness, whether that witness is telling the truth. Then, if you believe the witness was truthful, you must still decide how accurate the identification was. Again, I suggest that you ask yourself a number of questions: Did the witness have an adequate opportunity at the time of the crime to observe the person in question? What length of time did the witness have to observe the person? What were the prevailing conditions at that time in terms of visibility or distance and the like? Had the witness known or observed the person at earlier times?

Cited in U.S. v. Cherer, No. 06-10642, archived on January 08, 2008

You may also consider the circumstances surrounding the later 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 witness' identification of the Defendant.

After examining all of the testimony and evidence in the case, if 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.

ANNOTATIONS AND COMMENTS

United States v. Martinez, 763 F.2d 1297, 1304 (11th Cir. 1985) approved this instruction.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

4
Similar Acts Evidence
(Rule 404(b), FRE)

During the course of the trial, as you know from the instructions I gave you then, you 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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[whether the Defendant had the state of mind or intent necessary to commit the crime 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 the Defendant is on trial by accident or mistake].

ANNOTATIONS AND COMMENTS

> Rule 404. [FRE] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
>
> * * * * *
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc) cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. See note 15 at pages 911-912. Beechum also approves a limiting instruction similar to this one. See note 23 at pages 917-918.

Cited in U.S. v. Cherer, No. 06-10642 archived on January 28, 2008

Both the Supreme Court and the Eleventh Circuit have expressly endorsed the Beechum test. Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988); United States v. Miller, 959 F.2d 1535 (11th Cir. 1992) (en banc), cert. denied, 506 U.S. 942, 113 S.Ct. 382, 121 L.Ed.2d 292 (1992).

5
Notetaking

In this case you have been permitted to take notes during the course of the trial, and most of you - - perhaps all of you - - have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Cited in U.S. v. Chierer, No. 06-10642, archived on January 28, 2008

6
Possession

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.

A person who knowingly has direct physical control of something is then in actual possession of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.

If one person alone has possession of something, that possession is sole. If two or more persons share possession, such possession is joint.

Cited in U.S. v. Ohorer, No. 06-10642, archived on January 28, 2008

Whenever the word "possession" has been used in these instructions it includes constructive as well as actual possession, and also joint as well as sole possession.

ANNOTATIONS AND COMMENTS

United States v. Hastamorir, 881 F.2d 1551 (11th Cir. 1989) approved this instruction.

7
Aiding And Abetting (Agency)
18 USC § 2

The guilt of a Defendant in a criminal case may be proved without evidence that the Defendant personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for one's self may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had personally engaged in such conduct.

Cited in U.S. v. Chorer, No. 06-10642, archived on January 28, 2008

However, before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant willfully associate in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

ANNOTATIONS AND COMMENTS

United States v. Broadwell, 870 F.2d 594, 607 (11th Cir. 1989), cert. denied, 493 U.S. 840, 110 S.Ct. 125, 107 L.Ed.2d 85 (1989) approved this instruction. See also United States v. Walker, 621 F.2d 163 (5th Cir. 1980), cert. denied, 450 U.S. 1000, 101 S.Ct. 1707, 68 L.Ed.2d 202 (1981).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

8
Deliberate Ignorance
(As Proof Of Knowledge)

When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if the Defendant is aware of a high probability of its existence, unless the Defendant actually believes that it does not exist.

So, with respect to the issue of the Defendant's knowledge in this case, if you find from all the evidence beyond a reasonable doubt that the Defendant believed that [he] [she] possessed _____, a controlled substance, and deliberately and consciously tried to avoid learning that there was _____ in the package so possessed in order to be able to say, if apprehended, that [he] [she] did not know the contents of the package, you may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge.

Cited in U.S. v. Ohrerer, No. 06-10642, archived on January 28, 2008

In other words, you may find that a Defendant acted "knowingly" if you find beyond a reasonable doubt either: (1) that the Defendant actually knew that [he] [she] possessed _____; or (2) that [he] [she] deliberately closed [his] [her] eyes to what [he] [she] had every reason to believe was the fact.

I must emphasize, however, that the requisite proof of knowledge on the part of the Defendant cannot be established by merely demonstrating that the Defendant was negligent, careless or foolish.

ANNOTATIONS AND COMMENTS

United States v. Stone, 9 F.3d 934, 937 (11th Cir. 1993), cert. denied, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994), "deliberate ignorance" instruction appropriate only when evidence in the record shows that the Defendant purposely contrived to avoid learning the truth.

United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984), this instruction should be given only if there are facts that suggest the Defendant consciously avoided knowledge, not when the Defendant has actual knowledge; see also United States v. Rivera, 944 F.2d 1563, 1570-72 (11th Cir. 1991) (describing circumstances in which deliberate ignorance instruction is appropriate) and United States v. Perez-Tosta, 36 F.3d 1552 (11th Cir. 1994) (approving a similar instruction).

See also Basic Instruction 9.1.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

9
Intentional Violation Of A Known Legal Duty
(As Proof Of Willfulness Under The Internal Revenue Code)

Intent and motive should not be confused. Motive is what prompts a person to act, while intent refers to the state of mind with which the act is done.

So, if you find beyond a reasonable doubt that the acts constituting the crime charged were committed by the Defendant voluntarily as an intentional violation of a known legal duty - - that is, with specific intent to do something the law forbids - - then the element of "willfulness" as defined in these instructions has been satisfied even though the Defendant may have believed that the conduct was [religiously, politically or morally] required, or that ultimate good would result from such conduct.

Cited in U.S. v. Cheref, No. 08-10642, archived on January 28, 2008

On the other hand, if you have a reasonable doubt as to whether the Defendant acted in good faith, sincerely believing [himself] [herself] to be exempt by the law [from the withholding of income taxes], then the Defendant did not intentionally violate a known legal duty - - that is, the Defendant did not act "willfully" - - and that essential part of the offense would not be established.

ANNOTATIONS AND COMMENTS

United States v. Anderson, 872 F.2d 1508, 1518 (11th Cir. 1989), cert. denied, 493 U.S. 1004, 110 S.Ct. 566, 107 L.Ed.2d 540 (1989) approved this instruction and stated that it may be given when appropriate as a supplement to Basic Instruction 9.1 defining "willfully" in the usual way.

10
Lesser Included Offense(s) And Sentence Enhancers

In some cases the law which a Defendant is charged with breaking actually covers two [or more] separate crimes - - one is more serious than the [second] [others] - - and the [second crime is] [other crimes are] generally called [a] "lesser included offense[s]."

So, in this case, with regard to the offense charged in Count __ _____, if you should find the Defendant "not guilty" of that crime as defined in these instructions, you should then proceed to decide whether the Defendant is guilty or not guilty of the [first] lesser included offense of [give generic description of the lesser included offense]. The [first] lesser included offense would consist of proof beyond a reasonable doubt of all of the facts stated before as necessary to a conviction under Count _____, except _____.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[If you find the Defendant “not guilty” of the crime as charged in Count _____, and also find the Defendant “not guilty” of the first lesser included offense just discussed, you should then proceed to decide whether the Defendant is guilty or not guilty of a second lesser included offense of [give generic description of the second lesser included offense]. The second lesser included offense would consist of proof beyond a reasonable doubt of all of the facts stated before as necessary to a conviction under Count _____, except _____.]

ANNOTATIONS AND COMMENTS

United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985), cert. denied, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985) and cert. denied, 482 U.S. 908, 107 S.Ct. 2489, 96 L.Ed.2d 380 (1987) approved use of lesser included offense instruction.

The Committee recognizes - - and cautions - - that sentence enhancing factors subject to the principle of Apprendi are not necessarily "elements" creating separate offenses for purposes of analysis in a variety of contexts. See United States v. Sanchez, 269 F.3d 1250, 1277 fn. 51 (11th Cir. 2001) en banc, cert. denied _____ U.S. _____, 122 S.Ct. 1327 (2002). Even so, the lesser included offense model is an appropriate and convenient procedural mechanism for purposes of submitting sentence enhancers to a jury when required by the principle of Apprendi.

The following is one form of verdict that may be used in cases in which the offense charged in the indictment embraces a lesser included offense or offenses in the traditional sense, or involves sentencing enhancers subject to Apprendi. Alternatively, especially in drug cases involving multiple Defendants and/or multiple forms of controlled substances, it may be preferable to use a form of special verdict for each Defendant (preceded by appropriate instructions concerning the reasons for, and the use of, such verdict forms). See infra, Offense Instructions 85 and 87.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ of the offense charged in Count [One] of the indictment.

[Note: Proceed to the remainder of the verdict form only if you find the Defendant not guilty of the offense as charged.]

2. We, the Jury, having found the Defendant [name of Defendant] not guilty of the offense as charged in Count [One] of the indictment, now find the Defendant ____ of the [first] lesser included offense in Count [One] of [give generic description of lesser included offense, i.e., conspiring to distribute less than 50 grams but not less than 5 grams of cocaine base].

[Note: Proceed to the remainder of the verdict form only if you find the Defendant not guilty of the first lesser included offense.]

3. We, the Jury, having found the Defendant [name of Defendant] not guilty of the first lesser included offense within Count [One] now find the Defendant _____ of the second lesser included offense in Count [One] of [give generic description of second lesser included offense, i.e., conspiring to distribute less than 5 grams of cocaine base].

So Say We All.

Date: _____ _____
Foreperson

11
Attempt(s)

In some cases it is a crime for anyone to attempt the commission of an offense even though the attempt fails and the intended offense is not actually carried out or fully committed. So, in this instance the Defendant is charged with attempting to commit the offense of _____ [as alleged in Count _____.]

[The specific facts the Government must prove beyond a reasonable doubt to establish the offense of [give generic description of substantive offense involved] are: [give required elements unless they are already included elsewhere in the charge].]

The Defendant can be found guilty of an attempt to commit that offense only if both of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

First: That the Defendant knowingly and willfully intended to commit the offense of _____, as charged; and

Second: That the Defendant engaged in conduct which constituted a substantial step toward the commission of the crime and which strongly corroborates the Defendant's criminal intent.

A "substantial step" means some important action leading to the commission of a crime as distinguished from some inconsequential or unimportant act. It must be something beyond mere preparation; it must be an act which, unless frustrated by some condition or event,

would have resulted, in the ordinary and likely course of things, in the commission of the crime being attempted.

ANNOTATIONS AND COMMENTS

Instruction taken from United States v. McDowell, 250 F.3d 1354, 1365 (11th Cir. 2001).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

12
Character Evidence

The Defendant has offered evidence of the Defendant's traits of character, and such evidence may give rise to a reasonable doubt.

Where a Defendant has offered testimony that the Defendant is an honest and law-abiding citizen, the jury should consider that testimony, along with all the other evidence, in deciding whether the Government has proved beyond a reasonable doubt that the Defendant committed the crime charged.

ANNOTATIONS AND COMMENTS

> Rule 404. [FRE] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
>
> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;. . .

Cited in U.S. v. Ohnerer, No. 06-10642, archived on January 28, 2008

United States v. Broadwell, 870 F.2d 594, 609 (11th Cir. 1989), cert. denied, 493 U.S. 840, 110 S.Ct. 125, 107 L.Ed.2d 85 (1989), approved this instruction.

United States v. Darland, 626 F.2d 1235 (5th Cir. 1980) held that it can be plain error to refuse this instruction when the Defendant offers evidence of good character; and, further, the admission of such evidence may not be conditioned on the Defendant testifying as a witness. Character evidence may be excluded, however, when the proffered witness has an inadequate basis for expressing an opinion as to the Defendant's character. United States v. Gil, 204 F.3d 1347 (11th Cir. 2000). A distinction must be drawn between evidence of a pertinent trait of the Defendant's character, offered under FRE 404(a)(1), and evidence of the character of a witness for truthfulness (including the Defendant as a witness) offered under FRE 608(a). This instruction should be given when the evidence has been admitted under Rule 404. Basic Instruction 6.7 should be given when evidence has been admitted under Rule 608.

In either case - - whether character evidence is admitted under Rule 404 or Rule 608 - -Rule 405(a) provides that such "proof may be made by testimony as to reputation or by testimony in the form of an opinion."

13.1
Entrapment

The Defendant asserts "entrapment" concerning the offense charged in the indictment. A Defendant is "entrapped" when law enforcement officers [or cooperating individuals under their direction] induce or persuade a Defendant to commit a crime that the Defendant had no previous intent to commit; and the law as a matter of policy forbids a conviction in such a case.

However, there is no entrapment where a Defendant is ready and willing to break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit the crime. 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 with the Defendant. So, a Defendant would not be a victim of entrapment if you should find, beyond a reasonable doubt, that the Defendant, before contact with Government officers [or cooperating individuals], was ready, willing and able to commit the crime charged in the indictment whenever opportunity was afforded and that the Government did no more than offer an opportunity.

Cited in U.S. v. Ollerer, No. 06-10642, archived on January 28, 2008

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the Defendant had any intent to commit the crime except for inducement or persuasion on the part of some Government officer [or cooperating individual], then it is your duty to find the Defendant not guilty.

ANNOTATIONS AND COMMENTS

The former version of this instruction (Special Instruction 9, Pattern Jury Instructions, Criminal Cases, Eleventh Circuit 1985) was expressly approved in United States v. Davis, 799 F.2d 1490, 1493-94 (11th Cir. 1986). See also United States v. King, 73 F.3d 1564, 1569-71 (11th Cir. 1996), cert. denied, 519 U.S. 886, 117 S.Ct. 220, 136 L.Ed.2d 153 (1996).

However, in Jacobson v. United States, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992), the Supreme Court held that the necessary predisposition of the Defendant must have existed before the Defendant was approached by Government agents or cooperating informants, and in United States v. Brown, 43 F.3d 618, 628 at n.8 (11th Cir. 1995), cert. denied, 516 U.S. 917, 116 S.Ct. 309, 133 L.Ed.2d 212 (1995), the Court of Appeals upheld the sufficiency and correctness of the former instruction but implied that clarification might be appropriate in the light of Jacobson. The present reformulation of the instruction on entrapment makes that clarification.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

13.2
Entrapment
Evaluating Conduct Of Government Agents

The Defendant asserts "entrapment" concerning the offense charged in the indictment. A Defendant is "entrapped" when law enforcement officers [or cooperating individuals under their direction] induce or persuade a Defendant to commit a crime that the Defendant had no previous intent to commit; and the law as a matter of policy forbids a conviction in such a case.

However, there is no entrapment where a Defendant is ready and willing to break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit the crime. 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 with the Defendant, and it is not for you to evaluate the conduct of law enforcement officials, or the conduct of persons acting for or at the request of law enforcement officials, including informers and cooperating witnesses, to determine if you approve or disapprove of that conduct, or to determine if you think that conduct was moral or immoral, except to the extent that such conduct may bear on the central issue of whether a Defendant was ready and willing to break the law and the Government merely provided the Defendant with what appeared to be a favorable opportunity.

Cited in U.S. v. Chearer, No. 06-10642, archived on January 28, 2008

So, a Defendant would not be a victim of entrapment if you should find, beyond a reasonable doubt, that the Defendant, before contact with Government officers [or cooperating individuals], was ready, willing and able to commit the crime charged in the indictment whenever opportunity was afforded and that the Government did no more than offer an opportunity.

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the Defendant had any intent to commit the crime except for inducement or persuasion on the part of some Government officer [or cooperating individuals], then it is your duty to find the Defendant not guilty.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

The former version of this instruction (Special Instruction 9, Pattern Jury Instructions, Criminal Cases, Eleventh Circuit 1985) was expressly approved in United States v. Davis, 799 F.2d 1490, 1493-94 (11th Cir. 1986). See also United States v. King, 73 F.3d 1564, 1569-71 (11th Cir. 1996), cert. denied, 519 U.S. 886, 117 S.Ct. 220, 136 L.Ed.2d 153 (1996).

However, in Jacobson v. United States, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992), the Supreme Court held that the necessary predisposition of the Defendant must have existed before the Defendant was approached by Government agents or cooperating informants, and in United States v. Brown, 43 F.3d 618, 628 at n.8 (11th Cir. 1995), cert. denied, 516 U.S. 917, 116 S.Ct. 309, 133 L.Ed.2d 212 (1995), the Court of Appeals upheld the sufficiency and correctness of the former instruction but implied that clarification might be appropriate in the light of Jacobson. The present reformulation of the instruction on entrapment makes that clarification.

14
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 and place as alleged in the indictment, you must find the Defendant not guilty.

Cited in U.S. v. Chorer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Rhodes, 569 F.2d 384 (5th Cir. 1978), cert. denied, 439 U.S. 844, 99 S.Ct. 138, 58 L.Ed.2d 143 (1978) approved instruction in substantially same form.

15
Insanity

There is an issue in this case concerning the sanity of the Defendant 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 the Defendant's acts. Mental disease or defect does not otherwise constitute a defense.

Cited in U.S. v. Oliverer, No. 06-10642, archived on January 28, 2008

On the issue of insanity, it is the Defendant who must prove 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.

ANNOTATIONS AND COMMENTS

18 USC § 17 provides:

> (a) Affirmative defense.--It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) Burden of proof.--The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

See Also 18 USC § 4242:

> § 4242. Determination of the existence of insanity at the time of the offense.
>
> * * * * * *
>
> (b) Special verdict.--If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a non jury trial, the court shall find the defendant--
>
> (1) guilty;
>
> (2) not guilty; or
>
> (3) not guilty only by reason of insanity.

Cited in U.S. v. Cheever, No. 06-16642, archived on January 28, 2008

See United States v. Owens, 854 F.2d 432 (11th Cir. 1988) (describing the circumstances in which the insanity instruction should be given).

16
Duress And Coercion
(Justification Or Necessity)

It is the theory of the defense in this case that although the Defendant may have committed the acts charged in the indictment, the Defendant did not do so [voluntarily] [willfully] but only because of duress or coercion in the form of intimidation and force, or threats of force and serious bodily harm to the Defendant [or to someone else].

In order to excuse an act that would otherwise be criminal, however, it must appear from the evidence:

First: That the Defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury [to himself] [to someone else];

Second: That the Defendant did not negligently or recklessly place [himself] [herself] in a situation where [he] [she] would be forced to engage in criminal conduct;

Third: That the Defendant had no reasonable legal alternative to violating the law; and

Fourth: That there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

[If your consideration of the evidence in the case concerning each of these factors leaves you with a reasonable doubt that the Defendant acted willfully as charged, then it is your duty to find the Defendant not guilty.]

[It is the responsibility of the Defendant to prove every essential part of [his] [her] claim of [duress and coercion] [justification or necessity] by a preponderance of the evidence. This is sometimes called the burden of proof or burden of persuasion. A preponderance of the evidence simply means an amount of evidence which is enough to persuade you that the Defendant's claim is more likely true than not true.]

ANNOTATIONS AND COMMENTS

Cited in U.S. V. Chenet, on January 28, 2008 No. 06-10642, archived on Justia

This instruction is taken from United States v. Deleveaux, 205 F.3d 1292 (11th Cir. 2000), cert. denied, 530 U.S. 1264, 120 S.Ct. 2224 (2000). See also United States v. Lee, 694 F.2d 649 (11th Cir. 1983), cert. denied, 460 U.S. 1086, 103 S.Ct. 1779 (1983), and United States v. Herrera-Britto, 739 F.2d 551 (11th Cir. 1984).

In Deleveaux the Court of Appeals cautioned that this defense is available in only "extraordinary circumstances" (205 F.3d at 1297), and the holding of the Court was expressly limited to prosecutions under 18 USC § 922(g)(1) - - felon in possession of a firearm. See Offense Instruction 33.6, infra. The Deleveaux Court also held that because § 922(g)(1) does not contain a mens rea element - - so that the defense does not negate an element of the offense but is offered as an affirmative defense to the charge - - the Defendant must sustain the burden of proof by a preponderance of the evidence. See also United States v. Bailey, 444 U.S. 394, 100 S.Ct. 624 (1980).

This instruction has been prepared to cover both situations - - cases in which the theory of defense negates mens rea such that the Government retains the ultimate burden of proof, and cases in which the defense is an affirmative defense as to which the Defendant takes on the burden of proof. See Ninth Circuit Manual of Model Jury Instructions (Criminal, 2000), Instruction Nos. 6.5 and 6.6.

United States v. Bailey, supra, discusses the common law distinction between coercion/duress and necessity/justification, and notes that "[m]odern cases have tended to blur the distinction . . . " (44 U.S. at 409-410, 100 S.Ct. at 634).

With respect to coercion directed toward persons other than the Defendant, see United States v. Haney, _____ F.3d _____ (10th Cir. 2002), WL 652253.

17
Good Faith Defense To Charge Of Intent To Defraud

Good faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the Defendant to prove good faith, of course, since the Defendant has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud as charged in the indictment.

One who expresses an honestly held opinion, or an honestly formed belief, is not chargeable with fraudulent intent even though the opinion is erroneous or the belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

Cited in U.S. v. Chorer, No. 06-10642, archived on January 28, 2008

On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as that term is used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

ANNOTATIONS AND COMMENTS

United States v. Goss, 650 F.2d 1336 (5th Cir. 1981), failure to give this instruction as a theory-of-defense charge, when requested to do so, is error if there is any evidentiary foundation to support the Defendant's claim. Note, however, that there must be some evidentiary basis for the request. If the usual instructions are given defining willfulness and intent to defraud, that will ordinarily suffice in the absence of evidence of good faith. United States v. Boswell, 565 F.2d 1338 (5th Cir. 1978), reh'g denied, 568 F.2d 1367 (11th Cir. 1978), cert. denied, 439 U.S. 819, 99 S.Ct. 81, 58 L.Ed.2d 110 (1978); United States v. England, 480 F.2d 1266 (5th Cir. 1973), cert. denied, 414 U.S. 1041, 94 S.CT. 543, 38 L.Ed.2d 332 (1973); United States v. Williams, 728 F.2d 1402 (11th Cir. 1984).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

18
Good Faith Reliance Upon Advice Of Counsel

Good faith is a complete defense to the charge in the indictment since good faith on the part of the Defendant is inconsistent with the existence of willfulness which is an essential part of the charge. The burden of proof is not on the Defendant to prove good faith, of course, since the Defendant has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted willfully as charged in the indictment.

So, a Defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, the Defendant consulted in good faith an attorney whom the Defendant considered competent, made a full and accurate report to that attorney of all material facts of which the Defendant had the means of knowledge, and then acted strictly in accordance with the advice given by that attorney.

Cited in U.S. v. Chorer, No. 06-10642, archived on January 28, 2008

Whether the Defendant acted in good faith for the purpose of seeking advice concerning questions about which the Defendant was in doubt, and whether the Defendant made a full and complete report to the attorney, and whether the Defendant acted strictly in accordance with the advice received, are all questions for you to determine.

ANNOTATIONS AND COMMENTS

United States v. Eisenstein, 731 F.2d 1540, 1544 (11th Cir. 1984) approved similar instruction.

See also United States v. Condon, 132 F.3d 653 (11th Cir. 1998) (describing the circumstances in which a good faith reliance upon advice of counsel instruction is appropriate).

INDEX TO
OFFENSE INSTRUCTIONS

1. TITLE 18 OFFENSES*

Title 18 Section Number	Instruction Number		Nature of Offense	
111(a)(1)	1	.1	Forcibly Assaulting A Federal Officer (Without Use Of A Deadly Weapon) (Felony Offense)	87
111(b)		.2	Forcibly Assaulting A Federal Officer (With Use Of A Deadly Weapon Or Inflicting Bodily Injury)	90
152(1)	2		Concealment Of Property Belonging To Bankruptcy Estate Of Debtor	94
152(4)	3		Presenting Or Using A False Claim In A Bankruptcy Proceeding	98
153	4		Embezzlement Of Bankruptcy Estate	100
201(b)(1)	5	.1	Bribery Of Public Official (Or Juror)	103
201(b)(2)		.2	Receipt Of Bribe By Public Official (Or Juror)	105
215(a)(1)	6	.1	Bribery Or Reward Of Bank Officer	108
215(a)(2)		.2	Receipt Of A Bribe Or Reward By Bank Officer	110

Cited in U.S. v. Chesser No. 06-10642, archived on January 28, 2008

* The Offense Instructions are indexed sequentially, rather than topically or by subject matter, according to the appropriate section numbers of Title 18, United States Code. Offenses defined in other titles of the Code are similarly indexed in a sequential manner following the Title 18 offenses.

INDEX TO OFFENSE INSTRUCTIONS (Continued)

228(a)(3)	7		Failure To Pay Child Support	113
242	8		Deprivation Of Civil Rights (Without Bodily Injury, Kidnapping Sexual Assault Or Death)	115
247(a)(1) and (d)(2)	9		Damage To Religious Property	119
248(a)(1)	10	.1	Freedom Of Access To Reproductive Health Services - Intimidation Or Injury Of A Person	122
248(a)(3)		.2	Freedom Of Access To Reproductive Health Services - Damage To A Facility	125
286	11	.1	Conspiracy To Defraud The Government With Respect To Claims	127
287		.2	False Claims Against The Government	130
289	12		Presenting False Declaration Or Certification	133
371	13	.1	General Conspiracy Charge*	136
		.2	Multiple Objects (For Use With General Conspiracy Charge)	139

Cited in U.S. v. Chaser, No. 06-10642, archived on January 28, 2008

* See Offense Instruction 86 for instructions concerning conspiracy offenses charged under 21 USC §§ 846 and/or 955c and 963, and Offense Instruction 71.2 for instructions concerning conspiracy offenses charged under RICO, 18 USC § 1962(d).

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

371	13	.3	Multiple Conspiracies (For Use With General Conspiracy Charge)	140
		.4	Withdrawal From Conspiracy (For Use With General Conspiracy Charge)	141
		.5	Pinkerton Instruction	143
		.6	Conspiracy To Defraud United States	145
471	14		Counterfeiting	148
472	15	.1	Counterfeit - - Possession	149
		.2	Counterfeit - - Uttering	151
473	16		Counterfeit - - Dealing	153
474(a)	17		Counterfeit - - Possession	155
495 or 510(a)(1)	18	.1	Forgery Endorsement Of Government Check	157
495 or 510(a)(2)		.2	Forgery Uttering A Forged Endorsement	159
521	19		Criminal Street Gangs	162
545	20		Smuggling	165

Cited in U.S. v. Chemer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

641	21		Theft Of Government Money Or Property	167
656	22		Theft Or Embezzlement By Bank Employee	170
659	23	.1	Theft From Interstate Shipment	173
		.2	Buying Or Receiving Goods Stolen From Interstate Shipment	176
666(a)(1)(B)	24		Bribery Concerning Program Receiving Federal Funds	180
751(a)	25		Escape	183
752(a)	26		Instigating Or Assisting Escape	185
844(e)	27		Making Threats By Mail Or Telephone	187
844(i)	28		Federal Arson Statute	189
871	29		Threats Against The President	191
875(a)	30	.1	Interstate Transmission Of Demand For Ransom For Return Of Kidnapped Person	193

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

875(b)	30	.2	Interstate Transmission Of Extortionate Communication	196
875(c)		.3	Interstate Transmission Of Threat To Kidnap Or Injure	199
875(d)		.4	Interstate Transmission Of Extortionate Communication	201
876	31	.1	Mailing Threatening Communications (First Paragraph)	204
		.2	Mailing Threatening Communications (Second Paragraph)	206
		.3	Mailing Threatening Communications (Third Paragraph)	209
		.4	Mailing Threatening Communications (Fourth Paragraph)	211
911	32		False Impersonation Of A Citizen	214
912	33		False Impersonation Of An Officer Of The United States	216
922(a)(1)(A)	34	.1	Dealing In Firearms Without License	218
922(a)(5)		.2	Transfer Of Firearm To Non-Resident	221

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

922(a)(6)	34	.3	False Statement To Firearms Dealer	224
922(b)(5)		.4	Failure Of Firearms Dealer To Keep Proper Record Of Sale	227
922(d)(1)		.5	Sale Of Firearm To Convicted Felon	229
922(g)(1)		.6	Possession Of Firearm By A Convicted Felon	231
922(m)		.7	False Entry In Record By Firearms Dealer	234
922(o)(1)		.8	Possession Of A Machine Gun	236
924(a)(1)(A)	35	.1	False Statement With Respect To Information Required To Be Kept By Firearms Dealer	238
924(c)(1)(A)	35	.2	Carrying/Possessing A Firearm During Or In Furtherance Of Drug Trafficking Offense Or Crime Of Violence	240
1001	36		False Statement To Federal Agency	244
1005	37		False Entry In Bank Records	247
1010	38		False Statements In Department Of Housing And Urban Development And Federal Housing Administration Transactions	250

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

1014	39		False Statement To A Federally Insured Institution	252
1028(a)(3)	40	.1	False Identification Documents	254
1028(a)(4)		.2	False Identification Documents	256
1029(a)(1)	41	.1	Fraud In Connection With Counterfeit Credit Cards Or Other Access Devices	258
1029(a)(2)		.2	Fraud In Connection With Unauthorized Credit Cards Or Other Access Devices	261
1030(a)(1)	42	.1	Computer Fraud Injury To United States	264
1030(a)(2) and (c)(2)(B)		.2	Computer Fraud Obtaining Financial Information	267
1030(a)(5) (A) & (B)		.3	Computer Fraud - Causing Damage To Computer Or Program	270
1030(a)(6) (A) or (B)		.4	Computer Fraud Trafficking In Passwords	274
1031	43		Major Fraud Against The United States	277
1084	44		Transmission Of Wagering Information	280
1111	45	.1	First Degree Murder (Premeditated Murder)	282

Cited in U.S. v. Chemer No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

1111	45	.2	First Degree Murder (Felony Murder)	285
		.3	Second Degree Murder	288
1112	46	.1	Manslaughter - Voluntary	292
		.2	Manslaughter - Involuntary	294
1113	47		Attempted Murder	298
1114	48		Killing Or Attempting To Kill Federal Officer Or Employee	300
1201(a)(1)	49		Kidnapping	301
1341	50	.1	Mail Fraud	304
1341 & 1346		.2	Mail Fraud - Depriving Another Of Intangible Right Of Honest Services	310
1343	51	.1	Wire Fraud	316
1343 & 1346		.2	Wire Fraud - Depriving Another Of Intangible Right Of Honest Services	321
1344	52		Bank Fraud	326
1461	53		Mailing Obscene Material	330

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

1462	54		Interstate Transportation Of Obscene Material (By Common Carrier)	337
1465	55		Interstate Transportation Of Obscene Material (For Purpose Of Sale Or Distribution)	344
1503	56	.1	Obstruction Of Justice (Omnibus Clause)	351
		.2	Corruptly Influencing A Juror	354
		.3	Threatening a Juror	356
1512(a)(1)(A)	57	.1	Killing Of A Witness	358
1512(b)(1)		.2	Tampering With A Witness	359
1546(a)	58		Possession Or Use Of A False Visa	361
1581 & 1584	59		Involuntary Servitude And Peonage	364
1623(a)	60		False Declaration (Before Grand Jury)	368
1702	61		Obstruction Of Correspondence (Taking Of Mail)	371
1708	62	.1	Theft Of Mail Matter	373
		.2	Possession Of Stolen Mail Matter	375

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

1709	63		Theft Of Mail Matter By Postal Service Employee	377
1791(a)(1)	64	.1	Providing Contraband To A Federal Prisoner	379
1791(a)(2)		.2	Possession Of Contraband By A Federal Prisoner	381
1920	65		False Statement Regarding Federal Workers' Compensation Benefits	383
1951(a)	66	.1	Interference With Commerce By Extortion - Hobbs Act - Racketeering (Force Or Threats Of Force)	385
		.2	Interference With Commerce By Extortion - Hobbs Act - Racketeering (Color of Official Right)	388
		.3	Interference With Commerce By Robbery Hobbs Act - Racketeering (Robbery)	391
1952(a)(3)	67		Interstate Travel In Aid Of Racketeering	394
1953	68		Interstate Transportation Of Wagering Paraphernalia (Bookmaking)	397
1955	69		Illegal Gambling Business (Bookmaking)	399

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

1956(a)(1)(A)(i)	70	.1	Money Laundering Promoting Unlawful Activity	402
1956(a)(1)(B)(i)&(ii)		.2	Money Laundering Concealing Proceeds Of Specified Unlawful Activity Or Avoiding Transaction Reporting Requirement	406
1956(a)(2)(A)		.3	Money Laundering International Transportation Of Monetary Instruments	411
1956(a)(3)(A) or (a)(3)(b) or (a)(3)(C)		.4	Money Laundering Sting	414
1956(h)		.5	Money Laundering Conspiracy	419
1957		.6	Money Laundering	422
1962(c)	71	.1	RICO - Substantive Offense	425
1962(d)		.2	RICO - Conspiracy Offense	430
2113(a)	72	.1	Bank Robbery (Subsection (a) Only)	434
2113(a) & (d)		.2	Bank Robbery (Subsections (a) And (d) Alleged In Separate Counts)	437
2113(a) & (d)		.3	Bank Robbery (Subsections (a) And (d) Alleged In The Same Count)	441
2113(e)		.4	Bank Robbery (Subsection (e) Only - - Alleged In Separate Count)	446
2119	73		Motor Vehicles - "Carjacking"	449

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

2241(a)	74		Aggravated Sexual Abuse (By Force Or Threat)	453
2252(a)(1)	75	.1	Transporting Or Shipping Material Involving Sexual Exploitation Of Minors	456
2252(a)(2)		.2	Receiving And Distributing Material Involving Sexual Exploitation Of Minors	460
2252A(a)(1)		.3	Child Pornography Transporting Or Shipping	465
2252A(a)(2)(A) and (5)(B)		.4	Child Pornography Receiving Possessing And Distributing	470
2312	76		Interstate Transportation Of A Stolen Motor Vehicle	476
2313	77		Sale Or Receipt Of A Stolen Motor Vehicle	478
2314	78	.1	Interstate Transportation Of Stolen Property (First Paragraph)	481
		.2	Causing Interstate Travel In Execution Of A Scheme To Defraud (Second Paragraph)	484
2315	79		Sale Or Receipt Of Stolen Property (First Paragraph)	487
2422(b)	80		Coercion And Enticement Of A Minor To Engage In Sexual Activity	490

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

3146	81		Failure To Appear (Bail Jumping)	493

2. OFFENSES IN OTHER TITLES

7 USC 2024(b)	82		Unlawful Possession Of Food Stamps	495
8 USC 1324(a)(1)(A)(i)	83	.1	Bringing In Aliens	497
1324(a)(1)(A)(ii)		.2	Unlawfully Transporting Aliens	499
1321(a)(1)(A)(iii)		.3	Concealing Or Harboring Aliens	502
8 USC 1326	84		Illegal Entry By Deported Alien	504
21 USC 841(a)(1)	85		Controlled Substances (Possession With Intent To Distribute)	507
21 USC 843(b)	86		Controlled Substances (Unlawful Use Of Communications Facility)	510
21 USC 846, 955c and/or 963	87		Controlled Substances (Conspiracy)	512
21 USC 848	88	.1	Controlled Substances (Continuing Criminal Enterprise)	517
21 USC 848(e)		.2	Controlled Substances (Continuing Criminal Enterprise - Murder)	522

Cited in U.S. v. Chierer, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

21 USC 848(e) et seq.	88	.3	Controlled Substances (Death Penalty - Supplemental Instructions) Preliminary Instruction	524
		.4	Controlled Substances (Death Penalty - Supplemental Instructions) Substantive Instruction	526
21 USC 860	89		Possession Of Controlled Substances Near Schools Or Public Housing	536
21 USC 952(a)	90		Controlled Substances - Importation	538
26 USC 5604(a)(1)& 5301(d)	91		Possession Or Transfer Of Non-Tax-Paid Distilled Spirits	540
26 USC 5861(d) 5861(h)	92	.1	Possession Of Unregistered Firearm	542
		.2	Possession Of Firearm Having Altered Or Obliterated Serial Number	544
26 USC 7201	93	.1	Tax Evasion (General Charge)	546
		.2	Net Worth Method	549
		.3	Bank Deposits Method	553
		.4	Cash Expenditures Method	556
26 USC 7203	94		Failure To File Tax Return	560

Cited in U.S. v. Chaney, No. 06-10642, archived on January 28, 2008

INDEX TO
OFFENSE INSTRUCTIONS
(Continued)

26 USC 7206(2)	95	Aiding And Abetting Filing False Return	562
26 USC 7207	96	False Tax Return	564
26 USC 7212(a)	97	Impeding Internal Revenue Service	566
31 USC 5322(b) & 5324(3)	98	Evading Currency Transaction Reporting Requirement (While Violating Another Law) By Structuring Transaction	569
38 USC 6102(b)	99	Fraudulent Receipt Of V.A. Benefits	572
42 USC 408(a)(7)(B)	100	Falsely Representing Social Security Number	574
42 USC 3631	101	Forceful Intimidation Because Of Race (Occupancy Of Dwelling - - No Bodily Injury)	576
46 USC 1903(a)	102	Controlled Substances (Possession On United States Vessel)	578
49 USC 46504	103	Assaulting Or Intimidating Flight Crew Of Aircraft In United States (Without Dangerous Weapon)	582
49 USC 46505(b)	104	Attempting To Board Air Craft With Concealed Weapon Or Explosive Device	585

Cited in U.S. v. Chaser, No. 06-10642, archived on January 28, 2008

1.1
Forcibly Assaulting A Federal Officer
(Without Use Of A Deadly Weapon)
18 USC § 111(a)(1)
(Felony Offense)

Title 18, United States Code, Section 111(a)(1), makes it a Federal crime or offense for anyone to forcibly assault a Federal officer while the officer is engaged in the performance of official duties.

[You are instructed that a 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 execute arrest warrants issued by a Judge or Magistrate Judge of this Court.]

The Defendant can be found guilty of the offense of assaulting a Federal officer only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant "forcibly assaulted" the person described in the indictment, as that term is hereafter defined;

Second: That the person assaulted was a Federal officer as described above, then engaged in the performance of an official duty, as charged; and

Third: That the Defendant acted knowingly and willfully.

The term "forcible assault" means any willful threat or attempt to inflict serious bodily 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 and serious bodily harm or death even though the threat or attempt is not actually carried out and the victim is not actually injured.

It is not necessary to show that the Defendant knew that 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 performing an official duty and that the Defendant willfully committed a forcible assault upon the officer.

Cited in U.S. v. Cheron, No. 06-10642, archived on January 28, 2008

On the other hand, the Defendant would not be guilty of a willful assault if the evidence leaves you with a reasonable doubt concerning whether the Defendant knew the victim to be a Federal officer and that the Defendant only acted because of a reasonable, good faith belief that self defense was needed to protect against an assault by a private citizen.

ANNOTATIONS AND COMMENTS

18 USC § 111(a)(1) provides:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any [Federal officer or employee] designated in Section 1114 of this title while engaged in or on account of the performance of his official duties [shall be guilty of an offense against the United States],

Maximum Penalty: Three (3) years imprisonment and applicable fine.

In United States v. Fallen, 256 F.3d 1082 (11th Cir. 2001), the court distinguished simple assault, as defined at common law (the misdemeanor offense included within subsection (a) of the statute), from the "forcible assault" proscribed by the statute as a felony offense. The latter is characterized by a threat or attempt to inflict serious bodily harm or death. In some cases, therefore, it may be necessary to give a lesser included offense instruction on simple assault. See Special Instruction 10.

United States v. Young, 464 F.2d 161 (5th Cir. 1972); United States v. Danehy, 680 F.2d 1311 (11th Cir. 1982), although knowledge of the official capacity of the victim is unnecessary for conviction, a Defendant may not be found guilty if the Defendant acts from the mistaken belief that he or she is threatened with an intentional tort by a private citizen. In connection with a claim of self-defense, see United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985), concerning an instruction about the relevance of the Defendant's state of mind and the alternative methods the Government has to negate such a claim.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

1.2
Forcibly Assaulting A Federal Officer
(With Use Of A Deadly Weapon Or Inflicting Bodily Injury)
18 USC § 111(b)

Title 18, United States Code, Section 111(b), makes it a Federal crime or offense for anyone to forcibly assault a Federal officer [using a deadly or dangerous weapon] [inflicting bodily injury] while the officer is engaged in the performance of official duties.

[You are instructed that a 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 execute arrest warrants issued by a Judge or Magistrate Judge of this Court.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Defendant can be found guilty of the offense of assaulting a Federal officer [with a deadly weapon] [inflicting bodily injury] only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant "forcibly assaulted" the person described in the indictment, as that term is hereafter defined;

Second: That the person assaulted was a Federal officer, as described above, then engaged in the performance of an official duty, as charged;

Third: That the Defendant acted knowingly and willfully; and

Fourth: That in so acting the Defendant [used a deadly or dangerous weapon] [inflicted bodily injury].

The term "forcible assault" means any willful threat or attempt to inflict serious bodily 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 and serious bodily harm or death even though the threat or attempt is not actually carried out and the victim is not actually injured.

It is not necessary to show that the Defendant knew that 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 performing an official duty and that the Defendant willfully committed a forcible assault upon the officer.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

On the other hand, the Defendant would not be guilty of a willful assault if the evidence leaves you with a reasonable doubt concerning whether the Defendant knew the victim to be a Federal officer and that the Defendant only acted because of a reasonable, good faith belief that self defense was needed to protect against an assault by a private citizen.

[The term "deadly or dangerous weapon" includes any object capable of being readily used by one person to inflict severe bodily injury upon another person; and 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 the weapon in some manner while carrying out the forcible assault.]

[As stated before, a forcible assault requires a willful threat or attempt to inflict serious bodily injury or death upon someone, and such an assault may be committed even though the threat or attempt to cause such serious injury is not carried out and the intended victim is not actually injured. In this case, however, the indictment alleges that there actually was "bodily injury," and that part of the charge - - the Fourth thing the Government must prove, as stated before - - is satisfied regardless of the seriousness of the injury if the Government proves that the victim suffered any cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of a function of a bodily member, organ, or mental faculty; or any other injury to the body no matter how temporary.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 111(b) provides:

> Whoever, in the commission of any such act (i.e., a violation of § 111(a) - - assaulting a Federal officer) uses a deadly or dangerous weapon or inflicts bodily injury [shall be punished as provided by law].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

In United States v. Fallen, 256 F.3d 1082 (11th Cir. 2001), the court distinguished simple assault, as defined at common law (the misdemeanor offense included within subsection (a) of the statute), from the "forcible assault" proscribed by the statute as a felony offense. The latter is characterized by a threat or attempt to inflict serious bodily harm or death. In some cases, therefore, it may be necessary to give a lesser included offense instruction on simple assault. See Special Instruction 10.

United States v. Young, 464 F.2d 160 (5th Cir. 1972); United States v. Danehy, 680 F.2d 1311 (11th Cir. 1982), although knowledge of the official capacity of the victim is unnecessary for conviction, a Defendant may not be found guilty if the Defendant acts from the mistaken belief that he or she is threatened with an intentional tort by a private citizen. In connection with a claim of self-defense, see United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985), concerning an instruction about the relevance of the Defendant's state of mind and the alternative methods the government has to negate such a claim.

Cited in U.S. v. Cherer, No. 06-16642 archived on January 26, 2008

The definition of "bodily injury" in the last paragraph of the instruction is from United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017, 113 S.Ct. 1813, 123 L.Ed.2d 445 (1993), defining the term under 18 USC § 242.

If the evidence justifies an instruction on the lesser included offense of assaulting a Federal officer without use of deadly weapon or infliction of bodily injury, see Special Instruction 10, Lesser Included Offense.

2
Concealment Of Property Belonging To Bankruptcy Estate Of Debtor 18 USC § 152(1)

Title 18, United States Code, Section 152(1), makes it a Federal crime or offense for anyone, in a case governed by the Federal bankruptcy laws, fraudulently to conceal any property belonging to the estate of a bankruptcy debtor either from creditors or from an officer of the court charged with the control or custody of such property.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That on or about the date charged, there was pending in the United States Bankruptcy Court for the _____ District of _____, a bankruptcy case docketed as Case Number _____, wherein, _____ [doing business as _____] was the Debtor;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the property or an interest in the property described in the indictment was a part of the bankruptcy estate of such Debtor; and

Third: That the Defendant knowingly, willfully and fraudulently concealed the property from creditors or from the [Bankruptcy Administrator] [United States Trustee] who had responsibility for the control or custody of such property, as charged.

The term "Debtor" simply means the person or corporation concerning whom a case under the Federal bankruptcy laws has been commenced. When a debtor files a voluntary petition under the bankruptcy laws, there is created an estate comprised, among other things, of all legal or equitable interests of the debtor in property wherever located and by whomever held as of the commencement of the bankruptcy case. Thus, any interest owned by the bankruptcy debtor in any property at the time the bankruptcy case begins is a part of the bankruptcy estate. The fact that another person or entity also owned an interest in the property with the bankruptcy debtor does not prevent the interest of the bankruptcy debtor in the property from being a part of the bankruptcy estate. The bankruptcy estate also includes proceeds, product, rents, or profits of or from property of the estate, except earnings from services performed by an individual debtor after the commencement of the case.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

The [Bankruptcy Administrator] [United States Trustee] for the Bankruptcy Court for the _____ District of _____ is an officer of the court and was at all relevant times responsible for the control or custody of all property constituting the bankruptcy estate in Case Number _____.

The essence of the charge in the indictment is the knowing and fraudulent concealment by the Defendant of property belonging to the estate of the debtor. The term "concealment" or "conceal" is to be given its ordinary meaning, that is, to prevent disclosure or recognition of, or to place out of sight or to withdraw from being observed.

A person "fraudulently conceals" property of the estate of a debtor when that person knowingly withholds information or property, or knowingly acts for the purpose of preventing the discovery of such property, intending to deceive or to cheat a creditor or a custodian ordinarily for the purpose of causing some financial loss to another or bringing some financial gain to one's self.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

The term "creditor" means a person or company that has a claim or a right to payment from the debtor that arose at the time of or before the bankruptcy court issued its order for relief concerning the debtor.

The term “custodian” means a person authorized by the bankruptcy court to administer the property of the debtor and includes a bankruptcy administrator or trustee.

Fraudulently concealing property of the estate of the debtor may include transferring property to a third party or entity, destroying the property, withholding knowledge concerning the existence or

whereabouts of property, or knowingly doing anything else by which that person acts to hinder, delay or defraud any of the creditors or the [Bankruptcy Administrator] [United States Trustee].

ANNOTATIONS AND COMMENTS

18 USC § 152(1) provides that whoever:

> (1) knowingly and fraudulently conceals . . . in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Some of the definitions in this instruction are from 11 USC §§ 101 and 541.

Cited in U.S. v. Oberer, No. 06-10642, archived on January 28, 2008

3
Presenting Or Using A False Claim In A Bankruptcy Proceeding
18 USC § 152(4)

Title 18, United States Code, Section 152(4), makes it a Federal crime or offense for anyone to knowingly and fraudulently [present] [use] a false claim in any bankruptcy proceeding.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That on or about the date charged, there was pending in the United States Bankruptcy Court for the _____ District of _____, a bankruptcy case docketed as Case Number _____, wherein, _____ [doing business as _____] was the Debtor;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant [in a personal capacity] [as or through an agent, proxy, or attorney] [presented] [used] a claim against the estate of the Debtor in such bankruptcy proceeding;

Third: That the claim so [presented] [used] was false as to a material fact; and

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

A claim is "false" if it is untrue and is then known to be untrue by the person [presenting] [using] it.

A “material fact” means an important fact as distinguished from some unimportant or trivial detail.

A claim is "fraudulent" if it is intended to deceive or to cheat, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

ANNOTATIONS AND COMMENTS

18 USC § 152(4) provides that whoever:

> (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney [shall be guilty of an offense against the United States].

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

See 11 USC § 101(5) for a definition of “claim” if one is needed.

There are no decisions in the Eleventh Circuit as to whether materiality is an element of this offense. However, because the statute expressly incorporates the term “fraudulently” in conjunction with the term “false claim,” the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the Supreme Court decisions in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995); United States v. Wells, 519 U.S. 482, 117 S.Ct. 921 (1997); and Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999). The Court concluded in Wells that materiality was not an element of the offense of making a “false statement” in violation of 18 USC § 1014, but held in Neder that use of the words “fraud”or “fraudulently” in 18 USC §§ 1341, 1343 and 1344, as terms of art, incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And Gaudin held that when materiality is an essential element of an offense, it must be submitted to the jury.

4
Embezzlement Of Bankruptcy Estate
18 USC § 153

Title 18, United States Code, Section 153, makes it a Federal crime or offense for anyone who has access to the property belonging to a bankruptcy estate as a trustee or custodian to knowingly and fraudulently embezzle or appropriate to that persons' own use any property belonging to the bankruptcy estate.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That on or about the date charged there was pending in the United States Bankruptcy Court for _____ _____, a bankruptcy case docketed as Case Number _____, wherein _____ was the Debtor;

Second: That the property described in the indictment was a part of the bankruptcy estate of such Debtor;

Third: That the Defendant had access to such property by virtue of the Defendant's participation in the administration of the bankruptcy estate of such Debtor as a trustee or custodian, as charged; and

Fourth: That the Defendant knowingly, willfully and fraudulently embezzled and appropriated to the Defendant's own use, or spent or transferred, such property belonging to the estate of such Debtor.

The term "Debtor" simply means the person or corporation concerning whom a case under the Federal bankruptcy laws has been commenced. When a debtor files a voluntary petition under the bankruptcy laws, there is created an estate comprised, among other things, of all legal or equitable interests of the debtor in property wherever located and by whomever held as of the commencement of the bankruptcy case.

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

The Bankruptcy Court for the _____ has the authority and power under the applicable federal statutes and regulations to appoint a trustee or custodian to perform any necessary services with respect to the bankruptcy estate of the Debtor or otherwise be responsible for the control or custody of all property constituting the bankruptcy estate.

The essence of the charge in the indictment is the knowing and fraudulent embezzlement or appropriation by the Defendant of property belonging to the estate of the Debtor. The term "fraudulent" means to knowingly deceive or mislead someone, ordinarily for the purpose of

bringing about gain to one's self. The terms "embezzle" or "appropriate" are to be given their ordinary meaning, that is, to wrongfully take the property of someone else and convert it to one's own use or the use of another, or to wrongfully spend or transfer such property thereby depriving the rightful owner of its use.

ANNOTATIONS AND COMMENTS

18 USC § 153 provides:

> (a) Offense. A person described in subsection (b) [a trustee or other custodian] who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property. . . belonging to the estate of a debtor [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

5.1
Bribery Of Public Official (Or Juror)
18 USC § 201(b)(1)

Title 18, United States Code, Section 201(b)(1), makes it a Federal crime or offense for anyone to bribe a [public official] [juror].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant directly or indirectly [gave] [offered or promised] something of value to a [public official] [juror], as charged; and

Second: That the Defendant did so knowingly and corruptly, with intent [to influence an official act] [to influence such public official to allow or make opportunity for the commission of a fraud on the United States] [to induce such public official to omit an act in violation of the public official's lawful duty].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

You are instructed that anyone holding the position of _____, as described in the indictment, would be a [public official] [juror] as that term has been used in these instructions.

The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy which is brought before a [public official][juror] for a decision or to be acted upon.

To act "corruptly" means to act knowingly and dishonestly for a wrongful purpose.

ANNOTATIONS AND COMMENTS

18 USC § 201(a)(1) and (b)(1) provide:

> §201. Bribery of public officials and [jurors]
>
> (a) For the purpose of this section - -
>
> (1) the term "public official" means . . . an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof. . . or a juror;
>
> * * * * *
>
> (b) Whoever - -
>
> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent - -
>
> (A) to influence any official act; or
>
> (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> ©) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherer, No. 06-10042 archived on January 28, 2008

Maximum Penalty: Fifteen (15) years imprisonment and applicable fine, which may be enhanced to three times the monetary value of the amount of the bribe. Thus, under the principle of Apprendi, if the indictment alleges the amount of the bribe as a means of enhancing the maximum fine, the instruction should be modified to submit that issue to the jury. Consideration should also be given in such a case to the possible use of Special Instruction 10, Lesser Included Offense.

5.2
Receipt Of Bribe By Public Official
(Or Juror)
18 USC § 201(b)(2)

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

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

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

Second: That the Defendant did so knowingly and corruptly in return for [being influenced in the performance of an official act] [being influenced to allow or make opportunity for the commission of a fraud on the United States] [being induced to omit an act in violation of the Defendant's lawful duty].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

You are instructed that anyone holding the position of _____, as described in the indictment, would be a [public official] [juror] as that term has been used in these instructions.

The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy that is brought before a [public official] [juror] for a decision or to be acted upon.

To act "corruptly" means to act knowingly and dishonestly for a wrongful purpose.

ANNOTATIONS AND COMMENTS

18 USC § 201(a)(1) and (b)(2) provide:

> § 201. Bribery of public officials and [jurors]
>
> (a) For the purpose of this section - -
>
> (1) the term "public official" means . . . an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof. . . or a juror;
>
> * * * * *
>
> (b) Whoever - -
>
> (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
>
> (A) being influenced in the performance of any official act;
>
> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> ©) being induced to do or omit to do any act in violation of the official duty of such official or person [shall be guilty of an offense against the United States].

Maximum Penalty: Fifteen (15) years imprisonment and applicable fine, which may be enhanced to three times the monetary value of the

Cited in U.S. v. Cherer, No. 06-10642 archived on January 28, 2008

amount of the bribe. Thus, under the principle of Apprendi, if the indictment alleges the amount of the bribe as a means of enhancing the maximum fine, the instruction should be modified to submit that issue to the jury. Consideration should also be given in such a case to the possible use of Special Instruction 10, Lesser Included Offense.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

6.1
Bribery Or Reward Of Bank Officer
18 USC § 215(a)(1)

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

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant [gave] [offered] [promised] something of value to the person named in the indictment, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

<u>Second</u>: That the Defendant did so knowingly and corruptly with the intent to [influence] [reward] an [officer] [director] [employee] [agent] [attorney] of a financial institution in connection with any business or transaction of that institution; and

<u>Third</u>: That the money or other property so [given] [offered] [promised] had a value in excess of $1,000.

You are instructed that the institution named in the indictment is a "financial institution" within the meaning of the law.

To act "corruptly" means to act knowingly and dishonestly for a wrongful purpose.

ANNOTATIONS AND COMMENTS

Title 18 USC § 215(a)(1) provides:

> § 215. Receipt of commissions or gifts for procuring loans
>
> (a) Whoever - -
>
> (1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "financial institution" is defined in 18 USC § 20.

Maximum penalty: Thirty (30) years imprisonment and applicable fine, which may be enhanced to three times the monetary value of the amount of the bribe. Thus, under the principle of Apprendi, if the indictment alleges the amount of the bribe as a means of enhancing the maximum fine, the instruction should be modified to submit that issue to the jury. Consideration should also be given in such a case to the possible use of Special Instruction 10, Lesser Included Offense.

18 USC § 215(a) provides that if the value of the bribe does not exceed $1,000, the Defendant is subject to imprisonment for not more than one year, i.e., a misdemeanor offense. See Special Instruction 10, Lesser Included Offense.

The forfeiture provisions of 18 USC § 982 apply (18 USC § 982(a)(2)(A)) if the indictment has given notice under Federal Rule of Criminal Procedure 32.2 that the Government will seek forfeiture as part of the sentence. The principle of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), does not apply to forfeiture proceedings following conviction, and the burden of proof on a forfeiture count is preponderance of the evidence. United States v. Cabeza, 258 F.3d 1256 (11th Circuit 2001).

See Trial Instruction 8 for use in submitting forfeiture issues to the jury.

6.2
Receipt Of A Bribe Or Reward By Bank Officer
18 USC § 215(a)(2)

Title 18, United States Code, Section 215(a)(2), makes it a federal crime or offense for an [officer] [director] [employee] [agent] [attorney] of a financial institution, for the benefit of any person, corruptly to [solicit or demand] [accept or agree to accept] anything of value from any person, intending to be [influenced] [rewarded] in connection with any business or transaction of such institution.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant, as an [officer] [director] [employee] [agent] [attorney] of a financial institution [solicited or demanded] for the benefit of [himself] [another person] [accepted or agreed to accept] something of value from the person named in the indictment, as charged;

Second: That the Defendant did so knowingly and corruptly, intending to be [influenced] [rewarded] in connection with any business or transaction of the financial institution; and

Third: That the money or other property so [solicited or demanded] [accepted or agreed upon by the Defendant to

accept] had a value in excess of $1,000.

You are instructed that the institution named in the indictment is a "financial institution" within the meaning of the law.

To act "corruptly" means to act knowingly and dishonestly for a wrongful purpose.

ANNOTATIONS AND COMMENTS

18 USC § 215(a)(2) provides:

> §215. Receipt of commissions or gifts for procuring loans
>
> (a) Whoever - -
>
> (2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution [shall be guilty of an offense against the United States]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "financial institution" is defined in 18 USC § 20.

Maximum Penalty: Thirty (30) years imprisonment and applicable fine, which may be enhanced to three times the monetary value of the amount of the bribe. Thus, under the principle of Apprendi, if the indictment alleges the amount of the bribe as a means of enhancing the maximum fine, the instruction should be modified to submit that issue to the jury. Consideration should also be given in such a case to the possible use of Special Instruction 10, Lesser Included Offense.

18 USC § 215(a) provides that if the value of the bribe does not exceed $1,000, the Defendant is subject to imprisonment for not more than one year, i.e., a misdemeanor offense. See Special Instruction 10, Lesser Included Offense.

The forfeiture provisions of 18 USC § 982 apply (18 USC § 982(a)(2)(A)) if the indictment has given notice under Federal Rule of Criminal Procedure 32.2 that the Government will seek forfeiture as part of the sentence. The principle of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) does not apply to forfeiture

proceedings following conviction, and the burden of proof on a forfeiture count is preponderance of the evidence. United States v. Cabeza, 258 F.3d 1256 (11th Circuit 2001).

See Trial Instruction 8 for use in submitting forfeiture issues to the jury.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

7
Failure To Pay Child Support
18 USC § 228(a)(3)

Title 18, United States Code, Section 228(a)(3) makes it a Federal crime or offense for anyone to willfully fail to pay a support obligation with respect to a child who resides in another State, if such obligation [has remained unpaid for a period longer than two years] [is greater than $10,000.]

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant failed to pay a support obligation, as hereafter defined;

Second: That the support obligation was for a child who resides in another State;

Third: That the Defendant acted willfully in failing to pay the support obligation; and

Fourth: That the support obligation [remained unpaid for a period longer than two years] [was greater than $10,000].

The term "support obligation" means any amount determined under a court order or an order of an administrative process, pursuant

to the law of a State, to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living.

[The existence of a support obligation that was in effect for the time period charged in the indictment creates a rebuttable presumption that the Defendant had the ability to pay the support obligation for that time period. A "rebuttable presumption" refers to a fact that may be assumed in the absence of evidence to the contrary.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 228(a)(3) provides:

> (a) Any person who - -
>
> (3) willfully fails to pay a support obligation with respect to a child who resides in another state, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000 [shall be guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine. Section 228(d) mandates restitution in an amount equal to the unpaid support obligation as it exists at the time of sentencing.

The rebuttable presumption is created by the statute, 18 USC § 228(b). However in United States v. Grigsby, 85 F.Supp.2d 100 (D.R.I. 2000), the court held the presumption to be unconstitutional in violation of the Due Process Clause of the Fifth Amendment. No other court has addressed this issue to date.

With respect to the giving of Special Instruction 9 dealing with an intentional violation of a known legal duty, see United States v. Williams, 121 F.3d 615 (11th Cir. 1997).

8
Deprivation Of Civil Rights
(Without Bodily Injury, Kidnapping, Sexual Assault Or Death)
18 USC § 242

Title 18, United States Code, Section 242, makes it a Federal crime or offense for anyone, acting under color of state law, to willfully deprive someone else of his or her rights secured by the Constitution or laws of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant committed the act of [describe the right of which the victim was deprived, e.g. deprivation of liberty without due process of law] as charged in the indictment;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That in so doing the Defendant acted or purported to act under color of state law; and

Third: That in so doing the Defendant willfully exceeded and misused or abused the Defendant's authority under state law.

The phrase "under color of state law" covers not only acts done by an official under a State law, but also acts done by an official under any ordinance of a county or municipality of the State, as well as acts done under any regulation issued by any State or county or municipal

official, and even acts done by an official under color of some State or local custom.

To act "under color of state law" means to act beyond the bounds of lawful authority, but in such a manner that the unlawful acts were done while the official was purporting or pretending to act in the performance of official duties. In other words, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because that person is an official.

[A Defendant may be found guilty of the charges contained in the indictment, however, even though the Defendant was not an official or employee of the State, or of any county, city, or other governmental unit, if you find beyond a reasonable doubt that the essential facts constituting the offense charged have been established, as defined in these instructions, and that the Defendant was a willful participant together with the state or its agents in the doing of such acts.]

Cited in U.S. v. Cheren No. 06-10642, archived on January 28, 2008

[The term "liberty" includes the liberty to be free from unlawful attacks upon the victim's person. "Liberty" thus includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state.]

[To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of the law. Before the jury can determine whether or not the alleged victim was deprived of any liberty under the Federal Constitution "without due process of law" as charged in the indictment, the jury must first determine from the evidence whether the Defendant did any of the acts charged in the indictment. If so, you must next determine whether the Defendant acted within or without the bounds of the Defendant's lawful authority.]

[If you find that the Defendant acted within the limits of the Defendant's lawful authority under State law, then the Defendant did not deprive the alleged victim of any liberty "without due process of law."]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[On the other hand, if you should find that the Defendant acted beyond the limits of the Defendant's lawful authority under State law, then you may further find that the Defendant did deprive the alleged victim of liberty "without due process of law." And if you should so find, you must then proceed to decide whether, in so doing, the Defendant acted willfully, as charged.]

ANNOTATIONS AND COMMENTS

18 USC § 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of an offense against the United States.]

Maximum Penalty: One (1) year imprisonment and applicable fine.

18 USC § 242 was amended in 1988 to increase the maximum penalty in a variety of situations, such as when bodily injury results or dangerous weapons are used. Under the principle of Apprendi, this charge must be modified if one of the many situations calling for an increased punishment is charged and, in that event, the Lesser Included Offense Special Instruction may also be used.

The Eleventh Circuit has approved the following definition of "bodily injury" under § 242: "the term 'bodily injury' means -- (A) a cut, abrasion, bruise, burn or disfigurement; (B) physical pain; ©) illness; (D) impairment of a function of a bodily member, organ or mental faculty; or (E) any other injury to the body, no matter how temporary." United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017, 113 S.Ct. 1813, 123 L.Ed.2d 445 (1993).

Cited in U.S. v. Cherefet No. 06-10642, archived on January 28, 2008

A private citizen who aids and abets a state officer may be guilty under § 242 if the private citizen willfully acts with state officers who are active participants. United States v. Farmer, 923 F.2d 1557, 1564 (11th Cir. 1991).

If the determination of whether the Defendant acted within or without the limits of lawful authority is dependent upon the presence of "probable cause," an instruction defining probable cause, tailored to the case, must be included in the charge. For an example of a "probable cause" instruction, see Federal Claims Instruction 2.2, Pattern Jury Instructions (Civil Cases).

The civil action requirement that the alleged constitutional infringement be "clearly established" under substantially similar circumstances in order to overcome qualified immunity is equally applicable in criminal prosecutions in the sense that the unlawfulness of the conduct must be apparent in the light of pre-existing case law so as to give "fair warning" to the accused offender. United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219 (1997). See also Marsh v. Butler County, 268 F.3d 1014, 1031 n.9 (11th Cir. 2001).

9
Damage To Religious Property
18 USC § 247 (a)(1) and (d)(2)

Title 18, United States Code, Section 247(a)(1), makes it a Federal crime or offense under certain circumstances for anyone to intentionally [deface] [damage] [destroy] any religious real property because of the religious character of that property.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant intentionally [defaced] [damaged] [destroyed] the real property described in the indictment, as charged;

Second: That the Defendant did so knowingly and because of the religious character of that property;

Third: That the offense was in or affected interstate or foreign commerce;

Fourth: That bodily injury to the person named in the indictment occurred as a direct or proximate result of the Defendant's acts; and

Fifth: The Defendant employed [fire] [an explosive] in committing the offense.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "religious property" simply means any church, synagogue, mosque, religious cemetery, or other religious property.

The requisite effect on [interstate] [foreign] commerce can arise in a wide variety of ways, such as where the Defendant traveled into the state where the conduct occurred from [another state] [a foreign country]; or where materials to repair the damage traveled from one state into another state; or [insert other relevant conduct which affects commerce].

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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 247 provides:

> (a) Whoever, in any of the circumstances referred to in subsection (b) of this section - -
>
> > (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so [shall be guilty of an offense against the United States].
>
> * * * * *
>
> (b) The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.

* * * * *

(d) The punishment for a violation of subsection (a) of this section shall be - -

(2) if bodily injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, and the violation is by means of fire or an explosive a fine under this title or imprisonment for not more than 40 years, or both;

Maximum Penalty: One (1) year imprisonment and applicable fine unless bodily injury results (or the offense is otherwise aggravated as specified in subsection (d)(1),(2) and (3) of the statute).

This instruction covers three separate offenses embodied in § 247: (1) damage to property; (2) damage to property with bodily injury; (3) damage to property with bodily injury resulting from use of fire or explosives. In an appropriate case, therefore, it may be necessary to use Special Instruction 10, Lesser Included Offenses, and to modify that instruction if both of the lesser crimes are submitted to the jury.

Cited in U.S. v. Cherefin, No. 06-10642, archived on January 28, 2008

10.1
Freedom Of Access To Reproductive Health Services
Intimidation Or Injury Of A Person
18 USC § 248(a)(1)

Title 18, United States Code, Section 248(a)(1), makes it a Federal crime or offense for anyone by using [force] [threat of force] [physical obstruction] to intentionally [injure] [intimidate] [interfere with] a person [obtaining] [providing] reproductive health services.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant, by the use of [force] [threat of force] [physical obstruction] intentionally [injured] [intimidated] [interfered with] the person named in the indictment, as charged; [and]

Cited in U.S. v. Chetet, No. 06-10642, archived on January 28, 2008

Second: That the Defendant did so knowingly and because such person was, or had been, [providing] [obtaining] reproductive health services; [and]

Third: That the Defendant's acts resulted in [death] [bodily injury].

[To "force" someone simply means to exert or apply physical compulsion or restraint against the person.]

[To "interfere with" simply means to restrict a person's freedom of movement.]

[To "intimidate" simply means to place a person in reasonable apprehension of bodily harm either to that person or to another.]

[To "physically obstruct" simply means to render impassable ingress to or egress from a facility that provides reproductive health services.]

The term "reproductive health services" simply means medical, surgical, counseling or referral services provided in a hospital, clinic, physician's office or other facility, relating to the human reproductive system including services relating to pregnancy or the termination of a pregnancy.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

ANNOTATIONS AND COMMENTS

18 USC § 248(a)(1) provides:

> Whoever - -
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts

to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment, and applicable fine, if bodily injury results.
Three (3) years imprisonment, and applicable fine, for repeat offense.
One (1) year imprisonment, and applicable fine, for first offense without bodily injury.
Six (6) months, and applicable fine, "for an offense involving exclusively a nonviolent physical obstruction."

Lesser Included Offense (Special Instruction 10) may apply. Also, if the indictment or information charges only an exclusively nonviolent physical obstruction, the Defendant is not entitled of right to a jury trial. United States v. Unterberger, 97 F.3d 1413 (11th. Cir. 1996).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

10.2
Freedom Of Access To Reproductive Health Services
Damage To A Facility
18 USC § 248(a)(3)

Title 18, United States Code, Section 248(a)(3), makes it a Federal crime or offense for anyone to intentionally [damage] [destroy] the property of a facility because such facility provides reproductive health services.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant intentionally [damaged] [destroyed] the facility described in the indictment, as charged; [and]

Second: That the Defendant did so knowingly and because such facility was being utilized to provide reproductive health services; [and]

Third: That the Defendant's acts resulted in [death] [bodily injury.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "facility" simply means a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which such facility is located.

The term "reproductive health services" simply means medical, surgical, counseling or referral services provided in a facility relating to

the human reproductive system including services relating to pregnancy or the termination of a pregnancy.

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

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 248(a)(3) provides:

> Whoever --
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment, and applicable fine, if bodily injury results.
Three (3) years imprisonment, and applicable fine, for repeat offense.

Lesser Included Offense (Special Instruction 10) may apply.

11.1
Conspiracy To Defraud The Government With Respect To Claims
18 USC § 286

Title 18, United States Code, Section 286, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to defraud the Government by obtaining or aiding in obtaining, the payment or allowance of any false or fraudulent claim.

So, under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme, or that those who were members had entered into any formal type of agreement. Also, because the essence of a conspiracy offense is the making of the scheme itself, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it; and

Third: That the object of the unlawful plan was to defraud the Government by obtaining the payment or allowance of a claim which is based on a false or fraudulent material fact.

A fact is "material" if it is an important fact, as distinguished from some unimportant or trivial detail, and has a natural tendency to influence, or was capable of influencing, the decision of the department or agency in making a determination required to be made.

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before and even though the Defendant played only a minor part.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Of course, mere presence at the scene of a transaction or event, 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, standing alone, establish proof 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 one, does not thereby become a conspirator.

ANNOTATIONS AND COMMENTS

18 USC § 286 provides:

> Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be [guilty of an offense against the United States].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Ten (10) years and applicable fine.

Section 286 does not require the Government to prove an overt act. United States v. Lanier, 920 F.2d 887, 892 (11th Cir. 1991).

Because the statute expressly incorporates the term "fraudulent" in conjunction with the term "false," the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the more recent Supreme Court decisions in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995); United States v. Wells, 519 U.S. 482, 117 S.Ct. 921 (1997); and Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999). The Court concluded in Wells that materiality was not an element of the offense of making a "false statement" in violation of 18 USC § 1014, but held in Neder that use of the words "fraud" or "fraudulently" as terms of art in 18 USC §§ 1341, 1343 and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And Gaudin held that when materiality is an essential element of an offense, it must be submitted to the jury.

11.2
False Claims Against The Government
18 USC § 287

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

[You are instructed that the General Services Administration is a department or agency of the United States within the meaning of that law.]

The Defendant can be found guilty of the offense of making a false claim against the Government only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly presented to an agency of the United States a false and fraudulent claim against the United States, as charged in the indictment;

Second: That the false or fraudulent aspect of the claim related to a material fact; and

Third: That the Defendant acted willfully and with knowledge of the false and fraudulent nature of the claim.

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the Government agency was in fact deceived or misled.

The making of a false or fraudulent claim is not an offense unless the falsity or fraudulent aspect of the claim relates to a “material” fact. A misrepresentation is “material” if it relates to an important fact, as distinguished from some unimportant or trivial detail, and has a natural tendency to influence, or was capable of influencing, the decision of the department or agency in making a determination required to be made.

Cited in U.S. v. Cheree, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false fictitious, or fraudulent [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Note that Section 287, unlike other false claims or false statements provisions such as 18 USC § 1001, does not expressly state that "materiality" is an essential element of the offense.

Before 1997, the Fourth and Eighth Circuits held that materiality is an element of a violation under 18 USC § 287. United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983); United States v. Snider, 502 F.2d 645, 652 n.12 (4th Cir. 1974), while the Second, Fifth, Ninth, and Tenth Circuits held that materiality is not an element under 18 USC § 287. United States v. Upton, 91 F.3d 677 (5th Cir. 1996); United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995); United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992); United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir.), cert. denied, 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43 (1984).

The Eleventh Circuit had explicitly avoided deciding whether materiality is an element under 18 USC § 287. United States v. White, 27 F.3d 1531, 1535 (11th Cir. 1994).

However, because the statute expressly incorporates the term "fraudulent" in conjunction with the term "false," the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the more recent Supreme Court decisions in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995); United States v. Wells, 519 U.S. 482, 117 S.Ct. 921 (1997); and Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999). The Court concluded in Wells that materiality was not an element of the offense of making a "false statement" in violation of 18 USC § 1014, but held in Neder that use of the words "fraud"or "fraudulently" as terms of art in 18 USC §§ 1341, 1343 and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And Gaudin held that when materiality is an essential element of an offense, it must be submitted to the jury.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

12
Presenting False Declaration Or Certification
18 USC § 289

Title 18, United States Code, Section 289, makes it a Federal crime or offense for anyone to knowingly and willfully make a false declaration or certification to the Veterans Administration pertaining to any matter within its jurisdiction.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly presented a false, fictitious or fraudulent declaration or certificate to the Veterans Administration pertaining to a matter within the jurisdiction of the Administrator of Veterans Affairs;

Second: That the declaration or certificate related to a material matter; and

Third: That the Defendant acted willfully and with knowledge of the falsity of the declaration or certificate.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the Government agency was in fact deceived or misled.

A declaration or certificate is "material" if it relates to an important fact, as distinguished from some unimportant or trivial detail, and has a natural tendency to influence, or is capable of influencing, the Veterans Administration in making a determination required to be made.

ANNOTATIONS AND COMMENTS

18 USC § 289 provides:

> Whoever knowingly and willfully makes, or presents any false, fictitious or fraudulent affidavit, declaration, certificate, voucher, endorsement, or paper or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Secretary of Veterans Affairs [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Note that Section 289, like Section 287, but unlike other false claims or false statements provisions such as 18 USC § 1001, does not expressly state that "materiality" is an essential element of the offense. There are no decisions on the point under Section 289, but there seems to be no reason to distinguish cases decided under Section 287.

Before 1997, the Fourth and Eighth Circuits had held that materiality is an element of a violation under 18 USC § 287. United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983); United States v. Snider, 502 F.2d 645, 652 n.12 (4th Cir. 1974), while the Second, Fifth, Ninth, and Tenth Circuits had held that materiality is not an element under 18 USC § 287. United States v. Upton, 91 F.3d 677 (5th Cir. 1996); United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995); United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992); United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir.), cert. denied, 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43 (1984).

The Eleventh Circuit had explicitly avoided deciding whether materiality is an element under 18 USC § 287.

However, because the statute expressly incorporates the term "fraudulent" in conjunction with the term "false," the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the more recent Supreme Court decisions in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995); United States v. Wells, 519 U.S. 482, 117 S.Ct. 921 (1997); and Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999). The Court concluded in Wells that materiality was not an element of the offense of making a "false statement" in violation of 18 USC § 1014, but held in Neder that use of the words "fraud"or "fraudulently" as terms of art in 18 USC §§ 1341, 1343 and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And Gaudin held that when materiality is an essential element of an offense, it must be submitted to the jury.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

13.1
General Conspiracy Charge
18 USC §371

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has a general

understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before, and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, 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, standing alone, establish proof 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 one, does not thereby become a conspirator.

Cited in U.S. v. Cherek, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 371 provides:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

United States v. Horton, 646 F.2d 181, 186 (5th Cir. 1981), approved this instruction.

13.2
Multiple Objects
(For Use With General Conspiracy Charge)
18 USC § 371

In this instance, with regard to the alleged conspiracy, the indictment charges that the Defendants conspired [to rob a federally insured bank and to transport a stolen motor vehicle in interstate commerce]. It is charged, in other words, that they conspired to commit two separate, substantive crimes or offenses.

In such a case it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit both of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendant willfully conspired with someone to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the two offenses the Defendant conspired to commit.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Ballard, 663 F.2d 534, 544 (5th Cir. Unit B, 1981), requires this instruction in order to assure a unanimous verdict when a single conspiracy embraces multiple alleged objects.

13.3
Multiple Conspiracies
(For Use With General Conspiracy Charge)
18 USC § 371

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.

What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the Defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular Defendant was a member of some other conspiracy, not the one charged in the indictment, then you must acquit that Defendant.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In other words, to find a Defendant guilty you must unanimously find that such Defendant was a member of the conspiracy charged in the indictment and not a member of some other separate conspiracy.

ANNOTATIONS AND COMMENTS

United States v. Diecidue, 603 F.2d 535, 548-549 (5th Cir. 1979), approved this instruction.

13.4
Withdrawal From Conspiracy
(For Use With General Conspiracy Charge)
18 USC §371

As you have been instructed, a conspiracy, like the one charged in this case, does not become a crime until two things have occurred: first, the making of the agreement; and, second, the performance of some "overt act" by one of the conspirators.

So, if a Defendant enters into a conspiracy agreement but later has a change of mind and withdraws from that agreement before anyone has committed an "overt act," as previously defined, then the crime was not complete at that time and the Defendant who withdrew cannot be convicted - - the Defendant would not be guilty of the alleged conspiracy offense.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

However, in order for you to decide that a Defendant withdrew from a conspiracy you must find that the Defendant took affirmative action to disavow or defeat the purpose of the conspiracy; and, as just explained, the Defendant must have taken such action before any member of the scheme had committed any "overt act."

ANNOTATIONS AND COMMENTS

United States v. Jimenez, 622 F.2d 753 (5th Cir. 1980), approved an instruction in substantially the same form.

United States v. Heathington, 545 F.2d 972 (5th Cir. 1977), withdrawal, to constitute a defense, must come before the completion or consummation of the offense through the commission of an overt act.

It appears, therefore, that an instruction on withdrawal is never appropriate under a conspiracy statute that does not require proof of an overt act (such as 21 USC § 846, 955c and 963). See United States v. Nicoll, 664 F.2d 1308 (5th Cir. Unit B, 1982). See Offense Instruction 75, infra.

Withdrawal is an affirmative defense. The defendant must prove "that he undertook affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives, and either communicated those acts in a manner reasonably calculated to reach his co-conspirators or disclosed the illegal scheme to law enforcement authorities." United States v. Firestone, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987). Neither arrest nor incarceration during the time frame of the conspiracy automatically triggers withdrawal from a conspiracy. United States v. Gonzalez, 940 F.2d 1413, 1427 (11th Cir. 1991).

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

13.5
Pinkerton Instruction
[Pinkerton v. U. S., 328 U.S. 640 (1946)]

In some instances a conspirator may be held responsible under the law for a substantive offense in which he or she had no direct or personal participation if such offense was committed by other members of the conspiracy during the course of such conspiracy and in furtherance of its objects.

So, in this case, with regard to Counts _____, and insofar as the Defendants _____ are concerned, respectively, if you have first found either of those Defendants guilty of the conspiracy offense as charged in Count _____ of the indictment, you may also find such Defendant guilty of any of the offenses charged in Counts _____ _____ even though such Defendant did not personally participate in such offense if you find, beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the offense charged in such Count was committed by a conspirator during the existence of the conspiracy and in furtherance of its objects;

Second: That the Defendant under consideration was a knowing and willful member of the conspiracy at the time of the commission of such offense; and

Third: That the commission of such offense by a co-conspirator was a reasonably foreseeable consequence of the conspiracy.

ANNOTATIONS AND COMMENTS

This charge is an adaptation of the one set forth in footnote 22, United States v. Alvarez, 755 F.2d 830, 848 (11th Cir. 1985).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

13.6
Conspiracy To Defraud United States
18 USC § 371 (Second Clause)

Title 18, United States Code, Section 371, makes it a Federal crime or offense for anyone to conspire or agree with someone else to defraud the United States or any of its agencies. To "defraud" the United States means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery.

A "conspiracy" is simply an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act),

it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before, and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, 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, standing alone, establish proof 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 one, does not thereby become a conspirator.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 371 provides:

> If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

14
Counterfeiting
18 USC § 471

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

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant made counterfeit Federal Reserve Notes, as charged; and

Second: That the Defendant did so willfully with intent to defraud.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded so long as it is established that the Defendant acted "with intent to defraud."

ANNOTATIONS AND COMMENTS

18 USC § 471 provides:

> Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

See Trial Instruction 8 for use in submitting forfeiture issues to the Jury.

15.1
Counterfeit - - Possession
18 USC § 472

Title 18, United States Code, Section 472, makes it a Federal crime or offense for anyone to possess, with intent to defraud, any counterfeit United States Federal Reserve Notes.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant possessed counterfeit Federal Reserve Notes as charged;

Second: That the Defendant knew at the time that the notes were counterfeit; and

Third: That the Defendant possessed the notes willfully and with intent to defraud.

Cited in U.S. v. Oberer, No. 06-10642, archived on January 28, 2008

To act "with intent to defraud" means to act with the specific intent to deceive or cheat, ordinarily for the purpose of causing some financial loss to another, or bringing about some financial gain to one's self. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded so long as it is established that the Defendant acted "with intent to defraud."

ANNOTATIONS AND COMMENTS

18 USC § 472 provides:

> Whoever, with intent to defraud . . . keeps in possession or conceals any falsely made [or] counterfeited . . . obligation . . . of the United States [shall be guilty of an offense against the United States.]

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

See Trial Instruction 8 for use in submitting forfeiture issues to the jury.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

15.2
Counterfeit - - Uttering
18 USC § 472

Title 18, United States Code, Section 472, makes it a Federal crime or offense for anyone to pass or utter, with intent to defraud, any counterfeit United States Federal Reserve Note.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant passed or uttered a counterfeit Federal Reserve Note as charged;

Second: That the Defendant knew at the time that the note was counterfeit; and

Third: That the Defendant passed or uttered the note willfully and with intent to defraud.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To "pass" or "utter" a counterfeit note includes any attempt to spend the note or otherwise place it in circulation.

To act "with intent to defraud" means to act with the specific intent to deceive or cheat, ordinarily for the purpose of causing some financial loss to another, or bringing about some financial gain to one's self. It is not necessary, however, to prove that the United States or anyone

else was in fact defrauded so long as it is established that the Defendant acted "with intent to defraud."

ANNOTATIONS AND COMMENTS

18 USC § 472 provides:

> Whoever, with intent to defraud, passes [or] utters . . . any falsely made [or] counterfeited . . . obligation . . . of the United States [shall be guilty of an offense against the United States.]

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

The "pass" element can be satisfied at any stage after the manufacturing of a counterfeit bill by the willful delivery of the bill to someone for the purpose of placing the bill in circulation, provided the person delivering the bill had the intent to defraud someone who might thereafter accept the bill as true and genuine. See United States v. Wilkerson, 469 F.2d 963 (5th Cir. 1972).

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

See Trial Instruction 86 for use in submitting forfeiture issues to the Jury.

16
Counterfeit - - Dealing
18 USC § 473

Title 18, United States Code, Section 473, makes it a Federal crime or offense for anyone to buy, sell, exchange, transfer, receive or deliver any counterfeit United States Federal Reserve Note with the intent that the note be passed or used as true and genuine.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant bought, sold, exchanged, transferred, received or delivered a counterfeit Federal Reserve Note as charged;

Second: That the Defendant knew at the time that the note was counterfeit; and

Third: That the Defendant acted willfully and with the intent that the note be passed or used as true and genuine.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To "pass" or "use" a counterfeit note as "true and genuine" includes any attempt to spend the note or otherwise place it in circulation.

The indictment alleges that the Defendant bought, sold, exchanged, transferred, received and delivered a counterfeit Federal

Reserve Note. The law specifies these several ways in which the offense can be committed, and it is not necessary for the Government to prove that all of such acts were in fact committed. The Government must prove beyond a reasonable doubt that the Defendant either bought, sold, exchanged, transferred, received or delivered counterfeit notes; but, in order to return a verdict of guilt, you must agree unanimously upon the way in which the offense was committed.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 473 provides:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be [guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

The "pass" element can be satisfied at any stage after the manufacturing of a counterfeit bill by the willful delivery of the bill to someone for the purpose of placing the bill in circulation, provided the person delivering the bill had the intent to defraud someone who might thereafter accept the bill as true and genuine. See United States v. Wilkerson, 469 F.2d 963 (5th Cir. 1972).

See Trial Instruction 8 for use in submitting forfeiture issues to the jury.

17
Counterfeit - - Possession
18 USC § 474(a)
(Fifth Paragraph)

Title 18, United States Code, Section 474, makes it a Federal crime or offense for anyone to possess counterfeit United States Federal Reserve Notes made "after the similitude" of genuine money with intent to sell or otherwise use it.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant possessed counterfeit Federal Reserve Notes made after the similitude of genuine notes, as charged;

Second: That the Defendant knew at the time that the notes were not genuine; and

Third: That the Defendant possessed the counterfeit notes willfully and with intent to sell or otherwise use them.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A Federal Reserve Note is "made after the similitude" of a genuine note, even though it does not purport to be an exact reproduction, so long as it bears such a likeness or resemblance to a genuine note that it is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest.

ANNOTATIONS AND COMMENTS

18 USC § 474(a) (fifth paragraph) provides:

> Whoever has in his possession or custody . . . any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty-five (25) years imprisonment for a Class B felony (18 USC § 3581) and applicable fine.

The definition of "after the similitude" is taken from United States v. Parr, 716 F.2d 796, 807 (11th Cir. 1983).

See Trial Instruction 8 for use in submitting forfeiture issues to the Jury.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

18.1
Forgery
(Endorsement Of Government Check)
18 USC § 495 (First Paragraph)
or
18 USC § 510(a)(1)
(Having A Face Value Of More Than $1,000)

Title 18, United States Code, Section 495, [Title 18, United States Code, Section 510(a)(1)] makes it a Federal crime or offense for anyone to forge the endorsement of the payee on a United States Treasury check.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant forged the payee's endorsement on a United States Treasury check [having a face value of more than $1,000], as charged; and

<u>Second</u>: That the Defendant did so willfully and with intent to defraud, that is, to obtain, or to enable some other person to obtain a sum of money directly or indirectly from the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The "payee" of a check is the true owner or person to whom the check was payable.

The term "forging" means to write a payee's endorsement or signature on a check without the payee's permission or authority.

To act with "intent to defraud" means to act 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 one's self.

The offense is complete whenever someone willfully forges the payee's endorsement with intent to defraud, and it is not necessary to show that the Government was in fact defrauded or that anyone actually obtained money from the United States.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 495 (first paragraph) provides:

> Whoever falsely makes, alters, forges, or counterfeits any . . . writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

18 USC § 510(a)(1) provides:

> (a) Whoever, with intent to defraud - -
>
> (1) falsely makes or forges any endorsement or signature on a Treasury check or bond or security of the United States [having a face value of more than $1,000] [shall be guilty of an offense against the United States].

Maximum penalty: Ten (10) years imprisonment and applicable fine.

If the evidence justifies an instruction on the lesser included offense under § 510(c), see Special Instruction 10, Lesser Included Offense.

18.2
Forgery
(Uttering A Forged Endorsement)
18 USC § 495 (Second Paragraph)
or
18 USC § 510(a)(2)
(Having A Face Value Of More Than $1,000)

Title 18, United States Code, Section 495, makes it a Federal crime or offense for anyone to utter or pass as true any United States Treasury check with a forged endorsement.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant uttered or attempted to pass and circulate as true and genuine the United States Treasury check [having a face value of more than $1,000] as described in the indictment;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant did so with knowledge that the payee's endorsement on the check was a forgery; and

Third: That the Defendant acted willfully and with intent to defraud the United States.

The "payee" of a check is the true owner or person to whom the check was payable.

The term "forgery" means that the payee's endorsement on a check was written or signed without the payee's permission or authority.

To "utter" or "pass" a check includes any attempt to cash a check or otherwise place it in circulation, and in so doing to state or imply, directly or indirectly, that the check and the endorsement are genuine.

To act with "intent to defraud" means to act 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 one's self.

The offense is complete whenever someone willfully attempts to pass or circulate the check as genuine, but with knowledge that the endorsement is forged, and with intent to defraud. It is not necessary to show that the Defendant actually did the forgery, or that the Government was in fact defrauded, or that anyone actually obtained money from the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 495 (second paragraph) provides:

> Whoever utters or publishes as true any . . . false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

18 USC § 510(a)(2) provides:

> (a) Whoever, with intent to defraud - -
>
> (2) passes, utters, or publishes, or attempts to pass, utter, or publish, any Treasury check or bond or security of the United States [having a face value of more than $1,000] bearing a falsely made or forged endorsement or signature [shall be guilty of an offense against the United States].

Maximum penalty: Ten (10) years imprisonment and applicable fine.

If the evidence justifies an instruction on the lesser included offense, see Special Instruction 10, Lesser Included Offense.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

19
Criminal Street Gangs
18 USC § 521

Note: Section 521 creates a maximum sentence enhancement of up to ten years imprisonment under certain circumstances for any member of a "criminal street gang" who commits a federal felony crime of violence or a federal felony controlled substance offense. The Committee believes, therefore, under the principle of Apprendi (until the Supreme Court or the Court of Appeals holds otherwise), any indictment containing allegations sufficient to invoke Section 521 requires submission of those issues to the jury. In such a case the following additional elements of proof would apply:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant committed the offense charged in Count _____ while participating in a "criminal street gang," as hereafter defined;

Second: That the Defendant knew that the members of the criminal street gang had engaged in a "continuing series" of [controlled substance offenses punishable by not less than five (5) years imprisonment] [felony crimes of violence having an element of physical force, or attempted physical force, against the person of another];

Third: That in committing the offense charged in Count _____ the Defendant intended to promote or further the felonious activities of the criminal street gang or to maintain or increase [his] [her] position in the gang; and

Fourth: That within the five (5) years preceding the commission of the offense charged in Count _____, the Defendant had been convicted of [a controlled substance offense punishable by not less than five (5) years imprisonment] [a felony crime of violence having an element of physical force, or attempted physical force against the person of another].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A "criminal street gang" means (1) an ongoing group, club, organization or association; (2) consisting of five or more persons; (3) having as one of its primary purposes the commission of one or more [federal controlled substances felonies] [federal felony crimes of violence having an element of physical force or attempted physical force against another person]; (4) who engage or have engaged within the past five years in a continuing series of [federal controlled substances felonies] [federal felony crimes of violence having an element of physical force or attempted physical force against another person]; and (5) whose activities affect interstate or foreign commerce.

A “continuing series” of offenses means proof of at least three qualifying offenses that were connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

20
Smuggling
18 USC § 545
(First Paragraph)

Title 18, United States Code, Section 545, makes it a Federal crime or offense to willfully smuggle merchandise into the United States in violation of the customs laws and regulations.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant smuggled or clandestinely introduced merchandise into the United States without declaring the merchandise for invoicing as required under the customs laws and regulations;

Second: That the Defendant knew that the merchandise was of a type that should have been invoiced; and

Third: That the Defendant acted willfully with intent to defraud the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The words "smuggle" and "clandestinely introduce" mean the same thing, that is, to bring something into the United States secretly or by fraud.

The phrase "merchandise that should have been invoiced" refers to the customs laws and regulations, and means any goods or articles

that the law requires to be declared and disclosed to customs officials upon entry into the United States whether or not they are subject to the payment of a tax or duty.

You are instructed that [describe the merchandise involved in the case] is merchandise that must be declared and disclosed to customs officials upon entry into the United States.

To act "with intent to defraud the United States" means to act with the specific intent to deceive or cheat the Government; but it is not necessary to prove that the Government was in fact deceived or defrauded.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 545 (first paragraph) provides:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces . . . into the United States any merchandise which should have been invoiced [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

See Trial Instruction 8 for use in submitting forfeiture issues to the Jury.

21
Theft Of Government Money Or Property
18 USC § 641 (First Paragraph)

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

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the money or property described in the indictment belonged to the United States;

Second: That the Defendant [embezzled] [stole] [converted] such money or property to his own use or to the use of another;

Third: That the Defendant did so knowingly and willfully with intent to deprive the owner of the use or benefit of the money or property so taken; and

Fourth: That the money or property had a value in excess of $1,000.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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 Government owned the property at the time of the wrongful taking so long as it is established, beyond a reasonable doubt, that the Government did in fact own the money or property involved, that the Defendant knowingly and willfully [embezzled] [stole] [converted] it, and that it had a value in excess of $1,000.

[To "embezzle" means the wrongful or willful taking of money or property of someone else 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 or willful taking of money or property belonging to someone else with intent to deprive the owner of its use or benefit either temporarily or permanently. No particular type of movement or carrying away is required to constitute a "taking," as that word is used in these instructions.]

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

Any appreciable change in the location of the property with the necessary willful intent constitutes a taking whether or not there is any actual removal of it from the owner's premises.

ANNOTATIONS AND COMMENTS

18 USC § 641 (first paragraph) provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any . . . money, or thing of value of the United States [having a value in excess of the sum of $1,000 [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine; or if the value of the property taken does dot exceed $1,000, then one (1) year imprisonment and applicable fine.

Government does not lose its property interest in an erroneously issued tax refund check payable to the defendant even where defendant who received the check has done nothing to induce the issuance of the check. United States v. McRee, 7 F.3d 976 (11th Cir. 1993) (en banc), cert. denied, 511 U.S. 1071, 114 S.Ct. 1649, 128 L.Ed.2d 368 (1994).

When an outright grant is paid over to the end recipient, utilized, commingled or otherwise loses its identity, the money in the grant ceases to be federal. United States v. Smith, 596 F.2d 662 (5th Cir. 1979). But federal grant money remains federal money even after being deposited in grantee's bank account and even if commingled with non-federal funds so long as the government exercises supervision and control over the funds and their ultimate use. Hayle v. United States, 815 F.2d 879 (2nd Cir. 1987), cited with approval in United States v. Hope, 901 F.2d 1013, 1019 (11th Cir. 1990). Identifiable funds advanced by a HUD grantee to a subgrantee in anticipation of immediate federal reimbursement for purposes governed by and subject to federal statutes and regulations can be considered federal funds when those funds are diverted by the subgrantee prior to their delivery to the end recipient. United States v. Hope, supra.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Elements of an embezzlement offense under this statute are: (1) that the money or property belonged to the United States or an agency thereof [and had a value in excess of $1,000]; (2) that the property lawfully came into the possession or care of the defendant; (3) that the defendant fraudulently appropriated the money or property to his own use or the use of others; and (4) that the defendant did so knowingly and willfully with the intent either temporarily or permanently to deprive the owner of the use of the money or property so taken. United States v. Burton, 871 F.2d 1566 (11th Cir. 1989).

If the evidence justifies an instruction on the lesser included offense (theft of property having a value of $1,000 or less), see Special Instruction 10, Lesser Included Offense.

22
Theft Or Embezzlement By Bank Employee
28 USC § 656

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

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was an officer or employee of the bank described in the indictment;

Second: That the bank was an insured bank;

Third: That the Defendant knowingly and willfully [embezzled] [misapplied] funds or credits belonging to the bank or entrusted to its care;

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

Fifth: That the [embezzled] [misapplied] funds or credits had a value in excess of $1,000.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

An "insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

[To "embezzle" means the wrongful or willful taking of money or property belonging to someone else after the money or property has

lawfully come into the possession or control of the person taking it. To "take" money or property means to knowingly and willfully deprive the owner of its use and benefit by converting it to one's own use with intent to defraud the bank. However, no particular type of moving or carrying away is required to constitute a "taking." Any appreciable change of the location of the property with the required willful intent constitutes a taking whether or not there is an actual removal of it from the owner's premises.]

[To "misapply" a bank's money or property means a willful conversion or taking by a bank employee of such money or property for the employee's own use and benefit, or the use and benefit of another, and with intent to defraud the bank, whether or not such money or property has been entrusted to the employee's care.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To act with "intent to defraud" means to act with intent to deceive or cheat, ordinarily for the purpose of causing a financial loss to someone else or bringing about a financial gain to one's self.

ANNOTATIONS AND COMMENTS

18 USC § 656 provides:

> Whoever, being an officer, director, agent or employee of . . . any . . . national bank or insured bank . . . embezzles, abstracts,

> purloins or willfully misapplies any of the moneys, funds or credits [having a value in excess of $1,000] of such bank . . . or . . . intrusted to the custody or care of such bank [shall be guilty of an offense against the United States].

Maximum Penalty: Thirty (30) years imprisonment and applicable fine.

If the evidence justifies an instruction on the lesser included offense (embezzlement or misapplication of funds having a value of $1,000 or less), see Special Instruction 10, Lesser Included Offense.

See Trial Instruction 8 for use in submitting forfeiture issues to the Jury.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

23.1
Theft From Interstate Shipment
18 USC § 659 (First Paragraph)

Title 18, United States Code, Section 659, makes it a Federal crime or offense for anyone to [embezzle] [steal] from a [railroad car] [motor truck] any property which has a value of more than $1,000 and is part of an interstate shipment of freight.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully [embezzled] [stole] from a [railroad car] [motor truck] the property described in the indictment, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That such property was then moving as, or was a part of, an interstate shipment of freight or express; 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.

[To "embezzle" means the wrongful or willful taking of the goods or property of someone else after such property has lawfully come into the possession or control of the person taking it.]

[To "steal" or "unlawfully take" means the wrongful or willful taking of goods or property, belonging to someone else, with intent to deprive the owner of the use and benefit of such property and to convert it to one's own use or the use of another.]

An "interstate shipment" means goods or property that is moving as a part of interstate commerce; and interstate commerce simply means the movement or transportation of goods from one state into another state.

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 toward interstate transportation. The interstate nature of the shipment then continues until the shipment arrives at its destination and is there delivered.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Section 659 of Title 18, United States Code, further provides that a waybill or other shipping document shall be "prima facie" evidence of the places from which and to which the shipment was made.

"Prima facie evidence" means sufficient evidence, unless outweighed by other evidence in the case. In other words, waybills, or bills of lading, or other shipping documents such as invoices, if proved, are sufficient to show the interstate nature of the shipment in the

absence of other evidence in the case which leads the jury to a different conclusion.

And, while the interstate nature of the shipment must be proved as an essential part of the offense, it is not necessary to show that the Defendant actually knew that the goods were a part of such a shipment at the time of the alleged [embezzlement] [stealing]; only that the Defendant knowingly and willfully [embezzled] [stole] them.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 659 (first Paragraph) provides:

> Whoever embezzles, steals, or unlawfully takes [or] carries away . . . from any . . . railroad car . . . motortruck, or other vehicle . . . with intent to convert to his own use any goods or chattels [having a value in excess of $1,000, and] moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

If the evidence justifies an instruction on the lesser included offense (embezzlement or theft of goods having a value of $1,000 or less), see Special Instruction 10, Lesser Included Offense.

23.2
Buying Or Receiving Goods Stolen From Interstate Shipment
18 USC § 659 (Second Paragraph)

Title 18, United States Code, Section 659, makes it a Federal crime or offense for anyone to knowingly buy or receive stolen goods, having a value of more than $1,000, if such goods were stolen from a [railroad car] [motor truck] carrying an interstate shipment of freight.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That someone knowingly and willfully embezzled or stole from a [railroad car] [motor truck] the property described in the indictment while such property was moving as, or was a part of, an interstate shipment of freight or express;

Second: That the Defendant thereafter knowingly and willfully bought, received or possessed such property knowing that it had been stolen, as charged; and

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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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 that is moving as a part of interstate commerce; and interstate commerce simply means the movement or transportation of goods from one state into another state.

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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Section 659 of Title 18, United States Code, further provides that a waybill or other shipping document shall be "prima facie" evidence of the places from which and to which the shipment was made.

"Prima facie evidence" means sufficient evidence, unless outweighed by other evidence in the case. In other words, waybills, or bills of lading, or other shipping documents such as invoices, if proved, are sufficient to show the interstate nature of the shipment in the absence of other evidence in the case which leads the jury to a different conclusion.

So, while the interstate nature of the shipment must be proved as an essential element of the offense, it is not necessary to show that the person who stole the property actually knew that the goods were a part of such a shipment at the time of the stealing. Neither is it necessary for the Government to prove that the Defendant knew that the property was stolen while it was a part of an interstate shipment of freight.

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 or willful taking of the goods or property of someone else after such property has lawfully come into the possession or control of the person taking it.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To "steal" or "unlawfully take" means the wrongful or willful taking of goods or property, belonging to someone else, with intent to deprive the owner of the use and benefit of such property and to convert it to one's own use or the use of another.

The indictment charges that the Defendant bought, received and possessed the stolen goods or property. The law specifies those three different ways in which the offense can be committed, and it is not necessary for the Government to prove that the Defendant did all three.

It is sufficient if the Government proves beyond a reasonable doubt that the Defendant either bought, received or possessed the stolen goods; but, in order to return a verdict of guilt, you must agree unanimously upon which way the offense was committed.

ANNOTATIONS AND COMMENTS

18 USC § 659 (second paragraph) provides:

> Whoever buys or receives or has in his possession any such [goods having a value in excess of $1,000 embezzled or stolen from an interstate shipment of freight], knowing the same to have been embezzled or stolen [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherep, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

If the evidence justifies an instruction on the lesser included offense (receipt of stolen goods having a value of $1,000 or less), see Special Instruction 10, Lesser Included Offense.

24
Bribery Concerning Program Receiving Federal Funds
18 USC § 666(a)(1)(B)

Title 18 of the United States Code, Section 666, makes it a Federal crime or offense for anyone who is an agent of an organization, local government or local governmental agency receiving significant benefits under a Federal assistance program, corruptly to accept (or agree to accept) anything of value from any person intending to be influenced or rewarded in connection with certain transactions of such organization, government or agency.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant was an agent of [The Water Works Board of the City of _____,] as charged.

Second: That [The Water Works Board of the City of _____] was, during the one-year period _____, 20___, to _____, 20___, a corporation or other legal entity established and subject to control by the City of _____;

Third: That during such one year period [The Water Works Board of the City of _____] received benefits in excess of $10,000 under a Federal program involving some form of Federal assistance;

Fourth: That during such one year period the Defendant knowingly accepted or agreed to accept a thing of value, that is, approximately $_____ from persons or organizations other than [The Water Works Board of the City of _____], as charged;

Fifth: That by such acceptance or agreement the Defendant intended to be rewarded in connection with a transaction or series of transactions of [The Water Works Board of the City of _____], which transaction or series of transactions involved something of value of $5,000 or more; and

Sixth: That in so doing the Defendant acted corruptly.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

An act is done "corruptly" if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by any unlawful method or means.

The term "agent" as relevant to this case means any employee, officer or director of [The Water Works Board of the City of _____].

ANNOTATIONS AND COMMENTS

18 USC § 666(a)(1)(B) and (b) provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists - -
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof - -
> >
> > > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more [shall be guilty of an offense against the United States].
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Cited in U.S. v. Cherton, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

In United States v. Fischer, 168 F.3d 1273 (11th Cir. 1999), Affirmed, Fischer v. United States, 529 U.S. 667, 120 S.Ct. 1780 (2000), the Court held that Medicare disbursements are "benefits" within the meaning of the statute, and that the Government is not required to prove a direct link between the federal assistance and the fraudulent conduct in issue.

25
Escape
18 USC § 751(a)

Title 18, United States Code, Section 751(a), makes it a Federal crime or offense for anyone to escape from the lawful custody of a Federal officer.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly escaped from custody, as charged; and

Second: That at the time of the escape the Defendant was in the custody of a Federal officer [pursuant to a lawful arrest] [under judicial process issued by a Federal judicial officer].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

"Custody" simply means the detention of an individual's person by virtue of lawful process or authority.

To "escape" means to flee or depart from custody or failing to return to custody, with knowledge that the action being taken will result in leaving lawful detention.

ANNOTATIONS AND COMMENTS

18 USC § 751(a) provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and $250,000 fine.

In United States v. Bailey, 444 U.S. 394, 408, 100 S.Ct. 624, 633, 62 L.Ed.2d 575 (1980), the Supreme Court rejected the notion that § 751(a) requires proof of "an intent to avoid confinement." The Court held that the prosecution meets its burden by showing that the escapee knew his actions would result in leaving physical confinement without permission.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Regarding escape from an INS Detention Facility, see United States v. Rodriguez-Fernandez, 234 F.3d 498 (11th Cir. 2000).

The first element, pertaining to custody or confinement, normally can be established by demonstrating that a subject was (1) in the custody of the Attorney General or her authorized representative; (2) confined in an institution by direction of the Attorney General; (3) in custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate; or (4) in the custody of an officer or employee of the United States pursuant to a lawful arrest. Id. at 500, fn.6.

The Eighth, Ninth and Tenth Circuits hold that custody may be minimal or even constructive. See United States v. Gluck, 542 F.2d 728, 731 (8th Cir. 1976).

If the indictment alleges an attempt, see Special Instruction 11.

26
Instigating Or Assisting Escape
18 USC § 752(a)

Title 18, United States Code, Section 752(a), makes it a Federal crime or offense for anyone to instigate an escape or aid someone else in escaping from the lawful custody of a Federal officer.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the person named in the indictment was in the custody of [the Attorney General] [a Federal officer under judicial process]; and

Second: That the Defendant knowingly and willfully instigated, aided or assisted the escape or attempt of that person to escape from such custody.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

"Custody" simply means the detention of an individual's person by virtue of lawful process or authority.

To "escape" means to flee or depart from custody or failing to return to custody, with knowledge that the action being taken will result in leaving lawful detention.

ANNOTATIONS AND COMMENTS

18 USC § 752(a) provides:

> Whoever rescues or attempts to rescue or instigates, aids or assists the escape, or attempt to escape, of any person arrested upon a warrant or other process issued under any law of the United States, or committed to the custody of the Attorney General or to any institution or facility by his direction [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and $250,000 fine.

It may be necessary in some cases to define the boundary line between aiding an escape (under this section) and harboring a fugitive (in violation of 18 USC § 1072). If an escapee reaches safety so that the escape itself is accomplished, any aid given to the fugitive after that point would constitute harboring, not aiding the escape. See United States v. DeStefano, 59 F.3d 1 (1st Cir. 1995) in which the Court of Appeals approved the following instruction: "The crime of aiding or assisting an escape cannot occur after the escapee reaches temporary safety. After that, aid or assistance to a fugitive is no longer aiding or assisting his escape . . ."

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

27
Making Threats By Mail Or Telephone
18 USC § 844(e)

Title 18, United States Code, Section 844(e) makes it a Federal crime or offense for anyone to use an instrument of commerce, including the [mail] [telephone] to willfully communicate any threat to [kill, injure or intimidate any individual] [unlawfully damage or destroy any building] by means of [fire] [an explosive].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant made, or caused to be made, a threat to [kill, injure or intimidate any individual] [unlawfully damage or destroy a building] by means of [fire] [an explosive] as charged;

Second: That the Defendant used, or caused to be used, an instrument of commerce, such as [the mail] [a telephone] to communicate the threat; and

Third: That the Defendant acted knowingly and willfully.

A "threat" means a statement expressing an intention to [kill, injure or intimidate an individual] [unlawfully damage or destroy a building] by means of [fire] [an explosive], and made with the intent that

it be understood by others as a serious threat. It is not necessary to prove that the Defendant actually intended to carry out the threat.

ANNOTATIONS AND COMMENTS

18 USC § 844(e) provides:

> Whoever, through the use of the mail, telephone, telegraph, or other instrument of commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The term "explosive" is defined in 18 USC § 844(j) if the circumstances of the case require inclusion of a definition of the term in the instructions.

28
Federal Arson Statute
18 USC § 844(i)

Title 18, United States Code, Section 844(i), makes it a Federal crime or offense of anyone to [attempt to] maliciously damage or destroy by fire or explosive any building, vehicle, or any other real or personal property used in interstate or foreign commerce, or affecting interstate or foreign commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proven beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant [damaged] [destroyed] [attempted to damage or destroy] a [building] [vehicle] [other real or personal property] as described in the indictment by means of a [fire] [explosive], as charged.

Second: That the Defendant acted intentionally or with willful disregard of the likelihood that damage or injury would result from [his] [her] acts.

Third: That the [building] [vehicle] [other real or personal property] that was [damaged] [destroyed] [attempted to be damaged or destroyed] by the Defendant, was used [in interstate or foreign commerce] [in any activity affecting foreign or interstate commerce].

"Interstate or foreign commerce" refers to commercial activity between places in different states, or between some place in the United States and some place outside the United States, and it must be proved that the [building] [vehicle] [other real or personal property] described in the indictment was actually used for a function that either involved interstate or foreign commerce or directly affected such commerce.

ANNOTATIONS AND COMMENTS

18 USC § 844(i) provides:

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . .

Cited in U.S. v. Chemer No. 06-10642, archived on January 28, 2008

Penalty ranges from 5 years imprisonment to the death penalty and includes an applicable fine. See 18 USC § 844(i)

United States v. Gullett, 75 F.3d 941, 948 (4th Cir. 1996), "maliciously," as contained in § 844(i), is comparable to the common law definition of malice and "is satisfied if the defendant acted intentionally or with willful disregard of the likelihood that damage or injury would result from his or her acts."

Jones v. United States, 529 U.S. 848, 859, 120 S.Ct. 1904, 1912 (2000), holding that "building" in § 844(i) "covers only property currently used in commerce or in an activity affecting commerce," and does not cover an owner occupied dwelling.

For a discussion of the interstate commerce requirement of § 844(i) in light of Jones, see United States v. Odom, 252 F.3d 1289 (11th Cir. 2001).

Explosive is defined in 18 USC § 844(j).

If the indictment alleges an attempt, see Special Instruction 11.

29
Threats Against The President
18 USC § 871

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

The Defendant can be found guilty of that offense only if all of the following facts are proved 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 as a true threat; and

Third: That the Defendant [mailed] [wrote] [said] the words knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A "threat" is a statement expressing an intention to kill or injure the President; and a "true threat" means a serious threat as distinguished from words used as mere political argument, idle or careless talk, or something said in a joking manner. A statement is a true threat if it was made under such circumstances that a reasonable person would construe it as a serious expression of an intent to inflict bodily harm upon or to take the life of the President.

The essence of the offense is the knowing and willful making of a true threat. So, if it is proved beyond a reasonable doubt that the Defendant knowingly made a true threat against the President, willfully intending that it be understood by others as a serious threat, then the offense is complete; it is not necessary to prove that the Defendant actually intended to carry out the threat.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

USC § 871(a) provides:

> Whoever knowingly and willfully deposits for conveyance in the mail . . . any letter . . . or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . or knowingly and willfully otherwise makes any such threat against the President [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and $250,000 fine.

The language defining a "true threat" provides explanation and clarification as to the proper standard to be applied in determining whether a threat is a true threat or not. See, e.g., United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983); see generally Lucero v. Trosch, 904 F.Supp. 1336, 1340 (S.D. Ala. 1995).

30.1
Interstate Transmission Of Demand For Ransom For Return Of Kidnapped Person
18 USC § 875(a)

Title 18, United States Code, Section 875(a), makes it a Federal crime or offense for anyone to knowingly and willfully transmit in interstate or foreign commerce a demand or request for reward or ransom for the release of any kidnapped person.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant sent or transmitted in [interstate] [foreign] commerce a demand or request for a ransom or reward for the release of a kidnapped person.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant sent or transmitted that demand or request with intent to extort money or other thing of value; and

Third: That the Defendant did so knowingly and willfully.

[To transmit something in "interstate commerce" merely means to send it from a place in one state to a place in another state.] [To transmit something in "foreign commerce" merely means to send it from a place in the United States to any place in a country other than the United States.]

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

A "thing of value" includes property rights or other tangible objects as well as any intangible objects of value to the Defendant.

A kidnapped person is someone who is forcibly and unlawfully held, kept, detained or confined against his or her will.

The essence of the offense is the willful transmission of an extortionate communication in interstate commerce with the intent to obtain money or other thing of value for the release of a kidnapped victim, and it is not necessary to prove that the Defendant actually participated in any kidnapping or actually succeeded in obtaining the money or other thing of value.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 875(a) provides that:

> Whoever transmits in interstate commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

Although this subsection of § 875 does not specifically require an intent to extort, it has been held that such intent is implicitly an element. "Congress intended not only that there be a criminal intent element of the crime charged in the statute [18 USC § 875(a)] but also that this intent element be specifically the intent to extort." United States v. Heller, 579 F.2d 990, 995 (6th Cir. 1978).

Under United States v. Nilsen, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangibles and intangibles.

The federal kidnapping statute is 18 USC § 1201.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

30.2
Interstate Transmission Of Extortionate Communication
18 USC § 875(b)

Title 18, United States Code, Section 875(b), makes it a Federal crime or offense for anyone to knowingly and willfully transmit an extortionate communication in interstate or foreign commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant sent or transmitted in [interstate] [foreign] commerce a communication containing a true threat [to kidnap any person] [to injure the person of another], as charged;

Second: That the Defendant sent or transmitted that communication with intent to extort money or other thing of value; and

Third: That the Defendant did so knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[To transmit something in "interstate commerce" merely means to send it from a place in one state to a place in another state.] [To transmit something in "foreign commerce" merely means to send it from a place in the United States to any place outside the United States.]

A "true threat" means a serious threat as distinguished from idle or careless talk, or something said in a joking manner. A statement is

a true threat if it was made under such circumstances that a reasonable person would construe it as a serious expression of an intent [to kidnap] [to injure] another person.

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

A "thing of value" includes property rights or other tangible objects as well as any intangible objects of value to the Defendant.

The essence of the offense is the willful transmission of an extortionate communication in interstate commerce with the intent to obtain money or other thing of value, and it is not necessary to prove that the Defendant actually succeeded in obtaining the money or other thing of value, <u>or</u> that the Defendant actually intended to carry out the threat.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

<u>ANNOTATIONS AND COMMENTS</u>

18 USC § 875(b) provides that:

> Whoever, with intent to extort from any person . . . any money or other thing of value, transmits in interstate or foreign commerce any

> communication containing any threat to kidnap any person or any threat to injure the person of another [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

The language defining a "true threat" provides explanation and clarification as to the proper standard to be applied in determining whether a threat is a true threat or not. See, e.g., United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983); see generally Lucero v. Trosch, 904 F.Supp. 1336, 1340 (S.D. Ala. 1995).

Under United States v. Nilsen, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangibles and intangibles.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

30.3
Interstate Transmission Of Threat To Kidnap Or Injure
18 USC § 875(c)

Title 18, United States Code, Section 875(c), makes it a Federal crime or offense for anyone to knowingly and willfully transmit in interstate commerce or foreign commerce a threat to kidnap or injure someone.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant sent or transmitted in [interstate] [foreign] commerce a communication containing a true threat [to kidnap any person] [to injure the person of another], as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant did so knowingly and willfully.

[To transmit something in "interstate commerce" merely means to send it from a place in one state to a place in another state.] [To transmit something in "foreign commerce" merely means to send it from a place in the United States to any place outside the United States.]

A "true threat" means a serious threat as distinguished from idle or careless talk, or something said in a joking manner. A statement is a true threat if it was made under such circumstances that a reasonable

person would construe it as a serious expression of an intent [to kidnap] [to injure] another person.

The essence of the offense is the willful transmission of a true threat in interstate or foreign commerce. It is not necessary that anyone actually intended to carry out the threat.

ANNOTATIONS AND COMMENTS

18 USC § 875(c) provides that:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

Cited in U.S. v. Chorer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The language defining a "true threat" provides explanation and clarification as to the proper standard to be applied in determining whether a threat is a true threat or not. See, e.g., United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983); see generally, Lucero v. Trosch, 904 F.Supp. 1336, 1340 (S.D. Ala. 1995).

This subsection, as distinguished from § 875(a) (implicitly), and § 875(b) and § 875(d) (explicitly), does not require an intent to extort.

30.4
Interstate Transmission Of Extortionate Communication
18 USC § 875(d)

Title 18, United States Code, Section 875(d), makes it a Federal crime of offense for anyone to knowingly and willfully send or transmit in interstate or foreign commerce a threat to injure the property or reputation of another.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant sent or transmitted in [interstate] [foreign] commerce a communication containing a true threat [to injure the reputation] [to injure the property] of another, as charged;

Second: That the Defendant sent or transmitted that communication with intent to extort money or other thing of value; and

Third: That the Defendant did so knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[To transmit something in "interstate commerce" merely means to send it from a place in one state to a place in another state.] [To transmit something in "foreign commerce" merely means to send it from a place in the United States to any place outside the United States.]

A “true threat” means a serious threat as distinguished from idle or careless talk, or something said in a joking manner. A statement is a true threat if it was made under such circumstances that a reasonable person would construe it as a serious expression of an intent to injure the [property] [reputation] of another person.

To act with intent to “extort” means to act with the intent to obtain money or something of value from someone else, with his or her consent, but induced by the wrongful use of actual or threatened force, violence or fear.

A “thing of value” includes property rights or other tangible objects as well as any intangible objects of value to the Defendant.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

The essence of the offense is the willful transmission of an extortionate communication in interstate commerce with the intent to obtain money or other thing of value, and it is not necessary to prove that the Defendant actually succeeded in obtaining the money or other thing of value, <u>or</u> that the Defendant actually intended to carry out the threat.

ANNOTATIONS AND COMMENTS

18 USC § 875(d) provides that:

> Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

Maximum Penalty: Two (2) years imprisonment and applicable fine.

The language defining a "true threat" provides explanation and clarification as to the proper standard to be applied in determining whether a threat is a true threat or not. See, e.g., United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983); see generally Lucero v. Trosch, 904 F. Supp. 1336, 1340 (S.D. Ala. 1995).

Under United States v. Nilsen, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is clearly defined term that includes both tangibles and intangibles.

Cited in U.S. v. Cherek, No. 06-10642, archived on January 28, 2008

31.1
Mailing Threatening Communications
18 USC § 876 (First Paragraph)

Title 18, United States Code, Section 876, makes it a Federal crime or offense for anyone to knowingly and willfully use the United States mail to transmit a demand or request for reward or ransom for the release of any kidnapped person.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly deposited or caused to be deposited in the mail, for delivery by the United States Postal Service, a demand or request for a ransom or reward for the release of a kidnapped person;

Second: That the Defendant sent or caused to be sent that demand or request with intent to extort money or some other thing of value; and

Third: That the Defendant did so knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

A "thing of value" includes property rights or other tangible objects as well as any intangible objects of value to the Defendant.

The essence of the offense is the willful transmission of an extortionate communication through the use of the mails with the intent to obtain money or other thing of value for the release of a kidnapped victim, and it is not necessary to prove that the Defendant actually participated in any kidnapping or succeeded in obtaining the money or other thing of value.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 876 (first paragraph) provides:

> Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

Under United States v. Nilsen, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangible and intangibles.

The federal kidnapping statute is 18 USC § 1201.

31.2
Mailing Threatening Communications
18 USC § 876 (Second Paragraph)

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

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly deposited or caused to be deposited in the mail, for delivery by the United States Postal Service, a communication containing a true threat, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

Third: That the Defendant made the threat willfully and with intent to extort money or other thing of value.

A "true threat" is a statement expressing an intention to [kidnap someone, that is, to steal and carry away someone's person] [to inflict bodily injury upon someone]; and it means a real or serious threat as distinguished from idle or careless talk, or something said in a joking manner. A statement is a true threat if it was made under such

circumstances that a reasonable person would construe it as a serious expression of an intent [to kidnap] [to injure] another person.

To act with intent to "extort" means to act with the intent to induce someone else to pay money or something of value by willfully threatening [a kidnaping] [an injury] if such payment is not made.

A “thing of value” includes property rights or other tangible objects as well as any intangible objects of value to the Defendant.

So, the essence of the offense is the knowing conveyance through the mail of a threat to [kidnap] [injure] the person of someone, willfully made with intent to extort money or something of value; and it is not necessary to prove that any money or other thing of value was actually paid <u>or</u> that the Defendant actually intended to carry out the threat.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

<u>ANNOTATIONS AND COMMENTS</u>

18 USC § 876 (second paragraph) provides:

> Whoever, with intent to extort from any person any money or other thing of value, [deposits in any post office or authorized depository for mail matter, or causes to be delivered by the Post Office] any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

United States v. Wilkes, 685 F.2d 135 (5th Cir. 1982), approved the inclusion of willfulness as an essential element of this offense.

United States v. DeShazo, 565 F.2d 893 (5th Cir. 1978), present intent to actually do injury is not required.

The language defining a "true threat" provides explanation and clarification as to the proper standard to be applied in determining whether a threat is a true threat or not. See United States v. Taylor, 972 F.2d 1247, 1251 (11th Cir. 1992) (standard is whether a reasonable recipient, familiar with context of the communication at issue, would interpret it as a threat).

Under United States v. Nilsen, 967 F.2d 539, 543 (11th Cir. 1992) “thing of value” is a clearly defined term that includes both tangibles and intangibles.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

31.3
Mailing Threatening Communications
18 USC § 876 (Third Paragraph)

Title 18, United States Code, Section 876, makes it a Federal crime or offense for anyone to knowingly and willfully use the United States mail to transmit a threat to kidnap or injure someone.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly deposited or caused to be deposited in the mail, for delivery by the United States Postal Service, a true threat to [kidnap] [injure] someone, as charged, and

Second: That the Defendant did so knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A "true threat" means a serious threat as distinguished from idle or careless talk, or something said in a joking manner. A statement is a true threat if it was made under such circumstances that a reasonable person would construe it as a serious expression of an intent to [kidnap] [injure] another person.

The essence of the offense is the willful transmission of a true threat through the use of the mails. It is not necessary that anyone actually intended to carry out the threat.

ANNOTATIONS AND COMMENTS

18 USC § 876 (third paragraph) provides:

> Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with our without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The language defining a "true threat" provides explanation and clarification as to the proper standard to be applied in determining whether a threat is a true threat or not. See, e.g., United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983); see generally Lucero v. Trosch, 904 F.Supp. 1336, 1340 (S.D. Ala. 1995).

This subsection, like its counterpart §875(c), does not require an intent to extort.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

31.4
Mailing Threatening Communications
18 USC § 876 (Fourth Paragraph)

Title 18, United States Code, Section 876, makes it a Federal crime or offense for anyone to knowingly and willfully use the United States mail to transmit any threat to [injure the property of another person] [injure the reputation of another person] [accuse another person of a crime].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant knowingly deposited or caused to be deposited in the mail, for delivery by the United States Postal Service, a true threat [to injure the reputation of someone] [to injure the property of someone] [to accuse someone of a crime], as charged; and

<u>Second</u>. That the Defendant made the threat willfully and with intent to extort money or other thing of value.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A "true threat" means a serious threat as distinguished from idle or careless talk, or something said in a joking manner. A statement is a true threat if it was made under such circumstances that a reasonable person would construe it as a serious expression of an intent to injure

the [property] [reputation] of another person [accuse another person of a crime].

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

A "thing of value" includes property rights or other tangible objects as well as any intangible objects of value to the Defendant.

The essence of the offense is the willful transmission by mail of an extortionate communication with the intent to obtain money or other thing of value, and it is not necessary to prove that the Defendant actually succeeded in obtaining the money or other thing of value, <u>or</u> that anyone actually intended to carry out the threat.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

<u>ANNOTATIONS AND COMMENTS</u>

18 USC § 876(fourth paragraph) provides that:

> Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

Maximum Penalty: Two (2) years imprisonment and applicable fine.

The language defining a "true threat" provides explanation and clarification as to the proper standard to be applied in determining whether a threat is a true threat or not. See, e.g., United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983); see generally Lucero v. Trosch, 904 F.Supp. 1336, 1340 (S.D. Ala. 1995).

Under United States v. Nilsen, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangibles and intangibles.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

32
False Impersonation Of A Citizen
18 USC § 911

Title 18, United States Code, Section 911, makes it a Federal crime or offense for anyone to falsely and willfully impersonate a citizen of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

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

Second: That the Defendant falsely represented [himself] [herself] to be a citizen of the United States, as charged; and

Third: That the Defendant made such false representation knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642; archived on January 28, 2008

An "alien" is any person who is not a citizen of the United States.

American citizenship is acquired by birth within the United States, or through judicial proceedings known as "naturalization". One is also a citizen, even though born outside the United States, if both parents were citizens and one of them had a residence in the United States prior to the birth.

[The Immigration and Naturalization Service is the agency having jurisdiction, supervision and control over the entry of aliens into the United States, and officers of that agency have the right to administer oaths, and to take and consider evidence, concerning the right or privilege of any alien to enter, re-enter, pass through or remain in the United States.]

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 911 provides:

> Whoever falsely and willfully represents himself to be a citizen of the United States [shall be guilty of an offense against the United States]."

Maximum Penalty: Three (3) years imprisonment and applicable fine.

The Eleventh Circuit has not discussed it, but the Ninth Circuit makes it clear that "fraudulent purpose" is not an element of the crime. It must only be proved that "the misrepresentation was voluntarily and deliberately made." See Chow Bing Kew v. United States, 248 F.2d 466, 469 (9th Cir.) cert. denied, 355 U.S. 889, 78 S.Ct. 259 (1957).

33
False Impersonation Of An Officer Of The United States
18 USC § 912

Title 18, United States Code, Section 912, makes it a Federal crime or offense for anyone to falsely impersonate an officer of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant falsely assumed or pretended to be an officer or employee acting under the authority of the United States, as charged;

Second: That, while pretending to be a federal officer or employee, the Defendant [acted as such] [demanded or obtained money or other thing of value]; and

Third: That the Defendant did so knowingly and willfully with intent to deceive or defraud another.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To act "with intent to deceive or defraud" means to act with the specific intent to mislead another, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

ANNOTATIONS AND COMMENTS

18 USC § 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and [1] acts as such, or [2] in such pretended character demands or obtains any money . . . or thing of value [shall be guilty of an offense against the United States].

Maximum Penalty: Three (3) years imprisonment and applicable fine.

United States v. Gayle, 967 F.2d 483, 486-87 (11th Cir. 1992) (en banc), intent to defraud is an essential element of this offense.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

34.1
Dealing In Firearms Without License
18 USC § 922(a)(1)(A)

Title 18, United States Code, Section 922(a)(1)(A), makes it a Federal crime or offense to be in the business of dealing in firearms without a Federal license.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant engaged in the business of dealing in firearms;

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

Third: That the Defendant did so knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

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 "dealer" means any person engaged in the business of selling firearms at wholesale or retail regardless of whether the selling of firearms is the Defendant's principal business or job.

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 (whether one actually earns a profit or not) as opposed to other intents, such as improving or liquidating a personal firearms collection. [However, proof of profit motive is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.]

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 922(a)(1) provides:

(a) It shall be unlawful - -

(1) for any person - -

(A) except a licensed . . . dealer, to engage in the business of . . . dealing in firearms.

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The definition of "firearm" is taken from 18 USC § 921(a)(3). The definition of "dealer" is taken from 18 USC § 921(a)(11). The definition of "engaged in the business" is taken from 18 USC § 921(a)(21)(C). The definition of "principal objective of livelihood and profit" is taken from 18 USC § 921(a)(22).

Willfulness is an essential element of the offense under 18 USC § 924(a)(1)(D), but the Government does not have to prove that the Defendant knew of the licensing requirement to satisfy this element. Bryan v. United States, 524 U.S. 184, 118 S.Ct. 1939 (1998).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

34.2
Transfer Of Firearm To Non-Resident
18 USC § 922(a)(5)

Title 18, United States Code Section 922(a)(5), makes it a Federal crime or offense under certain circumstances for anyone who is not a licensed firearms dealer to sell or transfer a firearm to someone who lives in another state.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant willfully transferred, sold or delivered a firearm to another person as charged;

Second: That neither the Defendant nor the person to whom the firearm was transferred was a licensed firearms importer, manufacturer, dealer or collector at the time of such transfer; and

Third: That the Defendant knew or had reasonable cause to believe that the person to whom the firearm was transferred resided in a state other than the state in which the Defendant resided.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "firearm" means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an

explosive; and the term includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer.

To "transfer" a firearm simply means to deliver possession of a firearm to another person.

To have "reasonable cause to believe" that someone is a resident of another state means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts to reasonably conclude that such other person was a resident of another state. The essence of the offense is to knowingly transfer a firearm to a resident of another state. It is not a violation of the law to transfer a firearm to a resident of one's own state of residency.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

[The law does not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes; nor does the law apply to any transfer or delivery of a firearm to carry out a bequest to, or an acquisition by intestate succession by, a person who is permitted to acquire or possess a firearm by the laws of the state of his or her residence.]

[A "bequest" refers to a provision in a person's will providing for the disposition of property after death; and the term "intestate

succession" refers to the law of the state providing for the inheritance of property from a person who dies without leaving a will. Thus, to carry out a "bequest" or "intestate succession" simply means to transfer something after the owner has died and in accordance with the owner's will or the state law of intestate succession, as the case might be.]

ANNOTATIONS AND COMMENTS

18 USC § 922(a)(5) provides:

> (a) It shall be unlawful. . .
>
> * * * * *
>
> (5) for any person [other than a licensed dealer] to transfer, sell . . . or deliver any firearm to any person [other than a licensed dealer] who the transferor knows or has reasonable cause to believe does not reside in . . . the State in which the transferor resides [unless] the transfer [is] made to carry out a bequest . . . [or constitutes] a loan or rental . . . for temporary use for lawful sporting purposes.

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

18 USC § 924(a)(1)(D) makes willfulness an element of the offense, and in Bryan v. United States, 524 U.S. 184, 118 S.Ct. 1939 (1998) the Court held that "willfulness" should be given its usual meaning and did not require proof that the Defendant had specific knowledge of the criminal statute being violated by his conduct.

34.3
False Statement To Firearms Dealer
18 USC § 922(a)(6)

Title 18, United States Code, Section 922(a)(6), makes it a Federal crime or offense for anyone, in the process of buying a firearm, to make a false statement to a licensed firearms dealer.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant acquired or attempted to acquire a firearm from a Federally licensed firearms dealer, as charged;

Second: That in so doing the Defendant [knowingly made a false or fictitious statement, orally or in writing] [knowingly furnished or exhibited a false or fictitious identification], [intended to deceive] [likely to deceive] such dealer; and

Third: That the subject matter of the false [statement] [identification] was material to the lawfulness of the sale.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

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

A false [statement] [identification] is "likely to deceive" if the nature of the [statement] [identification], considering all of the surrounding circumstances at the time, would probably mislead or deceive a reasonable person of ordinary prudence.

The "materiality" of the alleged false [statement] [identification] is not a matter with which you are concerned, but rather is a question for the Court to decide. You are instructed that the alleged false [statement] [identification] described in the indictment, if proved, did relate to a material fact.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 922(a)(6) provides:

> (a) It shall be unlawful - -
>
> * * * * *
>
> (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, . . . manufacturer, . . . dealer, or . . . collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or

> misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition . . . .

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

United States v. Klais, 68 F.3d 1282 (11th Cir. 1995), held that under § 922(a)(6) materiality is a question of law, distinguishing the Supreme Court's decision in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), holding that in context of 18 USC § 1001 materiality is question for jury.

Willfulness is not an essential element of this offense. See 18 USC § 924(a)(1)(A).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

34.4
Failure Of Firearms Dealer To Keep Proper Record Of Sale
18 USC § 922(b)(5)

Title 18, United States Code, Section 922(b)(5), makes it a Federal crime or offense for a Federally licensed firearms dealer to sell [a firearm] [armor-piercing ammunition] to anyone without keeping a record concerning the purchaser.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was a Federally licensed firearms dealer at the time the alleged offense occurred;

Second: That the Defendant sold or delivered [a firearm] [armor-piercing ammunition] to the person named in the indictment; and

Third: That having sold or delivered the [firearm] [armor-piercing ammunition] to such person, the Defendant knowingly and willfully failed to record the name, age and place of residence of that individual in the records required to be kept by law.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

[The term "armor-piercing ammunition" means a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper or depleted uranium. The term also includes a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 922(b)(5) provides:

> (b) It shall be unlawful for any licensed . . . dealer . . . to sell or deliver - -
>
> * * * * *
>
> (5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person . . . .

Maximum Penalty: Five (5) years imprisonment and applicable fine.

18 USC § 924(a)(1)(D) makes willfulness an element of the offense, and in Bryan v. United States, 524 U.S. 184, 118 S.Ct. 1939 (1998) the Court held that "willfulness" should be given its usual meaning and did not require proof that the Defendant had specific knowledge of the criminal statute being violated by his conduct.

34.5
Sale Of Firearm To Convicted Felon
18 USC § 922(d)(1)

Title 18, United States Code, Section 922(d)(1), makes it a Federal crime or offense for any person to knowingly sell a firearm to a convicted felon.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant sold the firearm described in the indictment, at or about the time alleged;

Second: That the person who bought the firearm had been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, that is, a felony offense; and

Third: That the Defendant acted with knowledge or with reasonable cause to believe that such person had been so convicted.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

To have "reasonable cause to believe" that someone is a convicted felon means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same things, to reasonably conclude that the other person was in fact a convicted felon.

ANNOTATIONS AND COMMENTS

18 USC § 922(d)(1) provides:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person - -
>
> * * * * *
>
> (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

Cited in U.S. v. Cheer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

Willfulness is not an essential element of this offense. See 18 USC § 924(a)(2).

When a Defendant offers to stipulate to his or her status as a previously convicted felon, and the Government declines the stipulation, the issue should be evaluated under the balancing test of FRE 403. While there is no per se rule requiring the Government to accept such a stipulation, it can be an abuse of discretion to admit evidence of the nature of a stipulated conviction where the nature of the crime (as distinguished from the fact of the conviction itself) has potential prejudice outweighing any probative value. Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644 (1997).

34.6
Possession Of Firearm By A Convicted Felon
18 USC 922(g)(1)

Title 18, United States Code, Section 922(g), makes it a Federal crime or offense for anyone who has been convicted of a felony offense to possess any firearm in or affecting interstate commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly possessed a firearm in or affecting interstate commerce, as charged; and

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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

The term "interstate commerce" includes the movement of a firearm between any place in one state and any place in another state. It is not necessary for the Government to prove that the Defendant

knew that the firearm had moved in interstate commerce before the Defendant possessed it, only that it had made such movement.

ANNOTATIONS AND COMMENTS

18 USC § 922(g)(1) provides:

> (g) It shall be unlawful for any person - -
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year - - to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

When a Defendant offers to stipulate to his or her status as a previously convicted felon, and the Government declines the stipulation, the issue should be evaluated under the balancing test of FRE 403. While there is no per se rule requiring the Government to accept such a stipulation, it can be an abuse of discretion to admit evidence of the nature of a stipulated conviction where the nature of the crime (as distinguished from the fact of the conviction itself) has potential prejudice outweighing any probative value. Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644 (1997).

Willfulness is not an essential element of this offense. See 18 USC § 924(a)(2).

The Government is not required to prove that the unlawfully possessed firearm was operable. United States v. Adams, 137 F.3d 1298 (11th Cir. 1998).

What constitutes a prior state court "conviction" is determined, under 18 USC §921(a)(20), according to state law; and, under Florida law, a "conviction" requires an adjudication of guilt by a jury verdict or a plea of guilty. A plea of nolo contendere followed by a withholding of adjudication by the Court is not a "conviction" for purposes of § 922(g)(1). United States v. Willis, 106 F.3d 966 (11th Cir. 1997).

In United States v. Scott, 263 F.3d 1270 (11th Cir. 2001), the Court held that as long as the weapon at issue had a minimal nexus to interstate commerce, application of § 922(g) was constitutional. The interstate nexus was demonstrated by the fact that the firearm Defendant possessed was manufactured in California and had moved in interstate commerce to Georgia, where Defendant was found in possession of the weapon.

With regard to a "justification" defense under § 922(g), see United States v. Deleveaux, 205 F.3d 1292 (11th Cir. 2000). The Court held that in order to establish a justification defense, Defendant must prove by a preponderance of the evidence that: (1) Defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury, (2) Defendant did not negligently or recklessly place himself in a situation where Defendant would be forced to engage in criminal conduct, (3) Defendant had no reasonable legal alternative to violating the law, and (4) there was a direct causal relationship between the criminal action and the avoidance. Id. at 1297. See Special Instruction 16, Justification or Necessity.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

34.7
False Entry In Record By Firearms Dealer
18 USC § 922(m)

Title 18, United States Code, Section 922(m), makes it a Federal crime or offense for any licensed firearms dealer to make a false entry in any record the dealer is required by Federal law to keep.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was a Federally licensed firearms dealer at the time the alleged offense occurred;

Second: That the Defendant made a false entry in the firearm records [he] [she] was required by federal law to maintain; and

Third: That the Defendant made the false entry with knowledge of the falsity.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A _____ is a record which a Federally licensed firearms dealer is required by federal law to keep or maintain.

An entry in a record is "false" if it was untrue at the time it was made, and was then known to be untrue by the dealer who made it.

ANNOTATIONS AND COMMENTS

18 USC § 922(m) provides:

> It shall be unlawful for any licensed . . . dealer . . . . knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

Maximum Penalty: One (1) year imprisonment and applicable fine.

Willfulness is not an essential element of this offense. See 18 USC § 924(a)(3)(B).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

34.8
Possession Of A Machine Gun
18 USC § 922(o)(1)

Title 18, United States Code, Section 922(o)(1), makes it a Federal crime or offense for anyone to possess a machine gun.

Title 26, United States Code, Section 5845(b), defines a "machine gun" as any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly possessed a "machine gun," as defined above: and

Second: That the Defendant knew, or was aware of, the essential characteristics of the firearm which made it a "machine gun" as defined above.

ANNOTATIONS AND COMMENTS

18 USC § 922(o)(1) provides:

> . . . [I]t shall be unlawful for any person to transfer or possess a machine gun.

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

Willfulness is not an essential element of this offense. See 18 USC § 924(a)(2).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

35.1
False Statement With Respect To Information Required To Be Kept By Dealer
18 USC § 924(a)(1)(A)

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

An [ATF Form 4473] is a record which a Federally licensed firearms dealer is required by federal law to keep or maintain.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the person named as such in the indictment was a Federally licensed firearms dealer at the time the alleged offense occurred;

Second: That the Defendant made a false statement or representation in the firearm records the licensed firearms dealer was required by federal law to maintain; and

Third: That the Defendant made the false statement or representation with knowledge of the falsity.

An entry in a record is "false" if it was untrue at the time it was made, and was then known to be untrue by the person who made it.

ANNOTATIONS AND COMMENTS

18 USC § 924(a)(1)(A) provides:

> (a)(1) . . . [w]hoever:
>
> (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Willfulness is not an essential element of this offense.

In United States v. Nelson, 221 F.3d 1206 (11th Cir. 2000) the Court held that § 924(a)(1)(A) applies to "straw purchases" where the buyer of the firearm intends at the point of sale to later transfer the weapon to another person. Such a buyer cannot truthfully certify on ATF 4473 that he or she is the "actual buyer" of the firearm.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

35.2
Carrying/Possessing A Firearm During Or In Furtherance Of Drug Trafficking Offense Or Crime Of Violence
18 USC § 924(c)(1)(A)

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

The Defendant can be found guilty of that offense as charged in Count ____ of the indictment only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant committed the [drug trafficking offense] [crime of violence] charged in Count _____ of the indictment;

Second: That during the commission of that offense the Defendant knowingly [carried] [possessed] a firearm, as charged; and

Third: That the Defendant [carried the firearm "in relation to" the] [possessed the firearm "in furtherance of" the] [drug trafficking offense] [crime of violence].

The term "firearm" means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an

explosive; and the term includes the frame or receiver of any such weapon or any firearm muffler or firearm silencer.

To ["carry"] ["possess"] a firearm means that the Defendant either had a firearm on or around [his] [her] person <u>or</u> transported, conveyed or controlled a firearm in such a way that it was available for immediate use if the Defendant so desired during the commission of the [drug trafficking offense] [crime of violence]; and to carry a firearm "in relation to" an offense means that there must be a connection between the Defendant, the firearm, and the [drug trafficking offense] [crime of violence] so that the presence of the firearm was not accidental or coincidental, but facilitated the crime by serving some important function or purpose of the criminal activity. [To possess a firearm "in furtherance" of an offense means something more than mere presence of a firearm; it must be shown that the firearm helped, furthered, promoted or advanced the offense in some way.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The indictment charges that the Defendant knowingly [carried a firearm during and in relation to [a drug trafficking offense] [a crime of violence] and [possessed a firearm in furtherance of [a drug trafficking offense] [crime of violence]. It is charged, in other words, that the Defendant violated the law as charged in Count _____ in two separate

ways. It is not necessary, however, for the Government to prove that the Defendant violated the law in both of those ways. It is sufficient if the Government proves, beyond a reasonable doubt, that the Defendant knowingly violated the law in either way; but, in that event, you must unanimously agree upon the way in which the Defendant committed the violation.]

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Ciliberer, No. 06-10642, archived on January 28, 2008

Title 18 USC § 924(c)(1) provides:

> (c)(1)(A) . . . [a]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - -
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection - -
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

Maximum Penalty: As stated in statute above and applicable fine. Sentence must be consecutive.

In Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501 (1995), The Court held that "uses" within the meaning of § 924(c)(1) means more than mere possession and more than proximity and accessibility; it requires, instead, active employment of the weapon as by brandishing or displaying it in some fashion.

In 1998, in direct response to Bailey (see H.R. Rep. No. 105-344, Oct. 24, 1997, 1997 WL 668339), Congress amended the statute in several respects (Pub. L. 105-386, Nov. 13, 1998, 112 Stat. 3469) including the insertion of the phrase "or who, in furtherance of any such crime, possesses a firearm. . ." The stated purpose and effect of this amendment was to overcome the Bailey court's constrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the Defendant merely possesses a firearm "in furtherance of any such crime."

The Committee therefore anticipates that present and future indictments brought under § 924(c)(1)(A) will allege either (or perhaps both) "carrying a firearm during and in relation to" or "possession of a firearm in furtherance of" a drug trafficking offense or crime of violence, and that the "use" prong of the statute will be avoided in view of Bailey. See United States v. Timmons, 283 F.3d 1246 (11th Cir. 2002), in which both carrying and possessing were charged. This instruction was prepared for use when either, or both, carrying and possessing are charged in the same count. Timmons is also the primary source of the definitions contained in this instruction.

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

In Harris v. United States, _____ U.S. _____, _____ S.Ct. _____ (2002) (2002 WL 1357227), the Court held that the provisions of the statute requiring enhanced mandatory minimum sentences if the firearm is brandished or discharged (§ 924(c)(1)(A)(ii) and (iii)) are sentencing factors for the sentencing judge and are not elements of the offense that must be charged in the indictment and submitted to the jury under the principle of Apprendi which applies to factors that would increase the maximum sentence allowable. See also United States v. Pounds, 230 F.3d 1317, 1319 (11th Cir. 2000). Because the decision in Harris rested in part upon the structure of § 924, it is an open question as to whether the decision applies to the sentence enhancing provisions of § 924(c)(1)(B)(i) and (ii). If the indictment alleges one of those factors, the Committee recommends that the issue be submitted to the jury by modifying the instruction to include that factor as a Fourth Element of the offense.

Whether a crime is a crime of violence is a question of law, not of fact. United States v. Amparo, 68 F.3d 1222 (9th Cir. 1995); United States v. Moore, 38 F.3d 977 (8th Cir. 1994); United States v. Weston, 960 F.2d 212 (1st Cir. 1992); United States v. Adkins, 937 F.2d 947 (4th Cir. 1991). But see, United States v. Jones, 993 F.2d 58 (5th Cir. 1993).

36
False Statement To Federal Agency
18 USC § 1001

Title 18, United States Code, Section 1001, makes it a Federal crime or offense for anyone to willfully make a false or fraudulent statement to a department or agency of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant [made the statement] [made or used the document], as charged;

Second: That the [statement] [document] was false;

Third: That the falsity related to a material matter;

Fourth: That the Defendant acted willfully and with knowledge of the falsity; and

Fifth: That the [false statement] [false document] was made or used in relation to a matter within the jurisdiction of a department or agency of the United States, as charged.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

It is not necessary to show, however, that the Government agency was in fact deceived or misled.

[A false “no” in response to Government agents conducting an investigation is a false statement as it concerns the first two things the Government must prove as previously stated.]

[The Immigration and Naturalization Service, Department of Justice, is an "agency of the United States," and the filing of documents with that agency to effect a change in the immigration status of an alien is a matter within the jurisdiction of that agency.]

The [making of a false statement] [use of a false document] is not an offense unless the falsity relates to a "material" fact. A misrepresentation is "material" if it has a natural tendency to affect or influence, or is capable of affecting or influencing, the exercise of a government function. The test is whether the false statement has the capacity to impair or pervert the functioning of a governmental agency. In other words, a misrepresentation is material if it relates to an important fact as distinguished from some unimportant or trivial detail.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies . . . a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The enumeration of the elements of the offense is taken from United States v. Calhoon, 97 F.3d 518, 523 (11th Cir. 1996).

Arthur Pew Const. Co. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992), misrepresentation for purposes of § 1001 must be deliberate, knowing and willful, or at least have been made with a reckless disregard of the truth and a conscious purpose to avoid telling the truth.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In United States v. Gaudin 515 U.S. 506, 115 S.Ct. 2310 (1995), 132 L.Ed.2d 444 (1995), the Supreme Court held that the materiality of a false statement under this section is a jury question, and that failure to submit the question of materiality to the jury constitutes reversible error. See United States v. Klais, 68 F.3d 1282, 1283 (11th Cir. 1995) (recognizing holding).

Materiality definition is adopted from Gaudin, 115 S.Ct. at 2313; United States v. Grizzle, 933 F.2d 943, 948 (11th Cir. 1991); United States v. Herring, 916 F.2d 1543, 1547 (11th Cir. 1990); United States v. Gafyczk, 847 F.2d 685, 691 (11th Cir. 1988).

The "exculpatory no" doctrine as an exception to the scope of the offense (see United States v. Payne, 750 F.2d 844, 861 (11th Cir. 1985)) was repudiated by the Supreme Court in Brogan v. United States, 522 U.S. 398, 118 S.Ct. 805 (1998).

37
False Entry In Bank Records
18 USC § 1005 (Third Paragraph)

Title 18, United States Code, Section 1005, makes it a Federal crime or offense for anyone to make a false entry in any book or record of a federally insured bank.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly made or caused to be made a false entry in a book or record of an insured bank;

Second: That such entry was "material;" and

Third: That the Defendant made such entry, or caused it to be made, willfully, with knowledge of its falsity and with the intent of defrauding or deceiving, as charged.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

An "insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

An entry in a book or record is "false" when made if it is untrue and is then known to be untrue by the person making it.

An entry in a book or record is "material" if it has a natural tendency to affect or influence, or is capable to affecting or influencing, the operations of the bank. In other words, an entry in a book or record

is material if it relates to an important fact as distinguished from some unimportant or trivial detail.

To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self.

The essence of the offense is the willful making of a material false entry with intent to defraud, and it is not necessary to prove that anyone was in fact deceived or defrauded.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1005 (third paragraph) provides:

> Whoever makes any false entry in any book, report, or statement of [an insured bank] with intent to injure or defraud such bank . . . or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System [shall be guilty of an offense against the United States].

Maximum Penalty: Thirty (30) years imprisonment and $1,000,000 fine.

United States v. Rapp, 871 F.2d 957, 963 (11th Cir. 1989), statute requires knowing and willful making of a false entry with knowledge of its falsity and with intent to deceive or defraud a bank.

There are no decisions in the Eleventh Circuit as to whether materiality is an element of this offense. However, because the statute expressly requires that the false entry be made "with intent to defraud," the Committee believes that materiality

is an essential element of the offense that must be submitted to the jury under the Supreme Court decisions in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995); United States v. Wells, 519 U.S. 482, 117 S.Ct. 921 (1997); and Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999). The Court concluded in Wells that materiality was not an element of the offense of making a "false statement" in violation of 18 USC § 1014, but held in Neder that use of the words "fraud" or "fraudulently" as terms of art in 18 USC §§ 1341, 1343 and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And Gaudin held that when materiality is an essential element of an offense, it must be submitted to the jury.

See Trial Instruction 8 for use in submitting forfeiture issues to the jury.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

38
False Statements In Department Of Housing And Urban Development And Federal Housing Administration Transactions
18 USC § 1010

Title 18, United States Code, Section 1010, makes it a Federal crime or offense for anyone to [make a false statement] [to forge or counterfeit any document] [to pass as true any forged or counterfeited document] [willfully overvalue any asset or income] [for the purpose of obtaining any loan with the intent that such loan be offered to or accepted by the Department of Housing and Urban Development for insurance] [for the purpose of obtaining any extension or renewal of any loan or mortgage insured by the Department of Housing and Urban Development.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant [made a false statement] [forged or counterfeited a document] [passed as true a forged or counterfeited document] [willfully overvalued an asset or income] as charged;

Second: That the Defendant did so [for the purpose of obtaining a loan with the intent that such loan be offered to or accepted by] [for the purpose of obtaining any extension or renewal of any loan or mortgage insured by]

the Department of Housing and Urban Development; and

Third: That the Defendant acted knowingly and willfully.

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

ANNOTATIONS AND COMMENTS

18 USC § 1010 provides:

> Whoever for the purpose of obtaining any loan or advance of credit with the intent that such loan or advanced of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income. . . . [shall be guilty of an offense against the United States].

Cited in U.S. v. Cheer No. 06-10642, archived on January 28, 2008

Maximum Penalty: Two (2) years imprisonment and applicable fine.

United States v. DeCastro, 113 F.3d 176 (11th Cir. 1997), materiality is not an element of the offense under 18 USC § 1010. Although DeCastro was decided before Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999), the decision is in harmony with Neder because § 1010 does not require proof of fraud or fraudulent intent. Accord, United States v. Wells, 419 U.S. 482, 117 S.Ct. 921 (1997).

39
False Statement To A Federally Insured Institution
18 USC § 1014

Title 18, United States Code, Section 1014, makes it a Federal crime or offense for anyone to willfully make a false statement to a federally insured financial institution.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly made a false statement or report to the financial institution described in the indictment;

Second: That the deposits of the institution were insured by the Federal Deposit Insurance Corporation; and

Third: That the Defendant made the false statement or report willfully and with intent to influence the action of the institution upon an application, advance, commitment or loan, or any change or extension thereof.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt

to influence such an institution by willfully making a false statement or report concerning the matter.

ANNOTATIONS AND COMMENTS

18 USC § 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation,... [or] the Resolution Trust Corporation . . . upon any application, advance, . . . commitment, or loan, or any change or extension of any of the same [shall be guilty of an offense against the United States].

Maximum Penalty: Thirty (30) years imprisonment and applicable fine.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

United States v. Key, 76 F.3d 350, 353 (11th Cir. 1996), a defendant need not know of the victim institution's insured status to be guilty of this offense; rather, it is sufficient that the defendant knowingly directed conduct at a bank that the government proves was insured.

United States v. Greene, 862 F.2d 1512, 1514 (11th Cir. 1989), section applies to representations made in connection with conventional loan or related transactions.

United States v. Wells, 419 U.S. 482, 117 S.Ct. 921 (1997), materiality is not an element of this offense.

40.1
False Identification Documents
18 USC § 1028(a)(3)

Title 18, United States Code, Section 1028(a)(3), makes it a Federal crime or offense for anyone to knowingly possess with intent to transfer unlawfully five or more false identification documents, such possession being in or affecting interstate or foreign commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant possessed five or more false identification documents;

Second: That the Defendant did so knowingly and willfully with the intent to unlawfully transfer the false identification documents; and

Third: That the Defendant's possession of the false identification documents was in or affecting interstate or foreign commerce.

Cited in U.S. v. Oberer, No. 06-10642; archived on January 28, 2008

The intent to transfer false identification documents unlawfully is the intent to sell, pledge, distribute, give, loan or otherwise transfer false identification documents knowing that such documents were produced without lawful authority.

A "false identification document" means a document of a type commonly accepted for purposes of identification of individuals that is

not issued by or under the authority of a governmental entity, but appears to be issued by or under the authority of [the United States Government] [a State or a political subdivision of a State].

[The term "interstate commerce" refers to any transaction or event that involves travel or transportation between a place in one state and a place in another state.] [The term "foreign commerce" refers to any transaction or event that involves travel or transportation between a place in the United States and a place outside the United States.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1028(a)(3) provides:

> (a) Whoever - -
>
> (3) knowingly possess with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor) or false identification documents [shall be guilty of an offense against the United States].

Maximum penalty: depends on the use of the documents and can be as many as 25 years and applicable fine.

United States v. Alejandro, 118 F.3d 1518 (11th Cir. 1997), the Eleventh Circuit affirmed the trial court's use of this instruction.

If the indictment alleges one of the sentencing enhancing circumstances listed in § 2326 (telemarketing, victimizing 10 or more persons over age 55, or targeting persons over age 55), that factor should be stated as an additional element under the principle of Apprendi and consideration should be given to a lesser included offense instruction, Offense Instruction 10.

40.2
False Identification Documents
18 USC § 1028(a)(4)

Title 18, United States Code, Section 1028(a)(4) makes it a federal crime or offense for anyone to knowingly possess a false identification document with the intent that such document be used to defraud the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly possessed a false identification document as described in the indictment; and

Second: That the Defendant possessed the false identification document with the intent that such document be used to defraud the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "identification document" means a document made or issued by or under the authority of the United States Government which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

A "false identification document" means a document of a type commonly accepted for purposes of identification of individuals that is

not issued by or under the authority of a Governmental entity, but appears to be issued by or under the authority of the United States.

The phrase "with intent . . . to defraud the United States" means a specific intent to mislead or deceive an officer or employee of the United States in carrying out his or her official duties. It is not necessary for the Government to prove, however, that any Government employee or officer was in fact misled or deceived.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 1028(a)(4) provides:

> (a) Whoever, in a circumstance described in subsection ©) of this section - -
>
> * * * *
>
> (4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor) or a false identification document, with the intent such document be used to defraud the United States [shall be guilty of an offense against the United States].
>
> * * * *
>
> ©) The circumstance referred to in subsection (a) of this section is that - -
>
> (1) the identification document or false identification document is or appears to be issued by or under the authority of the United States or the document-making implement is designed or suited for making such an identification document or false identification document;
>
> (2) the offense is an offense under subsection (a)(4) of this section . . .

Maximum Penalty: Fifteen (15) years and applicable fine.

41.1
Fraud In Connection With Counterfeit Credit Cards Or Other Access Devices
18 USC § 1029(a)(1)

Title 18, United States Code, Section 1029(a)(1), makes it a Federal crime or offense for anyone to [produce] [use] [traffic in] counterfeit credit cards or other access devices.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [produced] [used] [trafficked in] a counterfeit access device;

Second: That the Defendant so acted willfully, with knowledge of the counterfeit nature of the access device, and with the intent of defrauding or deceiving, as charged; and

Third: That the Defendant's conduct affected interstate or foreign commerce.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "access device" means any credit card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can

be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

The term "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device.

[The term "produced" includes the design, alteration, authentication, duplication, or assembly of a counterfeit access device.]

[The term "used" includes any effort to obtain money, goods, services, or any other thing of value, or to initiate a transfer of funds with a counterfeit access device.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The term "trafficked in" means the transfer, or other disposal of, a counterfeit access device to another, or the possession or control of a counterfeit device with the intent to transfer or dispose of it to another.]

To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self.

The essence of the offense is the willful use of a counterfeit access device with intent to defraud, and it is not necessary to prove that anyone was in fact deceived or defrauded.

While it is not necessary to prove that the Defendant specifically intended to interfere with or affect interstate commerce, the Government must prove that the natural consequences of the acts alleged in the indictment would be to affect "interstate commerce," which means the flow of commerce or business activities between two or more states. If you find beyond a reasonable doubt that [the device was used to order goods from another state] [the device was used to purchase goods manufactured outside of this state] you may find that the requisite affect upon interstate commerce has been proved.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1029(a)(1) provides:

> (a) Whoever - -
>
> (1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices [shall be guilty of an offense against the United States] if the offense affects interstate commerce or foreign commerce.

Maximum Penalty: Fifteen (15) years and applicable fine.

United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997) (Unprogrammed ESN-MIN combinations constitute access devices within the meaning of § 1029).

United States v. Dabbs, 134 F.3d 1071 (11th Cir. 1998) (A merchant account number constitutes an access device).

If the indictment alleges one of the sentencing enhancing circumstances listed in § 2326 (telemarketing, victimizing 10 or more persons over age 55, or targeting persons over age 55), that factor should be stated as an additional element under the principle of Apprendi and consideration should be given to a lesser included offense instruction, Special Instruction 10.

41.2
Fraud In Connection With Unauthorized Credit Cards Or Other Access Devices
18 USC § 1029(a)(2)

Title 18, United States Code, Section 1029(a)(2), makes it a Federal crime or offense for anyone during any one year period to [use] [traffic in] unauthorized access devices, including ordinary credit cards, if by such conduct a person obtains anything of value aggregating $1,000 or more during that period.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant knowingly [used] [trafficked in] an unauthorized access device during a one year period, and by such use obtained things of value totaling more than $1,000 during that time period;

<u>Second</u>: That the Defendant so acted willfully, with knowledge of the unauthorized nature of the access device, and with the intent of defrauding or deceiving, as charged; and

<u>Third</u>: That the Defendant's conduct affected interstate or foreign commerce.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "access device" means any credit card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, 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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The term "used" includes any effort to obtain money, goods, services, or any other thing of value, or to initiate a transfer of funds with an unauthorized access device.]

[The term "trafficked" means the transfer, or other disposal of, a counterfeit access device to another, or the possession or control of an unauthorized access device with the intent to transfer or dispose of it to another.]

To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self.

The essence of the offense is the willful use of an unauthorized access device with intent to defraud, and it is not necessary to prove that anyone was in fact deceived or defrauded.

While it is not necessary to prove that the Defendant specifically intended to interfere with or affect interstate commerce, the Government must prove that the natural consequences of the acts alleged in the indictment would be to affect "interstate commerce," which means the flow of commerce or business activities between two or more states.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1029(a)(2) provides:

> (a) Whoever - -
>
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period [shall be guilty of an offense against the United States] if the offense affects interstate commerce or foreign commerce.

Maximum Penalty: Ten (10) years and applicable fine.

United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997) (Unprogrammed ESN-MIN combinations constitute access devices within the meaning of § 1029).

United States v. Dabbs, 134 F.3d 1071 (11th Cir. 1998) (A merchant account number constitutes an access device).

If the indictment alleges one of the sentencing enhancing circumstances listed in § 2326 (telemarketing, victimizing 10 or more persons over age 55, or targeting persons over age 55), that factor should be stated as an additional element under the principle of Apprendi and consideration should be given to a lesser included offense instruction, Special Instruction 10.

42.1
Computer Fraud
Injury To United States
18 USC § 1030(a)(1)

Title 18, United States Code, Section 1030(a)(1), makes it a Federal crime or offense for anyone to knowingly access a computer without authorization to obtain secret information to be used to the injury of the United States or to the advantage of any foreign nation.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly accessed a computer [without authorization] [in excess of the Defendant's authorization];

Second: That the Defendant thereby obtained [information that had been determined by the United States Government to require protection against unauthorized disclosure for reasons of national defense or foreign relations] [data regarding the design, manufacture or use of atomic weapons]; and

Third: That the Defendant obtained such [information] [data] with the intent, or reason to believe, that it was to be used to the injury of the United States or to the advantage of any foreign nation.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "computer" means an electric, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device.

[The term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the person gaining access is not entitled so to obtain or alter.]

If it is proved beyond a reasonable doubt that the Defendant knowingly obtained the [secret information] [restricted data] without authorization and with the intent or reason to believe that it would be used to the injury of the United States or to the advantage or any foreign nation, then the crime is complete. The Government does not have to prove that such [information] [data] was in fact thereafter used to the injury of the United States or to the advantage of any foreign nation.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1030(a)(1) provides:

> (a) Whoever - -
>
> (1) knowingly accesses a computer without authorization or exceeds authorized access, and by means of such conduct obtains information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y of section 11 of the Atomic Energy Act of 1954, with the intent or reason to believe that such information so obtained is to be used to the injury of the United States, or to the advantage of any foreign nation [shall be punished as provided in subsection ©) of this section].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

Cited in U.S. v. Cherif, No. 06-10642; archived on January 28, 2008

The Atomic Energy Act defines "Restricted Data" as "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title." 42 USC § 2014(y).

The Senate Judiciary Committee emphasized that "obtains information" in this context includes mere observation of the data. "Actual asportation, in the sense of physically removing the data from its original location or transcribing the data, need not be proved in order to establish a violation of this subsection." S.Rep. 99-432, at 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 2479, 2484.

42.2
Computer Fraud
Obtaining Financial Information
18 USC § 1030(a)(2) and (c)(2)(B)

Title 18, United States Code, Section 1030(a)(2) makes it a Federal crime or offense for anyone to intentionally access a computer [without authorization] [in excess of authorized access] and thereby obtain information contained in a financial record of [a financial institution] [the issuer of a credit card] [a consumer reporting agency concerning a consumer].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant intentionally accessed a computer [without authorization] [in excess of the Defendant's authorization]; and

Second: That the Defendant thereby obtained information contained [in a financial record of a financial institution] [in a financial record of the issuer of a credit card] [in a file of a consumer reporting agency concerning a consumer]; and

Third: The offense was committed [for purposes of commercial advantage or private financial gain] [in furtherance of any criminal or tortious act] [to obtain information having a value exceeding $5,000.]

The term "computer" means an electric, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device.

[The term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.]

[The term "financial record" means information derived from any record held by [a financial institution] [an issuer of a credit card] pertaining to a customer's relationship with it.]

Cited in U.S. v. Cherep, No. 06-10642, archived on January 28, 2008

[The term "financial institution" means [an institution with deposits insured by the Federal Deposit Insurance Corporation] [a credit union with accounts insured by the National Credit Union Administration] [a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934.]

[The term "consumer reporting agency" means any person or corporation which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of

assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.]

A "criminal or tortious act" would include [describe the crime or tort intended to be furthered by the offense].

ANNOTATIONS AND COMMENTS

18 USC § 1030(a)(2) provides:

> (a) Whoever - -
>
> * * * * *
>
> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of Title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) [shall be punished as provided in subsection ©) of this section].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

15 USC § 1681a(c) defines "consumer" to mean "an individual," and 15 USC § 1681a(f) defines "consumer reporting agency." 15 USC § 1602(n) defines "card issuer" to mean "any person who issues a credit card, or the agent of such person with respect to such card."

The Senate Judiciary Committee emphasized that "obtains information" in this context includes mere observation of the data. "Actual asportation, in the sense of physically removing the data from its original location or transcribing the data, need not be proved in order to establish a violation of this subsection." S.Rep. 99-432, at 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 2479, 2484.

42.3
Computer Fraud
Causing Damage To Computer Or Program
18 USC § 1030(a)(5)(A) and (B)

Title 18, United States Code, Section 1030(a)(5), makes it a Federal crime or offense for anyone, through means of a computer used in interstate commerce or communications, to knowingly and without authorization, cause the transmission of any program, code or command to another computer or computer system [with intent to] [with reckless disregard of a substantial and unjustifiable risk that the transmission will] [damage the receiving computer, computer system, network, information, data or program] [withhold or deny, or cause the withholding or denial, of the use of a computer, computer services, system or network, information, data or program].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant, through means of a computer used in interstate commerce or communications, knowingly caused the transmission of a program, information, code or command to another computer or computer system, as charged;

Second: That the Defendant, by causing the transmission [intended to] [acted with reckless disregard of a substantial and unjustifiable risk

that the transmission would] [damage the receiving computer, computer system, information, data or program] [withhold or deny, or cause the withholding or denial, of the use of a computer, computer services, system or network, information, data or program];

Third: That the Defendant so acted without the authorization of the persons or entities who own or are responsible for the computer system receiving the program, information, code or command; and

Fourth: That the Defendant's acts [caused loss or damage to one or more other persons of value aggregating $1,000 or more during any one year period] [modified or impaired, or potentially modified or impaired, the medical examination, medical diagnosis, medical treatment, or medical care of one or more individuals].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "computer" means an electric, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device.

ANNOTATIONS AND COMMENTS

18 USC § 1030(a)(5)(A) provides:

(a) Whoever - -

* * * * *

(5)(A) through means of a computer used in interstate commerce or communications, knowingly causes the transmission of a program, information, code, or command to a computer or computer system if - -

(i) the person causing the transmission intends that such transmission will - -

(I) damage, or cause damage to, a computer, computer system, network, information, data, or program; or

(II) withhold or deny, or cause the withholding or denial, of the use of a computer, computer services, system or network, information, data or program; and

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

(ii) the transmission of the harmful component of the program, information, code, or command - -

(I) occurred without the authorization of the persons or entities who own or are responsible for the computer system receiving the program, information, code, or command; and

(II)(aa) causes loss or damage to one or more other persons of value aggregating $1,000 or more during any 1-year period; or

(bb) modifies or impairs, or potentially modifies or impairs, the medical examination, medical diagnosis, medical treatment, or medical care of one or more individuals.

[shall be punished as provided in subsection (c) of this section].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

18 USC § 1030(a)(5)(B) provides:

(a) Whoever - -

* * * * *

(5)(B) through means of a computer used in interstate commerce or communication, knowingly causes the transmission of a program, information, code, or command to a computer or computer system - -

(i) with reckless disregard of a substantial and unjustifiable risk that the transmission will - -

(I) damage, or cause damage to, a computer, computer system, network, information, data or program; or

(II) withhold or deny or cause the withholding or denial of the use of a computer, computer services, system, network, information, data or program; and

(ii) if the transmission of the harmful component of the program, information, code, or command - -

(I) occurred without the authorization of the persons or entities who own or are responsible for the computer system receiving the program, information, code, or command; and

(II)(aa) causes loss or damage to one or more other persons of a value aggregating $1,000 or more during any 1-year period; or

(bb) modifies or impairs, or potentially modifies or impairs, the medical examination, medical diagnosis, medical treatment, or medical care of one or more individuals.

[shall be punished as provided in subsection (c) of this section].

Maximum Penalty: One (1) year imprisonment and applicable fine.

Cited in U.S. v. Cherek, No. 06-10642, archived on January 28, 2008

42.4
Computer Fraud
Trafficking In Passwords
18 USC § 1030(a)(6)(A) or (B)

Title 18, United States Code, Section 1030(a)(6)(A), makes it a Federal crime or offense for anyone, knowingly and with intent to defraud, to traffic in any password through which a computer may be accessed without authorization.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly trafficked in a password, or similar information through which a computer may be accessed, without authorization, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant acted with intent to defraud; and

Third: That the Defendant's acts [affected interstate commerce] [involved access to a computer used by or for the Government of the United States].

The term "computer" means an electric, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device.

To "traffic" in something means to transfer, deliver or otherwise dispose of it to another, or to obtain control of it with intent to transfer, deliver or dispose of it to another, either with or without any financial interest in the transaction.

To act "with intent to defraud" means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

The term "interstate commerce" means the movement or transmission of something in commerce from one state into another state. The Government claims that the Defendant's acts affected interstate commerce because the Defendant [used interstate telephone facilities in committing the alleged offense]. If you find that this claim has been proved beyond a reasonable doubt, then you may find that the requisite affect on interstate commerce has been established.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1030(a)(6)(A) provides:

> (a) Whoever - -
>
> * * * * * *
>
> (6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if - -
>
> (A) such trafficking affects interstate or foreign commerce [shall be punished as provided in subsection ©) of this section]; or
>
> (B) such computer is used by or for the Government of the United States [shall be punished as provided in subsection (c) of this section].

Maximum Penalty: One (1) year imprisonment and applicable fine.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

43
Major Fraud Against The United States
18 USC § 1031

Title 18, United States Code, Section 1031, makes it a Federal crime or offense for anyone to knowingly execute, or attempt to execute, any scheme or artifice with the intent to defraud the United States or to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States, or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract is $1,000,000 or more.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully executed or attempted to execute a scheme or artifice with the intent to defraud the United States, or to obtain money or property by means of materially false or fraudulent pretenses, representations, and promises, as charged;

Second: That the scheme took place as a part of the procurement or acquisition of [property] [services] [money] as a contractor with the

United States or as a subcontractor or a supplier on a contract with the United States; and

Third: That the value of the contract was one million dollars or more.

The value of the contract is the value of the amount to be paid under the contract.

The false or fraudulent pretenses, representations, or promises violate the law if they occur [prior to the creation of the contract] [at the same time as the creation of the contract] [during the execution of the contract].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud.

A “material fact” is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

To act with “intent to defraud” means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one’s self.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10842, archived on January 28, 2008

18 USC § 1031 provides:

> Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent - -
>
> (1) to defraud the United States; or
>
> (2) to obtain money or property by means of false or fraudulent pretenses, representations or promises,
> in any procurement of property or services as a prime contractor with the United States . . . if the value of the contract . . . for such property or services is $1,000,000 or more, shall [be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years and applicable fine.

In United States v. Nolan, 223 F.3d 1311 (11th Cir. 2000), the Eleventh Circuit approved a substantially similar instruction.

44
Transmission Of Wagering Information
18 USC § 1084

Title 18, United States Code, Section 1084, makes it a Federal crime or offense for anyone engaged in betting or wagering as a business to use a wire communication facility for the interstate transmission of a bet or betting information on any sporting event.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was engaged in the business of betting or wagering, as charged;

Second: That, as a part of such business, the Defendant knowingly used a wire communication facility to transmit in interstate [or foreign] commerce bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest; and

Third: That the Defendant did so willfully.

Cited in U.S. v. Chefer, No. 06-10642, archived on January 28, 2008

To be "engaged in the business of betting or wagering" it is not necessary that making bets or wagers, or dealing in wagering information, constitutes a person's primary source of income, nor must it be shown that such person has made any specific number of bets; or

that such person has made a specific dollar volume of bets, or has actually earned a profit.

What must be shown beyond a reasonable doubt is 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, rather than casual, isolated or sporadic transactions.

A "wire communication facility" would include long distance telephone facilities; and information conveyed or received by telephone from one state into another state [or between the United States and a foreign country], would constitute a transmission in interstate [or foreign] commerce.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1084(a) provides:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest [shall be guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine.

The "use" of a wire communication facility for the transmission of gambling information includes either the transmission or receipt of such information. United States v. Sellers, 483 F.2d 37 (5th Cir. 1974), cert. denied, 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212 (1974), overruled on other grounds by United States v. McKeever, 905 F.2d 829 (5th Cir. 1990). Also, the Defendant need not have personal knowledge of the interstate character of the transmission. United States v. Miller, 22 F.3d 1075 (11th Cir. 1994).

45.1
First Degree Murder
Premeditated Murder
18 USC § 1111

Title 18, United States Code, Section 1111, makes it a Federal crime or offense for anyone to murder another human being within the [special maritime] [territorial] jurisdiction of the United States. Murder is the unlawful killing of a human being with malice aforethought.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the victim named in the indictment was killed;

Second: That the Defendant caused the death of the victim with "malice aforethought," as charged;

Third: That the Defendant did so with "premeditated intent;" and

Fourth: That the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To kill with "malice aforethought" means an intent at the time of the killing to take the life of another person, either deliberately and intentionally, or to willfully act with callous and wanton disregard for human life. The Government need not prove that the Defendant hated the person killed or felt ill will toward the victim at the time, but the

evidence must establish beyond a reasonable doubt that the Defendant acted either with the intent to kill or to willfully do acts with callous and wanton disregard for the consequences and which the Defendant knew would result in a serious risk of death or serious bodily harm.

Killing with "premeditated intent" is required in addition to proof of malice aforethought in order to establish the offense of first degree murder. Premeditation is typically associated with killing in cold blood and requires a period of time in which the accused deliberates, or thinks the matter over, before acting. The law does not specify or require any exact period of time that must pass between the formation of the intent to kill and the killing itself. It must be long enough for the killer, after forming the intent to kill, to be fully conscious of that intent.

Cited in U.S. v. Cheron, No. 06-10642, archived on January 28, 2008

[It is not necessary, however, for the Government to prove that the person killed - - the victim - - was the person whom the Defendant intended to kill. If a person forms a premeditated intent to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.]

If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, you are

instructed that the location would be within the [special maritime] [territorial] jurisdiction of the United States.

ANNOTATIONS AND COMMENTS

(See Annotations and Comments following Offense Instruction 45.3, infra.)

In the appropriate case, the instructions for a Lesser Included Offense, for Second Degree Murder, and for Voluntary or Involuntary Manslaughter may need to be incorporated.

If there is evidence that the Defendant acted lawfully, such as in self defense, a fifth element should be added and explained. For example: "The Defendant did not act in self defense," with a definition or explanation of what constitutes self defense. The absence of self defense in such circumstances must be proven beyond a reasonable doubt by the Government. United States v. Alvarez, 755 F.2d 830, 842-43, 846 (11th Cir. 1985).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

45.2
First Degree Murder
(Felony Murder)
18 USC § 1111

Title 18, United States Code, Section 1111, makes it a Federal crime or offense for anyone to murder another human being during [the perpetration of] [an attempt to perpetrate] the crime of [arson] [escape] [murder] [kidnapping] [treason] [espionage] [sabotage] [aggravated sexual abuse] [sexual abuse] [burglary] [robbery] within the [special maritime] [territorial] jurisdiction of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the victim named in the indictment was killed;

Second: That the Defendant caused the death of the victim, as charged;

Third: That the death of the victim occurred as a consequence of and while the Defendant was knowingly and willfully engaged [in perpetrating] [in attempting to perpetrate] the crime of [arson, etc.] as charged; and

Fourth: That the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

The crime charged here is known as a "felony murder" - - that is, a killing that occurs during the knowing and willful commission of some other, specified felony offense. It is not necessary, therefore, for the Government to prove that the Defendant had any premeditated design or intent to kill the victim. It is sufficient if the Government proves beyond a reasonable doubt that the Defendant knowingly and willfully [committed] [attempted to commit] the crime of [arson, etc.] as charged in the indictment, and that the killing of the victim occurred during, and as a consequence of, the Defendant's [commission of] [attempt to commit] that crime.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, you are instructed that the location would be within the [special maritime] [territorial] jurisdiction of the United States.

ANNOTATIONS AND COMMENTS

(See Annotations and Comments following Offense Instruction 45.3, infra.)

In the case of felony murder the malice aforethought requirement of Section 1111 is satisfied if the murder results from the perpetration of the enumerated crime. United States v. Thomas, 34 F.3d 44, 49 (2d Cir.), cert. denied, 513 U.S. 1007, 115 S.Ct. 527, 130 L.Ed.2d 431 (1994). The felony murder statute "reflects the English

common law principle that one who caused another's death while committing or attempting to commit a felony was guilty of murder even though he did not intend to kill the deceased." United States v. Tham, 118 F.3d 1501, 1508 (11th Cir. 1997). It applies to the accidental, self-inflicted death of a co-conspirator. Id. Second-degree murder is not a lesser included offense of felony murder under Section 1111(a) because the malice aforethought elements are different. Unlike second-degree murder, malice aforethought for felony murder is satisfied only by commission of a felony enumerated in Section 1111(a). United States v. Chanthadara, 230 F.3d 1237, 1258 (10th Cir. 2000).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

45.3
Second Degree Murder
18 USC § 1111

Title 18, United States Code, Section 1111, makes it a Federal crime or offense for anyone to murder another human being within the [special maritime] or [territorial] jurisdiction of the United States. Murder is the unlawful killing of a human being with malice aforethought.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the victim named in the indictment was killed;

Second: That the Defendant caused the death of the victim with "malice aforethought," as charged; and

Third: That the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To kill with "malice aforethought" means an intent at the time of the killing to take the life of another person either deliberately and intentionally, or to willfully act with callous and wanton disregard for human life. The Government need not prove that the Defendant hated the person killed or felt ill will toward the victim at the time, but the evidence must establish beyond a reasonable doubt that the Defendant acted either with the intent to kill or to willfully do acts with callous and

wanton disregard for the consequences and which the Defendant knew would result in a serious risk of death or serious bodily harm.

The difference between second degree murder, which is the charge you are considering, and first degree murder, is that second degree murder does not require premeditation. Premeditation is typically associated with killing in cold blood and requires a period of time in which the accused deliberates, or thinks the matter over before acting.

The crime charged here is second degree murder, and it is sufficient if the Government proves beyond a reasonable doubt that the Defendant killed the victim deliberately and intentionally (but without premeditation), or that the Defendant killed the victim by acting with callous and wanton disregard for human life.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, you are instructed that the location would be within the [special maritime] [territorial] jurisdiction of the United States.

ANNOTATIONS AND COMMENTS

18 USC § 1111 provides:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnaping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;
>
> Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

Cited in U.S. v. Cheney, No. 06-10642, archived on January 28, 2008

First degree murder under Section 1111 (including murder by transferred intent) requires both a finding of malice aforethought and premeditation (or felony murder). United States v. Weise, 89 F.3d 502, 505 (8th Cir. 1996) ("first degree murder is a killing with malice aforethought and premeditation, second degree murder is a killing with malice aforethought. . ."); United States v. Shaw, 701 F.2d 367, 392 (5th Cir. 1983), cert. denied, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984) ("Section 1111 retains the common law distinction between second degree murder, which requires a killing with malice aforethought, and first degree murder, which in addition to malice aforethought requires a killing with premeditation and deliberation.")

Malice aforethought is a term of art which has several definitions. United States v. Pearson, 159 F.3d 480, 485 (10th Cir. 1998). Under both the common law and the federal murder statute, malice aforethought encompasses three distinct mental states: (1) intent to kill; (2) intent to do serious bodily injury; and (3) extreme recklessness and wanton disregard for human life (i.e. a "depraved heart"). Lara v. U. S. Parole Commission, 990 F.2d 839, 841 (5th Cir. 1993); United States v. Browner, 889 F.2d 549, 551-52 (5th Cir. 1989); see also United States v. Harrelson, 766 F.2d 186, 189 n.5 (5th Cir.) ("`Malice aforethought' means an intent, at the time of the killing, willfully to take the life of a human being, or an intent willfully to act in

callous and wanton disregard of the consequences to human life. . . .") (quoting 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions 215 (1977)), cert. denied, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985). In United States v. Milton, 27 F.3d 203, 206-207 (6th Cir. 1994), and United States v. Sheffey, 57 F.3d 1419, 1430 (6th Cir. 1995), cert. denied 516 U.S. 1065, 116 S.Ct. 749, 133 L.Ed.2d 697 (1996), the Sixth Circuit adopted essentially the same definition of malice aforethought: malice aforethought may be established by (1) "evidence of conduct which is `reckless and wanton, and a gross deviation from a reasonable standard of care, of such nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'" United States v. Black Elk, 579 F.2d 49, 51 (8th Cir. 1978) (citing United States v. Cox, 509 F.2d 390, 392 (D.C. Cir. 1974)); (2) evidence that the defendant "intentionally commit[ted] a wrongful act without legal justification or excuse." United States v. Celestine, 510 F.2d 457, 459 (9th Cir. 1975); or (3) "circumstances which show `a wanton and deprived spirit, a mind bent on evil mischief without regard to its consequences.'" Id. To prove that the Defendant acted with malice aforethought, "the government must show that he engaged in 'conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'" United States v. Tan, 254 F.3d 1204, 1207 (10th Cir. 2001) (addressing second degree murder) (quoting United States v. Wood, 207 F.3d 1222, 1228 (10th Cir. 2000)). In other words, "the government must show that Defendant knew that his conduct posed a serious risk of death or harm to himself or others, but did not care." Id. Malice aforethought also may be established by showing evidence that the defendant "intentionally commit[ted] a wrongful act without legal justification or excuse" or by "circumstances which show a wanton and deprived spirit, a mind bent on evil mischief without regard to its consequences." United States v. Celestine, 510 F.2d 457, 459 (9th Cir. 1975) (quoting Government of Virgin Islands v. Lake, 362 F.2d 770 (3d Cir. 1966)); see also United States v. Sheffey, 57 F.3d 1419, 1430 (6th Cir. 1995), cert. denied, 516 U.S. 1065, 116 S.Ct. 749, 133 L.Ed.2d 697 (1996); United States v. Milton, 27 F.3d 203, 206-07 (6th Cir. 1994), cert. denied, 513 U.S. 1085, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995).

In the case of a felony murder, the malice aforethought requirement of section 1111 is satisfied if the murder results from the perpetration of the enumerated crime. See United States v. Thomas, 34 F.3d 44, 49 (2d Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 527, 130 L.Ed.2d 431 (1994).

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

46.1
Manslaughter
Voluntary
18 USC § 1112

Title 18, United States Code, Section 1112, makes it a Federal crime or offense for anyone to commit voluntary manslaughter - - that is, the unlawful and intentional killing of a human being without malice upon a sudden quarrel or heat of passion - - whenever the offense occurs within the [special maritime] [territorial] jurisdiction of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the victim named in the indictment is dead;

Second: That the Defendant caused the death of the victim, as charged;

Third: That the Defendant so acted intentionally, but without malice and in the heat of passion caused by adequate provocation; and

Fourth: That the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

Manslaughter is an unlawful killing of a human being without malice, and it is voluntary when it occurs intentionally and upon a sudden quarrel or in the heat of passion. The phrase "in the heat of

passion" means an emotional state that is generally provoked or induced by anger, fear, terror, or rage. In order for this provocation to be an "adequate provocation," it must be of a kind that would naturally cause a reasonable person to temporarily lose self control and to commit the act upon impulse and without reflection but which did not justify the use of deadly force.

If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, you are instructed that the location would be within the [special maritime] [territorial] jurisdiction of the United States.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

(See Annotations and Comments following Offense Instruction 46.2, infra.)

46.2
Manslaughter
Involuntary
18 USC § 1112

Title 18, United States Code, Section 1112, makes it a Federal crime or offense for anyone to commit involuntary manslaughter - - that is, the unlawful but unintentional killing of a human being [during the commission of an unlawful act not amounting to a felony] [as a result of an act in wanton and reckless disregard for human life] - - whenever the offense occurs within the [special maritime] or [territorial] jurisdiction of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the victim named in the indictment is dead;

Second: That the Defendant caused the death of the victim, or inflicted injuries upon the victim from which the victim died, as charged;

Third: That the death of the victim occurred as a consequence of and while the Defendant was engaged in committing an unlawful act not amounting to a felony, namely [describe unlawful act], or in committing a lawful act in an unlawful manner or with wanton and reckless disregard for human life;

Fourth: That the Defendant knew that his [her] conduct was a threat to the lives of others or had knowledge of such circumstances as could have enabled him [her] to reasonably foresee the peril to which his [her] act might subject others; and

Fifth: That the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

Manslaughter is an unlawful killing of a human being without malice, and it is involuntary if it was not done intentionally, but occurs in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act in an unlawful manner or without due caution and circumspection of a lawful action which might produce death. In order to establish the offense of involuntary manslaughter the Government need not prove that the Defendant specifically intended to cause the death of the victim, but it must prove more than mere negligence or a failure to use reasonable care by the Defendant; it must, instead, prove gross negligence amounting to "wanton and reckless disregard for human life."

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, you are

instructed that the location would be within the [special maritime] [territorial] jurisdiction of the United States.

ANNOTATIONS AND COMMENTS

18 USC § 1112 provides:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary - - Upon a sudden quarrel or heat of passion.
>
> Involuntary - - In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of voluntary manslaughter [shall be guilty of an offense against the United States].
>
> Whoever is guilty of involuntary manslaughter [shall be guilty of an offense against the United States].

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

The fact that distinguishes manslaughter from murder is the absence of malice. See 18 USC § 112(a). In the case of voluntary manslaughter, the existence of a sudden quarrel or heat of passion is deemed to demonstrate the absence of malice. United States v. Pearson, 203 F.3d 1243, 1271 (10th Cir. 2000); United States v. Collins, 690 F.2d 431, 437 (5th Cir. 1982), cert. denied, 460 U.S. 1046, 103 S.Ct. 1447, 75 L.Ed.2d 801 (1983). "A 'heat of passion' is 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." Lizama v. United States Parole Comm'n., 245 F.3d 503, 506 (5th Cir. 2001). The government is not required to prove the absence of sudden provocation or heat of passion for a voluntary manslaughter conviction to stand in a murder trial. However, once evidence is presented that the defendant's capacity for self-control was impaired by an extreme provocation, "the burden is on the

Government to prove beyond a reasonable doubt the absence of sudden quarrel or heat of passion before a conviction for murder can be sustained. See United States v. Quintero, 21 F.3d 885, 890 (9th Cir. 1994) (citing Mullaney v. Wilbur, 421 U.S. 684, 704, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508 (1975).

"A proper instruction on an involuntary manslaughter charge requires the jury to find that the defendant (1) act with gross negligence, meaning a wanton or reckless disregard for human life, and (2) have knowledge that his or her conduct was a threat to the life of another or knowledge of such circumstances as could reasonably have enabled the defendant to foresee the peril to which his or her act might subject another." United States v. Fesler, 781 F.2d 384, 393 (5th Cir.), cert. denied 476 U.S. 1118, 106 S.Ct. 1977, 90 L.Ed.2d 661 (1986); see also, United States v. Paul, 37 F.3d 496, 499 (9th Cir. 1994) ("involuntary manslaughter is an unintentional killing that `evinces a wanton or reckless disregard for human life but not of the extreme nature that will support a finding of malice'" sufficient to justify a conviction for second degree murder). The intent element of involuntary manslaughter is not satisfied by a showing of simple negligence. United States v. Gaskell, 985 F.2d 1056, 1064 (11th Cir. 1993).

These elements are based upon United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991), and United States v. Schmidt, 626 F.2d 616 (8th Cir. 1980), cert. denied 449 U.S. 904, 101 S.Ct. 278, 66 L.Ed.2d (1981), but there may be some confusion regarding the third element in the Sasnett opinion. The third element set out here is intended to encompass the statutory distinction between lawful and unlawful acts, but should be tailored to fit the specific case. See also United States v. Browner, 889 F.2d 549 (5th Cir. 1989).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

47
Attempted Murder
18 USC § 1113

Title 18, United States Code, Section 1113, makes it a Federal crime or offense for anyone to attempt to murder another human being within the [special maritime] [territorial] jurisdiction of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant did something that was a substantial step toward killing _____, as charged;

Second: That the Defendant intended to kill _____, when the Defendant took that substantial step; and

Third: That the attempted killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The "substantial step" required to establish an attempt must be something beyond mere preparation; it must be an act which, unless frustrated by some condition or event, would have resulted, in the ordinary and likely course of things, in the commission of the crime being attempted.

The Government may have presented evidence of several acts taken by the Defendant, each of which may constitute a "substantial

step." In that event, you must all unanimously agree upon which act constituted the substantial step.

ANNOTATIONS AND COMMENTS

18 USC §1113 provides:

> Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall, for an attempt to commit murder be imprisoned not more than twenty years or fined under this title, or both, and for an attempt to commit manslaughter be imprisoned not more than seven years or fined under this title, or both.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Attempted murder requires proof of a specific intent to kill the victim. Recklessness and wanton conduct, grossly deviating from a reasonable standard of care such that the Defendant was aware of the serious risk of death, will not suffice as proof of an intent to kill. Braxton v. United States, 500 U.S. 344, 351 n.1, 111 S.Ct. 1854, 1859 n.1, 114 L.Ed.2d 385 (1991) ("Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill."); United States v. Kwong, 14 F.3d 189, 194-95 (2nd Cir. 1994).

Whether a Defendant's conduct amounts to a "substantial step" depends in large part on the facts of each case. United States v. Neal, 78 F.3d 901, 906 (4th Cir. 1996). "'A substantial step is an appreciable fragment of a crime and an action of such substantiality that, unless frustrated, the crime would have occurred.'" United States v. Smith, 264 F.3d 1012, 1016 (10th Cir. 2001) (quoting United States v. DeSantiago-Flores, 107 F.3d 1472, 1478-79 (10th Cir. 1997)).

48
Killing Or Attempting To Kill Federal Officer Or Employee
18 USC §1114

Note: If a Defendant is charged with murder, manslaughter, or attempted murder of an officer or employee of the United States in violation of 18 USC § 1114, the appropriate murder, manslaughter, or attempted murder instruction set out supra should be used, but modified to require the jury to find that the victim was a federal officer or employee. The jurisdictional element set out in those instructions is not necessary here.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1114 provides:

> Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished - -
>
> (1) in the case of murder, as provided under section 1111;
>
> (2) in the case of manslaughter, as provided under section 1112; or
>
> (3) in the case of attempted murder or manslaughter, as provided in section 1113.

See United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985).

49
Kidnapping
18 USC § 1201(a)(1)

Title 18, United States Code, Section 1201 (a)(1), makes it a Federal crime or offense for anyone to kidnap [seize] [confine] [inveigle] [decoy] [abduct] [carry away] another person and then transport that person in interstate commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully kidnapped [seized] [confined] [inveigled] [decoyed] [abducted] [carried away] the person described in the indictment, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant held such person for ransom or reward or other benefit which the Defendant intended to derive from the kidnapping; and

Third: That such person was thereafter transported in interstate commerce while so kidnapped [seized] [confined] [inveigled] [decoyed] [abducted] [carried away].

To "kidnap" a person means to forcibly and unlawfully hold, keep, detain and confine the person against his or her will. So,

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.]

It need not be proved, however, that a kidnapping was carried out for ransom or personal monetary gain so long as it is proved that the Defendant acted willfully, intending to gain some benefit from the kidnapping.

"Interstate commerce" means commerce or travel between one state and another state. A person is transported in interstate commerce whenever that person moves across state lines from one state into another state. The Government does not have to prove that the Defendant knew of the crossing of state lines, but only that it was done while the Defendant was intentionally transporting the victim.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1201(a)(1) provides:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person [and willfully transports such person in interstate or foreign commerce] [shall be guilty of an offense against the United States].

Maximum Penalty: Imprisonment for any term of years or for life or if the death of any person results, shall be punished by death or life imprisonment.

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. Hernandez v. United States, 226 F.3d 839, 841 (7th Cir. 2000). If a disputed issue is whether a death resulted, the Court should consider giving a lesser included offense instruction.

Inveiglement or decoying someone across state lines is not in and of itself conduct proscribed by the federal kidnapping statute. "Inveiglement" becomes unlawful under the federal kidnapping statute, "when the alleged kidnapper interferes with his victim's action, exercising control over his victim through the willingness to use forcible action should his deception fail." United States v. Boone, 959 F.2d 1550, 1555 & n.5 (11th Cir. 1992). However, the mere fact that physical force was not ultimately necessary does not take such conduct outside of the statute. See id. at 1556.

See United States v. Lewis, 115 F.3d 1531, 1535 (11th Cir. 1997) (setting forth elements of crime of kidnapping and transporting in interstate commerce under 18 USC § 1201): (1) "the transportation in interstate commerce (2) of an unconsenting person who is (3) held for ransom, reward, or otherwise, (4) with such acts being done knowingly and willfully." "Knowledge of crossing state lines is not an essential element . . . The requirement that an offender cross state lines merely furnishes a basis for the exercise of federal jurisdiction." Id.; United States v. Broadwell, 870 F.2d 594, 601 & n.16 (11th Cir. 1989) (recognizing that crime of kidnapping is complete upon transportation across state lines).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Note that Section 1201 also sets out four other jurisdictional circumstances in subparts (a)(2) through (a)(5), and this instruction will need to be modified to fit those if the charge is not under subpart (a)(1).

50.1
Mail Fraud
18 USC § 1341

Title 18, United States Code, Section 1341, makes it a Federal crime or offense for anyone to [use the United States mails] [transmit something by private or commercial interstate carrier] in carrying out a scheme to defraud.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly devised or participated in a scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the false or fraudulent pretenses, representations or promises related to a material fact;

Third: That the Defendant acted willfully with an intent to defraud; and

Fourth: That the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with such carrier] some matter or thing for the purpose of executing the scheme to defraud.

[A “private or commercial interstate carrier” includes any business engaged in the transmission, transportation or delivery of messages or other articles in interstate commerce, that is, from any place in one state to any place in another state. If a message or other article is deposited with such a carrier it need not be proved that the message or article thereafter moved in interstate commerce from one state to another.]

The term "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations, or promises.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, provided it is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, provided it is made with intent to defraud.

A “material fact” is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction. A fact is “material” if it has a natural tendency to influence,

or is capable of influencing, the decision of the person or entity to whom or to which it is addressed. A false or fraudulent statement, representation or promise can be material even if the decision maker did not actually rely on the statement, or even if the decision maker actually knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive or cheat someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

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 [mailed] [deposited with an interstate carrier] was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of [the mail] [the interstate carrier] was intended as the specific or exclusive means of accomplishing the alleged fraud; or that the Defendant did the actual [mailing] [depositing].

What must be proved beyond a reasonable doubt is that the Defendant, with the specific intent to defraud, knowingly devised, intended to devise, or participated in, a scheme to defraud substantially

the same as the one alleged in the indictment, and that the use of [the United States mail] [an interstate carrier] was closely related to the scheme because the Defendant either [mailed] [deposited] something or caused it to be [mailed] [deposited] in an attempt to execute or carry out the scheme.

To "cause" [the mails] [an interstate carrier] to be used is to do an act with knowledge that the use of [the mails] [such carrier] will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of [the mails] [an interstate carrier] in furtherance of a scheme to defraud constitutes a separate offense.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine. (If the violation affects a financial institution, thirty (30) years imprisonment and $1 million fine).

If the offense involved telemarketing, 18 USC § 2326 requires enhanced imprisonment penalties:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - - -
>
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
>
> (2) in the case of an offense under any of those sections that - - -
>
> (A) victimized ten or more persons over the age of 55; or
>
> (B) targeted persons over the Age of 55,
>
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

An additional element, prompted by the Apprendi doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 USC § 1341 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

> If you find beyond a reasonable doubt that the Defendant is guilty of using the mails in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt 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] [the scheme affected a financial institution].

The 1994 amendment to Section 1341 now also applies it to the use of "any private or commercial interstate carrier." Where such private carriers are involved, the statute requires the government to prove only that the carrier engages in interstate deliveries and not that state lines were crossed. See United States v. Marek, 238 F.3d 310, 318 (5th Cir.) cert. denied _____ U.S. _____, 122 S.Ct. 37, 151 L.Ed.2d 11 (2000).

Mail fraud requires a showing of "(1) knowing participation in a scheme to defraud, and (2) a mailing in furtherance of the scheme." United States v. Photogrammetric Data Svcs., Inc. 259 F.3d 229, 253 (4th Cir. 2001). The mailing, however, need only "be incident to an essential part of the scheme or a step in the plot," and does not have to be an essential element of the scheme to be part of the execution of the fraud. Schmuck v. United States, 489 U.S. 705, 710-11, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989).

Materiality is an essential element of the crime of mail fraud, wire fraud, and bank fraud to be decided by the jury. Neder v. United States, 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. United States v. Neder, 197 F.3d 1122, 1128-29 (11th Cir. 1999), cert. denied 530 U.S. 1261, 120 S.Ct. 2727, 147 L.Ed.2d 982 (2000).

In mail fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." United States v. Cooper, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of Title 18, United States Code, Section 1341. Cleveland v. United States, 531 U.S. 12, 15, 121 S.Ct. 365, 369, 148 L.Ed.2d 221 (2000).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

50.2
Mail Fraud
Depriving Another Of Intangible Right
Of Honest Services
18 USC §§ 1341 and 1346

Title 18, United States Code, Sections 1341 and 1346, make it a Federal crime or offense for anyone to [use the United States mails] [transmit something by private or commercial interstate carrier] in carrying out a scheme to fraudulently deprive another of an intangible right of honest services.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly devised or participated in a scheme to fraudulently deprive [the public] [another] of the intangible right of honest services, as charged;

Second: That the Defendant did so willfully with an intent to defraud; and

Third: That the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with such carrier] some matter or thing for the purpose of executing the scheme to defraud.

[A “private or commercial interstate carrier” includes any business engaged in the transmission, transportation or delivery of messages or other articles in interstate commerce, that is, from any place in one state to any place in another state. If a message or other article is deposited with such a carrier it need not be proved that the message or article thereafter moved in interstate commerce from one state to another.]

The word "scheme" includes any plan or course of action intended to deceive or cheat someone; and to act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To "deprive another of the intangible right of honest services" means to violate, or to cause [a public official or employee] [an employee or agent of another person] to violate, the employee's or agent's duty to provide honest services to the employer.

[Public officials and public employees inherently owe a duty to the public to act in the public’s best interest. If, instead, the [official] [employee] acts or makes [his] [her] decision based on the official’s own personal interests - - such as accepting a bribe, taking a kickback or

receiving personal benefit from an undisclosed conflict of interest - - the official has defrauded the public of the official's honest services even though the public agency involved may not suffer any monetary loss in the transaction.]

[With regard to employers in the private sector, the Government must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw, or reasonably should have foreseen, that the employer might suffer an economic harm as a result of that breach.]

Under the law, every agent or employee representing or working for someone else - - the employer - - has a duty (called a fiduciary duty) to act honestly and faithfully in all of his or her dealings with the employer, and to transact business in the best interest of the employer, including a duty to make full and fair disclosure to the employer of any personal interest or profit [or "kickback"] the employee expects to derive or has derived from any transaction in which he or she participates in the course of the employment.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[A "kickback" includes any kind of undisclosed payment or reward to an employee for dealing in the course of employment with the person making the payment so that the employee's personal financial interest

interferes with the employee's duty to secure the most favorable bargain for the employer.]

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 [mailed] [deposited with an interstate carrier] was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of [the mail] [the interstate carrier] was intended as the specific or exclusive means of accomplishing the alleged fraud; or that the Defendant did the actual [mailing] [depositing].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

What must be proved beyond a reasonable doubt is that the Defendant, with the specific intent to defraud, knowingly devised, intended to devise, or participated in, a scheme to defraud substantially the same as the one alleged in the indictment; and that the use of [the United States mail] [the interstate carrier] was closely related to the scheme because the Defendant either [mailed] [deposited] something or caused it to be [mailed] [deposited] in an attempt to execute or carry out the scheme.

To "cause" [the mails] [an interstate carrier] to be used is to do an act with knowledge that the use of [the mails] [an interstate carrier] will

follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of [the mails] [an interstate carrier] in furtherance of a scheme to defraud constitutes a separate offense.

ANNOTATIONS AND COMMENTS

18 USC § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Cited in U.S. v. Cherer, No. 06-10642 archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

18 USC § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 USC § 1346 in 1988. The Supreme Court had ruled in McNally v. United States, 483 U.S. 350, 360, 107 S.Ct. 2875, 2882, 97 L.Ed.2d 292 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule McNally and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to

be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." United States v. deVegter, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting McNally and addressing wire fraud); United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." Lopez-Lukis, 102 F.3d at 1169).

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. Since a strict duty of loyalty ordinarily is not part of private sector relationships, it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In the private sector context, the breach of loyalty must inherently harm the purpose of the parties' relationship. deVegter, 198 F.3d at 1328-29. "'The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'" Id. at 1329 (quoting United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997)). Federal law governs the existence of a fiduciary duty owed under this statute. Id. at 1329 & n.5.

Cited in U.S. v. Chenoweth, No. 06-10642, archived on January 28, 2008

The mail fraud and wire fraud statutes are "given a similar construction and are subject to the same substantive analysis." Belt v. United States, 868 F.2d 1208, 1211 (11th Cir. 1989).

51.1
Wire Fraud
18 USC § 1343

Title 18, United States Code, Section 1343, makes it a Federal crime or offense for anyone to use interstate [wire] [radio] [television] communications facilities in carrying out a scheme to defraud.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly devised or participated in a scheme to defraud, or for obtaining money or property by means of false pretenses, representations or promises;

Cited in U.S. v. Chefer, No. 06-10642, archived on January 28, 2008

Second: That the false pretenses, representations or promises related to a material fact;

Third: That the Defendant did so willfully and with an intent to defraud; and

Fourth: That the Defendant transmitted or caused to be transmitted by [wire] [radio] [television] in interstate commerce some communication for the purpose of executing the scheme to defraud.

The term "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property

by means of false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud.

A “material fact” is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction. A fact is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to whom or to which it is addressed. A false or fraudulent statement, representation or promise can be material even if the decision maker did not actually rely on the statement, or even if the decision maker actually knew or should have known that the statement was false.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive or cheat someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

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] [radio] [television] was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of interstate [wire] [radio] [television] communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud; or that the Defendant personally used the [wire] [radio] [television] communication facility.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

What must be proved beyond a reasonable doubt is that the Defendant, with intent to defraud, knowingly and willfully devised, intended to devise, or participated in, a scheme to defraud substantially the same as the one alleged in the indictment; and that the use of the interstate [wire] [radio] [television] communications facilities was closely related to the scheme because the Defendant either used, or caused to be used, [wire] [radio] [television] communications facilities in interstate commerce in an attempt to execute or carry out the scheme.

To "cause" interstate [wire] [radio] [television] communications facilities to be used is to do an act with knowledge that the use of such

facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate [wire] [radio] [television] communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

ANNOTATIONS AND COMMENTS

18 USC § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice [shall be guilty of an offense against the laws of the United States].

Cited in U.S. v. Cherer, No. 06-10542, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine. (If the violation affects a financial institution, thirty (30) years imprisonment and $1 million fine.)

If the offense involved telemarketing, 18 USC § 2326 requires enhanced imprisonment penalties:

A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - -

(1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections respectively; and

(2) in the case of an offense under any of those sections that - -

(A) victimized ten or more persons over the age of 55; or

(B) targeted persons over the age of 55,

shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

An additional element, prompted by the Apprendi doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 USC § 1343 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the defendant is guilty of using interstate [wire] [radio] [television] communications facilities in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing] [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] [the scheme affected a financial institution].

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

Wire fraud requires a showing (1) that the Defendant knowingly devised or participated in a scheme to defraud; (2) that the Defendant did so willfully and with an intent to defraud; and (3) that the Defendant used interstate wires for the purpose of executing the scheme. Langford v. Rite Aid of Ala., Inc., 231 F.3d 1308, 1312 (11th Cir. 2000). Materiality is an essential element of the crime of mail fraud, wire fraud, and bank fraud to be decided by the jury. Neder v. United States, 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. United States v. Neder, 197 F.3d 1122, 1128-20 (11th Cir. 1999), cert. denied 530 U.S. 1261 (2000).

In wire fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." United States v. Cooper, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of this statute. Cleveland v. United States, 531 U.S. 12, 15, 121 S.Ct. 365, 369, 148 L.Ed.2d 221 (2000) (addressing "property" for purposes of mail fraud statute).

The mail fraud and wire fraud statutes are "given a similar construction and are subject to the same substantive analysis." Belt v. United States, 868 F.3d 1208, 1211 (11th Cir. 1989).

51.2
Wire Fraud
Depriving Another Of Intangible Right
Of Honest Services
18 USC §§ 1343 and 1346

Title 18, United States Code, Sections 1343 and 1346, make it a Federal crime of offense for anyone to use interstate [wire] [radio] [television] communications facilities in carrying out a scheme to fraudulently deprive another of an intangible right of honest services.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly devised or participated in a scheme to fraudulently deprive [the public] [another] of the intangible right of honest services, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant did so willfully and with an intent to defraud; and

Third: That the Defendant transmitted or caused to be transmitted by [wire] [radio] [television] in interstate commerce some communication for the purpose of executing the scheme to defraud.

The word "scheme" includes any plan or course of action intended to deceive or cheat someone; and to act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone,

ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

To "deprive another of the intangible right of honest services" means to violate, or to cause [a public official or employee] [an employee or agent of another person] to violate, the employee's or agent's duty to provide honest services to the employer.

[Public officials and public employees inherently owe a duty to the public to act in the public's best interest. If, instead, the [official] [employee] acts or makes [his] [her] decision based on the official's own personal interests - - such as accepting a bribe, taking a kickback or receiving personal benefit from an undisclosed conflict of interest - - the official has defrauded the public of the official's honest services even though the public agency involved may not suffer any monetary loss in the transaction.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[With regard to employers in the private sector, the Government must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw, or reasonably should have foreseen, that the employer might suffer an economic harm as a result of that breach.]

Under the law, every agent or employee representing or working for someone else - - the employer - - has a duty (called a fiduciary duty)

to act honestly and faithfully in all of his or her dealings with the employer, and to transact business in the best interest of the employer, including a duty to make full and fair disclosure to the employer of any personal interest or profit [or "kickback"] the employee expects to derive or has derived from any transaction in which he or she participates in the course of the employment.

[A "kickback" includes any kind of undisclosed payment or reward to an employee for dealing in the course of employment with the person making the payment so that the employee's personal financial interest interferes with the employee's duty to secure the most favorable bargain for the employer.]

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

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] [radio] [television] was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of interstate [wire] [radio] [television] communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud; or that the Defendant personally used the [wire] [radio] [television] communication facility.

What must be proved beyond a reasonable doubt is that the Defendant, with intent to defraud, knowingly and willfully devised, intended to devise, or participated in, a scheme to defraud substantially the same as the one alleged in the indictment; and that the use of the interstate [wire] [radio] [television] communications facilities was closely related to the scheme because the Defendant either used, or caused to be used, [wire] [radio] [television] communications facilities in interstate commerce in an attempt to execute or carry out the scheme.

To "cause" interstate [wire] [radio] [television] communications facilities to be used is to do an act with knowledge that the use of such facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Each separate use of the interstate [wire] [radio] [television] communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

ANNOTATIONS AND COMMENTS

18 USC § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of

false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

18 USC § 1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

(See the Annotations and Comments following Offense Instruction 50.2, supra).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

52
Bank Fraud
18 USC § 1344

Title 18, United States Code, Section 1344, makes it a Federal crime or offense for anyone to execute, or to attempt to execute, a scheme to defraud a financial institution, or to obtain any money, assets, or other property owned by or under the control of a financial institution by means of false or fraudulent pretenses, representations, or promises.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant executed or attempted to execute a scheme [to defraud a financial institution] [to obtain money, assets, or property from a financial institution by means of false or fraudulent pretenses, representations, or promises relating to a material fact], as charged;

Second: That the Defendant did so willfully with an intent to defraud;

Third: That the false or fraudulent pretenses, representations, or promises were material; and

Fourth: That the financial institution was federally [insured] [chartered].

The term "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations, or promises relating to a material fact.

A statement or representation is "false" or "fraudulent" if it is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud, provided it is made with intent to defraud.

Cited in U.S. v. Cherew, No. 06-10642, archived on January 28, 2008

A fact is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to whom or to which it is addressed. A false or fraudulent statement, representation, or promise can be material even if the decision maker did not actually rely on the statement, or even if the decision maker actually knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive or cheat someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

It is not necessary that the Government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme; or that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly executed or attempted to execute a scheme that was substantially similar to the scheme alleged in the indictment.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10842, archived on January 28, 2008

18 USC § 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice - -
>
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

See 18 USC § 20 for an enumeration of the financial institutions covered by § 1344.

An additional element, prompted by the Apprendi doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 USC § 2326.

Proof that the financial institution is federally chartered or insured is an essential element of the crime, as well as necessary to establish federal jurisdiction. United States v. Scott, 159 F.3d 916, 921 (5th Cir. 1998). Materiality is an essential

element of the crime of bank fraud. Neder v. United States, 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

There are two separate offenses possible under Section 1344: (1) defrauding a financial institution, or (2) obtaining money or funds from the financial institution by means of material false or fraudulent pretenses, representations, or promises. United States v. Dennis, 237 F.3d 1295, 1303 (11th Cir. 2001) (discussing elements of bank fraud under section 1344); United States v. Mueller, 74 F.3d 1152, 1159 (11th Cir. 1996). In the case of defrauding a financial institution, the Government must establish "that the defendant (1)intentionally participated in a scheme or artifice to defraud another of money or property; and (2) that the victim of the scheme or artifice was an insured financial institution." United States v. Goldsmith, 109 F.3d 714, 715 (11th Cir. 1997). Under the alternative theory, the Government must prove "(1) that a scheme existed in order to obtain money, funds, or credit in the custody of the federally insured institution; (2) that the defendant participated in the scheme by means of false pretenses, representations or promises, which were material; and (3) that the defendant acted knowingly." Id.

While materiality is an element of the bank fraud offense under Neder, the Supreme Court has held (pre-Neder) that materiality is not an element of the offense in a prosecution under 18 USC § 1014, a similar statute which prohibits making a false statement to a federally insured bank or designated financial institution. United States v. Wells, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

53
Mailing Obscene Material
18 USC § 1461

Title 18, United States Code, Section 1461, makes it a Federal crime or offense for anyone to use the United States mails to transmit obscene material.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly used or caused the mails to be used for the conveyance or delivery of certain material, as charged;

Second: That the Defendant knew at the time of such mailing the general nature of the content of the material so mailed; and

Third: That the material so mailed was "obscene" as defined in these instructions.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

While the Government must prove that the Defendant knew the general sexual nature of the material that was transported in the mails, the Government does not have to prove that the Defendant knew that such material was legally obscene.

Therefore, if you find beyond a reasonable doubt that the Defendant transmitted the material in question through the mails and

that the Defendant knew the general sexual nature of the material - - that the Defendant knew what the material actually was - - and if you then find beyond a reasonable doubt that the material was in fact "obscene" within the meaning of these instructions, you may then find that the Defendant had the requisite knowledge, or scienter as we call it in the law.

Freedom of expression is fundamental to our system, and has contributed much to he development and well being of our free society. In the exercise of the constitutional right of free expression that 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."

Cited in U.S. v. Cheron, No. 06-10642, archived on January 28, 2008

To prove beyond a reasonable doubt that material 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 it lacks serious literary, artistic, political or scientific value.

The first test to be applied, therefore, in determining whether given material is obscene, 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 the average person of the community as a whole, [or the prurient interest of members of a deviant sexual group, as the case might be]. 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.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

The "predominant theme or purpose of the material, when viewed as a whole," means the main or principal thrust of the material when assessed in its entirety and on the basis of its total effect, and not on the basis of incidental themes or isolated passages or sequences.

Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment that must be made in the light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in, sex.

Contemporary community standards, in turn, are set by what is accepted in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror; rather, as stated before, the test is how the average person of the community as a whole would view the material.

[In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The second test to be applied in determining whether given material is obscene is whether it depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or lewd exhibition of the genitals. In making that judgment, however, you must not condemn by your own standards, regardless of whether you believe them to be less strict or more strict than those generally held. Rather, you must measure whether the material is patently offensive by

contemporary community standards; that is, whether it so exceeds the generally accepted limits of public tolerance as to be clearly offensive.

I emphasize that both the first test regarding prurient interests and the second test regarding patently offensive depictions or descriptions are to be evaluated by applying contemporary community standards. This means that the question is not how the material impresses you as an individual juror, but how it would be considered by the average person in the community, with an ordinary and normal attitude toward - - and interest in - - sex and sexual matters. Contemporary community standards are those accepted in this community as a whole; that is to say, by society at large or people in general, and not by what some segments or groups of persons may believe this community ought to accept or refuse to accept. It is a matter of common knowledge that customs and standards change and that the community as a whole may from time to time find acceptable that which was formerly not acceptable.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The third test to be applied in determining whether given material is obscene is whether the material, taken as a whole, lacks serious literary, artistic, political or scientific value. An item may have serious value in one or more of these areas even though it portrays explicit

sexual conduct, and it is for you to say whether the material in this case has such value. The ideas that a work represents need not obtain majority approval to merit protection, and the value of that work does not vary from community to community. Therefore, unlike the first two tests, you should not apply the contemporary community standards to the third test. Instead, you should make this determination on an objective basis: whether a reasonable person considering the material as a whole would find that it has, or does not have, serious literary, artistic, political, or scientific 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, then the material would not be obscene within the meaning of the law.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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 cause of business or where such use can reasonably be foreseen.

ANNOTATIONS AND COMMENTS

18 USC § 1461 provides:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . .

> Is declared to be nonmailable matter and shall not be conveyed in the mails [and] . . .
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared . . . to be nonmailable [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

A Defendant charged under 18 USC § 1461 has the requisite scienter if the Defendant knows of the nature and character of the allegedly obscene material. Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). See United States v. Johnson, 855 F.2d 299, 306 (6th Cir. 1988); United States v. Friedman, 528 F.2d 784 (10th Cir. 1976) vacated by, 430 U.S. 925, 97 S.Ct. 1541, 51 L.Ed.2d 769 (1977); United States v. Grassi, 602 F.2d 1192, 1195 n.3 (5th Cir. 1979); United States v. Groner, 494 F.2d 499 (5th Cir.), cert. denied, 419 U.S. 1010, 95 S.Ct. 331, 42 L.Ed.2d 285 (1975). It is not necessary to prove that the Defendant knew the material was obscene under legal standards. United States v. Schmeltzer, 20 F.3d 610, 612 (5th Cir. 1994), cert. denied, 513 U.S. 1041, 115 S.Ct. 634, 130 L.Ed.2d 540 (1994); United States v. Hill, 500 F.2d 733, 740 (5th Cir. 1974), cert. denied, 420 U.S. 952, 95 S.Ct. 1336, 43 L.Ed.2d 430 (1975). See Devitt & Blackmar, Federal Jury Practice and Instructions § 40A.05; § 40A.17. The only questions as to intent are whether the Defendant knowingly used (or caused to be used) the mail for the transmission or delivery of the material, 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, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

Cited in U.S. v. Cherney, No. 06-10642, archived on January 28, 2008

The "statute's intent is to punish for the use of the mails, not the mere possession of obscene materials". Therefore, the prohibition in Section 1461 against knowingly using the mails for obscene materials applies to "persons who order obscene materials through the mails for personal use, and thus cause the mails to be used for delivery of those materials." United States v. Carmack, 910 F.2d 748, (11th Cir. 1990).

The three-part test used in this instruction for determining whether a matter is legally obscene is set forth in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). See United States v. Bagnell, 679 F.2d 826, 835-37 (11th Cir. 1982) (applying Miller test for obscenity), cert. denied, 460 U.S. 1047, 103 S.Ct. 1449, 75 L.Ed.2d 803 (1983). Although the first two prongs of the Miller test are to be judged by the community standards, the third prong is to be objective - - a "reasonable person" standard. See, Pope v. Illinois, 481 U.S. 497, 500-01, 107 S.Ct. 1918, 1921, 95 L.Ed.2d 439 (1987).

54
Interstate Transportation Of Obscene Material
(By Common Carrier)
18 USC § 1462

Title 18, United States Code, Section 1462, makes it a Federal crime or offense for anyone to use a common carrier to transmit obscene materials in interstate commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly used or caused to be used a common carrier to transport certain materials as described in the indictment in interstate commerce, as charged;

Second: That the Defendant knew, at the time of such transportation, the general sexual nature of the content of the materials; and

Third: That the materials were "obscene" as defined in these instructions.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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.

The term "interstate commerce" includes any movement of goods or articles from one state into another state.

While the Government must prove that the Defendant knew the general sexual nature of the materials that were transported in interstate commerce. The Government does not have to prove that the Defendant knew that such materials were in fact legally obscene.

Therefore, if you find beyond a reasonable doubt that the Defendant transported by common carrier in interstate commerce the articles in question, and that the Defendant knew the general sexual nature of the materials - - that the Defendant knew what they actually were - - and if you then find beyond a reasonable doubt that the materials were in fact "obscene" within the meaning of these instructions, you may then find that the Defendant had the requisite knowledge, or scienter as we call it in the law.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Freedom of expression is fundamental to our system, and has contributed much to the development and well being of our free society. In the exercise of the 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 beyond a reasonable doubt that material 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 it lacks serious literary, artistic, political or scientific value.

The first test to be applied, therefore, in determining whether given material is obscene, 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 the average person of the community as a whole [or the prurient interest of members of a deviant sexual group, as the case might be]. 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.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

The "predominant theme or purpose of the material, when viewed as a whole," means the main or principal thrust of the material when assessed in its entirety and on the basis of its total effect, and not on the basis of incidental themes or isolated passages or sequences.

Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment that must be made in the light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in, sex. Contemporary community standards, in turn, are set by what is accepted in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror; rather, as stated before, the test is how the average person of the community as a whole would view the material.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.]

The second test to be applied in determining whether given material is obscene is whether it depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or

lewd exhibition of the genitals. In making that judgment, however, you must not condemn by your own standards, regardless of whether you believe them to be less strict or more strict than those generally held. Rather, you must measure whether the material is patently offensive by contemporary community standards; that is, whether it so exceeds the generally accepted limits of public tolerance as to be clearly offensive.

I emphasize that both the first test regarding prurient interests and the second test regarding patently offensive depictions or descriptions are to be evaluated by applying contemporary community standards. This means that the question is not how the material impresses you as an individual juror, but how it would be considered by the average person in the community, with an ordinary and normal attitude toward -- and interest in - - sex and sexual matters. Contemporary community standards are those accepted in this community as a whole; that is to say, by society at large or people in general, and not by what some segments or groups of persons may believe this community ought to accept or refuse to accept. It is a matter of common knowledge that customs and standards change, and that the community as a whole may from time to time find acceptable that which was formerly not acceptable or find unacceptable that which was formerly acceptable.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

The third test to be applied in determining whether given material is obscene is whether the material, taken as a whole, lacks serious literary, artistic, political or scientific value. An item may have serious value in one or more of these areas even though it portrays explicit sexual conduct, and it is for you to determine whether the material in this case has such value. The ideas that a work represents need not obtain majority approval to merit protection, and the value of that work does not vary from community to community. Therefore, unlike the first two tests, you should not apply the contemporary community standards to the third test. Instead, you should make this determination on an objective basis: whether a reasonable person considering the material as a whole would find that it has, or does not have, serious literary, artistic, political, or scientific value.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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, then the material would not be obscene within the meaning of the law.

To "cause" the common carrier to be used is to do an act with knowledge that the use of the common carrier will follow in the ordinary course of business or where such use can reasonably be foreseen.

ANNOTATIONS AND COMMENTS

18 USC § 1462 provides:

> Whoever . . . knowingly uses any express company or other common carrier . . . for carriage in interstate . . . commerce - -
>
> > (a) any obscene . . . book, pamphlet, picture [or] motion-picture film [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The scienter requirement for this offense is the same as for 18 USC § 1461: It is not necessary to prove that the Defendant knew the material was obscene under legal standards.

(See Annotations and Comments following Offense Instruction 53, supra.)

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

55
Interstate Transportation Of Obscene Material
(For Purpose Of Sale Or Distribution)
18 USC § 1465

Title 18, United States Code, Section 1465, makes it a Federal crime or offense for anyone to transport obscene materials in interstate commerce for the purpose of selling or distributing them.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly transported in interstate commerce certain materials as described in the indictment, 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, the general sexual nature of the content of the materials; and

Fourth: That the materials were "obscene" as defined in these instructions.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "interstate commerce" includes any movement of goods or articles from one state into another state.

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 two or more copies of any publication or two or more of any article of the kind described in the indictment, or a combined total of five such publications and articles, creates a presumption that such publications or articles are intended for sale or distribution, but such presumption is "rebuttable," which means that it may be overcome or outweighed by other evidence.]

While the Government must prove that the Defendant knew the general sexual nature of the materials that were transported in interstate commerce, the Government does not have to prove that the Defendant knew that such materials were in fact legally obscene.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Therefore, if you find beyond a reasonable doubt that the Defendant transported in interstate commerce the materials in question, and that the Defendant knew the general sexual nature of the materials - - that the Defendant knew what they actually were - - and if you then find beyond a reasonable doubt that the materials were in fact "obscene" within the meaning of these instructions, you may then find that the Defendant had the requisite knowledge, or scienter as we call it in the law.

Freedom of expression is fundamental to our system, and has contributed much to the development and well being of our free society. In the exercise of the 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 beyond a reasonable doubt that material is “obscene,” the Government must satisfy a three-part test:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

(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 it lacks serious literary, artistic, political or scientific value.

The first test to be applied, therefore, in determining whether given material is obscene, 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 the average person of the community as a whole, [or the prurient interest of members of a

deviant sexual group, as the case might be]. 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 "predominant theme or purpose of the material, when viewed as a whole," means the main or principal thrust of the material when assessed in its entirety and on the basis of its total effect, and not on the basis of incidental themes or isolated passages or sequences.

Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment that must be made in the light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in, sex. Contemporary community standards, in turn, are set by what is accepted in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror; rather, as stated before, the test is how the average person of the community as a whole would view the material.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the

sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.]

The second test to be applied in determining whether given material is obscene is whether it depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or lewd exhibition of the genitals. In making that judgment, however, you must not condemn by your own standards, regardless of whether you believe them to be less strict or more strict than those generally held. Rather, you must measure whether the material is patently offensive by contemporary community standards; that is, whether it so exceeds the generally accepted limits of public tolerance as to be clearly offensive.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

I emphasize that both the first test regarding prurient interests and the second test regarding patently offensive depictions or descriptions are to be evaluated by applying contemporary community standards. This means that the question is <u>not</u> how the material impresses you as an individual juror, but how it would be considered by the average person in the community, with an ordinary and normal attitude toward -- and interest in -- sex and sexual matters. Contemporary community

standards are those accepted in this community as a whole; that is to say, by society at large or people in general, and not by what some segments or groups of persons may believe this community ought to accept or refuse to accept. It is a matter of common knowledge that customs and standards change, and that the community as a whole may from time to time find acceptable that which was formerly not acceptable or find unacceptable that which was formerly acceptable.

The third test to be applied in determining whether given material is obscene is whether the material, taken as a whole, lacks serious literary, artistic, political or scientific value. An item may have serious value in one or more of these areas even though it portrays explicit sexual conduct, and it is for you to determine whether the material in this case has such value. The ideas that a work represents need not obtain majority approval to merit protection, and the value of that work does not vary from community to community. Therefore, unlike the first two tests, you should not apply the contemporary community standards to the third test. Instead, you should make this determination on an objective basis: whether a reasonable person considering the material as a whole would find that it has, or does not have, serious literary, artistic, political, or scientific value.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

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.

ANNOTATIONS AND COMMENTS

18 USC § 1465 provides:

> Whoever knowingly transports [in interstate commerce] for the purpose of sale or distribution of any obscene . . . book, pamphlet, picture [or] film [shall be guilty of an offense against the United States].
>
> The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

Cited in U.S. v. Chesser, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The scienter requirement for this offense is the same as for 18 USC § 1461: It is not necessary to prove that the Defendant knew the material was obscene under legal standards.

(See Annotations and Comments following Offense Instruction 53, supra.)

56.1
Obstruction Of Justice
18 USC § 1503
(Omnibus Clause)

Title 18, United States Code, Section 1503, makes it a Federal crime or offense for anyone [corruptly] [by threats or force] [by any threatening letter or communication] to endeavor to influence, obstruct or impede the due administration of justice

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That there was a proceeding pending [before this Court] [a United States Magistrate Judge of this Court] [a grand jury of this Court] as described in the indictment; and

Cited in U.S. v. Cherer, No. 06-10642; archived on January 28, 2008

Second: That the Defendant [by threats or force] [by a threatening letter or communication] knowingly and willfully endeavored to influence, obstruct or impede the due administration of justice in that [judicial] [grand jury] proceeding, as charged.

OR

Second: That the Defendant knowingly and corruptly endeavored to influence, obstruct or impede the due administration of justice in that [judicial] [grand jury] proceeding as charged.

To “endeavor” means to strive or to attempt to accomplish a goal or a result; and to endeavor to “influence, obstruct or impede” the due administration of justice means to take some action for the purpose of swaying or changing, or preventing or thwarting in some way any of the actions likely to be taken in the [judicial] [grand jury] proceeding involved.

[To act “corruptly” means to act knowingly and dishonestly with the specific intent to influence, obstruct or impede the due administration of justice].

While it must be proved that the Defendant [corruptly] endeavored to influence, obstruct or impede the due administration of justice [by threats or force] [by a threatening letter or communication] as charged, and that the natural and probable effect of the Defendant’s acts would be to influence, obstruct or impede the due administration of justice, it is not necessary for the Government to prove that the [judicial] [grand jury] proceeding was in fact influenced or obstructed or impeded in any way.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1530(a) provides (in the omnibus clause):

> Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

An obstruction of justice charge under the omnibus clause of § 1503 must relate to a specific judicial or grand jury proceeding - - the "nexus" requirement. United States v. Aguilar, 515 U.S. 593, 115 S.Ct. 2357 (1995). See also United States v. Brenson, 104 F.3d 1267 (11th Cir. 1997) (Hancock, District Judge, sitting by designation).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

56.2
Corruptly Influencing A Juror
18 USC § 1503

Title 18, United States Code, Section 1503, makes it a Federal crime or offense for anyone to corruptly endeavor to influence or impede any [grand] [petit] juror in any Federal Court.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the person described in the indictment was a [grand] [petit] juror in this Court as alleged;

Second: That the Defendant endeavored to influence, intimidate or impede such person in the discharge of the juror's duty as a [grand] [petit] juror;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Third: That the Defendant's acts were done knowingly and corruptly; and

[Fourth: That the case in which the petit juror served as such in this Court was a criminal case in which a [class A] [class B] felony was charged.]

To endeavor to "influence, intimidate or impede" a [grand] [petit] juror means to take some action for the purpose of swaying or changing or preventing the juror's performance of duty. However, it is not necessary for the Government to prove that the juror was in fact swayed

or changed or prevented in any way, only that the Defendant corruptly attempted to do so.

To act "corruptly" means to act knowingly and dishonestly with the specific intent to subvert or undermine the integrity of the court proceeding in which the juror served.

[A class A felony is any federal criminal offense punishable by life imprisonment.]

[A class B felony is any federal criminal offense punishable by a term of imprisonment up to twenty-five (25) years.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1503(a) provides:

> Whoever corruptly . . . endeavors to influence, intimidate, or impede any grand or petit juror . . . in the discharge of his duty [shall be guilty of an offense against the United States].

Maximum Penalty: If the offense is committed against a petit juror in a case in which a class A or B felony was charged, twenty (20) years imprisonment, a fine under Title 18, or both. In any other case, ten (10) years imprisonment, a fine under Title 18, or both.

The optional Fourth element is included in order to comply with Apprendi where the indictment alleges facts triggering the enhanced penalty under the statute.

Class A and class B felonies are defined in 18 USC § 3581.

56.3
Threatening A Juror
18 USC § 1503

Title 18, United States Code, Section 1503, makes it a Federal crime or offense for anyone to endeavor to influence or impede any [grand] [petit] juror in any Federal Court [by threats or force] [by any threatening letter or communication].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the person described in the indictment was a [grand] [petit] juror in this Court as alleged;

Second: That the Defendant endeavored to influence, intimidate or impede such juror by [threats or force] [by threatening letter or communication] in the manner charged in the indictment;

Third: That the Defendant did so willfully; and

[Fourth: That the case in which the petit juror served as such in this Court was a criminal case in which a [class A] [class B] felony was charged.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To endeavor to "influence, intimidate or impede" a juror means to take action [by means of threat or force] [by threatening letter or

communication] for the purpose of swaying or changing or preventing the juror's performance of duty. However, it is not necessary for the Government to prove that the juror was in fact swayed or changed or prevented, only that the Defendant attempted to do so in the manner charged.

[A class A felony is any federal criminal offense punishable by life imprisonment.]

[A class B felony is any federal criminal offense punishable by a term of imprisonment up to twenty-five (25) years.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1503(a) provides:

> Whoever . . . by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror . . . in the discharge of his duty [shall be guilty of an offense against the United States].

Maximum Penalty: If the offense is committed against a petit juror in a case in which a class A or B felony was charged, twenty (20) years imprisonment, a fine under Title 18, or both. In any other case, ten (10) years imprisonment, a fine under Title 18, or both.

The optional Fourth element is included in order to comply with Apprendi where the indictment alleges facts triggering the enhanced penalty under the statute.

Class A and class B felonies are defined in 18 USC § 3581.

57.1
Killing Of A Witness
18 USC § 1512(a)(1)(A)

Title 18, United States Code, Section 1512(a)(1)(A), makes it a Federal crime or offense for anyone to kill or attempt to kill another person to prevent the attendance or testimony of a witness in any proceeding in this Court.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the person described in the indictment was [a witness] [scheduled to be a witness] in this Court, as alleged;

Second: That the Defendant [killed] [attempted to kill] such person, as charged; and

Third: That the Defendant did so knowingly and willfully with the intent to prevent the attendance or testimony of the witness.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1512(a)(1)(A) provides:

> Whoever kills or attempts to kill another person, with intent to -
> (A) prevent the attendance or testimony of any person in an official proceeding [shall be guilty of an offense against the United States].

Maximum Penalty: In the case of murder (as defined in 18 USC § 1111), death or life imprisonment. For any other killing, the punishment provided in 18 USC § 1112. For any attempt, imprisonment for not more that twenty (20) years.

57.2
Tampering With A Witness
18 USC § 1512(b)(1)

Title 18, United States Code, Section 1512(b)(1), makes it a Federal crime or offense for anyone [to use intimidation] [to use physical force] [to threaten another person] with intent to [influence] [delay] [prevent] the testimony of a witness in any proceeding in this Court.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the person described in the indictment was [a witness] [scheduled to be a witness] in this Court as alleged;

Second: That the Defendant used [intimidation] [physical force] [threats] against such person, as charged; and

Third: That the Defendant did so knowingly and willfully with the intent to [influence] [delay] [prevent] the testimony of the witness.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To "intimidate" someone means to intentionally say or do something that would cause a person of ordinary sensibilities to be fearful of bodily harm. It is not necessary for the Government to prove, however, that the victim was actually frightened, and neither is it

necessary to prove that the behavior of the Defendant was so violent that it was likely to cause terror, panic or hysteria.

To act with intent to "influence" the testimony of a witness means to act for the purpose of getting the witness to change or color or shade his or her testimony in some way; but it is not necessary for the Government to prove that the witness' testimony was, in fact, changed in any way.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 1512(b)(1) provides:

> Whoever knowingly uses intimidation or physical force, or threatens . . . another person, or attempts to do so, . . . with intent to --
>
> > (1) influence, delay, or prevent the testimony of any person in an official proceeding [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment, applicable fine, or both.

In United States v. Moody, 977 F.2d 1420 (11th Cir. 1992), the Eleventh Circuit confirmed that witness tampering may also be prosecuted under section 1503.

58
Possession Or Use Of False Visa
18 USC § 1546(a)
(First Paragraph)

Title 18, United States Code, Section 1546, makes it a Federal crime or offense for anyone to knowingly [possess] [use] a false or counterfeit visa or other document required [for entry into] [as evidence of an authorized stay or employment in] the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [possessed] [uttered or used] [attempted to use] a[n] [immigrant or nonimmigrant visa] [permit] [border crossing card] [alien registration receipt card] required [for entry into] [as evidence of authorized stay or employment in] the United States, as charged; and

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That in so doing the Defendant acted willfully and with knowledge that such [immigrant or nonimmigrant visa] [permit] [border crossing card] [alien registration receipt card] [other document] [had been forged, counterfeited, altered or falsely made] [had been procured by means of a false claim or statement].

[Third: That the offense was committed [to facilitate an act of international terrorism] [to facilitate a drug trafficking crime], as charged.

To "utter or use" a document simply means to exhibit or display it to someone else.

[To “facilitate” an act simply means to aid or assist or further the accomplishment of that act.]

[An “act of international terrorism” means a criminal act dangerous to human life and which appears to be intended to intimidate or coerce a civilian population, or influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping, and which occurs outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

[A “drug trafficking crime” means any felony punishable under the Controlled Substances Act, 21 USC § 801 et seq.]

ANNOTATIONS AND COMMENTS

18 USC § 1546(a) (first paragraph) provides:

> Whoever knowingly . . . utters, uses [or] attempts to use . . . any [immigrant or nonimmigrant] visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay

or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty-Five (25) years imprisonment and applicable fine if committed to facilitate international terrorism; twenty (20) years imprisonment and applicable fine if committed to facilitate a drug trafficking crime; ten (10) years and applicable fine for first or second offense.

The optional Third element is included in order to comply with Apprendi where the indictment alleges facts triggering the enhanced penalty under the statute.

The definition of "act of intentional terrorism" is taken from 18 USC § 2331.

The definition of "drug trafficking crime" is taken from 18 USC § 929.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

59
Involuntary Servitude And Peonage
18 USC §§ 1581 and 1584

Title 18, United States Code, Section 1584, makes it a Federal crime or offense for anyone to wilfully hold another person in involuntary servitude.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant held the person named in the indictment in a condition of "involuntary servitude;"

Second: That such holding was for a "term," as hereafter defined; and

Third: That the Defendant acted knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "involuntary servitude" means a condition of compulsory service in which the victim is compelled to perform labor or services against the victim's will for the benefit of another person due to the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.

In considering whether service or labor was performed by someone involuntarily, it makes no difference that the person may have initially agreed, voluntarily, to render the service or perform the work.

If a person willingly begins work, but later desires to withdraw and is then forced to remain and perform work against that person's will by the use or threatened use of coercion, that person's service becomes involuntary. Also, whether a person is paid a salary or a wage is not determinative of the question of whether that person has been held in involuntary servitude. In other words, if a person is forced to labor against that person's will by the use or threatened use of coercion, such service is involuntary even though the person is paid for the work.

However, it is necessary to prove that the Defendant knowingly and willfully used or threatened to use coercion, causing the victim to reasonably believe that there was no way to avoid continued service. In deciding whether a particular person reasonably believed that there was no way to avoid continued service, you should consider the method or form of the coercion threatened or used in relation to the person's particular station in life, the person's physical and mental condition, age, education, training, experience and intelligence; and also any reasonable means the person may have had to escape. Servitude cannot be "involuntary" under the law unless the coercion threatened or used was sufficient in kind or degree to completely overcome the will of an ordinary person having the same general station in life as that of the

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

alleged victim, causing a belief that there was no reasonable means of escape and no choice except to remain in the Defendant's service.

It must also be shown that a person held to involuntary servitude was so held for a "term." It is not necessary, however, that any specific period of time be proved so long as the "term" of the involuntary service was not wholly insubstantial or insignificant.

Title 18, United States Code, Section 1581(a) is the peonage law cited in the indictment. The specific facts that must be proved beyond a reasonable doubt in order to establish the offense of peonage include each and all of the three specific factual elements constituting involuntary servitude as previously stated and explained in these instructions, plus a fourth specific fact, namely, that the involuntary servitude was compelled by the Defendant in order to satisfy a real or imagined debt regardless of amount.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC §§ 1581 and 1584 provide:

> Whoever holds or returns any person to a condition of peonage [shall be guilty of an offense against the United States]. (§ 1581)

> Whoever knowingly and willfully holds to involuntary servitude . . . any other person for any term [shall be guilty of an offense against the United States]. (§ 1584)

Maximum Penalty: Twenty (20) years imprisonment, a fine under Title 18, or both (as to each section). If the offense results in death or involves kidnapping, aggravated sexual abuse, or an attempt to kill, the penalty is enhanced to life imprisonment under both sections.

The reference to compulsion "by the use or threatened use of physical or legal coercion" incorporates the United States Supreme Court's holding in United States v. Kozminski, 487 U.S. 931 (1987).

If the indictment alleges one of the factors that would enhance the possible maximum punishment applicable to the offense, that factor should be stated as an additional element in the instructions under the principle of Apprendi. In such case it may also be appropriate to give a lesser included offense instruction, Special Instruction 10.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

60
False Declaration
(Before Grand Jury)
18 USC § 1623(a)

Title 18, United States Code, Section 1623, makes it a Federal crime or offense for anyone [to make a false statement under oath] [to use a false document] while appearing as a witness before a Federal grand jury.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That [testimony was given] [the described record or document was used] while the Defendant was under oath as a witness before the Grand Jury of this Court, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That [such testimony] [such record or document] was false in one or more of the ways charged concerning some material matter in the Grand Jury proceedings; and

Third: That such [false testimony] [false record or document] was knowingly and willfully [given] [used] by the Defendant as charged.

[Testimony is false if it was untrue when it was given and was then known to be untrue by the witness or person giving it.] [A

statement contained within a document is false if it was untrue when used and was then known to be untrue by the person using it.]

The [making of a false statement] [use of a false document] is not an offense unless the falsity relates to a "material" fact. A misrepresentation is "material" if it has a natural tendency to affect or influence, or is capable of affecting or influencing, the exercise of the Grand Jury's decision making process. The test is whether the false statement had the capacity to impair or pervert the functioning of the Grand Jury. In other words, a misrepresentation is material if it relates to an important fact as distinguished from some unimportant or trivial detail. It is not necessary for the Government to prove, however, that the Grand Jury was, in fact, misled or influenced in any way by the false [statement] [record or document].

Cited in U.S. v. Chester, No. 06-10642, archived on January 28, 2008

In reviewing the testimony that is charged to have been false, you should consider that testimony in the context of the series 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 or capable of being understood in two different ways, 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 that one reasonable interpretation of the answer would be truthful, then the answer would not be false.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 1623(a) provides:

> Whoever under oath . . . in any proceeding before [any] grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

The materiality instruction is required by United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) and United States v. Kramer, 73 F.3d 1067, 1074 (11th Cir. 1996).

61
Obstruction Of Correspondence
(Taking of Mail)
18 USC § 1702

Title 18, United States Code, Section 1702, makes it a Federal crime or offense for anyone to obstruct the delivery of mail by taking or removing it from the United States mails.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly took mail [out of a post office] [out of an authorized depository for mail matter] [from a letter or mail carrier] [that had been in the custody of any letter or mail carrier] before delivery to the person to whom it was directed, as charged; and

Second: That in doing so the Defendant acted willfully with design or intent to obstruct the correspondence.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A private mail box or mail receptacle is an "authorized depository for mail matter," and mail has not been delivered until it has been removed from such a depository by the addressee or someone acting for the addressee.

To "take" mail with "design to obstruct the correspondence" means to seize or take such mail for the purpose of preventing or obstructing its delivery to the person to whom it was directed.

ANNOTATIONS AND COMMENTS

18 USC § 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

62.1
Theft Of Mail Matter
18 USC § 1708
(First Paragraph)

Title 18, United States code, Section 1708, makes it a Federal crime or offense for anyone to steal mail matter from the United States mails.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the [letter] [package] [mail matter] described in the indictment was [in the United States mails] [in a post office or station thereof] [in a letter box] [in a mail receptacle] [in a mail route] [in an authorized depository for mail matter] [with a letter or mail carrier]; and

Second: That the Defendant did knowingly and willfully steal, take or abstract it from the mail as charged in the indictment.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A private mail box or mail receptacle is an "authorized depository for mail matter."

The words "steal," "take" and "abstract" include any act by which a person willfully obtains possession of property that belongs to someone else, without the owner's permission and with the intent to

deprive the owner of the benefits of ownership by converting it to one's own use or the use of someone else.

ANNOTATIONS AND COMMENTS

18 USC § 1708 (first paragraph) provides:

> Whoever steals, takes, or abstracts . . . from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

62.2
Possession Of Stolen Mail Matter
18 USC § 1708
(Third Paragraph)

Title 18, United States Code, Section 1708, makes it a Federal crime or offense for anyone to possess stolen mail matter with knowledge that it had been stolen.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the [letter] [mail matter] described in the indictment was stolen from [the United States mails] [a post office or station thereof] [a letter box] [a mail receptacle] [a mail route] [an authorized depository for mail matter] [a letter or mail carrier];

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant thereafter had possession of such mail matter, as charged; and

Third: That the Defendant possessed such mail matter willfully and with knowledge that it had been stolen.

A private mail box or mail receptacle is an "authorized depository for mail matter."

Mail matter is "stolen" when it has been willfully taken from [the United States mails] [a post office or station thereof] [a letter box] [a mail receptacle] [a mail route] [an authorized depository for mail matter]

[a letter or mail carrier] with intent to deprive the owner of its use and benefit, and to convert it to one's own use or to the use of someone else.

Because the essence of the offense is willful possession of mail matter previously stolen, it is not necessary to prove the identity of the person or persons who may have stolen it. Also, it is not necessary to prove that the Defendant knew that the matter had been stolen from the mail, only that the Defendant knew it had been stolen.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1708 (third paragraph) provides:

> Whoever . . . unlawfully has in his possession, any letter . . . or mail, or any article or thing contained therein, which has been . . . stolen, taken, embezzled, or abstracted [from or out of any mail, post office or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier], knowing the same to have been stolen, taken, embezzled or abstracted [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

United States v. Hall, 632 F.2d 500 (5th Cir. 1980), the Government does not have to prove that the Defendant knew the mail matter had been stolen from the mail, only that it had been stolen.

63
Theft Of Mail Matter By Postal Service Employee
18 USC § 1709

Title 18, United States Code, Section 1709, makes it a Federal crime or offense for any Postal Service employee to embezzle any mail matter possessed by the employee during such employment.

The Defendant can be found guilty of that offense only if all of the following facts are proved 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, or had 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 thereafter knowingly and willfully embezzled such mail matter.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Mail matter is "intended to be conveyed by mail" if a reasonable person who saw the item would think it was something intended to be delivered through the mail.

[The fact that a particular letter or other mail matter may have been a "decoy" that 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 item would think it was normal mail matter that was to be delivered.]

To "embezzle" means the wrongful or willful taking of money or property belonging to someone else after the money or property has lawfully come into the possession or control of the person taking it.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 1709 provides:

> Whoever, being a Postal Service officer or employee, embezzles any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

64.1
Providing Contraband To A Federal Prisoner
18 USC § 1791(a)(1)

Title 18, United States Code, Section 1791, makes it a Federal crime or offense for anyone to knowingly provide a prohibited object to a Federal prisoner.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That [name of inmate] was, at the time stated in the indictment, an inmate of a Federal prison or correctional facility;

Second: That the Defendant knowingly provided, or attempted to provide, a prohibited object to [name of inmate], as charged; and

Third: That the provision, or attempted provision of the prohibited object to such inmate was a violation of [a statute] [a rule or order issued under a statute], as charged.

Cited in U.S. v. Cherer, No. 06-10642; archived on January 28, 2008

To "provide" something to someone else simply means to knowingly deliver or transfer the object to another person either directly or through indirect means.

The term "prohibited object" includes [describe the relevant object as enumerated in subsection (d)(1) of the statute]. And, you are

instructed that the knowing transfer, delivery or provision of such a prohibited object to a Federal prisoner at the time alleged in the indictment would have been in violation of [a statute] [a rule or order issued under a statute] as charged.

ANNOTATIONS AND COMMENTS

(See Annotations and Comments following Offense Instruction 64.2, infra.)

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

64.2
Possession Of Contraband By A Federal Prisoner
18 USC § 1791(a)(2)

Title 18, United States Code, Section 1791, makes it a Federal crime or offense for a Federal prisoner to knowingly [make] [possess] [obtain] certain prohibited objects.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was, at the time stated in the indictment, an inmate of a Federal prison or correctional facility, as charged;

Second: That at such time the Defendant knowingly [made] [possessed] [obtained] the object described in the indictment, as charged; and

Third: That such object was a prohibited object.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "prohibited object" includes [describe the relevant object as enumerated in subsection (d)(1) of the statute].

ANNOTATIONS AND COMMENTS

18 USC § 1791 provides:

(a) Offense. - - Whoever - -

(1) in violation of a statute or a rule or order issued under a statute, provides to an inmate of a prison a prohibited object, or attempts to do so; or

(2) being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object [shall be guilty of an offense against the United States].

* * * * *

(d) Definitions. - - As used in this section - -

(1) the term "prohibited object" means - -

(A) a firearm or destructive device or a controlled substance in schedule I or II, other than marijuana or a controlled substance referred to in subparagraph (C) of this subsection;

(B) marijuana or a controlled substance in schedule III, other than a controlled substance referred to in subparagraph (C) of this subsection, ammunition, a weapon (other than a firearm or destructive device), or an object that is designed or intended to be used as a weapon or to facilitate escape from a prison;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

(C) a narcotic drug, methamphetamine, its salts, isomers, and salts of its isomers, lysergic acid diethylamide, or phencyclidine;

(D) a controlled substance (other than a controlled substance referred to in subparagraph (A), (B), or (C) of this subsection) or an alcoholic beverage;

(E) any United States or foreign currency; and

(F) any other object that threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In United States v. Allen, 190 F.3d 1208 (11th Cir. 1999), the Court held that where the indictment alleged that the "prohibited object" was "an object that is designed or intended to be used as a weapon" as proscribed by § 1791(d)(1)(B), rather than simply alleging possession of "a weapon," the requisite intent was an essential element of the offense to be submitted to the jury.

65
False Statement Regarding Federal Workers' Compensation Benefits
18 USC § 1920

Title 18, United States Code, Section 1920, makes it a Federal offense for anyone to knowingly and willfully make a false statement in connection with an application for, or receipt of, Federal Workers' Compensation Benefits.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully made a false statement or report to the Department of Labor, Office of Workers' Compensation Programs, as charged;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the false statement or report was made in connection with an application for, or receipt of, Federal Workers' Compensation Benefits; and

Third: That the false statement or report related to a material fact.

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

A fact is "material" if it is important to any decision to be made by the officers or employees of the Department of Labor, Office of Workers'

Compensation Programs, and has the capacity of influencing them in making that decision. It is not necessary,

however, for the Government to prove that the Department of Labor, Office of Workers' Compensation Programs was, in fact, influenced or misled. The gist of the offense is an attempt to influence that agency by willfully making a false statement or report concerning a material matter.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10842, archived on January 28, 2008

18 USC § 1920 provides:

> Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit, or payment under subchapter I or III of chapter 81 of title 5 [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The materiality instruction is required by United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.444 (1995).

66.1
Interference With Commerce By Extortion
Hobbs Act - - Racketeering
(Force Or Threats Of Force)
18 USC § 1951(a)

Title 18, United States Code, Section 1951(a), makes it a Federal crime or offense for anyone to extort something from someone else and in doing so to obstruct, delay or affect commerce or the movement of articles in commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant induced the person described in the indictment to part with property;

Second: That the Defendant did so knowingly and willfully by means of "extortion," as hereafter defined; and

Third: That the extortionate transaction delayed, interrupted or affected commerce.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "property" includes not only money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.

Extortion means to obtain property from someone else with that person's consent, but whose consent is brought about or induced by the wrongful use of actual or threatened force, violence or fear.

The term "fear" means a state of anxious concern, alarm or apprehension of harm, and it includes fear of economic loss as well as fear of physical violence.

The term "wrongful" means to obtain property unfairly and unjustly by one having no lawful claim to it.

While it is not necessary to prove that the Defendant specifically intended to affect commerce, it is necessary that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or affect "commerce," which means the flow of commerce or business activities between a state and any point outside of that state.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

You are instructed that you may find that the requisite affect upon commerce has been proved if you find beyond a reasonable doubt that [describe effect on commerce alleged in the indictment on which proof was offered at trial, e.g., that the banks described in the indictment were formed for the purpose of doing business both within and without the State of Florida, and actually did business outside the State of Florida].

ANNOTATIONS AND COMMENTS

18 USC § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce . . . by extortion [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In United States v. Blanton, 793 F.2d 1553 (11th Cir. 1986), the Eleventh Circuit upheld the District Court's refusal to instruct the jury that the Defendant must cause or threaten to cause the force, violence or fear to occur. The Court explained that the Defendant need only be aware of the victim's fear and intentionally exploit that fear to the Defendant's own possible advantage.

In United States v. Kaplan, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. See, e.g. Kaplan, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

Cited in U.S. v. Cherdon, No. 06-10642, archived on January 28, 2008

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. Kaplan, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial. See id.; see also United States v. Le, 256 F.3d 1229 (11th Cir. 2001).

66.2
Interference With Commerce By Extortion
Hobbs Act - - Racketeering
(Color Of Official Right)
18 USC § 1951(a)

Title 18, United States Code 1951(a), makes it a Federal crime or offense for anyone to extort something from someone else and in doing so to obstruct, delay or affect commerce or the movement of articles in commerce..

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant induced the person described in the indictment to part with property;

Second: That the Defendant did so knowingly and willfully by means of "extortion," as hereafter defined; and

Third: That the extortionate transaction delayed, interrupted or affected commerce.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "property" includes not only money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.

The term "extortion," in this context, means the wrongful acquisition of property from someone else under color of official right.

Extortion "under color of official right" is the wrongful taking or receipt by a public officer of property not due to the officer knowing that the payment or property was taken or received in return for [performing] [withholding] official acts.

The term "wrongful" means to obtain property unfairly and unjustly by one having no lawful claim to it.

While it is not necessary to prove that the Defendant specifically intended to affect commerce, it is necessary that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or affect "commerce," which means the flow of commerce or business activities between a state and any point outside of that state.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

You are instructed that you may find that the requisite affect upon commerce has been proved if you find beyond a reasonable doubt that [describe affect on commerce alleged in the indictment on which proof was offered at trial].

ANNOTATIONS AND COMMENTS

18 USC § 1951(a) provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,

> . . . by extortion [shall be guilty of an offense against the United States].

18 USC § 1951 (b)(2) provides:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), the Eleventh Circuit acknowledged that a Hobbs Act conviction for extortion under color of official right requires proof of a quid pro quo. See United States v. Evans, 504 U.S. 255, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992); McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). Fulfillment of the quid pro quo is not an element of the offense.

In United States v. Kaplan, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. See, e.g. Kaplan, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. Kaplan, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial. See id.; see also United States v. Le, 256 F.3d 1229 (11th Cir. 2001).

66.3
Interference With Commerce By Robbery
Hobbs Act - Racketeering
(Robbery)
18 USC § 1951(a)

Title 18, United States Code, Section 1951(a), makes it a Federal crime or offense for anyone to obtain or take the property of another by robbery and in so doing to obstruct, delay or affect commerce or the movement of articles in commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt.

First: That the Defendant knowingly obtained or took the personal property of another, or from the presence of another, as charged;

Second: That the Defendant took the property against the victim's will, by means of actual or threatened force or violence or fear of injury, whether immediately or in the future; and

Third: That, as a result of the Defendant's actions, commerce, or an item moving in commerce, was delayed, obstructed or affected in any way or degree.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "property" includes not only money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.

The term "fear" means a state of anxious concern, alarm or apprehension of harm.

While it is not necessary to prove that the Defendant specifically intended to affect commerce, it is necessary that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or adversely affect "interstate commerce," which means the flow of commerce or business activities between a state and any point outside of that state.

You are instructed that you may find that the requisite effect upon commerce has been proved if you find beyond a reasonable doubt that [describe effect on commerce alleged in the indictment on which proof was offered at trial, e.g. that the banks described in the indictment were formed for the purpose of doing business both within and without the State of Florida, and actually did business outside the State of Florida].

Cited in U.S. v. Cheron, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In United States v. Thomas, 8 F.3d 1552, 1562-63 (11th Cir. 1993), the Eleventh Circuit suggested that the Government need not prove specific intent in order to secure a conviction for Hobbs Act robbery. See also United States v. Gray, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting that the Court in Thomas suggested that specific intent is not an element under § 1951).

In United States v. Kaplan, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. See, e.g. Kaplan, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. Kaplan, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial. See id.; see also United States v. Le, 256 F.3d 1229 (11th Cir. 2001).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

67
Interstate Travel In Aid Of Racketeering
18 USC § 1952(a)(3)

Title 18, United States Code, Section 1952(a)(3), makes it a Federal crime or offense for anyone to travel in [interstate] [foreign] commerce for the purpose of carrying on certain unlawful activities.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant traveled in [interstate] [foreign] commerce on or about the time, and between the places, charged in the indictment;

Second: That the Defendant engaged in that travel with the specific intent to promote, manage, establish or carry on an "unlawful activity," as hereafter defined; and

Third: That the Defendant thereafter knowingly and willfully committed an act to promote, manage, establish or carry on such "unlawful activity."

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The term "interstate commerce" means transportation or movement between one state and another state;] [The term "foreign commerce" means transportation or movement between some place within the United States and some place outside the United States;] and

while it must be proved that the Defendant traveled in [interstate commerce] [foreign commerce] with the specific intent to promote, manage, establish or carry on an "unlawful activity," it need not be proved that such purpose was the only reason or motive prompting the Defendant's travel.

The term "unlawful activity" includes any "business enterprise" involving [gambling offenses in violation of the laws of the State in which they are committed].

[You are instructed that under Florida law engaging "in any game at cards . . . or other game of chance . . . for money or other thing of value" is unlawful.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To constitute a "business enterprise" it is not necessary that the alleged illegal activity be engaged in for any particular length of time, nor must it be proved that such activity constituted the primary pursuit or occupation of the Defendant, or that it actually returned any profit. What must be proved beyond a reasonable doubt is that the Defendant did engage in a continuous course of conduct or series of transactions for the purpose of profit, rather than casual, sporadic or isolated activity.

The indictment charges that the Defendant traveled in [interstate commerce] [foreign commerce] with the intent to promote, manage,

establish and carry on an unlawful activity. However, the law is worded in the disjunctive, that is, the various modes or methods of violating the statute are separated by the word "or." So, if you find beyond a reasonable doubt that any one method or way of violating the law occurred, that is sufficient so long as you agree unanimously upon the particular way or method involved.

ANNOTATIONS AND COMMENTS

18 USC § 1952(a)(3) provides:

Cited in U.S. v. Chenier, No. 06-10642, archived on January 28, 2008

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to - - (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraph . . . (3) [shall be guilty of an offense against the United States].
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which they are committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title . . .

Maximum Penalty: Five (5) years imprisonment and applicable fine.

A conviction under this statute does not require the Government to prove that the Defendant knew or intended that interstate facilities be used in the commission of the offense. See, United States v. Broadwell, 870 F.2d 594 (11th Cir. 1989).

68
Interstate Transportation Of Wagering Paraphernalia (Bookmaking) 18 USC § 1953

Title 18, United States Code, Section 1953, makes it a Federal crime or offense for anyone to carry or transmit so-called bookmaking materials in interstate commerce.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant carried or sent, or caused to be sent, in interstate commerce, the items described in the indictment, as charged;

Second: That the items so carried or sent were used, or were intended to be used, in "bookmaking"; and

Third: That the Defendant acted knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

"Interstate commerce" means commerce or movement between one state and another state, and includes all transportation between states including the mail.

The word "bookmaking" refers to 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 for the purpose of making a profit, not

from the betting itself, but from a percentage or commission collected from the bettors or customers for the privilege of placing the bets.

ANNOTATIONS AND COMMENTS

18 USC § 1953 provides:

> Whoever . . . knowingly carries or sends in interstate . . . commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used, or to be used, . . . in bookmaking [shall be guilty of an offense against the United States]."

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

69
Illegal Gambling Business
18 USC § 1955

Title 18, United States Code, Section 1955, makes it a Federal crime or offense for anyone to conduct an "illegal gambling business."

An "illegal gambling business" is defined to be a gambling business which:

(1) Is a violation of the law of the state in which it is conducted; and

(2) Involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and

(3) Has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

So, the Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That five or more persons, including the Defendant, knowingly and willfully conducted, financed, managed, supervised, directed or owned all or part of a gambling business, as charged;

Second: That such gambling business violated the laws of the state of ___ _____; and

Third: That such gambling business was in substantially continuous

> operation for a period of thirty days or more, or, alternatively, 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 for the purpose of making a profit, not from the betting itself, but from a percentage or commission collected from the bettors or customers for the privilege of placing the bets.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

You are instructed that "bookmaking" is unlawful in the state of _____.

The words "finances, manages, supervises, directs or owns" are all used in their ordinary sense and include those who finance or manage or supervise a business; but the word "conduct" is a broader term and would include anyone working with the business enterprise as an employee with or without 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 $2,000 or more 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 and 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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1955 provides:

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

For purposes of the statute, one "conducts" an illegal gambling business by performing any necessary function in the gambling operation, other than that of mere bettor. Thus, a Defendant's proposed instruction that "[a] person who took bets on five or six occasions over a year's time could not be considered [a] participant in conduct[ing] [a] gambling business" was properly refused where the evidence established that the Defendant, in addition to taking bets, collected gambling debts and forwarded them to another participant. United States v. Miller, 22 F.3d 1075 (11th Cir. 1994).

In United States v. Herring, 955 F.2d 703 (11th Cir. 1992), the Eleventh Circuit approved the district court's instruction concerning "layoff bets."

70.1
Money Laundering
Promoting Unlawful Activity
18 USC § 1956 (a)(1)(A)(i)

Title 18, United States Code, Section 1956(a)(1)(A)(i), makes it a Federal crime or offense for anyone to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly conducted, or attempted to conduct, a "financial transaction" as hereafter defined;

Second: That the Defendant knew that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity;

Third: That the funds or property involved in the financial transaction did in fact represent the proceeds of "specified unlawful activity" - - in this case the proceeds of [describe the specified unlawful activity alleged in the indictment]; and

Fourth: That the Defendant engaged in the financial transaction with the intent to promote the carrying on of such specified unlawful activity.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "conducts" means initiating, concluding, or participating in initiating or concluding a transaction.

The term "transaction" means a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition of funds or property; [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 use of a safe deposit box.]

The term "financial transaction" means - -

[a transaction which in any way or degree affects interstate or foreign commerce involving the movement of funds by wire or other means]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

or

[a transaction which in any way or degree affects interstate or foreign commerce involving one or more "monetary instruments" which includes coin or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in such form that title thereto passes upon delivery]

or

[a transaction which in any way or degree affects interstate or foreign commerce involving the transfer of title to any real property, vehicle, vessel or aircraft]

or

[a transaction involving the use of a "financial institution" which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. The term "financial institution: includes [give appropriate reference from 31 USC § 5312(a)(2) or the regulations thereunder]].

The term "interstate or foreign commerce" includes any commercial activity that involves transportation or communication between places in two or more states or between some place in the United States and some place outside the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "knowing that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity" means that the Defendant knew that such funds or property involved in the transaction represented proceeds from <u>some</u> form, though not necessarily <u>which</u> form, of activity that constitutes a felony offense under state or Federal or foreign law.

The term "specified unlawful activity" means [describe the specified unlawful activity listed in subsection (c)(7) of the statute and alleged in the indictment].

The term “with the intent to promote the carrying on of specified unlawful activity” means that the Defendant must have [conducted] [attempted to conduct] the financial transaction for the purpose of facilitating or making easier or helping to bring about the “specified unlawful activity” as just defined.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 1956(a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity - -
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995), the Court held that although proof of willfulness is not a statutory element of money laundering, where the indictment expressly charged willfulness, the District Court erred in not giving the usual instruction on willfulness (Basic Instruction 9.1).

70.2
Money Laundering
Concealing Proceeds Of Specified Unlawful Activity
Or
Avoiding Transaction Reporting Requirement
18 USC § 1956(a)(1)(B)(i) and (ii)

Title 18, United States Code, Section 1956(a)(1)(B), makes it a Federal crime or offense for anyone to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly conducted, or attempted to conduct, a "financial transaction" as hereafter defined;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant knew that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity;

Third: That the funds or property involved in the financial transaction did in fact represent the proceeds of "specified unlawful activity" - - in this case the proceeds of [describe the specified unlawful activity alleged in the indictment]; and

[Fourth: That the Defendant engaged in the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or the control of

the proceeds of such specified unlawful activity.]

or

[Fourth: That the Defendant engaged in the financial transaction for the purpose of avoiding a transaction reporting requirement under state or Federal law.]

The term "conducts" means initiating, concluding, or participating in initiating or concluding a transaction.

The term "transaction" means a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition of funds or property; [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 use of a safe deposit box.]

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

The term "financial transaction" means - -

[a transaction which in any way or degree affects interstate or foreign commerce involving the movement of funds by wire or other means]

or

[a transaction which in any way or degree affects interstate or foreign commerce involving one or more "monetary instruments" which

includes coin or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in such form that title thereto passes upon delivery]

or

[a transaction which in any way or degree affects interstate or foreign commerce involving the transfer of title to any real property, vehicle, vessel or aircraft]

or

[a transaction involving the use of a "financial institution" which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. The term "financial institution: includes [give appropriate reference from 31 USC § 5312(a)(2) or the regulations thereunder]].

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

The term "interstate or foreign commerce" includes any commercial activity that involves transportation or communication between places in two or more states or between some place in the United States and some place outside the United States.

The term "knowing that the funds or property involved in the financial transaction represented the proceeds of some form of unlawful activity" means that the Defendant knew that such funds or property

involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony offense under state or Federal or foreign law.

The term "specified unlawful activity" means [describe the specified unlawful activity listed in subsection (c)(7) of the statute and alleged in the indictment].

[The term "transaction reporting requirement" refers to the legal requirement that a domestic financial institution report any transaction involving a payment, receipt or transfer of United States coins or currency in an amount over $10,000. Transactions involving only personal checks, cashiers checks, wire transfers or other monetary instruments need not be reported.]

Cited in U.S. v. Cherfer, No. 06-10642, archived on January 28, 2008

[The term “transaction reporting requirement” refers to the legal requirement that a person who [physically transports, mails, or ships] [causes to be physically transported, mailed, or shipped] [attempts to cause to be physically transported, mailed or shipped] currency [describe any other reportable monetary instruments as alleged in the indictment] in an amount over $10,000 at one time [from the United States to any place outside the United States] [into the United States from a place outside the United States] must report that transaction.]

[The term "transaction reporting requirement" refers to the legal requirement that a person engaged in a trade or business who, in the course of that trade or business, receives currency in an amount over $10,000 in a single transaction or in two or more related transactions file a report with the Internal Revenue Service.]

ANNOTATIONS AND COMMENTS

18 USC § 1956(a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity - -
>
> (B) knowing that the transaction is designed in whole or in part - -
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherter, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995), the Court held that although proof of willfulness is not a statutory element of money laundering, where the indictment expressly charged willfulness, the District Court erred in not giving the usual instruction on willfulness (Basic Instruction 9.1).

70.3
Money Laundering
International Transportation Of Monetary Instruments
18 USC § 1956(a)(2)(A)

Title 18, United States Code, Section 1956(a)(2)(A), makes it a Federal crime or offense for anyone to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [transported] [transmitted] [transferred] a monetary instrument or funds [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] [or attempted to do so]; and

Second: That the Defendant engaged in the [attempted] [transportation] [transmission] [transfer] with the intent to promote the carrying on of "specified unlawful activity."

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "transports, transmits, or transfers" includes all means of carrying, sending, mailing, shipping or moving funds. Thus, it includes the electronic transfer of funds by wire or computer or other means including any physical means of transporting or transferring funds.

It makes no difference whether the monetary instrument or funds [attempted to be] transported, transmitted, or transferred is derived from criminal activity or not. It could be legitimately earned income [even money provided by a government agent in the course of an undercover operation].

The term "monetary instrument" includes the coin or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in such form that title passes upon delivery.

The term "specified unlawful activity" means [describe the specified unlawful activity listed in subsection (c)(7) of the statute and alleged in the indictment].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "with the intent to promote the carrying on of specified unlawful activity" means that the Defendant must have [conducted] [attempted to conduct] the financial transaction for the purpose of facilitating or making easier or helping to bring about the "specified unlawful activity" as just defined.

[To "attempt" an act simply means to intentionally take some substantial step toward the accomplishment of the act so that, except for interruption or frustration, the act would have occurred.]

ANNOTATIONS AND COMMENTS

18 USC § 1956(a)(2) provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States - -
>
> > (A) with the intent to promote the carrying on of specified unlawful activity [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995), the Court held that although proof of willfulness is not a statutory element of money laundering, where the indictment expressly charged willfulness, the District Court erred in not giving the usual instruction on willfulness (Basic Instruction 9.1).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

70.4
Money Laundering Sting
18 USC § 1956(a)(3)(A) or (a)(3)(b) or (a)(3)(C)

Title 18, United States Code, Section 1956(a)(3), makes it a Federal crime or offense for anyone to engage in certain kinds of financial transactions commonly known as money laundering.

The Defendant can be found guilty of this offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [conducted] [attempted to conduct] a financial transaction;

Second: That the [attempted] financial transaction involved property [represented by a law enforcement officer to be the proceeds of specified unlawful activity][used to conduct or facilitate specified unlawful activity];

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[Third: That the Defendant engaged in the [attempted] financial transaction with the intent to promote the carrying on of specified unlawful activity.

or [(a)(3)(B)]

Third: That the Defendant engaged in the financial transaction with the intent to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity.]

or [(a)(3)(C)]

[Third: That the Defendant engaged in the [attempted] financial transaction with the intent to avoid a transaction reporting requirement under state or federal law.]

In this case, the Government alleges that the property involved in the financial transaction [was represented to be the proceeds of] [was used to conduct or facilitate] [describe the specified unlawful activity alleged in the indictment]. I instruct you that [name specified unlawful activity alleged in the indictment] is a kind of specified unlawful activity for purposes of this case.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The government also alleges that the Defendant engaged in the [attempted] financial transaction with the intent [to promote the carrying on of] [to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of] [describe specified unlawful activity that the Defendant allegedly intended to promote], which I instruct you is a kind of specified unlawful activity for purposes of this case.][(a)(3)(A) or (a)(3)(B)].

[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 term "conducts" means initiating, concluding, or participating in initiating or concluding a transaction.

The term "transaction" means a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition of funds or property; [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 use of a safe deposit box.]

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

The term "financial transaction" means - -

[a transaction which in any way or degree affects interstate or foreign commerce involving the movement of funds by wire or other means]

or

[a transaction which in any way or degree affects interstate or foreign commerce involving one or more "monetary instruments" which includes coin or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in such form that title thereto passes upon delivery]

or

[a transaction which in any way or degree affects interstate or foreign commerce involving the transfer of title to any real property, vehicle, vessel or aircraft]

or

[a transaction involving the use of a "financial institution" which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. The term "financial institution: includes [give appropriate reference from 31 USC § 5312(a)(2) or the regulations thereunder]].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "with the intent to promote the carrying on of specified unlawful activity" means that the defendant must have [conducted] [attempted to conduct] the financial transaction for the purpose of promoting (that is, to make easier, facilitate or to help bring about) the carrying on of specified unlawful activity as previously defined.

ANNOTATIONS AND COMMENTS

18 USC § 1956(a)(3)(A), (B) and (C) provides:

> (3) Whoever, with the intent - -
>
> (A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), 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.

Maximum penalty: Twenty (20) years and applicable fine.

In United States v. Starke, 62 F.3d 1374, 1382 (11th Cir. 1995), the Eleventh Circuit held that, to satisfy the representation element of section 1956(a)(3), "the Government need only prove that a law enforcement officer or other authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property" was proceeds from the specified unlawful activity. The court explained that there is no requirement of any particular statement by the officer regarding the source of the property.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

70.5
Money Laundering Conspiracy
18 USC § 1956(h)

Title 18, United States Code, Section 1956(h), makes it a Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of Title 18, United States Code, Section [1956 or 1957].

[Describe the elements of the relevant provision of section 1956 or 1957]

Under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In order to establish a conspiracy offense it is <u>not</u> necessary for the Government to prove that all of the people named in the indictment were members of the scheme; <u>or</u> that those who <u>were</u> members had entered into any formal type of agreement. Also, because the essence of a conspiracy offense is the making of the agreement itself, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case <u>must</u> show beyond a reasonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan to violate [18 U.S.C. Section 1956 or 1957], as charged in the indictment; and

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before, and even though the Defendant played only a minor part.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Of course, mere presence at the scene of a transaction or event, 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, standing alone, establish proof 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 one, does not thereby become a conspirator.

ANNOTATIONS AND COMMENTS

18 USC § 1956(h) provides:

> (h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Maximum penalty: As stated above.

In United States v. Tam, 240 F.3d 797, 802 (9th Cir. 2000), the Ninth Circuit held that "the money laundering conspiracy statute does not require the indictment to allege an overt act" (citing United States v. Shabani, 513 U.S. 10, 15, 115 S. Ct. 382, 130 L. Ed. 225 (1994)).

Cited in U.S. v. Chairez No. 06-10642, archived on January 28, 2008

In United States v. Cancelliere, 69 F.3d 1116, 1120 (11th Cir. 1995), the Eleventh Circuit held that proof of willfulness is not an element of the substantive offense of money laundering.

70.6
Money Laundering
18 USC § 1957

Title 18, United States Code, Section 1957, makes it a Federal crime or offense for anyone to engage in certain kinds of financial transactions commonly known as money laundering.

The Defendant can be found guilty of this offense only if all of the following are proved beyond a reasonable doubt;

First: That the Defendant knowingly engaged or attempted to engage in a monetary transaction;

Second: That the Defendant knew the transaction involved criminally derived property;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Third: That the property had a value of greater than $10,000;

Fourth: That the property was, in fact, derived from [describe the specified unlawful activity alleged in the indictment]; and

Fifth: That the transaction occurred in [the United States][otherwise as set forth in 18 U.S.C. § 1957(D)].

The term "monetary transaction" means the [deposit] [withdrawal] [transfer] or [exchange], in or affecting interstate commerce, of funds or a monetary instrument by, through, or to a financial institution. [The term "monetary transaction" does not include any transaction necessary

to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution.]

The term "financial institution" means [identify type of institution listed in 31 USC § 5312 as alleged in the indictment].

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense. The government must prove only that the Defendant knew that the property involved in the monetary transaction constituted, or was derived from, proceeds obtained by <u>some</u> criminal offense. The government does <u>not</u> have to prove that the Defendant knew the precise nature of that criminal offense, or that the Defendant knew that the property involved in the transaction represented the proceeds of [specified unlawful activity as alleged in the indictment].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Although the government must prove that at least $10, 000 of the property at issue was criminally-derived property, the government does not have to prove that <u>all</u> of the property at issue was criminally-derived.

<u>ANNOTATIONS AND COMMENTS</u>

18 USC § 1957(a) and (d) provide:

> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a

monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

* * * *

(d) The circumstances referred to in subsection (a) are - -

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

Maximum penalty: Ten (10) years and applicable fine.

United States v. Adams, 74 F.3d 1093, 1101 (11th Cir. 1996), the Eleventh Circuit recommended that district courts make clear in the jury instruction that at least $10,000 of the property at issue must be criminally derived.

Cited in U.S. v. Cherer No. 06-10642, archived on January 28, 2008

In United States v. Christo, 129 F.3d 578, 580 (11th Cir. 1997), the Eleventh Circuit held that the predicate crime must be completed before the offense of money laundering can occur under section 1957.

71.1
RICO - Substantive Offense
18 USC § 1962(c)

Count _____ of the indictment charges that from on or about _____, and continuously thereafter up to and including the date of the filing of the indictment on _____, the Defendants were persons associated with an "enterprise" engaged in, or the activities of which affected, interstate commerce, and that they knowingly and willfully participated in the conduct of the enterprise's affairs "through a pattern of racketeering activity," in violation of Title 18, United States Code, Section 1961 and 1962(c).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "enterprise" includes any partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

The term "racketeering activity" includes any act in violation of [e.g., Title 18 of the United States Code relating to mail fraud (section 1341) and wire fraud (Section 1343)].

The term "pattern of racketeering activity" requires at least two acts of "racketeering activity," sometimes called predicate offenses, which must have been committed within ten years of each other, one of which must have occurred after October 15, 1970.

So, in order to establish that the Defendants named in Count _ _____ of the indictment, or any of them, committed the offense charged in that Count, there are five specific facts which must be proved beyond a reasonable doubt:

First: That the Defendant was associated with an "enterprise" as defined in these instructions;

Second: That the Defendant knowingly and willfully committed, or knowingly and willfully aided and abetted the commission of at least two of the predicate offenses hereinafter specified;

Third: That the two predicate offenses allegedly committed by the Defendant were connected with each other by some common scheme, plan or motive so as to be a pattern of criminal activity and not merely a series of separate, isolated or disconnected acts;

Fourth: That through the commission of two or more connected offenses, the Defendant conducted or participated in the conduct of the "enterprise's" affairs; and

Fifth: That the enterprise was engaged in, or that its activities affected, interstate commerce.

Cited in U.S. v. Cherer, No. 06-10642; archived on January 28, 2008

With respect to the first specific fact stated above, in order for you to find that the Defendant was "associated" with the enterprise, the Government need only prove beyond a reasonable doubt that the Defendant was aware of the general existence of the enterprise described in the indictment.

With respect to the second specific fact stated above, the Government must prove beyond a reasonable doubt that the Defendant under consideration knowingly and willfully committed, or aided and abetted the commission of any two of the predicate offenses specifically alleged and described in the indictment [under the headings "Racketeering Act One and "Racketeering Act Two."] [in Counts ____ __ through _____, respectively.]

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

You are further instructed, however, that you must unanimously agree concerning each Defendant under consideration as to which of the two predicate offenses the Defendant is alleged to have committed, or aided and abetted in committing. It would not be sufficient if some of the jurors should find that a Defendant committed two of the predicate offenses while the remaining jurors found that such Defendant committed two different offenses; you must all agree upon the same two predicate offenses in order to find the Defendant guilty of Count ____.

With respect to the fourth specific fact stated above - - that the Defendant conducted or participated in the conduct of the affairs of the enterprise - - the Government must prove beyond a reasonable doubt that the Defendant was something more than an outsider lending aid to the enterprise. It must be proved that the Defendant had some part in either the management or the operation of the affairs of the enterprise itself. Thus, it need not be proved that the Defendant had primary responsibility or even a managerial position; it is enough if the Defendant was involved in conducting the operation of the affairs of the enterprise as a lower level participant.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

With respect to the fifth specific fact - - the requirement that the "enterprise" was engaged in, or that its activities affected, interstate commerce - - the Government contends that in conducting the affairs of the enterprise the Defendants [e.g. utilized interstate communications facilities by engaging in long distance telephone conversations; by traveling in interstate commerce from one state to another; and by causing the transmission of funds by mail or by wire in interstate commerce from one state to another.] You are instructed that if you find beyond a reasonable doubt that these transactions or events occurred, and that they occurred in, or as a direct result of, the conduct of the

affairs of the alleged enterprise, the required affect upon interstate commerce has been established. If you do not so find, the required effect upon interstate commerce has not been established.

ANNOTATIONS AND COMMENTS

18 USC § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."

Maximum Penalty: Twenty (20) years imprisonment and applicable fine. Life imprisonment if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment. (The jury must find that defendant committed such a predicate act beyond a reasonable doubt. See United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001) (applying Apprendi v. New Jersey, 530 U.S. 466 (2000)).

Cited in U.S. v. Cherfer, No. 06-10642, archived on January 28, 2008

In United States v. Kotvas, 941 F.2d 1141 (11th Cir. 1991), the Eleventh Circuit held that this pattern instruction properly instructed the jury on the continuity requirement discussed by the United States Supreme Court in H. J., Inc., v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).

In Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), the Supreme Court held that a Defendant participates in the conduct of an enterprise's affairs by participating in the "operation or management" of the enterprise. The Eleventh Circuit has held that Reves, a civil RICO action, applies to criminal proceedings as well. See United States v. Starrett, 55 F.3d 1525 (11th Cir. 1995). Starrett nevertheless upheld the district court's refusal to give a proposed instruction that the Defendant must have occupied a "leadership" position in the enterprise.

If the indictment seeks a forfeiture of property under § 1963(a), see Trial Instruction No. 8.

71.2
RICO - Conspiracy Offense
18 USC § 1962(d)

Title 18, United States Code, Section 1962(c), makes it a Federal crime or offense for anyone who is associated with an "enterprise" engaged in, or the activities of which affect, interstate commerce, to participate in conducting the affairs of the enterprise through a "pattern of racketeering activity."

The meaning of these terms and an explanation of what must be proved in order to establish that offense, is discussed in that part of the instructions covering Count _____ of the indictment.

However, the Defendants named in Count _____ of the indictment - - the conspiracy count - - are not charged in that Count with violating Section 1962(c); rather, they are charged with knowingly and willfully conspiring to violate that law, the alleged conspiracy itself being a separate crime or offense in violation of Section 1962(d).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

So, under that law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish an offense that would be in violation of Section 1962(c) as elsewhere defined in these instructions. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member.

The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement; or that they directly discussed between themselves the details of the scheme and its purpose, or the precise ways in which the purpose was to be accomplished. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

What the evidence in the case must show beyond a reasonable doubt is:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, namely, to engage in a "pattern of racketeering activity" as charged in the indictment; and

Second: That the Defendant knowingly and willfully became a member of such conspiracy; and

Third: That at the time the Defendant knowingly and willfully agreed to join in such conspiracy, the Defendant did so with the specific intent either to personally participate in the commission of two "predicate offenses," as elsewhere defined in these instructions, or that

> the Defendant specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses" as a part of a "pattern of racketeering activity."

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict for conspiracy even though the Defendant did not participate before, and even though the Defendant played only a minor part.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Of course, mere presence at the scene of a transaction or event, 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, standing alone, 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.

ANNOTATIONS AND COMMENTS

18 USC § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or ©) of this section.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine. Life imprisonment if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment. (The jury must find that defendant committed such a predicate act beyond a reasonable doubt. See United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001) (applying Apprendi v. New Jersey, 530 U.S. 466 (2000)).

United States v. To, 144 F.3d 737 (11th Cir. 1998) (discusses 'single objective' and 'overall objective' RICO conspiracy theories); see also United States v. Beale, 921 F.2d 1412 (11th Cir. 1991) (discusses the alternate methods of proving a RICO conspiracy).

Salinas v. United States, 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (finding that no overt act is required under the RICO conspiracy statute); see also United States v. Starrett, 55 F.3d 1525 (11th Cir. 1995) (observing that no overt act is required under § 1962(d)).

Cited in U.S. v. Cherer, No. 06-10642 archived on January 28, 2008

72.1
Bank Robbery
(Subsection (a) Only)
18 USC § 2113(a)

Title 18, United States Code, Section 2113(a), makes it a Federal crime or offense for anyone to take [or to attempt to take] from the person or presence of someone else [by force and violence] [by intimidation] any property or money in the possession of a federally [insured bank] [insured credit union] [insured savings and loan association].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly took from the person or the presence of the person described in the indictment, money or property then in the possession of a federally insured [bank] [credit union] [savings and loan association] as charged; and

Second: That the Defendant did so [by means of force or violence] [by means of intimidation].

[A "federally insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.] [A "federally insured credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National

Credit Union Administration Board or any credit union chartered under the laws of a state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.] [A "federally insured savings and loan association" means any savings and loan association the deposits of which are insured by the Federal Savings and Loan 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. The essence of the offense is the taking of money or property aided and accompanied by intentionally intimidating behavior on the part of the Defendant.]

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 2113(a) provides:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . any property or money . . . belonging to . . . or in the possession of, any

bank, credit union, or any savings and loan association [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

The statute creates various modes of committing the offense (force and violence or intimidation) (assault or use of a dangerous weapon) and care must be taken in adapting the instruction to the allegations of the indictment. See United States v. Bizzard, 615 F.2d 1080 (5th Cir. 1980).

In Carter v. United States, 530 U.S. 255, 120 S.Ct. 2159 (2000), the court held that the bank larceny provision of § 2113(b) is not a lesser included offense of § 2113(a).

In United States v. King, 178 F.3d 1376 (11th Cir. 1999), the court held, in a prosecution under § 2113(b), that money being transferred in a contractor's armored vehicle from a bank to the Federal Reserve was money still "in the care, custody, control, management or possession" of the bank because the bank retained legal title to the funds.

In United States v. Mitchell, 146 F.3d 1338 (11th Cir. 1998), the court upheld arguably inconsistent verdicts finding the Defendant guilty under §2113(d) (armed bank robbery), but acquitting him under § 924(c) (carrying a firearm during a crime of violence).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

72.2
Bank Robbery
(Subsections (a) and (d) Alleged In Separate Counts)
18 USC § 2113(a) And (d)

Title 18, United States Code, Section 2113(a), makes it a Federal crime or offense for anyone to take [or to attempt to take] from the person or presence of someone else [by force and violence] [by intimidation] any property or money in the possession of a federally [insured bank] [insured credit union] [insured savings and loan association].

The Defendant can be found guilty of that offense as charged in Count _____ of the indictment only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 08-10642, archived on January 28, 2008

First: That the Defendant knowingly took [or attempted to take] from the person or the presence of the person described in the indictment, money or property then in the possession of a federally insured [bank] [credit union] [savings and loan association] as charged; and

Second: That the Defendant did so [by means of force or violence] [by means of intimidation;

[A "federally insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.] [A "federally

insured credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board.] [A "federally insured savings and loan association" means any savings and loan association the deposits of which are insured by the Federal Savings and Loan 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. The essence of the offense is the taking of money or property aided and accompanied by intentionally intimidating behavior on the part of the Defendant.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Title 18, United States Code, Section 2113(d) makes it a more serious offense for anyone, while in the process of violating subsection (a) of the statute, [to assault] [to put in jeopardy the life of any person by the use of a dangerous weapon or device].

In order to establish that offense as charged in Count _____ of the indictment, the Government must prove beyond a reasonable doubt

each of the two specific facts I mentioned a moment ago in discussing Count _____, and must also prove, beyond a reasonable doubt, a third specific fact, namely:

> That the Defendant knowingly [assaulted] [put in jeopardy the life of a person by the use of a dangerous weapon or device] while engaged in stealing property or money from [the bank] [credit union] [savings and loan association] as charged.

[An "assault" may be committed without actually striking or injuring another person. So, an assault occurs whenever one person makes an intentional attempt or threat to injure someone else, and also has an apparent, present ability to carry out the threat, such as by flourishing or pointing a dangerous weapon or device.]

Cited in U.S. v. Cheron, No. 06-10642, archived on January 28, 2008

[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, then, to expose someone else to a risk of death by the use of such dangerous weapon or device.]

ANNOTATIONS AND COMMENTS

18 USC § 2113(a) and (d) provide:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, . . . any property or money . . . belonging to . . . or in the possession of any bank, credit union, or any savings and loan association [shall be guilty of an offense against the United States].
>
> (d) Whoever, in committing, or attempting to commit, any offense defined in subsection (a) . . . of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device [shall be punished as provided by law.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine as to subsection (a); and Twenty-five (25) years imprisonment and applicable fine as to subsection (d).

The statute creates various modes of committing the offense (force and violence or intimidation) (assault or use of a dangerous weapon) and care must be taken in adapting the instruction to the allegations of the indictment. See United States v. Blizzard, 615 F.2d 1080 (5th Cir. 1980).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In McLaughlin v. United States, 476 U.S. 16, 19, 106 S.Ct. 1677, 1678, 90 L.Ed.2d 15 (1986) the Supreme Court held that an unloaded gun is a dangerous weapon. One of the three reasons given for this conclusion, each of which the Court characterized as "independently sufficient," was that the display of a gun instills fear in the average citizen and creates an immediate danger of a violent response. Id.

Citing to McLaughlin v. United States, the Eleventh Circuit held that a toy gun should be considered a dangerous weapon under § 2113(d). United States v. Garrett, 3 F.3d 390, 391 (11th Cir. 1993).

In United States v. King, 178 F.3d 1376 (11th Cir. 1999), the court held, in a prosecution under § 2113(b), that money being transferred in a contractor's armored vehicle from a bank to the Federal Reserve was money still "in the care, custody, control, management or possession" of the bank because the bank retained legal title to the funds.

In United States v. Mitchell, 146 F.3d 1338 (11th Cir. 1998), the court upheld arguably inconsistent verdicts finding the Defendant guilty under §2113(d) (armed bank robbery), but acquitting him under § 924(c) (carrying a firearm during a crime of violence).

72.3
Bank Robbery
(Subsections (a) and (d) Alleged In The Same Count)
18 USC § 2113)(a) And (d)

Title 18, United States Code, Sections 2113(a) and (d), makes it a Federal crime or offense for anyone to take from the person or presence of someone else [by force and violence] [by intimidation] any property or money in the possession of a federally [insured bank] [insured saving and loan association], and in the process of so doing to [assault any person] [put in jeopardy the life of any person by the use of a dangerous weapon or device].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly took from the person or the presence of the person described in the indictment, money or property then in the possession of a federally [insured bank] [credit union] [insured savings and loan association], as charged;

Second: That the Defendant did so [by means of force or violence] [by means of intimidation];

Third: That the Defendant [assaulted] [put in jeopardy the life of some person by the use of a dangerous weapon or device] while engaged in taking the property or money, as charged.

[A "federally insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.] [A "federally insured credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board.] [A "federally insured savings and loan association" means any savings and loan association the deposits of which are insured by the Federal Savings and Loan 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. The essence of the offense is the taking of money or property aided and accompanied by intentionally intimidating behavior on the part of the Defendant.]

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

[An "assault" may be committed without actually striking or injuring another person. So, an assault occurs whenever one person makes an intentional attempt or threat to injure someone else, and also has an

apparent, present ability to carry out the threat such as by flourishing 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, then, to expose someone else to a risk of death by the use of such dangerous weapon or device.]

In some cases the law which a Defendant is charged with breaking actually covers two separate crimes - - one is more serious than the second, and the second is generally called a "lesser included offense."

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

So, in this case, if you should unanimously find the Defendant "Not Guilty" of the crime charged in the indictment, you must then proceed to determine the guilt or innocence of the Defendant as to a lesser included offense.

The crime of robbing a bank, accompanied by [an assault] [the putting in jeopardy of the life of another person by the use of a dangerous weapon or device] as charged in the indictment, necessarily includes the lesser offense of robbery of a bank, <u>without</u> [an assault]

[putting in jeopardy the life of another by the use of a dangerous weapon or device.]

With respect to the offense charged in the indictment, then, if you should find the Defendant not guilty as charged, you must then proceed to determine whether the Defendant is guilty or not guilty of the lesser included offense of robbery of a bank without [committing an assault] [putting in jeopardy the life of another by the use of a dangerous weapon or device.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 2113(a) and (d) provide:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, . . . any property or money . . . belonging to . . . or in the possession of any bank, credit union, or any savings and loan association [shall be guilty of an offense against the United States].
>
> (d) Whoever, in committing, or attempting to commit, any offense defined in subsection (a) . . . of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device [shall be punished as provided by law].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine as to subsection (a); and Twenty-five (25) years imprisonment and applicable fine as to subsection (d).

The statute creates various modes of committing the offense (force and violence <u>or</u> intimidation) (assault <u>or</u> use of a dangerous weapon) and care must be taken in

adapting the instruction to the allegations of the indictment. See United States v. Blizzard, 615 F.2d 1080 (5th Cir. 1980).

In McLaughlin v. United States, 476 U.S. 16, 19, 106 S.Ct. 1677, 1678, 90 L.Ed.2d 15 (1986), the Supreme Court held that an unloaded gun is a dangerous weapon. One of the three reasons given for this conclusion, each of which the Court characterized as "independently sufficient," was that the display of a gun instills fear in the average citizen and creates an immediate danger of a violent response. Id.

Citing to McLaughlin v. United States, the Eleventh Circuit held that a toy gun should be considered a dangerous weapon under § 2113(d). United States v. Garrett, 3 F.3d 390, 391 (11th Cir. 1993).

In United States v. King, 178 F.3d 1376 (11th Cir. 1999), the court held, in a prosecution under § 2113(b), that money being transferred in a contractor's armored vehicle from a bank to the Federal Reserve was money still "in the care, custody, control, management or possession" of the bank because the bank retained legal title to the funds.

In United States v. Mitchell, 146 F.3d 1338 (11th Cir. 1998), the court upheld arguably inconsistent verdicts finding the Defendant guilty under §2113(d) (armed bank robbery), but acquitting him under § 924(c) (carrying a firearm during a crime of violence).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

72.4
Bank Robbery
(Subsection (e) Only - - Alleged In Separate Count)
18 USC § 2113(e)

Title 18, United States Code, Section 2113(e), makes it a separate Federal crime or offense for anyone who, [while committing the offense described in Count _____ of the indictment] [in avoiding or attempting to avoid apprehension for the commission of the offense described in Count _____ of the indictment] forces any person to accompany [him/her] without the consent of such person. Count _____ alleges that [in committing] [in avoiding or attempting to avoid apprehension for] the bank robbery offense charged in Count _____, the Defendant forced a person to accompany the Defendant without the consent of such person. So, if you first find beyond a reasonable doubt that the Defendant committed the bank robbery offense as charged in Count _____, then the Defendant can be found guilty of this additional offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That while [committing such bank robbery offense] [attempting to avoid apprehension for the commission of a bank robbery offense], the Defendant forced another person or persons to accompany the Defendant, as charged; and

Second: That such other person or persons did not voluntarily consent to accompany the Defendant.

To force another person to do something without "voluntary consent" is to compel the person to act against his or her will through the use of intimidation or threats of harm.

To require someone else to "accompany" a person means that the victim must have been forced to move with the Defendant from one place to another (rather than being forced to move alone or with someone other than the Defendant). It is not necessary, however, for the Government to prove that the forced movement in the company of the Defendant involved leaving the premises of the bank, or that such movement traversed a particular number of feet, or lasted a particular length of time, or produced any particular level of fear or apprehension on the part of the victim. What must be proved beyond a reasonable doubt is that the forced movement in the company of the Defendant was a movement of some substance or significance as distinguished from a wholly insubstantial, trivial or insignificant movement.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 2113 (e) provides:

> (e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself from arrest or confinement for such offense . . . forces any person to accompany him [or her] without the consent of such person [shall be guilty of an offense against the United States].

Maximum Penalty: Mandatory minimum of ten (10) years imprisonment. If death results, then the maximum penalty is death.

The definition of "accompany," including the enumeration of things that need not be proved, is derived from United States v. Bauer, 956 F.2d 239 (11th Cir. 1992), cert. denied 506 U.S. 976, 113 S.Ct. 469, 121 L.Ed.2d 376 (1992).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

73
Motor Vehicles
"Carjacking"
18 USC § 2119

Title 18, United Sates Code, Section 2119, makes it a Federal crime or offense for anyone to take or attempt to take a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another, [by force and violence] [by intimidation] with the intent to cause death or serious bodily harm.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant [took] [attempted to take] a motor vehicle from the person or presence of another;

Second: That the Defendant did so [by force and violence] [by intimidation];

Third: That the motor vehicle previously had been transported, shipped, or received in interstate or foreign commerce; and

Fourth: That the Defendant intended to cause death or serious bodily harm when the Defendant took the motor vehicle[; and]

[Fifth: That [death] [serious bodily injury] resulted from the commission of the offense.]

The term "by force and violence" means the use of actual physical strength or actual physical violence.

The term "by intimidation" means the commission of some act or the making of some statement that would put a reasonable person of ordinary sensibilities in fear of bodily harm. It is not necessary for the Government to prove that the alleged victim was actually placed in fear.

The phrase "transported, shipped or received in interstate or foreign commerce" means the movement of a motor vehicle between any place in one state and any place in another state or another country. It is not necessary for the Government to prove that the Defendant knew that the motor vehicle had moved in interstate or foreign commerce. The Government need only prove that the motor vehicle had moved in interstate or foreign commerce.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Whether the Defendant "intended to cause death or serious bodily harm" is to be judged objectively from the conduct of the Defendant as disclosed by the evidence and from what one in the position of the alleged victim might reasonably conclude. [In this case the Government contends that the Defendant intended to cause death or serious bodily

harm if the alleged victim had refused to turn over the car. If you find beyond a reasonable doubt that the Defendant had such an intent, the Government has satisfied this element of the offense.]

[The term "serious bodily injury" means bodily injury which involves [a substantial risk of death] [extreme physical pain] [protracted and obvious disfigurement] [protracted loss or impairment of the function of a bodily member, organ, or mental faculty]. [The term "serious bodily injury" also includes [knowingly causing another person to engage in a sexual act by using force against that other person] [or describe the other mode of sexual abuse in violation of § 2241 or 2242 as alleged in the indictment.]

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 2119 provides:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall [violate this section].

Maximum Penalty varies depending on injury to victim.

1) When no serious bodily injury or death results, the maximum penalty is imprisonment for not more than 15 years and applicable fine.

2) When serious bodily injury results, the maximum penalty is imprisonment for not more than 25 years and applicable fine.

3) When death results, the maximum penalty is death and applicable fine.

In the context of a violation of 18 USC § 113(c) - - assault with a dangerous weapon with intent to do bodily harm - - "[t]he intent of the defendant `is not to be measured by the secret motive of the actor, or some undisclosed purpose merely to frighten, not to hurt,' but rather `is to be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude.'" United States v. Guilbert, 692 F.2d 1340, 1344 (11th Cir. 1982), cert. denied, 103 S.Ct. 1260 (1983) (quoting Shaffer v. United States, 308 F.2d 654, 655 (5th Cir. 1962) (per curiam)). See United States v. Gibson, 896 F.2d 206, (6th Cir. 1990) (citing United States v. Guilbert and explaining that "[a] defendant's state of mind is a question of fact, often determined by objective evaluation of all the surrounding facts and circumstances").

Holloway v. United States, 526 U.S. 1, 119 S.Ct. 966 (1999) (conditional intent to "cause death or serious bodily harm" only if the victim offers resistance is sufficient to meet the state of mind requirement of the statute.) accord United States v. Fulford, 267 F.3d 1241 (11th Cir. 2001).

Cited in U.S. v. Cherror, No. 06-10642, archived on January 28, 2008

United States v. Lumley, 135 F.3d 758 (11th Cir. 1998). "We decline to interpret section 2119 to require a perpetrator to have 'the intent to cause death or serious bodily harm' only as to the person from whom the perpetrator takes the motor vehicle." (The Defendant shot at an armed guard while fleeing a robbery, then ordered a victim out of her truck and drove off in the vehicle.)

The Fifth element should be included under the principle of Apprendi if the indictment triggers the enhanced maximum sentences provided by the statute in cases resulting in serious bodily injury or death.

74
Aggravated Sexual Abuse
(By Force Or Threat)
18 USC § 2241(a)

Title 18, United States Code, Section 2241(a), makes it a Federal crime or offense for anyone in [the special maritime or territorial jurisdiction of the United States] [a Federal Prison] to sexually abuse another person by using force or threats.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant caused the person named in the indictment to engage in a sexual act;

Second: That the Defendant did so by using force against the person or by threatening or placing the person in fear that such person, or any other person, would be subjected to death, serious bodily injury, or kidnapping;

Third: That the Defendant did such acts knowingly; and

Fourth: That the acts occurred within [the special maritime jurisdiction of the United States] [the territorial jurisdiction of the United States] [a Federal prison].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "sexual act" means:

(a) contact between the penis and the vulva or the penis and the anus, and, for purposes of this subparagraph, contact involving the penis occurs upon penetration however slight; or,

(b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade the person named in the indictment, or to arouse or gratify the sexual desire of the Defendant or any other person.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[(d) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.]

The term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

[You are instructed that the location of the alleged offense, as described in the indictment, if you find beyond a reasonable doubt that such offense occurred there, would be within the [special maritime] [territorial] jurisdiction of the United States.]

ANNOTATIONS AND COMMENTS

18 USC § 2241(a) provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act - -
>
> (1) by using force against that other person; or
>
> (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
>
> or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Life in prison and applicable fine.

75.1
Transporting Or Shipping Material Involving Sexual Exploitation Of Minors
18 USC § 2252(a)(1)

Title 18, United States Code, Section 2252(a)(1), makes it a Federal crime or offense for any person to knowingly [transport] [ship] [mail] any visual depiction in interstate or foreign commerce by any means [including by computer] if the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly [transported] [shipped] [mailed] a visual depiction in interstate or foreign commerce by any means [including by computer];

Second: That the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Third: That such visual depiction is of a minor engaged in sexually explicit conduct; and

Fourth: That the Defendant knew that at least one of the performers in such visual depiction was a minor and knew that the visual depiction was of such minor engaged in sexually explicit conduct.

The term "interstate or foreign commerce" means the movement of property from one state to another state or from one state to another country. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

[The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "sexually explicit conduct" means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person.

Regarding the last type of sexually explicit conduct - - "lascivious exhibition" - - not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In determining whether a visual depiction constitutes a lascivious exhibition, you should consider the context and setting in which the genitalia or pubic area is being displayed. You may consider the overall content of the material. You may also consider such factors as whether the focal point of the visual depiction is on the minor's genitalia or pubic area, or whether there is some other focal point. You may consider whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive; for example, in a location or in a pose associated with sexual activity. In addition, you may consider whether the minor appears to be displayed in an unnatural pose or in inappropriate attire. You may also consider whether the minor is partially clothed or nude. You may consider whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity, and whether the depiction appears to have been designed to elicit a sexual

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

response in the viewer. Of course, a visual depiction need not involve all of these factors to be a lascivious exhibition.

[The term "visual depiction" includes undeveloped film and videotape, and data stored on computer disc or by electronic means which is capable of conversion into a visual image.]

The term "minor" means any person under the age of eighteen years.

ANNOTATIONS AND COMMENTS

18 USC § 2252(a)(1) provides:

> Any person who - -
>
> > knowingly transports or ships in interstate or foreign commerce by any means including by computer . . . any visual depiction, if - -
> >
> > > (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> > >
> > > (B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

Cited in Usry v. Cherer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Fifteen (15) years and applicable fine when Defendant has no prior conviction. Not less than five (5) nor more than thirty (30) years and applicable fine when Defendant has prior conviction.

Definition of the relevant terms is taken from 18 USC § 2256.

See United States v. X-citement Video, Inc., 513 U.S. 64, 115 S.Ct. 464, 471-72 (1994), setting out the scienter requirement.

The explanation of the term "lascivious exhibition" is derived from United States v. Dost, 636 F.Supp. 828, 832 (S.D. Ca. 1986), a decision that has been cited with approval by three circuits and many other district courts.

75.2
Receiving And Distributing Material Involving Sexual Exploitation Of Minors
18 USC § 2252(a)(2)

Title 18, United States Code, Section 2252(a)(2), makes it a Federal crime or offense for any person to knowingly [receive] [distribute] any visual depiction [that has been mailed] [that has been shipped or transported in interstate or foreign commerce by any means] [including by computer], if the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [received] [distributed] a visual depiction;

Second: That such visual depiction [was mailed] [was shipped or transported in interstate or foreign commerce by any means] [including computer];

Third: That the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Fourth: That such visual depiction is of a minor engaged in sexually explicit conduct; and

Fifth: That the Defendant knew that at least one of the performers in such visual depiction was a minor and knew that the visual depiction was of such minor engaged in sexually explicit conduct.

[The term "visual depiction" includes undeveloped film and videotape, and data stored on computer disc or by electronic means which is capable of conversion into a visual image.]

The term "minor" means any person under the age of eighteen years.

The term "interstate or foreign commerce" means the movement of property from one state to another state or from one state to another country. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.]

The term "sexually explicit conduct" means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person.

Regarding the last type of sexually explicit conduct - - "lascivious exhibition" - - not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In determining whether a visual depiction constitutes a lascivious exhibition, you should consider the context and setting in which the genitalia or pubic area is being displayed. You may consider the overall content of the material. You may also consider such factors as whether the focal point of the visual depiction is on the minor's genitalia or pubic area, or whether there is some other focal point. You may consider whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive; for example, in a location or in a pose associated with

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

sexual activity. In addition, you may consider whether the minor appears to be displayed in an unnatural pose or in inappropriate attire. You may also consider whether the minor is partially clothed or nude. You may consider whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity, and whether the depiction appears to have been designed to elicit a sexual response in the viewer. Of course, a visual depiction need not involve all of these factors to be a lascivious exhibition.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

18 USC § 2252(a)(2) provides:

> Any person who - -
>
> > knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, . . . if - -
> >
> > > (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> > >
> > > (B) such visual depiction is of such conduct;
> >
> > shall be punished as provided in subsection (b) of this section.

Maximum Penalty: Fifteen (15) years and applicable fine when Defendant has prior conviction under this chapter or chapter 109A.

Ten (10) years and applicable fine when Defendant has no prior conviction under this chapter or chapter 109A.

Definition of the relevant terms is taken from 18 USC § 2256.

See United States v. X-citement Video, Inc., 513 U.S. 64, 115 S.Ct. 464, 471-72 (1994).

The explanation of the term "lascivious exhibition" is derived from United States v. Dost, 636 F.Supp. 828, 832 (S.D. Ca. 1986), a decision that has been cited with approval by three circuits and many other district courts.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

75.3
Child Pornography
Transporting Or Shipping
18 USC § 2252A(a)(1)

Title 18, United States Code, Section 2252A(a)(1), makes it a Federal crime or offense for any person to knowingly [transport] [ship] [mail] any child pornography in interstate or foreign commerce [including by computer].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [transported] [shipped] [mailed] [by computer] in interstate or foreign commerce an item or items of "child pornography," as charged; and

Second: That at the time of such [transportation] [shipment] [mailing] [by computer] the Defendant believed that such item[s] constituted or contained "child pornography" as hereafter defined.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "interstate or foreign commerce" means the movement of property from one state to another state or from one state to another country. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

[The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.]

The term “child pornography” means any visual depiction including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where [the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct] [such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term “minor” means any person under the age of eighteen (18) years.

[The term “identifiable minor” means a person [who was a minor at the time the visual depiction was created, adapted, or modified] [whose image as a minor was used in creating, adapting or modifying

the visual depiction] and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; provided that the Government is not required to prove the actual identity of the identifiable minor.]

The term "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.

The term "sexually explicit conduct" means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or public area of any person.

Regarding the last type of sexually explicit conduct - - "lascivious exhibition" - - not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In determining whether a visual

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

depiction constitutes a lascivious exhibition, you should consider the context and setting in which the genitalia or pubic area is being displayed. You may consider the overall content of the material. You may also consider such factors as whether the focal point of the visual depiction is on the minor's genitalia or pubic area, or whether there is some other focal point. You may consider whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive; for example, in a location or in a pose associated with sexual activity. In addition you may consider whether the minor appears to be displayed in an unnatural pose or in inappropriate attire. You may also consider whether the minor is partially clothed or nude. You may consider whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity, and whether the depiction appears to have been designed to elicit a sexual response in the viewer. Of course, a visual depiction need not involve all of these factors to be a lascivious exhibition.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 2252A(a)(1) provides:

> (a) any person who - - (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including computer any

child pornography [shall be guilty of an offense against the United States].

Maximum Penalty: Fifteen (15) years and applicable fine when Defendant has no prior conviction; not less than five (5) nor more than thirty (30) years and applicable fine when Defendant has prior conviction.

Definition of the relevant terms is taken from 18 USC § 2256. However, the key term "child pornography" is limited to the definitions given in 18 USC § 2256(8)(A) and (C). Subsections (B) and (D) of that section were declared to be "overbroad and unconstitutional" in Ashcroft v. The Free Speech Coalition, _____ U.S. _____, 122 S.Ct. 1389 (2002).

Note that 1998 amendment to § 2252A added subsections (c) and (d) allowing certain affirmative defenses.

United States v. X-Citement Video, Inc., 513 U.S. 64, 111 S.Ct. 464 (1992) held that 18 USC § 2252(a)(1) and (2) requires proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contains as an element scienter the age of the performer. See United States v. Acheson, 195 F.3d 645, 653 (11th Cir. 1999) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age.)

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The explanation of the term "lascivious exhibition" is derived from United States v. Dost, 636 F.Supp. 828, 832 (S.D. Ca. 1986), a decision that has been cited with approval by three circuits and many other district courts.

75.4
Child Pornography
Receiving, Possessing, Distributing
18 USC § 2252A(a)(2)(A) and (5)(B)

Title 18, United States Code, makes it a Federal crime or offense for any person to knowingly [receive] [possess] [distribute] any child pornography that has been [transported] [shipped] [mailed] in interstate or foreign commerce [including by computer].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [received] [possessed] [distributed] an item or items of child pornography, as charged;

Second: That such item[s] of child pornography had been [transported] [shipped] [mailed] in interstate or foreign commerce [including by computer], as charged; and

Third: That at the time of such [reception] [possession] [distribution] the Defendant believed that such item[s] constituted or contained child pornography, as hereafter defined.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

The term “interstate or foreign commerce” means the movement of property from one state to another state or from one state to another country. The term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. It is not necessary for the Government to prove that the Defendant knew that the alleged child pornography had moved in interstate or foreign commerce, only that it had so moved.

[The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term “child pornography” means any visual depiction including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where [the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct] [such visual depiction has been created, adapted, or

modified to appear that an identifiable minor is engaging in sexually explicit conduct].

The term "minor" means any person under the age of eighteen (18) years.

[The term "identifiable minor" means a person [who was a minor at the time the visual depiction was created, adapted, or modified] [whose image as a minor was used in creating, adapting or modifying the visual depiction] and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; provided that the Government is not required to prove the actual identity of the identifiable minor.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.

The term "sexually explicit conduct" means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or public area of any person.

Regarding the last type of sexually explicit conduct - - "lascivious exhibition" - - not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In determining whether a visual depiction constitutes a lascivious exhibition, you should consider the context and setting in which the genitalia or pubic area is being displayed. You may consider the overall content of the material. You may also consider such factors as whether the focal point of the visual depiction is on the minor's genitalia or pubic area, or whether there is some other focal point. You may consider whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive; for example, in a location or in a pose associated with sexual activity. In addition you may consider whether the minor appears to be displayed in an unnatural pose or in inappropriate attire. You may also consider whether the minor is partially clothed or nude. You may consider whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity, and whether the

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

depiction appears to have been designed to elicit a sexual response in the viewer. Of course, a visual depiction need not involve all of these factors to be a lascivious exhibition.

ANNOTATIONS AND COMMENTS

18 USC § 2252A(a)(2)(A) and (5)(B) provides:

> (a) any person who - -
>
> (2) knowingly receives or distributes - -
>
> (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
>
> * * * *
>
> (5) either - -
>
> * * * *
>
> (B) knowingly possess any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, [shall be guilty of an offense against the United States].

Cited in U.S. v. Oberer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Fifteen (15) years and applicable fine when Defendant has no prior conviction; not less than five (5) nor more than thirty (30) years and applicable fine when Defendant has prior conviction.

Definition of the relevant terms is taken from 18 USC § 2256. However, the key term "child pornography" is limited to the definitions given in 18 USC § 2256(8)(A) and (C). Subsections (B) and (D) of that section were declared to be "overbroad and unconstitutional" in Ashcroft v. The Free Speech Coalition, _____ U.S. _____, 122 S.Ct. 1389 (2002).

Note that 1998 amendment to § 2252A added subsections (c) and (d) allowing certain affirmative defenses.

United States v. X-Citement Video, Inc., 513 U.S. 64, 111 S.Ct. 464 (1992) held that 18 USC § 2252(a)(1) and (2) requires proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contains as an element scienter the age of the performer. See United States v. Acheson, 195 F.3d 645, 653 (11th Cir. 1999) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age.)

The explanation of the term "lascivious exhibition" is derived from United States v. Dost, 636 F.Supp. 828, 832 (S.D. Ca. 1986), a decision that has been cited with approval by three circuits and many other district courts.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

76
Interstate Transportation Of A Stolen Motor Vehicle 18 USC § 2312

Title 18, United States Code, Section 2312, makes it a Federal crime or offense for anyone to transport, or cause to be transported in interstate commerce, a stolen motor vehicle.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant transported, or caused to be transported, in interstate commerce, a stolen motor vehicle, as described in the indictment; and

Second: That the Defendant did so willfully, and with knowledge that the motor vehicle had been stolen.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The word "stolen" includes any wrongful and dishonest taking of a motor vehicle with the intent to deprive the owner of the rights and benefits of ownership.

It does not matter whether the Defendant stole the car or someone else did, but, to find the Defendant guilty you must find that the Defendant transported it or caused it to be transported, in interstate commerce, with knowledge that it had been stolen.

The term "interstate commerce" means commerce between one state and another state, the District of Columbia, or any commonwealth, territory, or possession of the United States. If a motor vehicle is driven under its own power or otherwise transported across state lines from one state to another it has been transported in interstate commerce.

ANNOTATIONS AND COMMENTS

18 USC § 2312 provides:

> Whoever transports in interstate commerce a motor vehicle . . . knowing the same to have been stolen, [shall be guilty of an offense against the United States].

Cited in U.S. v. Chester No. 06-10642, archived on January 28, 2008

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

Definition of State taken from 18 USC § 2313(b), also referred to in definition of interstate commerce 18 USC § 10.

See 18 USC § 2312 (crime not limited simply to person driving the car across state lines).

77
Sale Or Receipt Of A Stolen Motor Vehicle
18 USC § 2313

Title 18, United States Code, Section 2313, makes it a Federal crime or offense for anyone [to receive] [to possess] [to conceal] [to store] [to sell] [to dispose of] any [motor vehicle] [aircraft] which has crossed a State or United States boundary after being stolen, knowing it to have been stolen.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant willfully [received] [possessed] [concealed] [stored] [sold] [disposed of] a stolen motor vehicle, as described in the indictment, with knowledge that the motor vehicle had been stolen; and

Second: That at the time the Defendant did so, the motor vehicle had crossed a State or United States boundary after having been stolen.

The indictment alleges that the Defendant received, possessed, concealed, stored, sold and disposed of a certain motor vehicle. The law specifies these several different ways in which the offense can be committed, and it is not necessary for the Government to prove that all of such acts were in fact committed. The Government must prove

beyond a reasonable doubt that the Defendant either received, possessed, concealed, stored, sold or disposed of the motor vehicle; but, in order to return a verdict of guilt you must agree unanimously upon the way in which the offense was committed.

The word "stolen" includes any wrongful and dishonest taking of a motor vehicle with the intent to deprive the owner of the rights and benefits of ownership.

Also, while it must be proved that the Defendant knew that the vehicle had been stolen, it is not necessary to prove that the Defendant knew that the vehicle had crossed a State or United States boundary after it had been stolen.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

The word "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

ANNOTATIONS AND COMMENTS

18 USC § 2313 provides:

> Whoever receives, possesses, conceals, stores, . . . sells or disposes of any motor vehicle . . . which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen, [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

The requirement that the jury unanimously agree upon the way in which the offense was committed is mandated by United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

Where "concealment" is an issue, see United States v. Casey, 540 F.2d 811 (5th Cir. 1976).

See definition of "State" at 18 USC § 2313(b).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

78.1
Interstate Transportation Of Stolen Property
18 USC § 2314
(First Paragraph)

Title 18, United States Code, Section 2314, makes it a Federal crime or offense for anyone to transport, or to cause to be transported in interstate commerce, property which has been [stolen] [converted] [taken by fraud] and has a value of $5,000 or more.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant [transported] [transmitted] [transferred] or caused to be [transported] [transmitted] [transferred] in interstate commerce, items of [stolen property] [converted property] [property taken by fraud] as described in the indictment;

Second: That such items had a value of $5,000 or more; and

Third: That the Defendant transported the items willfully and with knowledge that the property had been [stolen] [converted] [taken by fraud].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The word "stolen" includes any wrongful and dishonest taking of property with the intent to deprive the owner of the rights and benefits of ownership.] [The word "converted" means the unauthorized exercise of control over the property of another inconsistent with the owner's

rights.] [The term “taken by fraud” means to deceive or cheat someone out of property by means of false or fraudulent pretenses, representations or promises.]

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

It does not matter whether the Defendant [stole the property] [converted the property] [took the property by fraud] or someone else did, but to find the Defendant guilty, you must find that the Defendant knew it had been [stolen] [converted] [taken by fraud].

The term "interstate commerce" includes any movement or transportation of goods, wares, merchandise, securities or money from one state into another state, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

18 USC § 2314 (first paragraph) provides:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

The language "or caused to be transported," although not found in the first paragraph of the statute, has been expressly allowed by United States v. Block, 755 F.2d 770 (11th Cir. 1985).

In United States v. LaSpesa, 956 F.2d 1027, 1035 (11th Cir. 1992), the Eleventh Circuit held that 18 USC § 2314 prohibits interstate wire transfers of stolen money.

In United States v. Baker, 19 F.3d 605, 614 (11th Cir. 1994), the Eleventh Circuit held that the substitution of "stolen or taken by fraud" for "stolen" in the jury instructions was allowable under the statute, where the property in question was taken by fraud.

The definition of State taken from 18 USC § 2313(b).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

78.2
Causing Interstate Travel In Execution Of A Scheme To Defraud
18 USC § 2314
(Second Paragraph)

Title 18, United States Code, Section 2314, makes it a Federal crime or offense for anyone to transport someone or induce someone to travel in interstate commerce for the purpose of executing a scheme to defraud that person of money [property].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant transported or caused to be transported, or induced travel by, in interstate commerce, the person named in the indictment;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That such travel was caused or induced by the Defendant in the execution [concealment] of a scheme to defraud such person as charged in the indictment;

Third: That the Defendant knew the scheme was fraudulent and acted with intent to defraud; and

Fourth: That the purpose of the scheme to defraud was to obtain money or property from such person having a value of $5,000 or more.

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

The term "interstate commerce" includes any movement or transportation of a person or persons from one state into another state, the District of Columbia, or any commonwealth, territory, or possession of the United States.

The word "scheme" includes any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived.

A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half-truth, or effectively conceals a material fact, with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether or not to engage in a particular transaction.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

ANNOTATIONS AND COMMENTS

18 USC § 2314 (second paragraph) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

79
Sale Or Receipt Of Stolen Property
18 USC § 2315
(First Paragraph)

Title 18, United States Code, Section 2315, makes it a Federal crime or offense for anyone to knowingly [receive] [possess] [conceal] [dispose of] stolen property which has a value of $5,000 or more and which has crossed a State or United States boundary after being stolen, taken or unlawfully converted.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant [received] [possessed] [concealed] [stored] [disposed of] items of stolen property as described in the indictment;

Second: That such items had crossed a State or United States boundary after having been stolen, unlawfully converted, or unlawfully taken;

Third: That the Defendant knew the property had been stolen, unlawfully converted or taken; and

Fourth: That such items had a value in excess of $5,000.

The indictment alleges that the Defendant received, possessed, concealed, stored, sold and disposed of certain stolen property. The

law specifies these several different ways in which an offense can be committed, and it is not necessary for the Government to prove that all of those acts were in fact committed. The Government must prove beyond a reasonable doubt that the Defendant either received, possessed, concealed, stored, sold or disposed of the stolen property; and, in order to return a verdict of guilt you must agree unanimously upon the way in which the offense was committed.

Also, in order to commit the offense charged, a Defendant must know that the property had been stolen, but the Defendant need not know that it had crossed a State or United States boundary after being stolen. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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

ANNOTATIONS AND COMMENTS

18 USC § 2315 (first paragraph) provides:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, merchandise, securities or money

> of the value of $5,000 or more, . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, the same to have been stolen, unlawfully converted, or taken [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

See United States v. King, 87 F.3d 1255, 1256 (11th Cir. 1996) reciting the elements of the offense as stated in this instruction.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

80
Coercion And Enticement Of A Minor To Engage In Sexual Activity 18 USC § 2422(b)

Title 18, United States Code, Section 2422(b), makes it a Federal crime or offense for anyone, using [the mail or] any facility of interstate or foreign commerce [including transmissions by computer on the internet], to knowingly [persuade] [induce] [entice] [coerce] anyone under eighteen (18) years of age to engage in [prostitution] any sexual activity for which any person could be charged with a criminal offense.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly used [the mail] [a computer] [describe other interstate facility as alleged in indictment] to attempt to persuade, induce, entice [or coerce] an individual under the age of eighteen (18) to engage in sexual activity, as charged;

Second: That the Defendant believed that such individual was less than eighteen (18) years of age;

Third: That if the sexual activity had occurred, the Defendant could have been charged with a criminal offense under the law of [identify the state]; and

Fourth: That the Defendant acted knowingly and willfully.

It is not necessary for the Government to prove that the individual was in fact less than 18 years of age; but it is necessary for the Government to prove that Defendant believed such individual to be under that age.

Also, it is not necessary for the Government to prove that the individual was actually persuaded or induced or enticed [or coerced] to engage in sexual activity; but it is necessary for the Government to prove that the Defendant intended to engage in some form of unlawful sexual activity with the individual and knowingly and willfully took some action that was a substantial step toward bringing about or engaging in that sexual activity.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

So, the Government must prove that if the intended sexual activity had occurred, the Defendant could have been charged with a criminal offense under the laws of [state].

In that regard I instruct you as a matter of law that the following acts are crimes under [state] law. [Describe the applicable state law].

ANNOTATIONS AND COMMENTS

18 USC § 2422(b) provides:

> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be [guilty of an offense against the United States].

Maximum Penalty: Fifteen (15) years imprisonment and applicable fine.

United States v. Farmer, 251 F.3d 510 (5th Cir. 2001). The Defendant need not know the age of the intended victim so long as he believes that the victim is under eighteen.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

81
Failure To Appear
(Bail Jumping)
18 USC § 3146

Title 18, United States Code, Section 3146, makes it a Federal crime or offense for anyone who has been released on bail in this Court to thereafter [knowingly fail to appear when required to do so] [knowingly fail to surrender for service of sentence pursuant to a Court order].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant had been admitted to bail pursuant to an order of a Judge or Magistrate Judge of this Court, as charged;

Second: That the Defendant thereafter knowingly [failed to appear before a Judge or Magistrate Judge of this Court as required] [failed to surrender for service of sentence pursuant to a Court order]; and

Third: That the offense charged in the case in which the Defendant had been released on bail was punishable by a term of [state maximum punishment applicable to the charged offense].

It is an affirmative defense to a prosecution for failure to appear or "bail jumping" - - and the Defendant would not be guilty - - if (a)

uncontrollable circumstances prevented the Defendant from appearing; (b) the Defendant did not [himself] [herself] contribute to the creation of such circumstances in reckless disregard of the requirement to appear; and (c) the Defendant then appeared as soon as such circumstances ceased to exist.

ANNOTATIONS AND COMMENTS

18 USC § 3146 provides:

> (a) Offense. - - Whoever, having been released under this chapter knowingly - -
>
> (1) fails to appear before a court as required by the conditions of release; or
>
> (2) fails to surrender for service of sentence pursuant to a court order.
>
> * * * * *
>
> (c) Affirmative defense.–It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Varies according to severity of the penalty applicable to the most serious charge made in the underlying case. See 18 USC § 3146(b).

The third element of the offense is submitted to the jury under the principle of Apprendi.

82
Unlawful Possession Of Food Stamps
7 USC § 2024(b)

Title 7, United States Code, Section 2024(b), makes it a Federal crime or offense for anyone to knowingly [transfer] [acquire] [possess] United States Department of Agriculture Food Stamp [coupons] [authorization cards] [access devices] in any manner contrary to law or Department regulations, where the Food Stamp [coupons] [authorization cards] [access devices] have a value of $5,000 or more.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant [transferred] or [acquired] the Food Stamp [coupons] [authorization cards] [access devices] in a manner contrary to law or Department of Agriculture regulations, as charged;

Second: That the Defendant knew that his [transfer] [acquisition] of the Food Stamp [coupons] [authorization cards] [access devices] was in a manner unauthorized by the law; and

Third: That the Food Stamp coupons had a value of $5,000 or more.

You are instructed that it is contrary to Department of Agriculture regulations [to sell or purchase Food Stamp [coupons] [authorization

cards] [access devices] for cash] [to transfer or acquire Food Stamp [coupons] [authorization cards] [access devices] in exchange for clothes, drugs, cigarettes or liquor].

For the purpose of determining the value of Food Stamp coupons, you should place a value on them equal to their face value.

ANNOTATIONS AND COMMENTS

7 USC § 2024(b) provides:

> . . . whoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter [7 USC §§ 2011 et seq.] or the regulations issued pursuant to this chapter shall, if such coupons, authorization cards, or access devices are of a value of $5,000 or more, be guilty of a felony.

Cited in U.S. v. Chemer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Shall be fined not more than $250,000 or imprisoned for not more than twenty (20) years, or both, and [smaller penalties for violations at lower dollar levels]. 7 USC § 2024(b).

The knowledge element of the statute has been analyzed in Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); see also United States v. Saldana, 12 F.3d 160, 162-63 (9th Cir. 1993).

Food Stamps "may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible food . . . ." 7 CFR § 278.2(a) (1995).

83.1
Bringing In Aliens
8 USC § 1324(a)(1)(A)(i)

Title 18, United States Code, Section 1324(a)(1)(A)(i), makes it a Federal crime or offense for anyone knowingly to [bring] [attempt to bring] an alien into the United States at a place other than a designated point of entry.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly [brought] [attempted to bring] into the United States the person named in the indictment;

Second: That such person was then an alien;

Third: That the Defendant knew such person to be an alien; and

Fourth: That entry into the United States was [made] [attempted] at a place other than a designated port of entry.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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.

ANNOTATIONS AND COMMENTS

8 USC § 1324 provides:

> 1(A) Any person who - -
>
> (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years and applicable fine.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

83.2
Unlawfully Transporting Aliens
8 USC § 1324(a)(1)(A)(ii)

Title 8, United States Code, Section 1324(a)(1)(A)(ii), makes it a Federal crime or offense for anyone, knowing [or acting in reckless disregard of the fact] that an alien is in the United States illegally, to transport such alien in furtherance of the alien's illegal presence.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That an alien [entered] or [remained in] the United States in violation of 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 knowingly transported the alien within the United States in furtherance of the alien's unlawful purpose. [and]

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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To act with "reckless disregard" means to be aware of, but consciously and carelessly ignore, facts and circumstances clearly

indicating that the person transported was an alien who had entered or remained in the United States in violation of 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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

8 USC § 1324(a)(1)(A)(ii) provides:

> (1)(A) Any person who - -
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in

furtherance of such violation of law [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years and applicable fine.

There is disagreement among the circuits regarding the mens rea for this offense. In United States v. Barajas-Chavez, 162 F.3d 1285, 1288 (10th Cir. 1999), the court found that a defendant must act "wilfully" in furtherance of an alien's violation of law. The Fifth Circuit Pattern Instruction 2.03 requires that the "defendant transported the alien . . . with intent to further the alien's unlawful presence." As the notes to that instruction explain, the statute does not contain a willfulness requirement and the Fifth Circuit has rejected the argument that "willful transportation" is an element of § 1324(a)(1)(A)(ii). United States v. Rivera, 838 F.2d 1359, 1361 (5th Cir. 1989). The Committee believes that the legislative history supports the conclusion that § 1324(a)(1)(A)(ii) only requires that the Defendant knowingly transport the alien in furtherance of the alien's violation of law. See H.R.Rep. No. 682(I), 99th Cong., 2d Sess. 65 (1986), reprinted in 1986 U.S. Code Cong. and Adm. News, 5649 at 5669-70.

The statute describes aggravating factors raising the statutory maximum penalty which, under the principle of Apprendi, 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 USC § 1324(a)(1)(B)(i); whether the Defendant caused serious bodily injury (as defined in 18 USC § 1365) to a person or placed a person's life in jeopardy (8 USC § 1324(a)(1)(B)(iii)); or whether death resulted (8 USC § 1324(a)(1)(B)(iv)).

Cited in U.S. v. Cherian, No. 06-10642, archived on January 28, 2008

83.3
Concealing Or Harboring Aliens
8 USC § 1324(a)(1)(A)(iii)

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

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

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

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

Third: That the Defendant either knew or acted in reckless disregard of the fact that the alien [entered] [remained in] the United States in violation of law.[and]

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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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.

To act with "reckless disregard" means to be aware of, but consciously and carelessly ignore, facts and circumstances clearly indicating that the person transported was an alien who had entered or remained in the United States in violation of law.

To [conceal] [harbor] [shield from detection] includes any knowing conduct by the Defendant tending to substantially facilitate an alien's escaping detection thereby remaining in the United States illegally.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

8 USC § 1324(a)(1)(A)(iii) provides:

> (1)(A) Any person who - -
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation [shall be guilty of an offense against the United States].

The statute describes aggravating factors raising the statutory maximum penalty which, under the principle of Apprendi, 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 USC § 1324(a)(1)(B)(i); whether the Defendant caused serious bodily injury (as defined in 18 USC § 1365) to a person or placed a person's life in jeopardy, 8 USC § 1324(a)(1)(B)(iii); or whether death resulted, 8 USC § 1324(a)(1)(B)(iv).

84
Illegal Entry By Deported Alien
8 USC § 1326

Title 8, United States Code, Section 1326, makes it a Federal crime or offense for an alien - - someone who is not a natural-born or naturalized citizen, or a national of the United States - - to [enter] [be found in] the United States after the alien had been [deported] [excluded] [removed] at some earlier time.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant was an alien at the time alleged in the indictment;

<u>Second</u>: That the Defendant had previously been [deported] [excluded] [removed] from the United States;

<u>Third</u>: That the Defendant thereafter [knowingly reentered] [was found to be voluntarily in] the United States; and

<u>Fourth</u>: That the Defendant had not received the consent of the Attorney General of the United States to apply for readmission to the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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.

ANNOTATIONS AND COMMENTS

8 USC § 1326(a) provides:

> any alien who - -
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be [guilty of an offense against the United States].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Two years imprisonment and applicable fine.

Specific intent is not an element of the unlawful reentry offense. United States v. Ramos-Quirarte, 935 F.2d 162, 163 (9th Cir. 1991). For the mistake of law defense see United States v. Espinoza-Leon, 873 F.2d 743, 746-47 (4th Cir.), cert. denied, 492 U.S. 924 (1989); United States v. Miranda-Enriquez, 842 F.2d 1211, 1213 (10th Cir. 1988), cert. denied, 488 U.S. 836 (1988).

An alien who approaches a port of entry and makes a false claim of citizenship or nonresident alien status has attempted to enter the United States. United States v. Cardenas-Alvarez, 987 F.2d 1129, 1132-33 (5th Cir. 1993).

Surreptitious reentry is not a prerequisite to prosecution for being "found" in the United States. United States v. Ortiz-Villegas, 49 F.3d 1435, 1436 (9th Cir.), cert. denied, 116 S.Ct. 134 (1995).

On statute of limitations, "continuing offense" and tolling issues, see United States v. Rivera-Ventura, 72 F.3d 277 (2d Cir. 1995) and United States v. Castrillon-Gonzalez, 77 F.3d 403 (11th Cir. 1996) (discussing when a § 1326 violation commences and is completed).

Lawfulness of the prior detention is not an element of the § 1326 offense. United States v. Holland, 876 F.2d 1553, 1555 (11th Cir. 1989). According to the Ninth Circuit, "[t]he government merely needs to prove that a deportation proceeding actually occurred with the end result of [the defendant] being deported." United States v. Medina, 236 F.3d 1028, 1031 (9th Cir. 2001). However, a Defendant can preclude the Government from relying on a prior deportation if the deportation proceeding was so procedurally flawed that it "effectively eliminated the right of the alien to obtain judicial review" Id. (citations omitted). To successfully make this collateral attack, the Defendant must show that the prior deportation was fundamentally unfair and that he or she was prejudiced by the error. Id. (citations omitted).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Surreptitious reentry is not a prerequisite to prosecution of being "found" in the United States. United States v. Gay, 7 F.3d 200, 202 (11th Cir. 1993).

For a discussion of how the Government can prove entry and attempted entry see United States v. Barnes, 244 F.2d 331, 334 (2nd Cir. 2001) and United States v. Angeles-Mascote, 206 F.3d 529, 531 (5th Cir. 2000).

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

Proof of the Defendant's commission of an aggravated felony prior to deportation is not an element of the offense; rather, it is a punishment provision used in addressing recidivism. Almendarez-Torres v. United States, 523 U.S. 224, 247-48 (1998) further discussed but not overruled in Apprendi v. New Jersey, 530 U.S. 446, 484-97 (2000). Until Almendarez-Torres is overruled, the Eleventh Circuit has held that it has the duty to follow it as United States Supreme Court precedent even though it may conflict with the reasoning in Apprendi. United States v. Thomas, 242 F.3d 1028, 1035 (11th Cir. 2001).

85
Controlled Substances
(Possession With Intent To Distribute)
21 USC § 841(a)(1)

Title 21, United States Code, Section 841(a)(1), makes it a Federal crime or offense for anyone to possess a "controlled substance" with intent to distribute it.

_____ is a "controlled substance" within the meaning of the law.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant knowingly and willfully possessed _____ as charged;

<u>Second</u>: That the Defendant possessed the substance with the intent to distribute it; and

<u>Third</u>: That the weight of the _____ possessed by the Defendant was in excess of _____ as charged.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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.

[The Defendant[s] [is] [are] charged in the indictment with [distributing] [possessing with intent to distribute] a certain quantity or weight of the alleged controlled substance[s]. However, you may find [the] [any] Defendant guilty of the offense if the quantity of the controlled substance[s] for which [he] [she] should be held responsible is less than the amount or weight charged. Thus the verdict form prepared with respect to [the] [each] Defendant, as I will explain in a moment, will require, if you find [the] [any] Defendant guilty, to specify on the verdict your unanimous finding concerning the weight of the controlled substance attributable to the Defendant.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

21 USC § 841(a) provides:

> . . . it shall be unlawful for any person knowingly or intentionally - -
>
> (1) to . . . possess with intent to . . . distribute . . . a controlled substance . . . .

Maximum Penalty: Depends upon the nature and weight of the substance involved. See 21 USC § 841(b).

The Committee recognizes - - and cautions - - that sentence enhancing factors subject to the principle of Apprendi, including weights of controlled substances under 21 USC § 841(b), are not necessarily "elements" creating separate offenses for purposes of analysis in a variety of contexts. See United States v. Sanchez, 269 F.3d 1250, 1257 fn. 51 (11th Cir. 2001) en banc, cert. denied, _____ U. S. _____, 122 S.Ct. 1327 (2002). Even so, the lesser included offense model is an appropriate and convenient procedural mechanism for purposes of submitting sentence enhancers to a jury when required by the principle of Apprendi. This

would be especially true in simpler cases involving single Defendants. See Special Instruction 10 and the verdict form provided in the Annotations And Comments following that instruction. If the lesser included offense approach is followed, using Special Instruction 10 and its verdict form, then the bracketed language in this instruction explaining the significance of weights and the use of a special verdict form specifying weights, should be deleted.

Alternatively, in more complicated cases, if the bracketed language in this instruction concerning weights is made a part of the overall instructions, followed by use of the special verdict form below, then the Third element of the instructions defining the offense should be deleted. The following is a form of special verdict that may be used in such cases.

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment. [Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he] [she] [distributed] [possessed with intent to distribute] [conspired to possess with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[(a) Marijuana - -
(i) Weighing 1000 kilograms or more ☐
(ii) Weighing 100 kilograms or more ☐
(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -
(i) Weighing 5 kilograms or more ☐
(ii) Weighing 500 grams or more ☐
(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -
(i) Weighing 50 grams or more ☐
(ii) Weighing 5 grams or more ☐
(iii) Weighing less than 5 grams ☐]

SO SAY WE ALL.

_____
Foreperson

Date:_____

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

86
Controlled Substances
(Unlawful Use Of Communications Facility)
21 USC § 843(b)

Title 21, United States Code, Section 843(b), makes it a separate Federal crime or offense for anyone to knowingly use a communication facility in committing, or "facilitating" the commission of, another offense in violation of [Section 841(a)(1) such as the crime charged in Count _____].

The Defendant can be found guilty of the offense of unlawful use of a communication facility as charged in Count _____ only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant used a "communication facility," as charged;

Second: That the Defendant used the communication facility while in the process of committing, or to "facilitate" the commission of, the offense charged in Count _____ of the indictment; and

Third: That the Defendant acted knowingly and willfully.

The term "communication facility" includes all mail, telephone, wire, radio, and computer-based communication systems.

To "facilitate" the commission of a crime merely means to use a communication facility in a way which aids or assists the commission of the crime. The Government does not have to prove, however, that the other crime - - the facilitated offense - - was successfully carried out or completed.

ANNOTATIONS AND COMMENTS

21 USC § 843(b) provides:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter.

Cited in U.S. v. Cherer No. 06-10642, archived on January 28, 2008

Maximum Penalty: Four (4) years imprisonment and $30,000 fine. § 843(c).

"Each separate use of a communication facility shall be a separate offense under this subsection." § 843(b)

"Communication facility" means "any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio and all other means of communication." § 843(b). In addition to wire-based e-mail (e.g. on the Internet), computers can now communicate via microwave, FM-frequency, infrared and by other non-wire based media. The statute, however, contemplates **"any and all"** forms of communication facilities.

87
Controlled Substances
(Conspiracy)
21 USC § 846, 955c and/or 963

Title 21, United States Code, Section[s] [846] [955c] [963] make it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of [Section 841(a)(1)] [Section 952(a)]. [Section 841(a)(1) makes it a crime for anyone to knowingly possess _____ with intent to distribute it.] [Section 952(a) makes it a crime for anyone to knowingly import _____ into the United States from some place outside the United States.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

So, under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is <u>not</u> necessary for the Government to prove that all of the people named in the indictment were members of the scheme, <u>or</u> that those who <u>were</u> members had entered into any formal type of agreement. Also, because the essence of a conspiracy offense is the making of the scheme itself, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it; and

Third: That the object of the unlawful plan was to [possess with intent to distribute] [import] more than _____ _____ of _____, as charged.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has a general understanding of the unlawful purpose of the plan (including the nature and anticipated weight of the substance involved) and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, 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, standing alone, establish proof 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 one, does not thereby become a conspirator.

[The Defendant[s] [is] [are] charged in the indictment with [distributing] [conspiracy to possess with intent to distribute] a certain quantity or weight of the alleged controlled substance[s]. However, you may find [the] [any] Defendant guilty of the offense if the quantity of the controlled substance[s] for which [he] [she] should be held responsible is less than the amount or weight charged. Thus the verdict form prepared with respect to [the] [each] Defendant, as I will explain in a moment, will require, if you find [the] [any] Defendant guilty, to specify on the verdict your unanimous finding concerning the weight of the controlled substance attributable to the Defendant.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

21 USC § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter [Sections 801 through 904] [shall be guilty of an offense against the United States].

21 USC § 963 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter [Sections 951 through 966] [shall be guilty of an offense against the United States].

Maximum Penalty: Both sections (846 and 963) provide that the penalty shall be the same as that prescribed for the offense which was the object of the conspiracy.

The "knowledge" elaboration upon the pre-existing version of this pattern charge is taken from United States v. Knowles, 66 F.3d 1146, 1155 (11th Cir. 1995).

Unlike 18 USC § 371 (general conspiracy statute), no overt act need be alleged or proved under either § 846 or § 963, United States v. Shabani, ___ U.S. ___, 115 S.Ct. 382, 385-86 (1994); United States v. Ricardo, 619 F.2d 1124, 1128 (5th Cir.), cert. denied, 449 U.S. 1063 (1980), nor does the absence of that requirement violate the First Amendment. United States v. Pulido, 69 F.3d 192, 209 (7th Cir. 1995).

Termination of a conspiracy instruction discussed in United States v. Knowles, 66 F.3d 1146, 1157 (11th Cir. 1995) (no plain error in failing to instruct on this point); see also United States v. Belardo-Quinones, 71 F.3d 941, 944 (1st Cir. 1995).

Acts of concealment are not part of the original conspiracy. United States v. Knowles, 66 F.3d 1146, 1155-56 (11th Cir. 1995).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

For comparative citations analyzing the "mere presence" and "mere association" concepts, see United States v. Lopez-Ramirez, 68 F.3d 438, 440-41 (11th Cir. 1995).

The distinction between conspiracy to commit crime and aiding and abetting in its commission (they are distinct offenses) is illuminated in United States v. Palazzolo, 71 F.3d 1233, 1237 (6th Cir. 1995).

For a discussion of the "buyer-seller rule" (one who merely purchases drugs for personal use does not thereby become a member of a drug distribution conspiracy), see United States v. Ivy, 83 F.3d 1266, 1285 (10th Cir. 1996), cert. denied, 519 U.S. 901, 117 S.Ct. 253.

The Committee recognizes - - and cautions - - that sentence enhancing factors subject to the principle of Apprendi, including weights of controlled substances under 21 USC § 841(b), are not necessarily "elements" creating separate offenses for purposes of analysis in a variety of contexts. See United States v. Sanchez, 269 F.3d 1250, 1257 fn. 51 (11th Cir. 2001) en banc, cert. denied, _____ U. S. _____, 122 S.Ct. 1327 (2002). Even so, the lesser included offense model is an appropriate and convenient procedural mechanism for purposes of submitting sentence enhancers to a jury when required by the principle of Apprendi. This would be especially true in simpler cases involving single Defendants. See Special

Instruction 10 and the verdict form provided in the Annotations And Comments following that instruction. If the lesser included offense approach is followed, using Special Instruction 10 and its verdict form, then the bracketed language in this instruction explaining the significance of weights and the use of a special verdict form specifying weights, should be deleted.

Alternatively, in more complicated cases, if the bracketed language in this instruction concerning weights is made a part of the overall instructions, followed by use of the special verdict form below, then the Third element of the instructions defining the offense should be deleted. The following is a form of special verdict that may be used in such cases.

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment. [Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he] [she] [distributed] [possessed with intent to distribute] [conspired to possess with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[(a) Marijuana - -
(i) Weighing 1000 kilograms or more ☐
(ii) Weighing 100 kilograms or more ☐
(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -
(i) Weighing 5 kilograms or more ☐
(ii) Weighing 500 grams or more ☐
(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -
(i) Weighing 50 grams or more ☐
(ii) Weighing 5 grams or more ☐
(iii) Weighing less than 5 grams ☐]

SO SAY WE ALL.

_____
Foreperson

Date:_____

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

88.1
Controlled Substances
(Continuing Criminal Enterprise)
21 USC § 848

Title 21, United States Code, Section 848, makes it a Federal crime or offense for anyone to engage in what is called a "continuing criminal enterprise" involving controlled substances.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant violated [Section 841(a)(1)] [Section 952(a)] the Florida narcotics laws as charged in Counts _____ of the Indictment, respectively;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Second: That such violations were a part of a "continuing series of violations," as hereafter defined;

Third: That the Defendant engaged in that "continuing series of violations" in concert or together with at least five (5) or more other persons with respect to whom the Defendant occupied the position of an organizer, supervisor or manager;

Fourth: That the Defendant obtained substantial income or resources from the "continuing series of violations."

[Fifth: That the Defendant was a principal administrator, organizer, or leader of the enterprise and [the weight of

> the _____ involved in the commission of the offense was at least _____] [the enterprise received $10 million dollars in gross receipts during any twelve month period of its existence.]

A "continuing series of violations" means proof of at least three violations of the Federal controlled substances laws, as charged in Counts _____ of the indictment, and also requires a finding that those violations were connected together as a series of related or on-going activities as distinguished from isolated and disconnected acts. In addition, you must unanimously agree about which three [or more] violations the Defendant committed.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Government must prove that the Defendant engaged in the "continuing series of violations" with at least five or more other persons, whether or not those persons are named in the indictment and whether or not the same five or more persons participated in each of the violations, or participated at different times. And, it must prove that the Defendant's relationship with the other five or more persons was that of an organizer, supervisor or manager - - that the Defendant was more than a fellow worker and either organized or directed the activities of the others, whether the Defendant was the only organizer or supervisor or not. Also, the Defendant may be shown to have delegated authority to

a subordinate and need not have had personal contact with each of the five or more persons whom [he] [she] organized, supervised or managed through directions given to someone else.

Finally, the Government must prove that the Defendant obtained "substantial income or resources" from the continuing series of violations, meaning that the Defendant's income from the violations, in money or other property (but not necessarily any profit), must have been significant in size or amount as distinguished from some relatively insubstantial, insignificant or trivial amount.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

21 USC § 848(c) provides:

> . . . a person is engaged in a continuing criminal enterprise if - -
>
> (1) he violates any provision of [sections 801 through 966] the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of [sections 801 through 966] - -
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Maximum Penalty: Not less than twenty (20) years and up to life imprisonment, and applicable fine.

Mere buyer-seller relationship does not satisfy management requirement; organizer is one who arranges the activities of others into an orderly operation. United States v. Witek, 61 F.3d 819, 821-24 (11th Cir. 1995), cert. denied, 116 S.Ct. 738 (1996).

The Government must prove at least three felony narcotics violations to establish a continuing series of violations. United States v. Church, 955 F.2d 688, 695 (11th Cir. 1992), cert. denied, ____ U.S. ____, 113 S.Ct. 233 (1992); United States v. Alvarez-Moreno, 874 F.2d 1402, 1408-09 (11th Cir. 1989), cert. denied, 494 U. S. 1032, 110 S.Ct. 1484, 108 L.Ed.2d 620 (1990).

The jury, however, "must agree unanimously about which three crimes the defendant committed." Richardson v. United States, 526 U.S. 813, 818, 119 S.Ct. 1707 (1999) (emphasis added); Santana-Madera v. United States, 260 F.3d 133, 137 (2nd Cir. 2001).

Failure to instruct on the "Richardson" unanimity requirement has been held to be plain error, but not reversible error, absent prejudice. United States v. Stewart, 256 F.3d 231, 255 (4th Cir. 2001); United States v. Stitt, 250 F.3d 878, 883 (4th Cir. 2001); Monsanto v. United States, 143 F.Supp.2d 273, 280 (S.D. N.Y. 2001).

Cited in U.S. v. Cherena, No. 06-10642 archived on January 28, 2008

How "related" must the three violations be? See United States v. Maull, 806 F.2d 1340, 1343 (8th Cir. 1986) ("Continuing offense" for purpose of continuing criminal enterprise statute is continuous illegal act or series of acts driven by single impulse and operated by unintermittent force).

Whether a § 846 conspiracy can count as one of the three required offenses is debated in United States v. Baker, 905 F.2d 1100, 1103 (7th Cir. 1990), cited in 2B Fed. Jury Prac. & Instr. § 66.05 (5th ed. 2000).

In any event, the use of unindicted offenses is permissible in obtaining a conviction under § 848. The violations need not be charged or even set forth as predicate acts in the indictment. Hence, the law only requires evidence that the defendant committed three substantive offenses to provide the predicate for a § 848 violation, regardless of whether such offenses were charged in counts of the indictment or in separate indictments. What is important is proof that there was indeed a far-flung operation. Whether this has led to other convictions is all but irrelevant to the nature of the CCE offense. United States v. Alvarez-Moreno, 874 F.2d 1402, 1408-09 (11th Cir. 1989).

The "organizer, supervisor, or manager of a CCE" wording is known as the "management element" and "is given a 'common sense reading,' bearing in mind that the statute is intended to reach the leaders of the drug trade." United States v. Stewart, 256 F.3d 231, 255 (4th Cir. 2001). Hence, "[a] mere buyer-seller

relationship does not satisfy § 848's management requirement." United States v. Witek, 61 F.3d 819, 822 (11th Cir. 1992).

A defendant who supervises three persons who, in turn, supervise the activities of several others, can be found to have supervised and managed "five or more other persons" under § 848. Thus, if "a defendant personally hires only the foreman, that defendant is still responsible for organizing the individuals hired by the foreman to work as the crew . . . . [M]ere delegation of authority does not detract from [the defendant's] ultimate status as organizer." United States v. Rosenthal, 793 F.2d 1214, 1226 (11th Cir. 1986), modified on other grounds, 801 F.2d 378 (11th Cir. 1986); United States v. Heater, 63 F.3d 311, 317 (4th Cir. 1995) ("the Government need not prove that the five individuals were supervised and acted in concert at the same time, or even that [they] were collectively engaged in at least one specific offense") (quotes and cite omitted; brackets original). Indeed, "the government need not show that the defendant ha[d] personal contact with the five persons because organizational authority and responsibility may be delegated." Heater, 63 F.3d at 317 (quotes and cite omitted).

In contrast to the "three-violation" requirement, the jury need not unanimously agree on which five persons the defendant organized, supervised, or managed. United States v. Moorman, 944 F.2d 801, 802-03 (11th Cir. 1991); United States v. Stitt, 250 F.3d 878, 885-86 (4th Cir. 2001); Fifth Cir. Pattern Jury Instr. § 2.90 at 265 ("note") (2001) (collecting cases).

Cited in U.S. v. Cherek, No. 06-10642, archived on January 28, 2008

Jury instructions must be crafted in light of the double jeopardy considerations addressed in Rutledge v. United States, 517 U.S. 292, 296-307 (1996), as explained in United States v. Escobar-de Jesus, 187 F.3d 148, 152 n.8, 173 n.24 (1st Cir. 1999), cert. denied, 529 U.S. 1176 (2000). For example, a § 846 drug conspiracy is a lesser included offense of the CCE charge, so if the defendant is convicted under § 846, the "in concert" element of an § 848 conviction cannot rest on the same agreement as the § 846 conspiracy. Rutledge, 517 U.S. at 307 (an § 846 "conspiracy is therefore a lesser included offence of CCE"); see also United States v. Vigneau, 2001 WL 273094 at * 1 (1st Cir. 2001) (unpublished) (Convicting defendant of conspiracy to distribute marijuana, based on same conduct that supported conviction for engaging in a continuing criminal enterprise, violated the double jeopardy clause).

88.2
Controlled Substances
(Continuing Criminal Enterprise - - Murder)
21 USC § 848(e)

Title 21, United States Code, Section 848(e) makes it a Federal crime or offense to intentionally [kill] [command or procure the intentional killing] of someone while engaging in or working to further a continuing criminal enterprise.

The Defendant can be found guilty of that offense only if you find the Defendant guilty of engaging in a Continuing Criminal Enterprise as charged in Count _____, and the following facts are also proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant [intentionally killed the victim] [intentionally commanded, induced, procured or caused the killing of the victim], as charged in Count _____ of the indictment;

Second: That such killing occurred because of, and as a part of, the Defendant's engaging in or working in furtherance of the continuing criminal enterprise charged in Count _____ of the indictment; and

Third: The Defendant acted knowingly and willfully.

ANNOTATIONS AND COMMENTS

21 USC § 848(e) provides:

> (A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death . . . .

21 USC § 848(e) is a separate, chargeable offense; conviction thereunder requires a connection between the underlying continuing criminal enterprise and the murder. United States v. Chandler, 996 F.2d 1073, 1096-98 (11th Cir. 1993), cert. denied, 512 U.S. 2724, 114 S.Ct. 2724 (1994).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

88.3
Controlled Substances
(Death Penalty - Supplemental Instructions)
21 USC § 848(e) et seq.
Preliminary Instruction

You have unanimously found the Defendant guilty of Count ____ ____ of the indictment, which charged the Defendant with [intentionally killing] [commanding or procuring the intentional killing] of an individual while engaged in or working in furtherance of a continuing criminal enterprise. Title 21, United States Code, Section 848(e), provides that the punishment for that offense may be death.

You will now hear additional evidence and will then decide whether to recommend a sentence of death. You cannot recommend a sentence of death unless you find certain aggravating factors to exist and, if so, whether those aggravating factors sufficiently outweigh any mitigating factors to justify a sentence of death. Or, in the absence of mitigating factors, whether the aggravating factors alone are sufficient to justify a sentence of death.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

An aggravating factor is a fact or circumstance specified by law which might indicate, or tend to indicate, that a sentence of death may be justified. A mitigating factor is any fact or circumstance that might indicate, or tend to indicate, that a sentence of death may not be justified.

You will now hear evidence from each party relevant to your determination of whether aggravating and/or mitigating factors exist. After the parties present their evidence, I will give you additional instructions which will guide you during your deliberations.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

88.4
Controlled Substances
(Death Penalty - Supplemental Instructions)
Substantive Instruction

As I told you before, you now must consider whether to recommend a sentence of death for the Defendant. During your deliberations you must consider whether any aggravating factors are present. You must unanimously agree in order to find that an aggravating factor exists.

The law provides a list of aggravating factors you may consider. The Government has the burden of proving aggravating factors, and it must prove them beyond a reasonable doubt. A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence. 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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The fundamental aggravating factor the Government alleges in this case is that the Defendant - -

[intentionally killed the victim; or]

[intentionally inflicted serious bodily injury which resulted in the death or the victim; or]

[intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; or]

[intentionally engaged in conduct which - -

(i) the Defendant knew would create a grave risk of death to a person other than one of the participants in the offense; and

(ii) which resulted in the death of the victim.]

If the Government does not satisfy each of you beyond a reasonable doubt that this fundamental aggravating factor exists, then you should return a finding to that effect, and cease further deliberations.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

If you unanimously find beyond a reasonable doubt that the fundamental aggravating factor does exist, then you should determine whether the Government has proved beyond a reasonable doubt that one or more of the following aggravating factors also exists:

[Choose applicable factors charged in the indictment]

(1) The Defendant has previously been convicted of either a Federal offense or a State offense resulting n the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(2) The Defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of serious bodily injury upon another person.

(3) The Defendant has previously been convicted of two or more State or Federal offenses punishable by a term of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(4) In the commission of the offense or in escaping apprehension for commission of the offense, the Defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(5) The Defendant procured the commission of the offense by payment, or promise of payment, of anything of monetary value.

(6) The Defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of monetary value.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

(7) The Defendant committed the offense after substantial planning and premeditation.

(8) The victim was particularly vulnerable due to old age, youth, or infirmity.

(9) The Defendant had previously been convicted of violating [21 USC § 801 et seq.] or [21 USC § 951 et seq.] for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(10) The violation of this title in relation to which the conduct described in subsection (e) occurred was a violation of 21 USC § 859, which prohibits distribution of a controlled substance to anyone under twenty-one years of age.

(11) The Defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

If you do not unanimously find beyond a reasonable doubt that at least one of these additional aggravating factors exists, then you should return a finding to that effect, and no further deliberations will be necessary regardless of whether any mitigating factors exist.

[If you find the fundamental aggravating factor present, and you find one or more of the above aggravating factors present, you may also find one or more of the following aggravating factors was present: [insert special factors, if any, of which the prosecution gave Defendant notice under 21 USC § 848(k)].]

You should confine your deliberations to the aggravating factors I have outlined above. If you find any aggravating factors to exist, you should note your finding in the appropriate place on the Verdict Form.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

In addition to aggravating factors, you must also consider any mitigating factors that are present. The finding that mitigating factors are present does not require unanimous or even majority agreement. Any one of you may find, by a preponderance of the evidence, that a mitigating factor or factors exist. "Preponderance of the evidence" simply means an amount of evidence which is enough to persuade you that a mitigating factor is more likely present than not.

Mitigating factors for you to consider include the following:

(1) The Defendant's capacity to appreciate the wrongfulness of the Defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The Defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The Defendant is punishable as a principal in the offense, which was committed by another, but the Defendant's participation was relatively minor, regardless of whether such minor participation would constitute a defense to the charge.

(4) The Defendant could not reasonably have foreseen that the Defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the Defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

(5) The Defendant was youthful, even though the Defendant was over the age of eighteen.

(6) The Defendant did not have a significant prior criminal record.

(7) The Defendant committed the offense under severe mental or emotional disturbance.

(8) Another Defendant or Defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the Defendant's background or character mitigate against imposition of the death sentence.

There is a space provided on the Verdict Form to enter which of the mitigating factors you find present. You may write them on the form, but you are not required to.

If, after weighing the aggravating and mitigating factors, you determine that the aggravating factors found to exist sufficiently outweigh the mitigating factors; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a sentence of death be imposed rather than some lesser sentence. Regardless of your findings with respect to aggravating and mitigating factors, however, you are never required to recommend a sentence of death.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

If you do decide to recommend a sentence of death, you must do so unanimously, and all twelve of you must sign the Recommendation Form to that effect. If you do decide to recommend a sentence of death, the Court is required to impose that sentence.

In reaching your findings concerning aggravating and mitigating factors in this case, the instructions I gave you prior to your deliberations in the guilt phase of the trial regarding determination of credibility issues apply equally here. In other words, you alone determine the credibility of the witnesses and the weight to give to their

testimony and to the other evidence. Also, in determining whether to recommend a sentence of death, you must avoid any influence of passion or prejudice. Your deliberation and verdict should be based upon the evidence you have seen and heard and the law on which I have instructed you. While it is your duty to follow the instructions of the Court, any statement, question, ruling, remark, or other expression that I have made at any time during this trial, during the guilt phase or during the sentencing phase, should not be considered by you as an indication of any opinion I might have on the sentence that should be imposed.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In deciding what recommendation to make, do not be concerned about what sentence the Defendant might receive if you do not recommend a sentence of death. That is a matter for me to decide in the event you conclude that a sentence of death should not be recommended.

In considering whether or not to recommend a sentence of death, you shall not consider the race, color, religious beliefs, national origin, or sex of the Defendant or the victim, and you should not recommend a sentence of death unless you conclude that you would recommend a sentence of death for the crime in question no matter what the race,

color, religious beliefs, national origin, or sex of the Defendant, or the victim, may be. The verdict form will contain a certification to this effect which each of you must sign.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weights or values by different jurors. In your decision making process, you, and you alone, are to decide what weight is to be given to a particular factor.

Your only interest is to seek the truth from the evidence and to determine in the light of that evidence and the Court's instructions whether to recommend a sentence of death. If you do not recommend a sentence of death, the Court is required by law to impose a sentence other than death, which sentence is to be determined by the Court alone. Let me admonish you again, while you may recommend a sentence of death, you are not required to do so.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

The first thing you should do is elect a foreperson who may be the same one that served you during the guilt phase, or it may be someone else. He or she will preside over your deliberations and will speak for you here in Court.

A verdict form has been prepared for you.

[Explain Verdict Form]

When you have reached your decision, the foreperson will fill in the verdict form, and each of you will sign it.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the Marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

Cited in U.S. v. Cheever, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

21 USC § 848(e) et seq.

Statute held to be Constitutional. United States v. Chandler, 996 F.2d 1073 (11th Cir. 1993), cert. denied, 512 U.S. 2724, 114 S.Ct. 2724 (1994).

Jury may find aggravating factors other than those listed in statute only if it finds one aggravating factor listed in 21 USC §848(n)(1) and one or more aggravating factors listed in (n)(2)-(12). 21 USC § 848(k).

According to the Fourth Circuit, the Eighth Amendment does not require the jury to be instructed that defendant will be sentenced to live in prison without parole if he is not sentenced to death. United States v. Stitt, 250 F.3d 878, 888-89 (4th Cir. 2001); see also id. at 889-93 (In analyzing whether a Simmons instruction on parole

ineligibility is required in a particular case, a court must take into account the particular characteristics of the sentencing scheme at issue).

21 USC § 848(k), which governs the "Return of Findings" (what the jury must specify on its "special findings" verdict form) in sentencing a CCE defendant, does not allow a jury to make a binding recommendation on any sentence other than that of death. Chandler, 996 F.2d at 1084-85; United States v. Flores, 63 F.3d 1342, 1369 (5th Cir. 1995).

The Second Circuit has held that those who aid and abet the commission of drug-related murders are death-penalty eligible. United States v. Walker, 142 F.3d 103, 113 (2ND Cir. 1998). But jury instructing in this area can involve some subtle nuances. See United States v. Wingo, 2001 WL 279755 at * 3 (E.D. Mich. 1/23/01) (unpublished).

Use of deadly weapon in a murder, the Tenth Circuit has held, may be used as a nonstatutory aggravating factor; but use of a duplicative aggravating factor is error. United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996). "the jury may take into account as an aggravating factor at sentencing the circumstances of the crime, even if such information necessarily duplicates elements of the underlying offense, so long as that factor is not duplicative of another aggravating factor." United States v. Johnson, 136 F.Supp.2d 553, 559 (W.D. Va. 2001); see also United States v. McVeigh, 944 F.Supp. 1478, 1490 (D. Colo. 1996); United States v. Bin Laden, 126 F.Supp.2d 290, 301 (S.D. N.Y. 2001).

Cited in U.S. v. Cheek, No. 06-10642, archived on January 28, 2008

Courts also must be mindful of the elements to be submitted to the jury as required by Apprendi v. New Jersey, 530 U.S. 466 (2000). See Fifth Cir Pattern Jury Instr. § 2.90 at 266 ("Note") (2001) ("When the Government seeks the death penalty under 21 USC § 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 USC § 848(e)(2)").

The Federal Rules of Evidence do not apply to penalty phase hearings under § 848. United States v. Chandler, 996 F.2d 1073, 1090 (11th Cir. 1993) ("although the Federal Rules of Evidence do not govern the admissibility of evidence during a Section 874(e) sentencing hearing it is helpful to refer to the definition of relevant evidence from the Federal Rules").

Unanimity is not required on mitigating factors. See, e.g., United States v. Flores, 63 F.3d 1342, 1375 (5th Cir. 1995)

89
Possession Of Controlled Substance Near Schools Or Public Housing
21 USC § 860

Title 21, United States Code, Section 860, makes it a Federal crime or offense of anyone to possess a "controlled substance" with intent to distribute it within 1,000 feet of [a school] [real property comprising a housing facility owned by a public housing authority].

_____ is a "controlled substance" within the meaning of the law.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly and willfully possessed _____ as charged;

Second: That the Defendant possessed the _____ with the intent to distribute it;

Third: That the Defendant intended to distribute the substance at some place within 1,000 feet of [a school] [a housing facility owned by a public housing authority]; and

Fourth: That the weight of the _____ was in excess of _____ as charged.

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.

ANNOTATIONS AND COMMENTS

21 USC § 860 provides:

> Any person who violates section 841(a)(1) or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Twice the applicable penalty under 21 USC § 841(b).

Where the indictment alleges a factor that would enhance the possible maximum punishment applicable to the offense, that factor should be stated as an additional element in the instructions under the principle of Apprendi. In such case it may also be appropriate to give a lesser included offense instruction, Special Instruction 10, or use a special verdict form (with associated instructions concerning the use of the verdict). (See Annotations And Comments following Offense Instruction 85.

90
Controlled Substances
Importation
21 USC § 952(a)

Title 21, United States Code, Section 952(a), makes it a Federal crime or offense for anyone to knowingly import any controlled substance into the United States.

_____ is a controlled substance within the meaning of the law.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant imported _____ _____ into the United States from a place outside thereof, as charged;

<u>Second</u>: That the Defendant did so knowingly and willfully; and

<u>Third</u>: That the weight of the imported ___ _____ by the Defendant was in excess of _____ as charged.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To "import" a substance means to bring or transport that substance into the United States from some place outside the United States.

ANNOTATIONS AND COMMENTS

21 USC § 952(a) provides:

> It shall be unlawful to import into . . . the United States from any place outside thereof, any controlled substance . . . .

Maximum Penalty: Varies depending upon weight and nature of substance involved. See 21 USC § 960.

Belief that the Defendant is importing a controlled substance satisfies knowledge element even if Defendant believes the substance being imported is a different controlled substance. United States v. Rodriguez-Suarez, 856 F.2d 135, 140 (11th Cir. 1988); United States v. Restrepo-Granda, 575 F.2d 524, 527-29 (5th Cir. 1978).

Importation is a continuing crime and is not complete until the controlled substance reaches its final destination. United States v. Camargo-Vergaga, 57 F.3d 993 (11th Cir. 1995).

The evidence may warrant a deliberate indifference instruction. United States v. Arias, 984 F.2d 1139 (11th Cir. 1993). See Special Instruction 8.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

Where the indictment alleges a factor that would enhance the possible maximum punishment applicable to the offense, that factor should be stated as an additional element in the instructions under the principle of Apprendi. In such case it may also be appropriate to give a lesser included offense instruction, Special Instruction 10, or use a special verdict form (with associated instructions concerning the use of the verdict). (See Annotations And Comments following Offense Instruction 85.

91
Possession Or Transfer Of Non-Tax-Paid Distilled Spirits
26 USC §§ 5604(a)(1) and 5301(d)

Title 26, United States Code Sections 5604(a)(1) and 5301(d) make it a Federal crime or offense for anyone to knowingly [transport] [possess] [buy] [sell] [transfer] any distilled spirits unless the immediate container bears a closure evidencing compliance with the Internal Revenue laws.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant knowingly [transported] [possessed] [bought] [sold] [transferred] distilled spirits, as charged; and

<u>Second</u>: That the immediate containers of the distilled spirits did not bear a closure or other device as required by law.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A "closure or other device as required by law" means a closure that is designed to require breaking in order to gain access to the contents of the container, such as a seal, <u>and</u> was affixed to the container at the time it was withdrawn from bonded premises or from customs custody.

[The indictment charges that the Defendant [transported] [possessed] [bought] [sold] [transferred] distilled spirits in an unlawful manner. The law specifies those different modes or ways in which the offense can be committed, and it is not necessary for the Government to prove that the Defendant violated the statute in each or all of those ways. It is sufficient if the Government proves beyond a reasonable doubt that the Defendant either [transported] [possessed] [bought] [sold] [transferred] distilled spirits in an unlawful manner; but, in order to return a verdict of guilty, you must agree unanimously upon which way the offense was committed.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

26 USC § 5604(a) provides:

> Any person who shall - -
>
> (1) transport, possess, buy, sell, or transfer any distilled spirits unless the immediate container bears the type of closure or other device required by section 5301(d) ["The immediate container of distilled spirits withdrawn from bonded premises, or from customs custody, on determination of tax shall bear a closure or other device which is designed so as to require breaking in order to gain assess to the contents of such container."], [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and $250,000 fine. See 26 USC § 5604 and 18 USC § 3571.

92.1
Possession Of Unregistered Firearm
26 USC § 5861(d)

Title 26, United States Code, Section 5861(d), makes it a Federal crime or offense for anyone to possess certain kinds of firearms that are not registered to [him] [her] in the National Firearms Registration and Transfer Record.

Title 26, United States Code, Section 5845, defines "firearm" as including [describe firearm as alleged in the indictment, viz., a shotgun having a barrel of less than 18 inches in length.]

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Oberer, No. 06-10642, archived on January 28, 2008

First: That the Defendant possessed a "firearm," as defined above;

Second: That the "firearm" was not then registered to the Defendant in the National Firearms Registration and Transfer Record; and

[Third: That the Defendant knew of the specific characteristics or features of the firearm that caused it to be registrable under the National Firearms Registration and Transfer Record.]

You will notice that it is not necessary for the Government to prove that the Defendant knew that the item described in the indictment

was a "firearm" which the law requires to be registered; it is sufficient if the Government has proved beyond a reasonable doubt that the Defendant knew or was aware of the specific characteristics or features of the firearm that caused it to be within the scope of the Act, namely, [describe essential feature] defined above, and that it was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

26 USC § 5861(d) provides:

> It shall be unlawful for any person . . . to . . . possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record. . .
>
> [Note: For the definition of "firearm" within the context of this statute, see 26 USC § 5845].

Maximum Penalty: Ten (10) years imprisonment and $250,000 fine. See 26 USC § 5871 and 18 USC § 3571.

In Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), the Court held that in the case of firearms such as fully automatic as distinguished from semiautomatic weapons, where the essential difference between registrable and nonregistrable characteristics is not open and obvious, the Government must prove knowledge on the part of the Defendant with respect to those essential characteristics of the firearm in question. Thus, in such a case, the instruction to the jury must be expanded to so state. Still where the essential characteristics of the firearm making it registerable are known, it is not necessary for the Government to prove that the Defendant also knew that registration was required. United States v. Owens, 103 F.3d 953 (11th Cir. 1997). This instruction has been amended to provide the optional Third element in a case like Staples, and meets the suggestion made in United States v. Moore, 253 F.3d 607 (11th Cir. 2001).

92.2
Possession Of Firearm Having Altered Or Obliterated Serial Number
26 USC § 5861(h)

Title 26, United States Code, Section 5861(h) makes it a Federal crime or offense for anyone to possess a firearm having an [altered] [obliterated] serial number.

The term "firearm," as defined by Title 26, United States Code, Section 5845, includes the kind of firearm or weapon described in the indictment.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant, at the time and place charged in the indictment, knowingly possessed the "firearm" described in the indictment;

Second: That the "firearm" serial number had been [obliterated] [altered]; and

Third: That the Defendant knew that the serial number had been [obliterated] [altered].

ANNOTATIONS AND COMMENTS

26 USC § 5861(h) provides:

> It shall be unlawful for any person . . . (h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered.
>
> [Note: For the definition of "firearm" within the context of this statute, see 26 USC § 5845.]

Maximum Penalty: Ten (10) years imprisonment and $250,000 fine. See 26 USC § 5871 and 18 USC § 3571.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

93.1
Tax Evasion
(General Charge)
26 USC § 7201

Section 7201 of the Internal Revenue Code (26 USC 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant owed substantial income tax in addition to that declared in [his] [her] tax return; and

Second: That the Defendant knowingly and willfully attempted to evade or defeat such tax.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the Defendant had knowledge and an understanding that, during the particular tax year involved, [he] [she] had income which was taxable, and which the Defendant was required by law to report; but that [he] [she]

nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which [he] [she] knew [he] [she] had during that year.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business, regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common non-taxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

ANNOTATIONS AND COMMENTS

26 USC §7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and $250,000 fine (or $500,000 in the case of a corporation), plus the costs of prosecution. See 26 USC § 7201 and 18 USC § 3571.

United States v. Carter, 721 F.2d 1514, (11th Cir. 1984), requires a detailed explanation to the jury concerning the Government's theory-of-proof (Net Worth, Bank Deposits or Cash Expenditures, Instruction Nos. 93.2, 93.3 and 93.4) and it is plain error not to give such an instruction, i.e., no request is necessary.

See Special Instruction 9 for instruction on the concept of intentional violation of a known legal duty as proof of willfulness.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

93.2
Net Worth Method

In this case the Government relies upon the so-called "net worth method" of proving unreported income.

A person's "net worth" at any given date is the difference between such person's total assets and total liabilities on that date. It is the difference between what one owns and what one owes (measuring the value of what one owns by its cost rather than unrealized increases in market value).

If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes and other expenditures, which did not add to the Defendant's net worth at the end of the year, then you may infer that those expenditures also came from

funds received during the year; and, again, if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

Because the "net worth method" of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so long as it is established that the assets owned by the Defendant at that time were insufficient by themselves to account for the subsequent increases in the Defendant's net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the Defendant's net worth was at the beginning of the year, you should find the Defendant not guilty.

Cited in U.S. v. Cherep, No. 06-10642, archived on January 28, 2008

In determining whether or not the claimed net worth of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents

sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the Defendant or which otherwise arose during the investigation concerning other assets the Defendant had at the beginning of the year (or other non-taxable sources of income the Defendant had during the year), then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up; the Government is not required to investigate every conceivable asset or source of non-taxable funds.

Cited in U.S. v. Cherian, No. 06-10642, archived on January 28, 2008

If you decide the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the Defendant's net worth at the beginning of the tax year, and further establishes that any increase in the Defendant's net worth at the end of that year, together with non-deductible expenditures made during the year, did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the

evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that is, income from taxable sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

93.3
Bank Deposits Method

In this case the Government relies upon the so-called "bank deposits method" of proving unreported income.

This method of proof proceeds on the theory that if a taxpayer is engaged in an income producing business or occupation and periodically deposits money in bank accounts in the taxpayer's name or under the taxpayer's control, an inference arises that such bank deposits represent taxable income unless it appears that the deposits represented re-deposits or transfers of funds between accounts, or that the deposits came from non-taxable sources such as gifts, inheritances or loans. This theory also contemplates that any expenditures by the Defendant of cash or currency from funds not deposited in any bank and not derived from a non-taxable source, similarly raises an inference that such cash or currency represents taxable income.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Because the "bank deposits method" of proving unreported income involves a review of the Defendant's deposits and cash expenditures that came from taxable sources, the Government must establish an accurate cash-on-hand figure for the beginning of the tax year. The proof need not show the exact amount of the beginning

cash-on-hand so long as it is established that the Government's claimed cash-on-hand figure is reasonably accurate. So, if you should decide that the evidence does not establish with reasonable certainty what the Defendant's cash-on-hand was at the beginning of the year, you should find the Defendant not guilty.

In determining whether or not the claimed cash-on-hand of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence of other funds at that time. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations which were advanced by the Defendant, or which otherwise arose during the investigation, concerning the Defendant's cash-on-hand at the beginning of the year, then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up; the Government is not required to investigate every conceivable source of non-taxable funds.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

If you decide that the evidence in the case establishes beyond a reasonable doubt that the Defendant's bank deposits together with non-deductible cash expenditures during the year did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional deposits and expenditures represented taxable income (that is, income from taxable sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

93.4
Cash Expenditures Method

In this case the Government relies upon the so-called "cash expenditures method" of proving unreported income. The theory of this method of proof is that if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth exceed the total of the taxpayer's reported income together with non-taxable receipts and available cash at the beginning of the year, then the taxpayer has understated [his] [her] income.

The "cash expenditures method" necessarily involves not only the examination of the Defendant's expenditures and disbursements during the taxable year, but also an examination of the Defendant's "net worth" at the beginning and at the end of that year.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A person's "net worth" at any given date is the difference between such person's total assets and total liabilities on that date. It is the difference between what one owns and what one owes (measuring the value of what one owns by its cost rather than unrealized increases in market value).

If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may

infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.

In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes and other expenditures, which did not add to the Defendant's net worth at the end of the year, then you may infer that those expenditures also came from funds received during the year; and, again, if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Because the "net worth method" of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so

long as it is established that the assets owned by the Defendant at that time were insufficient by themselves to account for the subsequent increases in the Defendant's net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the Defendant's net worth was at the beginning of the year, you should find the Defendant not guilty.

In determining whether or not the claimed net worth of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the Defendant or which otherwise arose during the investigation concerning other assets the Defendant had at the beginning of the year (or other non-taxable sources of income the Defendant had during the year), then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up;

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

the Government is not required to investigate every conceivable asset or source of non-taxable funds.

If you decide the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the Defendant's net worth at the beginning of the tax year, and further establishes that any increase in the Defendant's net worth at the end of that year, together with non-deductible expenditures made during the year, did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that is, income from taxable sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Cited in U.S. v. Cherey, No. 06-10642, archived on January 28, 2008

94
Failure To File Tax Return
26 USC § 7203

Title 26, United States Code, Section 7203, makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when required to do so by the Internal Revenue laws or regulations.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was required by law or regulation to make a return of [his] [her] income for the taxable year charged;

Second: That the Defendant failed to file a return at the time required by law; and

Third: That the Defendant's failure to file the return was willful.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A person is required to make a federal income tax return for any tax year in which [he] [she] has gross income in excess of _____.

"Gross income" includes the following: [(1) Compensation for services, including fees, commissions and similar items; (2) Gross income derived from business; (3) Gains derived from dealing in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8)

Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.]

The Defendant is a person required to file a return if the Defendant's gross income for any calendar year exceeds _____even though the Defendant may be entitled to deductions from that income in a sufficient amount so that no tax is due. So, the Government is not required to prove that a tax was due and owing, or that the Defendant intended to evade or defeat payment of taxes, only that the Defendant willfully failed to file the return.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

26 USC § 7203 provides:

> Any person required [by law or regulation] to . . . make a return . . . who willfully fails to . . . make such return . . . at the time . . . required by law or regulations [shall be guilty of an offense against the United States].

Maximum Penalty: One (1) year imprisonment and $100,000 fine (or $200,000 in the case of a corporation), plus costs of prosecution. See 26 USC § 7203 and 18 USC § 3571.

See Special Instruction 9 for instruction on the concept of intentional violation of a known legal duty as proof of willfulness.

95
Aiding And Abetting Filing False Return
26 USC § 7206(2)

Title 26, United States Code, Section 7206(2), makes it a Federal crime or offense for anyone to willfully aid or assist in the preparation and filing of a Federal income tax return knowing it to be false or fraudulent in some material way.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant aided or assisted in the preparation and filing of an income tax return which was false in a material way as charged in the indictment; and

Second: That the Defendant did so knowingly and willfully.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is "false" if it was untrue when the document was used and was then known to be untrue by the person using it.

A declaration is "material" if it relates to a matter of significance or importance as distinguished from a minor or insignificant or trivial detail. It is not necessary, however, that the Government be deprived of any tax by reason of the filing of the false return, or that it be shown

that additional tax is due, only that the Defendant willfully aided and abetted the filing of a materially false return.

ANNOTATIONS AND COMMENTS

26 USC § 7206(2) provides:

> [Any person who] [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is within the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document [shall be guilty of an offense against the United States].

Cited in U.S. v. Cherner, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Three (3) years imprisonment and $250,000 fine (or $500,000 in the case of a corporation). See 26 USC § 7206 and 18 USC § 3571.

The issue of "materiality" is for the jury, not the court. United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995).

96
False Tax Return
26 USC § 7207

Title 26, United States Code, Section 7207, makes it a Federal crime or offense for anyone to willfully file a Federal income tax return knowing it to be false in some material way.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant filed an income tax return that was false in a material way as charged in the indictment; and

Second: That the Defendant did so knowingly and willfully, as charged.

Cited in U.S. v. Oberer, No. 06-10642, archived on January 28, 2008

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is "false" if it was untrue when the document was used and was then known to be untrue by the person using it.

A declaration is "material" if it relates to a matter of significance or importance as distinguished from a minor, insignificant or trivial detail. It is not necessary, however, that the Government be deprived of any tax by reason of the filing of the false return, or that it be shown

that additional tax is due, only that the Defendant willfully filed a materially false return.

ANNOTATIONS AND COMMENTS

26 USC § 7207 provides:

> Any person who willfully delivers or discloses to the Secretary [of the Treasury] any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter [shall be guilty of an offense against the United States.]

Maximum Penalty: One (1) year imprisonment and $100,000 fine (or $200,000 in the case of a corporation). See 26 USC § 7207 and 18 USC § 3571.

Cited in U.S. v. Cherer No. 08-10642, archived on January 08, 2008

The issue of "materiality" is for the jury, not the Court. United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995). It is not necessary, however, for the Government to prove that any additional tax was due. In Re Haas, 48 F.3d 1153, 1159 (11th Cir. 1995).

97
Impeding Internal Revenue Service
26 USC § 7212(a)

Title 18, United States Code, Section 7212(a), makes it a federal crime or offense for anyone to [corruptly] [forcibly] [endeavor to intimidate or impede any officer or employee of the United States acting in an official capacity under the Internal Revenue laws] [endeavor to obstruct or impede the due administration of the Internal Revenue laws].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

<u>First</u>: That the Defendant knowingly endeavored to obstruct or impede the due administration of the Internal Revenue laws, as charged; and

<u>Second</u>: That the Defendant did so [corruptly] [forcibly].

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[To act "corruptly" means to act knowingly and dishonestly with the specific intent to secure an unlawful benefit either for oneself or for another.]

[To act "forcibly" means the actual use of physical force or threats of force, including any threatening letter or communication; and "threats of force" means threats of bodily harm to the Internal Revenue Officer or members of [his] [her] family.]

To “endeavor” to obstruct or impede means to engage in some act, or to take some step, in a conscious attempt to obstruct or impede; and to “obstruct or impede” means to hinder or prevent or delay, or make more difficult, the due administration of the Internal Revenue laws. However, it is not necessary for the Government to prove that the administration of the Internal Revenue laws was in fact obstructed or impeded in any way, only that the Defendant corruptly endeavored to do so.

Neither is it necessary that the Government prove all of the alleged ways and means of committing the charged offense as stated in the indictment. It would be sufficient if the Government proves beyond a reasonable doubt, that the Defendant committed any one of those alleged ways and means with the corrupt intent to obstruct and impede the due administration of the Internal Revenue laws; provided, however, you must unanimously agree upon which of those alleged ways and means the Defendant corruptly committed.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

26 USC § 7212(a) provides:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, [shall be guilty of an offense against the United States].

Maximum Penalty: Three (3) years imprisonment and applicable fine.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

98
Evading Currency Transaction Reporting Requirement (While Violating Another Law) By Structuring Transaction 31 USC §§ 5322(b) and 5324(3)

Title 31, United States Code, Section 5324(3) makes it a Federal crime or offense for anyone, under certain circumstances, to knowingly evade a currency transaction reporting requirement.

With respect to currency transaction reporting requirements, Title 31, United States Code, Section 5313(a), and the regulations of the Treasury Department under that section, require domestic financial institutions and banks (with certain stated exceptions) to file reports with the Government, called Currency Transaction Reports, Form 4789, disclosing all deposits, withdrawals, transfers or payments involving more than $10,000 in cash or currency.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

So, the Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant had knowledge of the currency transaction reporting requirements;

Second: That with such knowledge, the Defendant knowingly structured or assisted in structuring a currency transaction;

Third: That the purpose of the structured transaction was to evade the transaction reporting requirements; [and]

Fourth: That the structured transaction involved one or more domestic financial institutions; [and]

[Fifth: That the currency transaction with the domestic financial institutions was in furtherance of another violation of federal law.]

To "structure" a transaction means to deposit or withdraw or otherwise participate in the transfer of a total of more than $10,000 in cash or currency by or through a financial institution or bank by setting up or arranging a series of separate transactions, each involving less that $10,000 individually, thereby intentionally evading the currency reporting requirements that would have applied if the transaction had not been so structured.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

31 USC § 5313(a) provides:

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and

denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 USC § 5324(a)(3) and (c)(2) provides:

(a) Domestic coin and currency transactions involving financial institutions. - - No person shall for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section - -

* * * *

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

* * * *

(c) Criminal penalty. - -

(1) In general. - - Whoever violates this section shall be fined in accordance with title 18 United States Code, imprisoned for not more than 5 years, or both.

(2) Enhanced penalty for aggravated cases. - - Whoever violates this section while violating another law of the United States . . . shall be fined twice the amount provided in subsection (b)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In Ratzlaf v. United States, 510 U. S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), the Court held that the Government must prove that the Defendant knew that the structuring was unlawful, but Congress then amended § 5324(c) eliminating the word "willfully." Thus, willfulness is no longer an element of the offense. See Blakely v. United States, 276 F.3d 853, 875 note 10 (6th Cir. 2002).

When the Fifth element is included in the instructions, see Special Instruction 10, Lesser Included Offense(s) And Sentence Enhancers.

99
Fraudulent Receipt of V. A. Benefits
38 USC 6102(b)

Title 38, United States Code, Section 6102(b), makes it a federal crime or offense for anyone to obtain or receive money from the Veterans Administration without being entitled to it and with intent to defraud the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant received, under the laws administered by the V.A., money or a check without being entitled to receive it; and

Second: That the Defendant received the funds with intent to defraud the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

To act "with intent to defraud" means to act knowingly and willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self. It is not necessary, however, to prove that anyone was in fact deceived or defrauded.

The evidence need not show the precise amount of the pension benefits received by the Defendant as alleged in the indictment, but it must be established beyond a reasonable doubt that the Defendant

knowingly and willfully received some substantial portion of such benefits as charged.

ANNOTATIONS AND COMMENTS

38 USC § 6102(b) provides:

> (b) Whoever obtains or receives any money or check under any of the laws administered by the Secretary without being entitled to it, and with intent to defraud the United States or any beneficiary of the United States, shall be fined in accordance with title 18, or imprisoned not more than one year, or both.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

100
Falsely Representing Social Security Number
42 USC § 408(a)(7)(B)

Title 42, United States Code, Section 408(a)(7)(B), makes it a Federal crime or offense for anyone, with the intent to deceive, to falsely represent a number to be the Social Security account number assigned by the Commissioner of Social Security to [him] [her] when in fact such number is not the Social Security account number assigned to [him] [her] by the Commissioner of Social Security.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant knowingly represented to someone that the Social Security number described in the indictment had been assigned to [him] [her] by the Commissioner of Social Security;

Second: That such Social Security number, in fact, had not been assigned at that time to the Defendant by the Commissioner of Social Security; and

Third: That the Defendant made such representation willfully, and with the intent to deceive, for the purpose of [state purpose as alleged in the indictment].

To "act with intent to deceive" simply means to act for the deliberate purpose of misleading someone. It is not necessary for the Government to prove, however, that anyone else was in fact misled or deceived.

ANNOTATIONS AND COMMENTS

42 USC § 408(a)(7)(B) provides:

> Whoever - -
>
> (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person [shall be guilty of an offense against the United States].

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Five (5) years imprisonment and applicable fine.

101
Forceful Intimidation Because Of Race
(Occupancy Of Dwelling - - No Bodily Injury)
42 USC § 3631

Title 42, United Sates Code, Section 3631, makes it a Federal crime or offense for anyone, by force or threat of force, to willfully intimidate or interfere with someone because of his or her race and because he or she has been occupying any dwelling.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant, by force or threat of force, intimated or interfered with, or attempted to intimidate or interfere with the persons named in the indictment, as charged;

Cited in U.S. v. Oberer, No. 06-10642, archived on January 28, 2008

Second: That the Defendant did so because of the race of those persons and because they were occupying a dwelling; and

Third: That the Defendant did so knowingly and willfully.

To use "force" is to do something which causes another person to act against his or her will. To use a "threat of force" or to "intimidate" or "interfere with" means to say or do something which, under the same circumstances, would cause another person of ordinary sensibilities to be fearful of bodily harm if he or she did not comply.

A "dwelling" includes any place where people ordinarily live or reside.

ANNOTATIONS AND COMMENTS

42 USC § 3631 provides:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with . . . (a) any person because of his race . . . and because he is or has been . . . occupying . . . any dwelling [shall be guilty of an offense against the United States].

Maximum Penalty: One (1) year imprisonment and $100,000 fine without bodily injury; Ten (10) years imprisonment and $250,000 fine with bodily injury and/or use of a dangerous weapon, explosive, or fire; or any term of years up to life imprisonment and $250,000 fine if death results or if such acts include kidnapping, aggravated sexual assault or an attempt to kill. See 42 USC § 3631 and 18 USC § 3571.

Cited in U.S. v. Chester No. 06-10642, archived on January 28, 2008

102
Controlled Substances
(Possession On United States Vessel)
46 USC § 1903(a)

Title 46, United States Code, Section 1903(a), makes it a Federal crime or offense for anyone [on board a vessel of the United States] [on board a vessel subject to a jurisdiction of the United States] [who is a citizen of the United States or a resident alien of the United States on board any vessel] to knowingly possess a controlled substance with intent to distribute it.

_____ is a controlled substance within the meaning of the law.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The Defendant can be found guilty of that offense only if each of the following facts is proved beyond a reasonable doubt:

First: That the Defendant was [on board a vessel of the United States] [on board a vessel subject to jurisdiction of the United States] [is a citizen of the United States or a resident alien of the United States on board any vessel];

Second: That the Defendant knowingly and willfully possessed _____, with the intent to distribute it; and

Third: That the weight of the _____ exceeded _____, as charged.

A "vessel of the United States" means any vessel documented under the laws of the United States, any vessel owned in whole or in part by a citizen or a corporation of the United States and not registered or documented by some foreign nation, or a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was either sold to a person not a citizen of the United States or placed under foreign registry or a foreign flag, whether or not the vessel has been granted the nationality of a foreign nation.

A "vessel subject to jurisdiction of the United States" includes any vessel without nationality, and a vessel which purports to sail under the flags of two or more nations may be treated as a vessel without nationality. A "vessel subject to jurisdiction of the United States" also includes a vessel registered in a foreign nation which has consented or waived objection to the enforcement of United States law by the United States; a vessel located within the customs waters of the United States; and a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[The term "customs waters of the United States" includes all water within four leagues or twelve miles of the coast of the United States.]

To "possess with intent to distribute" simply means to knowingly possess with intent to deliver or transfer possession of a controlled substance to another person, with our without any financial interest in the transaction.

ANNOTATIONS AND COMMENTS

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

46 USC § 1903 provides:

> (a) It is unlawful for any person on board a vessel of the United States, on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance.

19 USC § 1401(j) provides:

> (j) The term "customs waters" means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

46 USC § 1903 was formerly codified at 21 USC § 955a-955d.

> "Vessel of the United States" means any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended, or owned in whole or in part by the United States or a citizen of the United States, or a corporation created under the laws of the United States, or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention on the High Seas, 1958. 46 USC §1903(b).

Maximum Penalty: Varies depending upon nature and weight of substance involved. See 21 USC § 960.

The offense of Possession of a Controlled Substance on a United States Vessel in Customs Waters, formerly codified at 21 USC § 955a(c) is now codified as part of 46 USC § 1903 by virtue of Congress including "a vessel located within the customs waters of the United States" as part of the definition for a "vessel subject to jurisdiction of the United States." 46 USC § 1903(c)(1)(D).

Evidence may support a deliberate indifference instruction. See Special Instruction 8.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Vessel sailing under the flag/authority of two or more states is a "vessel assimilated to a vessel without nationality." United States v. Matute, 767 F.2d 1511, 1512-13 (11th Cir. 1985).

Where the indictment alleges a factor that would enhance the possible maximum punishment applicable to the offense, that factor should be stated as an additional element in the instructions under the principle of Apprendi. In such case it may also be appropriate to give a lesser included offense instruction, Special Instruction 10.

103
Assaulting Or Intimidating Flight Crew Of Aircraft In United States (Without Dangerous Weapon) 49 USC § 46504

Title 49 of the United States Code, Section 46504, makes it a Federal crime or offense for anyone to [assault] [intimidate] a flight crew member of attendant on an aircraft in flight in the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was on an aircraft in flight in the United States;

Second: That the Defendant knowingly [assaulted] [intimidated] a flight crew member or flight attendant of the aircraft; and

Third: That such [assault] [intimidation] interfered with the performance of the duties of the flight crew member or flight attendant of the aircraft or lessened the ability of the member or attendant to perform those duties.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The phrase "aircraft in flight" means an aircraft from the moment all external doors are closed following boarding through the moment when one external door is opened to allow passengers to leave the aircraft; therefore, an aircraft does not have to be airborne in order to be deemed an aircraft in flight within the meaning of the applicable law.

[The term "assault" is any intentional and voluntary act or attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the act or attempt or threat is directed in fear of immediate bodily harm.]

[The term "intimidate" has several meanings: It means the use of words or actions to place another person in reasonable apprehension of bodily harm either to that person or to another. It also means the use of words or actions to make another person fearful or make that person refrain from doing something that the person would otherwise do, or do something that the person would otherwise not do.]

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

49 USC § 46504 provides:

> An individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, shall be fined under title 18, imprisoned for not more than 20 years, or both.

Maximum Penalty: Twenty (20) years imprisonment and $250,000 fine.

"Aircraft in flight" and other definitions are set forth in 49 USC § 46501. Note that the definition of the "special aircraft jurisdiction of the United States" varies

depending upon whether the aircraft is owned by the United States and whether the aircraft is in or outside the United States. This charge is based upon the aircraft not being owned by the United States but being in the United States.

This statute does not require any showing of specific intent. United States v. Grossman, 131 F.3d 1449 (11th Cir. 1997).

If venue problems are raised, see United States v. Hall, 691 F.2d 48 (1st Cir. 1982). Further, this case held the offense was committed so long as the crew was responding to defendant's behavior in derogation of their ordinary duties.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

104
Attempting To Board Air Craft With Concealed Weapon Or Explosive Device
49 USC § 46505(b)

Title 49, United States Code, Section 46505(b), makes it a Federal crime or offense for anyone to willfully attempt [to board an aircraft involved in air transportation having on or about one's person a concealed deadly or dangerous weapon] [to have placed aboard an aircraft involved in air transportation any bomb or similar explosive or incendiary device].

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

First: That the Defendant attempted to board an aircraft involved in air transportation, as charged;

Second: That the Defendant knowingly had on or about [his] [her] person [a concealed dangerous weapon which would have been accessible to [him] [her] in flight had [he] [she] boarded the aircraft] [attempted to have placed aboard the aircraft an explosive device]; and

Third: That the Defendant acted willfully and with reckless disregard for the safety of human life.

To "attempt" an act means to knowingly do something which leads toward the accomplishment or fulfillment of the act.

An item is "concealed" if it is hidden from ordinary observation.

ANNOTATIONS AND COMMENTS

49 USC § 46505(b) provides that "[a]n individual shall be fined under title 18, imprisoned for not more than ten years, or both, if the individual - -

> (1) when on, or attempting to get on, an aircraft in, or intended for operation in, air transportation, has on or about the individual or the property of the individual a concealed dangerous weapon that is or would be accessible to the individual in flight;
>
> (2) has placed, attempted to place, or attempted to have placed a loaded firearm on that aircraft in a property not accessible to passengers in flight; or
>
> (3) has on or about the individual, or has placed, attempted to place, or attempted to have placed on that aircraft, an explosive or incendiary device.

Cited in U.S. v. Chenier, No. 06-10642, archived on January 28, 2008

Maximum Penalty: Ten years imprisonment and $250,000 fine. See 49 USC § 4605(b) and 18 USC § 3571. If an individual violates subsection (b) "willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, " the maximum term of imprisonment is 20 years and, if death results to any person, any term of imprisonment including life. See 49 USC § 46505(c).

INDEX TO
TRIAL INSTRUCTIONS

Instruction Number			
1		Preliminary And Explanatory Instructions To Innominate (Anonymous) Jury	588
2	.1	Preliminary Instructions Before Opening Statements (Short Form)	591
	.2	Preliminary Instructions Before Opening Statements (Long Form)	595
3	.1	Notetaking - Permitted	606
	.2	Notetaking - Not Permitted	608
4		Cautionary Instruction - Similar Acts Evidence (Rule 404(b), FRE)	610
5		Explanatory Instruction - Prior Statement Or Testimony Of A Witness	612
6		Explanatory Instruction - Transcript Of Tape Recorded Conversation	613
7		Modified "Allen" Charge	615
8		Forfeiture Proceedings (To be given before supplemental evidentiary proceedings and/or supplemental arguments of counsel)	618

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Preliminary And Explanatory Instructions To Innominate (Anonymous) Jury

Before we proceed to select several from among your number to serve as jurors in this case, I want to comment briefly on a matter that affects both the manner in which we will proceed to select a jury and the manner in which, thereafter, we conduct the trial.

Occasionally trials attract the attention of the media, the public, casual and interested onlookers, and others. The level of public and media interest is often unpredictable and, of course, not within the Court's control. This criminal case, which involves several defendants and which will continue for some time, perhaps will attract more than the usual attention among the media and the public and may, therefore, cause some level of curiosity about the participants - - the lawyers, the witnesses, the defendants, perhaps even the judge and, to some extent, the jurors. Any outside interest in t his proceeding and its participants could come to your attention by, for example, comments, questions, and other attempts by interested persons to contact you and learn more about this case, both during and after the trial. These inquiries, even though well intended not to cause mischief, can nevertheless distract or divert your attention from your duties as a juror, place you in awkward circumstances, inconvenience you or your friends and family, and

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

otherwise create opportunities for unwanted and improper approaches toward you from outside the courtroom.

Notwithstanding any media and public interest in this case, as I will explain in greater detail at a later time, during your service as a juror you must refrain from discussing this proceeding with anyone and, even after the case is concluded, you will never be required to explain your verdict or your jury service to anyone.

Therefore, after consideration of all the attendant circumstances, I have decided that during the selection of those who will serve as jurors and, thereafter, during the term of your service as a juror in this case, your name, your address, and your place of employment - - and any other bit of information that particularly identifies you - - will remain unstated and unavailable to anyone except court personnel. In other words, your names and other identifying information have not been and will not be disclosed. Of course, I know your names, but they will go no further.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In short, during and after these proceedings, we will refer to you only by your juror number. As I said, this will serve to discourage inquiries from those seeking information and otherwise preserve your

privacy over against unwanted and unsolicited publicity, telephone calls, letters, questions, and the like.

ANNOTATIONS AND COMMENTS

The term "innominate" jury (in preference to anonymous jury) is taken from United States v. Ippolito, 10 F.Supp. 1305, 1307 n.1 (M.D. Fla. 1998), as approved in United States v. Carpa, 271 F.3d 962 (11th Cir. 2001) (reversing in part on other grounds).

The selection of an innominate jury is a "drastic measure" but is an approved technique in this Circuit when circumstances warrant. United States v. Ross, 33 F.3d 1507, 1419-1522 (11th Cir. 1994). See also, United States v. Salvatore, 110 F.3d 1131, 1143-1144 (5th Cir. 1997).

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

2.1
Preliminary Instructions Before Opening Statements (Short Form)

Members of the Jury:

You have now been sworn as the jury to try this case. By your verdict(s) you will decide the disputed issues of fact. I will decide all questions of law that arise during the trial, and before you retire to deliberate together and decide the case at the end of the trial, I will instruct you on the rules of law that you must follow and apply in reaching your decision.

Because you will be called upon to decide the facts of the case, you should give careful attention to the testimony and evidence presented for your consideration during the trial, but you should keep an open mind and should not form or state any opinion about the case one way or the other until you have heard all of the evidence and have had the benefit of the closing arguments of the lawyers as well as my instructions to you on the applicable law.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

During the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence; and, insofar as the lawyers are concerned, as well as others whom you may come to

recognize as having some connection with the case, you are instructed that, in order to avoid even the appearance of impropriety, you should have no conversation whatever with those persons while you are serving on the jury.

You must also avoid reading any newspaper articles that might be published about the case now that the trial has begun, and you must also avoid listening to or observing any broadcast news program on either television or radio because of the possibility that some mention might be made of the case during such a broadcast now that the trial is in progress.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case only on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatever.

From time to time during the trial I may be called upon to make rulings of law on motions or objections made by the lawyers. You should not infer or conclude from any ruling I may make that I have any opinions on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the witness, you should not speculate on what answer might have been

given, nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing concerning questions of law or procedure that require consideration by the Court alone. On some occasions you may be excused from the courtroom as a convenience to you and to us while I discuss such matters with the lawyers. I will try to limit such interruptions as much as possible, but you should remember at all times the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

In that regard, as you were told during the process of your selection, we expect the case to last _____, but I will make every effort to expedite the trial whenever possible.

Now, we will begin by affording the lawyers for each side an opportunity to make opening statements to you in which they may explain the issues in the case and summarize the facts they expect the evidence will show. After all the testimony and evidence has been presented, the lawyers will then be given another opportunity to address you at the end of the trial and make their summations or final arguments

in the case. The statements that the lawyers make now, as well as the arguments they present at the end of the trial, are not to be considered by you either as evidence in the case (which comes only from the witnesses and exhibits) or as your instruction on the law (which will come only from me). Nevertheless, these statements and arguments are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for the purpose of making an opening statement.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

2.2
Preliminary Instructions Before Opening Statements (Long Form)

Members of the Jury:

You have now been sworn as the jury to try this case and I would like to give you some preliminary instructions at this time.

By your verdict(s) you will decide the disputed issues of fact. I will decide all questions of law that arise during the trial, and before you retire to deliberate together and decide the case at the end of the trial, I will then instruct you again on the rules of law that you must follow and apply in reaching your decision.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Because you will be called upon to decide the facts of the case you should give careful attention to the testimony and evidence presented for your consideration during the trial, but you should keep an open mind and should not form or state any opinion about the case one way or the other until you have heard <u>all</u> of the evidence <u>and</u> have had the benefit of the closing arguments of the lawyers as well as my instructions to you on the applicable law.

During the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence; and, insofar as the

lawyers are concerned, as well as others whom you may come to recognize as having some connection with the case, you are instructed that, in order to avoid even the appearance of impropriety, you should have no conversation whatever with those persons while you are serving on the jury.

You must also avoid reading any newspaper articles that might be published about the case now that the trial has begun, and you must also avoid listening to or observing any broadcast news program on either television or radio because of the possibility that some mention might be made of the case during such a broadcast now that the trial is in progress.

Cited in U.S. v. Cheeks, No. 06-10642, archived on January 28, 2008

The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case only on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatever.

From time to time during the trial I may be called upon to make rulings of law on motions or objections made by the lawyers. You should not infer or conclude from any ruling I may make that I have any opinions on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the

witness, you should not speculate on what answer might have been given, nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing concerning questions of law or procedure that require consideration by the Court alone. On some occasions you may be excused from the courtroom as a convenience to you and to us while I discuss such matters with the lawyers. I will try to limit such interruptions as much as possible, but you should remember at all times the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

In that regard, as you were told during the process of your selection, we expect the case to last _____, but I will make every effort to expedite the trial whenever possible.

Now, in order that you might better understand at the beginning of the case the nature of the decisions you will be asked to make and how you should go about making them, I would like to give you some preliminary instructions at this time concerning some of the rules of law that will apply.

Of course, the preliminary instructions I will give you now will not cover all of the rules of law applicable to this case. As stated before, I will instruct you fully at the end of the trial just before you retire to deliberate upon your verdict(s), and will probably restate at that time some of the rules I want to tell you about now. In any event, you should not single out any one instruction alone as stating the law, but should consider all of my instructions as a whole.

Presumption of Innocence. As you were told during the process of your selection, an indictment in a criminal case is merely the accusatory paper which states the charge or charges to be determined at the trial, but it is not evidence against the Defendant or anyone else. Indeed, the Defendant has entered a plea of Not Guilty and is presumed by the law to be innocent. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Burden of Proof. Proof beyond a reasonable doubt 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.

Order of Proof - Defendant's Right Not To Testify. Because the Government has the burden of proof it will go forward and present its

testimony and evidence first. After the Government finishes or "rests" what we call its "case in chief," the Defendant may call witnesses and present evidence if [he] [she] wishes to do so. However, you will remember that the law does not require a Defendant to prove [his] [her] innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a Defendant not to testify in the event [he] [she] should so elect.

Credibility Of The Witnesses. As you listen to the testimony you should remember that you will be the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In deciding whether you believe or disbelieve any witness you should consider his or her relationship to the Government or to the Defendant; the interest, if any, of the witness in the outcome of the case; his or her manner of testifying; the opportunity of the witness to observe or acquire knowledge concerning the facts about which he or she testified; the candor, fairness and intelligence of the witness; and the extent to which the witness has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Trial Transcripts Not Available. You will notice that the Court Reporter is making a complete stenographic record of all that is said during the trial, including the testimony of the witnesses, in case it should become necessary at a future date to prepare printed transcripts of any portion of the trial proceedings. Such transcripts, however, if prepared at all, will not be printed in sufficient time or appropriate form for your review during your deliberations, and you should not expect to receive any transcripts. You will be required to rely upon your own individual and collective memory concerning what the testimony was.

Exhibits Will Be Available. On the other hand, any papers and other tangible exhibits received in evidence during the trial will be available to you for study during your deliberations. On some occasions, during the trial, exhibits may be handed to you for brief inspection there in the Jury box; others will not be shown to you. But do not be concerned because, as I said, you will get to see and inspect at the end of the case all of the exhibits that are received in evidence.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Notetaking - Permitted. Because transcripts will not be available, you will be permitted to take notes during the trial if you want to do so, and the Clerk will provide notebooks and pens or pencils for each of

you. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you, individually.

If you do decide to take notes, be careful not to get so involved in notetaking that you become distracted from the ongoing proceedings. Don't try to summarize all of the testimony. Instead, limit your notetaking to specific items of information that might be difficult to remember later such as dates, times, amounts, measurements or identities and relationships. But remember that you must decide upon the credibility or believability of each witness, and you must therefore observe the demeanor and appearance of each witness while testifying. Notetaking must not distract you from that task.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Also your notes should be used only as aids to your memory; and, whether you take notes or not, you should rely upon your own independent recollection or memory of what the testimony was and should not be unduly influenced by the notes of other Jurors. Notes are not entitled to any greater weight than the recollection or impression of each Juror as to what the testimony was.

Notetaking - Not Permitted. A question sometimes arises as to whether individual members of the Jury will be permitted to take notes during the trial.

The desire to take notes is perfectly natural, especially for those of you who are accustomed to making notes because of your schooling or the nature of your work or the like. It is requested, however, that Jurors not take notes during the trial. One of the reasons for having a number of persons on the Jury is to gain the advantage of your several, individual memories concerning the testimony presented before you; and, while some of you might feel comfortable taking notes, other members of the Jury may not have skill or experience in notetaking and may not wish to do so.

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

Instructions On The Law Of Conspiracy. As you know from the explanation I gave during the course of your selection, it is charged in this case (among other things) that the Defendant(s) engaged in an unlawful "conspiracy" to commit certain offenses.

Under the law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in criminal purposes," and willful participation in such a scheme or agreement, [followed by the commission of an overt act by one of the conspirators][*] is sufficient to

---

[*] The bracketed material on this page should be omitted with respect to conspiracy offenses not requiring proof of overt acts (such as 21 USC §§ 846 and 963).

complete the offense of "conspiracy" itself even though the ultimate criminal object of the conspiracy is not accomplished or carried out. In order to establish the offense of "conspiracy" the Government must prove beyond a reasonable doubt each of the following specific facts:

> (1) That two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;
>
> (2) That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;
>
> [(3) That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and
>
> (4) That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.][*]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Instructions On The Law Governing Substantive Offenses. In addition to the alleged conspiracy offense, the indictment also charges certain so-called "substantive offenses," namely [here describe the alleged substantive offenses charged in the indictment]. In order to

---

[*] The bracketed material on this page should be omitted with respect to conspiracy offenses not requiring proof of overt acts (such as 21 USC §§ 846 and 963).

establish that offense the Government must prove beyond a reasonable doubt each of the following essential elements:

> **[Quote essential elements of the offense as set forth in the appropriate Offense Instruction.]**

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

The word "willfully, " as that term has been used 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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Conclusion. Now, we will begin the trial at this time by affording the lawyers for each side an opportunity to make opening statements to you in which they may explain the issues in the case and summarize the facts they expect the evidence will show. After all the testimony and evidence has been presented, the lawyers will then be given another opportunity to address you at the end of the trial and make their summations or final arguments in the case.

The statements that the lawyers make now, as well as the arguments they present to you at the end of the trial, are not to be considered by you either as evidence in the case (which comes only from the witnesses and exhibits), or as your instruction on the law (which will come only from me). Nevertheless, these statements or arguments are intended to help you understand the evidence as it comes in, the issues or disputes you will be called upon to decide, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them in turn for the purpose of making an opening statement.

Cited in U.S. v. Cheren, No. 06-10642, archived on January 28, 2008

3.1
Notetaking - Permitted

Members of the Jury:

[I see that some of you, from time-to-time, have been taking notes during the proceedings up to this point.]

[or]

[I understand that someone on the Jury has asked the Clerk or the Marshal about the taking of notes by members of the Jury during the course of the trial.]

If you would like to take notes during the trial you may do so, and the Clerk will provide notebooks and pens or pencils for each of you. On the other hand, of course, you are not required to take notes if you would prefer not to do so. That will be left up to you individually.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

If you do decide to take notes, however, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings. Don't try to summarize all of the testimony. Instead, limit your notetaking to specific items of information that might be difficult to remember later such as dates, times, amounts or measurements, and identities or relationships. But remember that you must decide upon the credibility or believability of each witness, and you must therefore

observe the demeanor and appearance of each witness while testifying. Notetaking must not distract you from that task.

Also, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence; and, whether you take notes or not, you should rely upon your own independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony was.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Rhodes, 631 F.2d 43, 45 (5th Cir. 1980) held that: "Trial courts often allow jurors to take notes in simple as well as complex cases, and it is within their discretion to do so." The court suggested a jury instruction in substantially this form. Id., at 46, n.3.

3.2
Notetaking - Not Permitted

Members of the Jury:

[I see that some of you, from time-to-time, have been taking notes during the proceedings up to this point.]

[or]

[I understand that someone on the Jury has asked the Clerk or the Marshal about the taking of notes by members of the Jury during the course of the trial.]

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The desire to take notes, of course, is a perfectly natural and understandable desire, particularly for those of you who are accustomed to making notes because of your schooling or the nature of your work or the like.

Ordinarily, however, it is requested that Jurors <u>not</u> take notes during the trial.

One of the reasons for having a number of persons on the Jury in the first place is to gain the advantage of your several, individual memories concerning the testimony so that you can then deliberate together at the end of the trial to reach agreement concerning the facts;

and while some of you might feel comfortable taking notes, other members of the Jury may not have skill or experience in notetaking and may not wish to do so.

[Also, insofar as tangible exhibits are concerned, remember that all exhibits received in evidence during the trial will be available to you for study during your deliberations, and notes concerning those items would be of little or no value anyway.]

So, for those reasons, I ask that you not take notes during the trial.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

United States v. Rhodes, 631 F.2d 43, 45 (5th Cir. 1980). Permitting notetaking by jurors, or not permitting notetaking, lies within the discretion of the District Court.

4
Cautionary Instruction
Similar Acts Evidence
(Rule 404(b), FRE)

You have just 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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

[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 identity of the Defendant as the perpetrator of the crime charged here has been established]

or

[whether the Defendant committed the acts for which the Defendant is on trial by accident or mistake.]

ANNOTATIONS AND COMMENTS

> Rule 404. [FRE] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
>
> * * * * * *
>
> (b) Other crimes, wrongs, or acts. - - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) en banc, cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. See note 15 at pages 911-912. Beechum also approves a limiting instruction similar to this one. See note 23 at pages 917-918.

5
Explanatory Instruction
Prior Statement Or Testimony Of A Witness

Members of the Jury:

When a witness is questioned about an earlier statement he/she may have made [or earlier testimony he/she may have given] such questioning is permitted in order to aid you in evaluating the truth or accuracy of the witness' testimony here at the trial.

Earlier statements made by a witness [or earlier testimony given by a witness] are not ordinarily offered or received as evidence of the truth or accuracy of those statements, but are referred to for the purpose of giving you a comparison and aiding you in making your decision as to whether you believe or disbelieve the witness' testimony which you hear at trial.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with his [or her] trial testimony is entirely for you to determine.

I will, of course, give you additional instructions at the end of the trial concerning a number of matters you may consider in determining the credibility or "believability" of the witnesses and the weight to be given to their testimony.

Explanatory Instruction
Transcript Of Tape Recorded Conversation

Members of the Jury:

As you have heard, Exhibit ___ has been identified as a typewritten transcript [and partial translation from Spanish into English] of the oral conversation that 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.]

However, 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

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

ANNOTATIONS AND COMMENTS

United States v. Nixon, 918 F.2d 895 (11th Cir. 1990), held that transcripts are admissible in evidence, including transcripts that purport to identify the speakers, and specifically approved the text of this instruction as given at the time the transcripts were offered and received.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

Modified "Allen" Charge

Members of the Jury:

I'm going to ask that you continue your deliberations in an effort to reach agreement 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, money and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to 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 any better or more exhaustively than it has been tried before you.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

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.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your

doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but, 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.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt the Defendant 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 other instructions I have previously given to you.

ANNOTATIONS AND COMMENTS

United States v. Elkins, 885 F.2d 775, 783 (11th Cir. 1989), cert. denied, 494 U.S. 1005, 110 S.Ct. 1300, 108 L.Ed.2d 477 (1990). "This circuit allows the use of Allen charges."

United States v. Chigbo, 38 F.3d 543, 544-545 (11th Cir. 1994), cert. denied, ___ U.S. ____, 116 S.Ct. 92, 133 L.Ed.2d 48 (1995) approves the text of this instruction verbatim.

Cited in U.S. v. Cherer,
No. 06-10642, archived on January 28, 2008

Forfeiture Proceedings

(To be given before supplemental evidentiary proceedings and/or supplemental arguments of counsel)

Members Of The Jury:

Your verdict in this case does not complete your jury service, as it would in most cases, because there is another matter you must now consider and decide, namely, whether the Defendant[s] _____ should forfeit certain [money or] property to the United States as a part of the penalty for the crime charged in Count _____ of the indictment.

In a portion of the indictment not previously discussed or disclosed to you, it is alleged that the Defendant[s] [obtained] [maintained] or [derived] certain [money or] property from the commission of the offense charged in Count _____; and, in view of your verdict finding the Defendant[s] guilty of that offense, you must also decide, under the law I will now explain to you, whether such [money or] property should be forfeited to the United States.

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

The term "forfeited" simply means for someone to be divested or deprived of the ownership of something as a part of the punishment allowed by the law for the commission of certain criminal offenses.

In deciding these forfeiture issues you should consider all of the evidence you have already heard during the trial [plus the additional

evidence that will be presented to you when I finish giving you these instructions].

The forfeiture allegations of the indictment - - a copy of which will be provided to you for your consideration during your supplemental deliberations - - describes in particular the [money or proceeds] [and] [property] allegedly subject to forfeiture to the United States.

> [Read or summarize the money or property described in the indictment as subject to forfeiture]

In order to be entitled to the forfeiture of [any of those items of] [that] property, the Government must have proved [beyond a reasonable doubt] [by a preponderance of the evidence]:

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

Option No. 1

(Forfeitures under 18 USC § 982)

First: That the [money or] property to be forfeited constitutes the proceeds the Defendant obtained directly or indirectly as the result of the crime charged in Count _____ of the indictment;

OR

Second: That the [money or] property to be forfeited [was derived from] [traceable to] the proceeds the Defendant obtained directly or indirectly as the result of the crime

charged in Count _____ of the indictment.

Option No. 2

(RICO - 18 USC § 1963(a))

First: That the [sum of money or proceeds] [property] sought to be forfeited constituted an interest acquired by the Defendant, as charged;

Second: That such interest [was acquired by the Defendant as a result of the conduct of the enterprise's affairs through the pattern of racketeering activity] [constituted or was derived from proceeds which the Defendant obtained, directly or indirectly, from racketeering activity] committed by the Defendants as charged in Count _____ in violation of Title 18, United States Code, § 1962(c).

Cited in U.S. v. Cherer, No. 06-10642, archived on January 28, 2008

Option No. 3

(Child Pornography - 18 USC § 2253)

First: That the property to be forfeited is a visual depiction, or other matter which contains a visual depiction, which was [produced] [transported] [received] in violation of [cite statutory offense of conviction].

OR

Second: That the property to be forfeited constituted, or is traceable to, gross profits or other proceeds obtained from the offense of conviction.

OR

Third: That the property to be forfeited was used or intended to e used to commit or to promote the commission of the offense of conviction.

Option No. 4

(Drug Offenses - 21 USC § 853)

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

First: That the property to be forfeited constitutes, or was derived from, the proceeds the Defendant obtained, directly or indirectly, as the result of the commission of the offense charged in Count _____ of the indictment,

OR

Second: That the property to be forfeited was used, or was intended to be used, in any manner or part, to commit or to facilitate the commission of, the offense charged in Count _____ of the indictment.

[Before you can find that the Defendant must forfeit any property under either of those standards, however, you must unanimously agree

upon which of the two standards should be applied in forfeiting a particular asset.]

[Proof "beyond a reasonable doubt" has the same meaning that I explained to you in my instructions at the end of the trial.]

OR

[A "preponderance of the evidence" simply means an amount of evidence which is enough to persuade you that a claim or contention is more likely true than not true.]

[To be "derived" from something means that the [money or] property under consideration must have been formed or developed out of the original source so as to be directly descended from that source.]

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

[To be "traceable" to something means that the [money or] property under consideration must have followed an ascertainable course or trail in successive stages of development or progress from the original source.]

[To "facilitate" the commission of an offense means to aid, promote, advance, or make easier, the commission of the act or acts constituting the offense. There must be more than an incidental connection between the property and the offense for you to find that the property facilitated, or was intended to facilitate, the commission of the

offense. However, the property need not be indispensable to the commission of the offense, nor does the property have to have been used exclusively for the commission of the offense or as the exclusive means of committing the offense. Property used to facilitate an offense can be in virtually any form.]

While deliberating concerning the issue of forfeiture you must not reexamine your previous determination regarding the Defendant's guilt. However, all of the instructions previously given to you concerning your consideration of the evidence, the credibility of the witnesses, your duty to deliberate together, your duty to base your verdict solely on the evidence without prejudice, bias or sympathy, and the necessity of a unanimous verdict, will continue to apply during these supplemental deliberations. [The specific instructions I gave you earlier concerning Count _____ and the definitions of the terms "enterprise" and "pattern of racketeering activity" also continue to apply.]

Cited in U.S. v. Cherem, No. 06-10642, archived on January 28, 2008

ANNOTATIONS AND COMMENTS

Federal Rule of Criminal Procedure 32.2 provides

> (a) Notice To The Defendant. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

* * * *

(b)(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

18 USC § 982, entitled "Criminal Forfeiture," is a general statute that provides for the forfeiture of property interests as a part of the sentence for a variety of offenses enumerated in the several subsections of the statute. The definition of the nexus that must be shown to exist between the offense and the property as a prerequisite to forfeiture differs slightly from one subsection to the next:

982(a)(1)	"involved in such offense" "traceable to such property"
982(a)(2)	"constituting or derived from proceeds. . . obtained directly or indirectly as the result"
982(a)(3)	"which represents or is traceable to the gross receipts obtained directly or indirectly as a result"
982(a)(4)	"obtained directly or indirectly, as a result"
982(a)(5)	"which represents or is traceable to the gross receipts obtained directly or indirectly as a result"
982(a)(6)	"any conveyance . . . vessel, vehicle or aircraft used" <u>or</u> "constitutes or is derived from or is traceable to proceeds obtained directly or indirectly from" <u>or</u> "is used to facilitate"
982(a)(7)	"constitutes or is derived directly or indirectly from gross proceeds traceable to"
982(a)(8)	"used to facilitate" <u>or</u> "constituting, derived from or traceable to"

Cited in U.S. v. Cherek, No. 06-10642, archived on January 28, 2008

Extreme care must be taken, therefore, in adapting and tailoring elements of proof as stated in this instruction to the standards stated in the specific subsection of § 982 applicable to the case.

18 USC § 1963 (a)(RICO) provides:

> Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States (1) any interest the person has acquired or maintained in violation of section 1962; (2) any interest in; security of; claim against; or property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of section 1962.

18 USC § 2253 (Child Pornography) provides:

> (a) Property subject to criminal forfeiture. - - A person who is convicted of an offense under this chapter [18 U.S.C.A. § 2251 et seq.] involving a visual depiction described in section 2251, 2251A, 2252, 2252A, or 2260 of this chapter, or who is convicted of an offense under section 2421, 2422, or 2423 of chapter 117 [18 U.S.C.A. § 2421 et seq.], shall forfeit to the United States such person's interest in - -
>
> (1) any visual depiction described in section 2251, 2251A, or 2252, of this chapter, or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of this chapter;
>
> (2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and
>
> (3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense.

Cited in U.S. v. Cherent, No. 06-10642, archived on January 28, 2008

21 USC § 853(a) (Drug Offenses) provides:

> Any person convicted of a violation of this subchapter of subchapter II of this chapter [21 USC §§ 951 et seq.] punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law - -
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise [the defendant forfeits any interest in the enterprise itself]

With respect to forfeitures under 18 USC § 982, the preponderance of the evidence standard applies. United States v. Cabeza, 258 F.3d 1256 (11th Cir. 2001) (holding also that the principle of Apprendi does not apply to forfeiture proceedings.)

With respect to the Government's burden of proof under 18 USC § 1963 (RICO), the Eleventh Circuit has not squarely decided the issue. See United States v. Goldin Industries, Inc., 219 F.3d 1271, 1278 at note 10 (11th Cir. 2000) ("The government contends for the first time on appeal that the correct burden of proof is preponderance of the evidence rather than beyond a reasonable doubt. We have never decided this issue with respect to RICO's forfeiture provision. We need not decide the issue here. . .")

Other Circuits, however, have held that the beyond a reasonable doubt standard applies. See United States v. Peluso, 14 F.3d 881, 906 (3d Cir. 1994) (holding that government, in a criminal forfeiture proceeding under 18 USC § 1963(a), must prove beyond a reasonable doubt that the targeted property was derived from the defendant's racketeering activity); United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987). See also United States v. Houlihan, 92 F.3d 1271, 1299 at note 33 (1st Cir. 1996) (affirming district court's instruction that the government had the burden of proving entitlement to forfeiture pursuant to 18 USC § 1963(a) beyond a reasonable doubt, but noting that "the government may have conceded too much," and that the question was open).

Cited in U.S. v. Cherer, No. 06-10642; archived on January 28, 2008

With respect to forfeitures sought under 21 USC §853, the Eleventh Circuit has held that the preponderance of the evidence standard applies. United States v. Elgersma, 971 F.2d 690, 697 (11th Cir. 1992) (en banc) (holding that the preponderance standard applies in § 853(a)(1) forfeitures); United States v. Dicter, 198 F.3d 1284, 1289 (11th Cir. 1999) (the preponderance of the evidence standard governs forfeitures under § 853(a)(2)).

21 USC § 853(d) creates a rebuttable presumption that property is subject to forfeiture if the Government proves by a preponderance of the evidence that the drug offender (1) acquired the property during the period of time the offense of conviction was committed, or within a reasonable time thereafter, and (2) there was no likely source for such property other than the offense.

With respect to forfeiture proceedings under 18 USC § 2253, the statute (subsection (e)) requires proof beyond a reasonable doubt.