JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

JAMES P. GERSTENLAUER
CIRCUIT EXECUTIVE

TEL. 404/335-6535
56 FORSYTH STREET, NW
ATLANTA, GEORGIA 30303

30 March 2015

On 30 January 2015, the Judicial Council approved revised and new instructions for the 2010 Eleventh Circuit Pattern Jury Instructions, Criminal Cases. The following instructions have been changed or created:

Special Instructions

4 Similar Acts Evidence.

Offense Instructions

1.1 Forcibly Assaulting a Federal Officer: without Use of a Deadly Weapon.

1.2 Forcibly Assaulting a Federal Officer: with Use of a Deadly Weapon or Inflicting Bodily Injury.

21 Theft of Government Money or Property.

34.1 Dealing in Firearms Without a License.

35.2 Using or Carrying a Firearm During a Violent Crime or Drug Trafficking Crime.

35.3 Possessing a Firearm in Furtherance of a Violent Crime or Drug Trafficking Crime. *[new instruction]*

35.4 Using or Carrying and Possessing a Firearm in Furtherance of a Violent Crime or Drug-Trafficking Crime. *[new instruction]*

35.5 Aiding and Abetting: Possessing a Firearm. *[new instruction]*

35.6 Aiding and Abetting: Using or Carrying a Firearm. *[new instruction]*

35.7 Aiding and Abetting: Using or Carrying and Possessing a Firearm. *[new instruction]*

35.8 Brandishing. *[new instruction]*

35.9 Discharge of Firearm. *[new instruction]*

35.10 Weapons Listed in 18 U.S.C. §924(c)(1)(B). *[new instruction]*

40.3 Aggravated Identity Theft.

41.2 Fraudulent Use of Unauthorized Credit Card or Other Access Devices.

50.2 Mail Fraud: Depriving Another of an Intangible Right of Honest Services (Public Official/Public Employee).

50.3 Mail Fraud: Depriving Another of an Intangible Right of Honest Services (Private Employee). *[new instruction]*

50.4 Mail Fraud: Depriving Another of an Intangible Right of Honest Services (Independent Contractor or Other Private Sector Contractual Relationship Besides Employer/Employee). *[new instruction]*

53 Health Care Fraud.

74.5 Money Laundering Conspiracy.

92.2 Coercion and Enticement of a Minor to Engage in Sexual Activity

All other instructions in the 2010 Pattern Jury Instructions for Criminal Cases remain in effect. The June 2010 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2010 pattern jury instructions. Those limitations and conditions also apply to the instructions listed above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at http://pji.ca11.uscourts.gov has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:

James P. Gerstenlauer
Secretary to the Judicial Council

Offense Instruction 1.1
Forcibly Assaulting a Federal Officer:
without Use of a Deadly Weapon
18 U.S.C. § 111(a)(1)– Felony Offense

It's a Federal crime to forcibly assault a Federal officer [causing physical contact] [intending to commit another felony] while the officer is performing official duties.

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

(1) the Defendant "forcibly assaulted" the person described in the indictment;

(2) the person assaulted was a Federal officer performing an official duty; and

(3) the Defendant's acts [resulted in physical contact with the person assaulted] [involved the intent to commit another felony].

A "forcible assault" is an intentional threat or attempt to cause serious bodily injury when the ability to do so is apparent and immediate. It includes any intentional display of force that would cause a reasonable person to expect immediate and serious bodily harm or death.

The Government must prove beyond a reasonable doubt that the victim was a Federal officer performing an official duty and that the Defendant forcibly assaulted the officer. Whether the Defendant knew at the time that the victim was a

Federal officer carrying out an official duty does not matter.

[But you can't find that a forcible assault occurred if you believe that the Defendant acted only on a reasonable good-faith belief that self-defense was necessary to protect against an assault by a private citizen, and you have a reasonable doubt that the Defendant knew that the victim was a Federal officer.]

[A [name of agent type, e.g., Special Agent or I.R.S. Agent] of the [name of agency], is a Federal officer and has the official duty to [describe function at issue in case].]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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 . . . and where such acts involve physical contact with the victim of that assault or the intent to commit another felony [shall be guilty of an offense against the United States].

Maximum Penalty: Eight (8) years imprisonment and applicable fine.

Before 18 U.S.C. § 111 was amended in 2008, it provided for three categories of forcible assault: (1) simple or misdemeanor assault, "where the acts in violation of [subsection (a)] constitute only simple assault;" (2) "all other cases," where the acts specified in subsection (a) constitute felony assault; and (3) where the acts specified in subsection (a) involved use of a deadly or dangerous weapon, or inflicted bodily injury. *See United States v. Siler*, 734 F.3d 1290 (11th Cir. 2013) (citing *United States v. Martinez*, 486 F.3d 1239 (11th Cir. 2007)). The statute was amended in 2008 to narrow the second category of forcible assault to require "physical contact with the victim or the intent to commit another felony." 18 U.S.C. § 111(a). If the evidence does not support that there was physical contact or the intent to commit another crime, it may be necessary to instruct on

the lesser included offense of 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.

Offense Instruction 1.2
Forcibly Assaulting a Federal Officer: with Use of a Deadly Weapon or Inflicting Bodily Injury
18 USC § 111(b)

It's a Federal crime to forcibly assault a Federal officer [using a deadly or dangerous weapon] [inflicting bodily injury] while the officer is performing official duties.

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

(1) the Defendant "forcibly assaulted" the person described in the indictment;

(2) the person assaulted was a Federal officer performing an official duty; and

(3) the Defendant [used a deadly or dangerous weapon] [inflicted bodily injury]

A "forcible assault" is an intentional threat or attempt to cause serious bodily injury when the ability to do so is apparent and immediate. It includes any intentional display of force that would cause a reasonable person to expect immediate and serious bodily harm or death.

The Government must prove beyond a reasonable doubt that the victim was a Federal officer performing an official duty and the Defendant forcibly assaulted the officer. Whether the Defendant knew at the time that the victim was a Federal

officer carrying out an official duty does not matter.

[But you can't find that a forcible assault occurred if you believe that the Defendant acted only on a reasonable good-faith belief that self-defense was necessary to protect against an assault by a private citizen, and you have a reasonable doubt that the Defendant knew that the victim was a Federal officer.]

[A [name of agent type, e.g., Special Agent, I.R.S. Agent] of the [name of agency] is a Federal officer and has the official duty to [describe function at issue in case].]

[A "deadly or dangerous weapon" means any object that can cause death or present a danger of serious bodily injury. A weapon intended to cause death or present a danger of serious bodily injury but that fails to do so by reason of a defective component, still qualifies as a "deadly or dangerous weapon."

To show that such a weapon was "used," the Government must prove that the Defendant possessed the weapon and intentionally displayed it during the forcible assault.]

[Though a forcible assault requires an intentional threat or attempt to inflict serious bodily injury, the threat or attempt doesn't have to be carried out and the victim doesn't have to be injured.]

[In this case, the indictment alleges that bodily injury actually occurred, so

that is the last element that the government must prove.

A "bodily injury" is any injury to the body, no matter how temporary. It includes any cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; or impairment of the function of a bodily member, organ, or mental faculty.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 111(b) provides:

> Whoever, in the commission of any acts described in subsection (a) uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury [shall be punished as provided by law].

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

In *United States v. Siler*, 734 F.3d 1290 (11th Cir. 2013), the Eleventh Circuit held that 18 U.S.C. § 111(b) does not require proof of physical contact or the intent to commit another felony. The twenty-year maximum penalty applies whenever a person commits any act listed in 18 U.S.C. § 111(a), including simple assault, while using a deadly or dangerous weapon.

If the evidence does not support that a deadly or dangerous weapon was used, or that bodily injury was inflicted, it may be necessary to instruct on the lesser included offense of assaulting a Federal officer without use of deadly weapon or infliction of bodily injury, or 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.

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 U.S.C. § 242.

Offense Instruction 21
Theft of Government Money or Property
18 U.S.C. § 641 (First Paragraph)

It's a Federal crime to [embezzle] [steal] [convert] any money or property belonging to the United States and worth more than $1,000.

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

(1) the money or property described in the indictment belonged to the United States;

(2) the Defendant [embezzled] [stole] [knowingly converted] the money or property to his own use or to someone else's use;

(3) the Defendant knowingly and willfully intended to deprive the United States of the use or benefit of the money or property; and

(4) the money or property had a value greater than $1,000.

The word "value" means the greater of (1) the face, par, or market value, or (2) the price, whether wholesale or retail.

It doesn't matter whether the Defendant knew that the Government owned the property. But it must be proved beyond a reasonable doubt that the Government did in fact own the money or property, that the Defendant knowingly [embezzled] [stole] [converted] it, and that the value was greater than $1,000.

[To "embezzle" means to wrongfully or intentionally take someone else's money or property after lawfully taking possession or control of it.]

[To "steal" or "convert" means to wrongfully or intentionally take the money or property belonging to someone else with the intent to deprive the owner of its use or benefit permanently or temporarily.]

A "taking" doesn't have to be any particular type of movement or carrying away. But any appreciable and intentional change in the property's location is a taking, even if the property isn't removed from the owner's premises.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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 not 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 the 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 the 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 (2d 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*.

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.

The committee believes that the general definition of “willfully” in Basic Instruction 9.1A would usually apply to this crime.

Offense Instruction 34.1
Dealing in Firearms without a License
18 U.S.C. § 922(a)(1)(A)

It's a Federal crime to engage in the business of dealing in firearms without a Federal license.

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

(1) the Defendant engaged in the business of dealing in firearms;

(2) the Defendant didn't have a Federal license; and

(3) the Defendant acted willfully.

A "firearm" is any weapon designed to, or readily convertible to, expel a projectile by the action of an explosive. [The term includes the frame or receiver of any such weapon and any firearm muffler or silencer. "Firearm frame or receiver" means that part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.]

A person is "engaged in the business of dealing in firearms" if the person regularly purchases and resells firearms with the principal objective of livelihood and profit. "Livelihood" includes both making a living and supplementing one's income. Some things that are *not* the "business of dealing in firearms" are

occasionally selling, exchanging, or purchasing firearms for one's own personal collection or selling all or part of one's own personal collection.

A "dealer" is any person "engaged in the business of dealing in firearms," at wholesale or retail, even if that's not the person's primary business or job.

In determining whether a Defendant had the principal objective of livelihood and profit, you may consider all of the circumstances surrounding the transactions, including: the quantity and the frequency of sales; the location of the sales; conditions under which the sales occurred; Defendant's behavior before, during, and after the sales; the price charged; and the characteristics of the firearms sold. The Government need not show that the Defendant actually made a profit, so long as the Defendant's principal objective was livelihood and profit.

The Government must prove that the Defendant knew that [his] [her] conduct was unlawful, but it doesn't have to prove that the Defendant actually knew [he][she] was required to obtain a Federal license to engage in the business of dealing in firearms.

[Proof of a profit motive isn't required if the Defendant deals regularly in firearms for criminal or terroristic purposes.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 922(a)(1)(A) 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 based on 18 U.S.C. § 921(a)(3). The definition of “firearm frame or receiver” is based on 27 C.F.R. § 478.11. The definition of “dealing” is based on “dealer,” as defined at 18 U.S.C. § 921(a)(11). The definition of "engaged in the business" is based on 18 U.S.C. § 921(a)(21)(C). The definition of "principal objective of livelihood and profit" is based on 18 U.S.C. § 921(a)(22). The Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, which governs, among other things, the sale of firearms, was amended in 1986. The language of Section 921(a)(11) and Section 922(a)(1)(A) were not affected by the 1986 Amendment. The pre-1986 version of Section 921 did not define “engaged in the business” or “principal objective of livelihood and profit.”

The term “willfully” in Section 924(a)(1)(D), which proscribes the penalty for a violation of Section 922(a)(1)(A), requires only proof that the defendant knew that his conduct was unlawful, and not that the defendant also knew of the specific federal licensing requirement. *Bryan v. United States*, 524 U.S. 184 (1998). The general definition of “willfully” in Basic Instruction 9.1A will usually apply.

Engaged in the business

Before the 1986 Amendment, the term “engaged in the business” was judicially interpreted. *See, e.g.*, *United States v. Burgos*, 720 F.2d 1520, 1527 n.8 (11th Cir. 1983) (possession of large supply of firearms and willingness to sell and ship them held sufficient); *United States v. Berry*, 644 F.2d 1034, 1037 (5th Cir. 1981) (considering “whether [a defendant] has guns on hand or is ready and able to procure them for the purpose of selling them from time to time to such persons as might be accepted as customers”). The 1986 Amendment defined “engaged in the business” and “principal objective of livelihood and profit,” as those terms apply to a “dealer” in firearms. *United States v. Schumann*, 861 F.2d 1234, 1237-38 (11th Cir. 1988) (discussing narrowing effect of 1986 Amendment in context of determining whether it applied retroactively).

The 1986 Amendment focuses on "repetitive purchase and resale," and specifically excludes "occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection or for a hobby," or "[sales of] all or part of his personal collection of firearms." 18 U.S.C. § 921(a)(21)(C). The 1986 Amendment also requires "the principal objective of livelihood and profit," which does not include "other intents, such as improving or liquidating a personal firearms collection." 18 U.S.C. §§ 921(a)(21)(C), 921(a)(22).

In determining whether a defendant has "engaged in the business" of dealing in firearms, courts have utilized a "totality of the circumstances" test. Under that test, a "defendant engages in the business of dealing in firearms when his 'principal motive is economic' and he 'pursues this objective through the repetitive purchase and resale of firearms.'" *United States v. Tyson*, 653 F.3d 192, 200-01 (3d Cir. 2011).

The Eleventh Circuit has held that a court may look at the "totality of the circumstances" "[i]n determining whether one is engaged in the business of dealing in firearms, [and] the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business." *United States v. Bailey*, 123 F.3d 1381, 1392 (11th Cir. 1997). "[I]n determining the character and intent of firearms transaction, the jury must examine all circumstances surrounding the transactions, without the aid of a 'bright-line rule.' [Such] relevant circumstances include: 'the quantity and the frequency of sales;' the 'location of the sales;' 'conditions under which the sales occurred;' 'defendant's behavior before, during, and after the sales;' 'the price charged;' 'the characteristics of the firearms sold;' and 'the intent of the seller at the time of the sales.'" *Tyson*, 653 F.3d at 201 (internal citations omitted).

In *United States v. Gray*, the Sixth Circuit held that evidence was sufficient to support a conviction under Section 922(a)(1)(A) where the government demonstrated: "(1) that the defendant frequented flea markets and gun shows where he displayed and sold guns; (2) that the defendant offered to sell guns to confidential informants on multiple occasions and actually sold them three different guns on two different occasions; (3) and that the defendant bought and sold guns for profit." 470 F. App'x 468, 473 (6th Cir. 2012). *See also United States v. Dettra*, 238 F.3d 424 (6th Cir. 2000) (holding that where defendant "recorded the cost of each firearm he acquired, enabling him to later determine the amount needed to sell the item in a profitable manner . . . , [he used] printed business cards and [accepted] credit [card] payment[s]," the jury could reasonably "infer that he was conducting his firearms activity as a profitable trade or business, and not merely as a

hobby.”).

In *United States v. Allah*, 130 F.3d 33, 42 (2d Cir. 1997), the Second Circuit also used a “totality” approach and found that the elements of “engaging in the business” and “principal objective of livelihood and profit” were satisfied when there was no “evidence that defendants were selling guns for the various nonpecuniary reasons specified in the statute.” The defendants’ conversations “plainly indicated that the weapons they offered to sell were coming, or could be [readily] ordered, from outside sources.” *Id.* at 35.

<u>Livelihood</u>

While the Eleventh Circuit has not interpreted the “principal objective of livelihood and profit” clause in the statute, other circuits have held that Section 922 does not require the government to prove that the unlicensed dealing in firearms is a defendant’s only source of income or livelihood, nor does it have to prove that the defendant actually made a profit. *See Gray*, 470 F. App’x at 472 (finding “principal objective of livelihood and profit” to mean “that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents”); *United States v. Beecham*, 993 F.2d 1539 (4th Cir. 1993) (evidence supported dealing in firearms was a regular business to which defendant devoted time and effort and from which he intended to obtain a profit; firearm-related activity was more than a hobby); *but see United States v. Nadirashvili*, 655 F.3d 114 (2d Cir. 2011) (citing *United States v. Carter*, 801 F.2d 78, 81-81 (2d Cir. 1986), a pre-amendment case, for the requirement that “the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers”).

Offense Instruction 35.2
Using or Carrying a Firearm During a
Violent Crime or Drug-Trafficking Crime
18 U.S.C. § 924(c)(1)(A)

It's a separate Federal crime to [use] [carry] a firearm during and in relation to a [violent crime] [drug-trafficking crime].

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

(1) that the Defendant committed the [violent crime] [drug-trafficking crime] charged in Count _____ of the indictment; and

(2) that during and in relation to that crime the Defendant knowingly [used] [carried] a firearm, as charged in the indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

[To "use" a firearm means more than a mere possession and more than proximity and accessibility to the firearm. It requires active employment of the firearm as by brandishing or displaying it in some fashion.]

[To "brandish" a firearm means to show all or part of the firearm to another person, or otherwise make another person aware of the firearm, in order to

intimidate that person. The firearm need not be directly visible to the other person.]

[To "carry" a firearm is to have the firearm on one's person *or* to transport the firearm, such as in a vehicle, from one place to another, while committing the [violent crime] [drug-trafficking crime].]

To [use] [carry] a firearm "in relation to" a crime means that the firearm had some purpose or effect with respect to the crime, and was not there by accident or coincidence. The firearm must have facilitated, or had the potential of facilitating, the crime.

If you find the defendant guilty of [using] [carrying] a firearm during and in relation to a [violent crime] [drug-trafficking crime], you will answer an additional question about the firearm: whether the firearm was [a short-barreled rifle] [a short-barreled shotgun] [a semiautomatic assault weapon] [a machinegun] [was equipped with a firearm silencer or firearm muffler] [a destructive device]. The government has the burden of proof on this question, and the standard again is proof beyond a reasonable doubt.

[A "rifle" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels only one projectile through a grooved barrel. A "short-barreled rifle" is a rifle with one or more barrels that are less than sixteen

inches long, or any weapon made from a rifle and which is less than twenty-six inches long overall.]

[A "shotgun" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels one projectile or a number of pellets contained in one shell, through a smooth barrel. A "short-barreled shotgun" is a shotgun with one or more barrels that are less than eighteen inches long, or any weapon made from a shotgun and which is less than twenty-six inches long overall.]

[A "semiautomatic weapon" is a weapon that uses the action of an explosive to expel a projectile and automatically reload another, which requires the trigger to be pulled again to expel the next projectile. A "semiautomatic assault weapon" is [type of firearm or applicable characteristics from 18 U.S.C. § 921(a)(30)]].

[A "machinegun" is a weapon that shoots, is designed to shoot, or can be readily restored to shoot, multiple shots automatically, without manual reloading, using one sustained pull of the trigger or by a single pulling of the trigger. The term also includes any part or combination of parts used to assemble, or convert another weapon into, a machinegun.]

[A "firearm silencer" or "firearm muffler" is any device that can be attached to a firearm to silence, muffle, or lessen the sound of a firearm if discharged. The

terms also include any combination of parts designed for use in assembling or fabricating a firearm silencer or firearm muffler.]

[A "destructive device" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive or other propellant, and which has a barrel with an interior width of more than one-half inch in diameter.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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 a 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 the statute above and applicable fine. Sentence must be consecutive.

The definition of “brandish” is based on 18 U.S.C. § 924(c)(4). The definition of “short-barreled rifle” is based on 18 U.S.C. §§ 921(a)(7)-(8). The definition of “short-barreled shotgun” is based on 18 U.S.C. §§ 921(a)(5)-(6). The definition of “machinegun” is based on 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). The definition of “destructive device” is based on 18 U.S.C. § 921(a)(4).

The definition of “semiautomatic assault weapon” is based on 18 U.S.C. § 921(a)(28), and should be completed by including language from 18 U.S.C. § 921(a)(30) (West 2004). On September 13, 2004, 18 U.S.C. § 921(a)(30) was repealed upon expiration of the Federal Assault Weapons Ban. The Committee believes that the language of Section 921(a)(30) is still helpful to define the term “semiautomatic assault weapon” for violations of 18 U.S.C. § 924(c)(1).

In *Bailey v. United States*, 516 U.S. 137 (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*, Congress amended the statute in several respects, 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.” Thus, there are three possible charges under this statute: (1) “used” during and in relation to; (2) “carried” during and in relation to; or (3) “possessed” in furtherance of; the offense.

In *Watson v. United States*, 552 U.S. 74 (2007), the Supreme Court held that, for purposes of § 924(c)(1)(A), the term “uses” would turn on the language as it was normally spoken. *Compare Smith v. United States*, 508 U.S. 223, 113 S.Ct. 2050, 124 L.E.2d 138 (1993) (A person “who trades his firearm for drugs ‘uses’ the firearm during and in relation to a drug trafficking offence within the meaning of § 924(c)(1).”), *with Watson*, 552 U.S. 74 (a person does not “use” a firearm under the statute when he receives it in trade for drugs).

In *Dean v. United States*, 556 U.S. 568 (2009), the Supreme Court held that

§ 924(c)(1)(A)(iii), which provides for an enhanced penalty "if the firearm is discharged," does not require separate proof of intent. In other words, the enhancement will apply even if the firearm is discharged by accident. *See id.*

For purposes of § 924(c)(1)(B)(ii), a firearm may be "equipped with a firearm silencer or firearm muffler," where a silencer is located in close proximity to the firearm and the silencer is specially designed to be used with that firearm. The enhancement may apply even if the silencer is not attached to the firearm. *See United States v. Charles,* 469 F.3d 402 (5th Cir. 2006), *cert. denied,* 549 U.S. 1273 (2007); *United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994), *aff'd*, 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995). In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the United States Supreme Court held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the mandatory minimum punishment for a crime, and that any fact (other than the fact of a prior conviction) that increases a mandatory minimum sentence "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155. The Court in *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. Accordingly, a jury is required to be instructed that any fact charged in the indictment that enhances a defendant's sentence must be found by the jury beyond a reasonable doubt and the verdict form should be amended to show these required findings. The enhancements under 924(c) that trigger mandatory minimum sentences beyond the five-year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon (10 years); and machinegun, destructive device, or firearm equipped with a silencer or muffler (30 years).

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). *Cf. Begay v. United States*, 553 U.S. 137 (2008) ("In determining whether [a] crime is a violent felony [for purposes of § 924(e)], we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."); *James v. United States*, 550 U.S. 192 (2007) (stating that in determining if a crime qualifies as a violent felony for purposes of § 924(e), "we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction").

Special Verdict

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

[Note: If you find the Defendant not guilty as charged in Count [___], you need not consider the paragraph[s] below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count that the firearm __________ [brandished] [discharged].

3. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count the firearm [used] [carried] __________ a [short-barreled rifle] [short-barreled shotgun] [semiautomatic assault weapon] [machinegun] [destructive device] [equipped with a firearm silencer or firearm muffler].

So Say We All.

Date: _____________ _____________________

Foreperson

Offense Instruction 35.3
Possessing a Firearm in Furtherance of a
Violent Crime or Drug-Trafficking Crime
18 U.S.C. § 924(c)(1)(A)

It's a separate Federal crime to possess a firearm in furtherance of a [violent crime] [drug-trafficking crime].

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

(1) that the Defendant committed the [violent crime] [drug-trafficking crime] charged in Count _____ of the indictment; and

(2) that the Defendant knowingly possessed a firearm in furtherance of that crime, as charged in the indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

To "possess" a firearm is to have direct physical control of the firearm *or* to have knowledge of the firearm's presence and the ability and intent to later exercise control over the firearm..

Possessing a firearm "in furtherance of" a crime means that the firearm helped, promoted, or advanced the crime in some way.

If you find the defendant guilty of possessing a firearm in furtherance of a

[violent crime] [drug-trafficking crime], you will answer an additional question about the firearm: whether the firearm was [a short-barreled rifle] [a short-barreled shotgun] [a semiautomatic assault weapon] [a machinegun] [was equipped with a firearm silencer or firearm muffler] [a destructive device]. The government has the burden of proof on this question, and the standard again is proof beyond a reasonable doubt.

[A "rifle" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels only one projectile through a grooved barrel. A "short-barreled rifle" is a rifle with one or more barrels that are less than sixteen inches long, or any weapon made from a rifle and which is less than twenty-six inches long overall.]

[A "shotgun" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels one projectile or a number of pellets contained in one shell, through a smooth barrel. A "short-barreled shotgun" is a shotgun with one or more barrels that are less than eighteen inches long, or any weapon made from a shotgun and which is less than twenty-six inches long overall.]

[A "semiautomatic weapon" is a weapon that uses the action of an explosive to expel a projectile and automatically reload another, which requires the trigger to

be pulled again to expel the next projectile. A "semiautomatic assault weapon" is [type of firearm or applicable characteristics from 18 U.S.C. § 921(a)(30)]].

[A machinegun is a weapon that shoots, is designed to shoot, or can be readily restored to shoot, multiple shots automatically, without manual reloading, using one sustained pull of the trigger or by a single pulling of the trigger. The term also includes any part or combination of parts used to assemble, or convert another weapon into, a machinegun.]

[A "firearm silencer" or "firearm muffler" is any device that can be attached to a firearm to silence, muffle, or lessen the sound of a firearm if discharged. The term also includes any combination of parts designed for use in assembling or fabricating a firearm silencer or firearm muffler.]

[A "destructive device" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive or other propellant, and which has a barrel with an interior width of more than one-half inch in diameter.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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 a 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 the statute above and applicable fine. Sentence must be consecutive.

The definition of "short-barreled rifle" is based on 18 U.S.C. §§ 921(a)(7)-(8). The definition of "short-barreled shotgun" is based on 18 U.S.C. §§ 921(a)(5)-(6). The definition of "machinegun" is based on 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). The definition of "destructive device" is based on 18 U.S.C. § 921(a)(4).

The definition of "semiautomatic assault weapon" is based on 18 U.S.C. § 921(a)(28), and should be completed by including language from 18 U.S.C. § 921(a)(30) (West 2004). On September 13, 2004, 18 U.S.C. § 921(a)(30) was repealed upon expiration of the Federal Assault Weapons Ban. The Committee believes that the language of Section 921(a)(30) is still helpful to define the term "semiautomatic assault weapon" for violations of 18 U.S.C. § 924(c)(1).

In *Bailey v. United States*, 516 U.S. 137 (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*, Congress amended the statute in several respects, 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." Thus, there are three possible charges under this statute: (1) "used" during and in relation to; (2) "carried" during and in relation to; or (3) "possessed" in furtherance of; the offense.

Possession of a firearm may be either actual or constructive. "Constructive possession of a firearm is shown where a defendant (1) was aware or knew of the firearm's presence and (2) had the ability and intent to later exercise dominion and control over that firearm." *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011) (citing *United States v. Beckles*, 565 F.3d 832, 841 (11th Cir. 2009) (where defendant was charged with violating 18 U.S.C. §§ 924(c), 922(g), government must prove defendant's knowing possession of firearm as key element of both offenses).

To establish that a firearm was possessed "in furtherance of" the crime, the government must show that the firearm helped, furthered, promoted or advanced the crime. *United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002). There must be "some nexus" between the firearm and the crime, which can be shown by, for example, ". . . accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to the drugs or drug profits, and the time and circumstances under which the firearm is found." *Id.* at 1253 (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)).

In *Dean v. United States*, 556 U.S. 568 (2009), the Supreme Court held that § 924(c)(1)(A)(iii), which provides for an enhanced penalty "if the firearm is discharged," does not require separate proof of intent. In other words, the enhancement will apply even if the firearm is discharged by accident. *See id.*

For purposes of § 924(c)(1)(B)(ii), a firearm may be "equipped with a firearm silencer or firearm muffler," where a silencer is located in close proximity to the firearm and the silencer is specially designed to be used with that firearm. The enhancement may apply even if the silencer is not attached to the firearm. *See United States v. Charles,* 469 F.3d 402 (5th Cir. 2006), *cert. denied,* 549 U.S. 1273 (2007); *United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994), *aff'd*, 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995).

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the United States Supreme Court held

that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the mandatory minimum punishment for a crime, and that any fact (other than the fact of a prior conviction) that increases a mandatory minimum sentence "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155. The Court in *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. Accordingly, a jury is required to be instructed that any fact charged in the indictment that enhances a defendant's sentence must be found by the jury beyond a reasonable doubt and the verdict form should be amended to show these required findings. The enhancements under 924(c) that trigger mandatory minimum sentences beyond the five-year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon (10 years); and machinegun, destructive device, or firearm equipped with a silencer or muffler (30 years).

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). *Cf. Begay v. United States*, 553 U.S. 137 (2008) ("In determining whether [a] crime is a violent felony [for purposes of § 924(e)], we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."); *James v. United States*, 550 U.S. 192 (2007) (stating that in determining if a crime qualifies as a violent felony for purposes of § 924(e), "we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction").

Special Verdict

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

[Note: If you find the Defendant not guilty as charged in Count [___], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count the firearm [possessed] ___________ a [short-barreled rifle] [short-barreled shotgun] [semiautomatic assault weapon] [machinegun] [destructive device] [equipped with a firearm silencer or firearm muffler].

So Say We All.

Date: _______________ ______________________

Foreperson

Offense Instruction 35.4
Using or Carrying and Possessing a Firearm in Furtherance of a Violent Crime or Drug-Trafficking Crime
18 U.S.C. § 924(c)(1)(A)

It's a separate Federal crime to [use] [carry] a firearm during and in relation to a [violent crime] [drug-trafficking crime], or to possess a firearm in furtherance of a [violent crime] [drug-trafficking crime].

The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt:

(1) that the Defendant committed the [violent crime] [drug-trafficking crime] charged in Count _____ of the indictment; and

(2) that during and in relation to that [violent crime] [drug-trafficking crime], the Defendant knowingly [used] [carried] a firearm, as charged in the indictment;

or

that the Defendant knowingly possessed a firearm in furtherance of that [violent crime] [drug-trafficking crime], as charged in the indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

[To "use" a firearm means more than a mere possession and more than proximity and accessibility to the firearm. It requires active employment of the firearm as by brandishing or displaying it in some fashion.]

[To "brandish" a firearm means to show all or part of the firearm to another person, or otherwise make another person aware of the firearm, in order to intimidate that person. The firearm need not be directly visible to the other person.]

[To "carry" a firearm is to have the firearm on one's person *or* to transport the firearm, such as in a vehicle, from one place to another, while committing the [violent crime] [drug-trafficking crime].]

To [use] [carry] a firearm "in relation to" a crime means that that the firearm had some purpose or effect with respect to the crime, and was not there by accident or coincidence. The firearm must have facilitated, or had the potential of facilitating, the crime.

To "possess" a firearm is to have direct physical control of the firearm *or* to have knowledge of the firearm's presence and the ability and intent to later exercise control over the firearm.

Possessing a firearm "in furtherance of" a crime means that the firearm helped, promoted, or advanced the crime in some way.

If you find the defendant guilty of [using] [carrying] or possessing a firearm as charged in this count, you will answer an additional question about the firearm: whether the firearm was [a short-barreled rifle] [a short-barreled shotgun] [a semiautomatic assault weapon] [a machinegun] [was equipped with a firearm silencer or firearm muffler] [a destructive device]. The government has the burden of proof on this question, and the standard again is proof beyond a reasonable doubt.

[A "rifle" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels only one projectile through a grooved barrel. A "short-barreled rifle" is a rifle with one or more barrels that are less than sixteen inches long, or any weapon made from a rifle and which is less than twenty-six inches long overall.]

[A "shotgun" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels one projectile or a number of pellets contained in one shell, through a smooth barrel. A "short-barreled shotgun" is a shotgun with one or more barrels that are less than eighteen inches long, or any weapon made from a shotgun and which is less than twenty-six inches long overall.]

[A "semiautomatic weapon" is a weapon that uses the action of an explosive

to expel a projectile and automatically reload another, which requires the trigger to be pulled again to expel the next projectile. A "semiautomatic assault weapon" is [type of firearm or applicable characteristics from 18 U.S.C. § 921(a)(30)]].

[A machinegun is a weapon that shoots, is designed to shoot, or can be readily restored to shoot, multiple shots automatically, without manual reloading, using one sustained pull of the trigger or by a single pulling of the trigger. The term also includes any part or combination of parts used to assemble, or convert another weapon into, a machinegun.]

[A "firearm silencer" or "firearm muffler" is any device that can be attached to a firearm to silence, muffle, or lessen the sound of a firearm if discharged. The term also includes any combination of parts designed for use in assembling or fabricating a firearm silencer or firearm muffler.]

[A "destructive device" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive or other propellant, and which has a barrel with an interior width of more than one-half inch in diameter.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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 a 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 the statute above and applicable fine. Sentence must be consecutive.

The definition of "brandish" is based on 18 U.S.C. § 924(c)(4). The definition of "short-barreled rifle" is based on 18 U.S.C. §§ 921(a)(7)-(8). The definition of "short-barreled shotgun" is based on 18 U.S.C. §§ 921(a)(5)-(6). The definition of "machinegun" is based on 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). The definition of "destructive device" is based on 18 U.S.C. § 921(a)(4).

The definition of "semiautomatic assault weapon" is based on 18 U.S.C. § 921(a)(28), and should be completed by including language from 18 U.S.C. § 921(a)(30) (West 2004). On September 13, 2004, 18 U.S.C. § 921(a)(30) was repealed upon expiration of the Federal Assault Weapons Ban. The Committee believes that the language of Section 921(a)(30) is still helpful to define the term "semiautomatic assault weapon" for violations of 18 U.S.C. § 924(c)(1).

In *Bailey v. United States*, 516 U.S. 137 (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*, Congress amended the statute in several respects, 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." Thus, there are three possible charges under this statute: (1) "used" during and in relation to; (2) "carried" during and in relation to; or (3) "possessed" in furtherance of; the offense.

This instruction was prepared to cover situations when any combination of the three are charged in the same count. *See United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002).

In *Watson v. United States*, 552 U.S. 74 (2007), the Supreme Court held that, for purposes of § 924(c)(1)(A), the term "uses" would turn on the language as it was normally spoken. *Compare Smith v. United States*, 508 U.S. 223 (1993) (A person "who trades his firearm for drugs 'uses' the firearm during and in relation to a drug trafficking offence within the meaning of § 924(c)(1)."), *with Watson*, 552 U.S. 74 (a person does not "use" a firearm under the statute when he receives it in trade for drugs).

Possession of a firearm may be either actual or constructive. "Constructive possession of a firearm is shown where a defendant (1) was aware or knew of the firearm's presence and (2) had the ability and intent to later exercise dominion and control over that firearm." *United States v. Perez,* 661 F.3d 568, 576 (11th Cir. 2011) (citing *United States v. Beckles*, 565 F.3d 832, 841 (11th Cir. 2009) (where defendant was charged with violating 18 U.S.C. §§ 924(c), 922(g), government must prove defendant's knowing possession of firearm as key element of both offenses).

To establish that a firearm was possessed "in furtherance of" the crime, the government must show that the firearm helped, furthered, promoted or advanced the crime. *United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002). There must be "some nexus" between the firearm and the crime, which can be shown by, for example, ". . . accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to the drugs or drug profits, and the time and circumstances under which the firearm is found." *Id.* at 1253 (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)).

In *Dean v. United States*, 556 U.S. 568 (2009), the Supreme Court held that § 924(c)(1)(A)(iii), which provides for an enhanced penalty "if the firearm is discharged," does not require separate proof of intent. In other words, the enhancement will apply even if the firearm is discharged by accident. *See id.*

For purposes of § 924(c)(1)(B)(ii), a firearm may be "equipped with a firearm silencer or firearm muffler," where a silencer is located in close proximity to the firearm and the silencer is specially designed to be used with that firearm. The enhancement may apply even if the silencer is not attached to the firearm. *See United States v. Charles,* 469 F.3d 402 (5th Cir. 2006), *cert. denied,* 549 U.S. 1273 (2007); *United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994), *aff'd*, 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995).

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the United States Supreme Court held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the mandatory minimum punishment for a crime, and that any fact (other than the fact of a prior conviction) that increases a mandatory minimum sentence "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155. The Court in *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. Accordingly, a jury is required to be instructed that any fact charged in the indictment that enhances a defendant's sentence must be found by the jury beyond a reasonable doubt and the verdict form should be amended to show these required findings. The enhancements under 924(c) that trigger mandatory minimum sentences beyond the five-year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon (10 years); and machinegun, destructive device, or firearm equipped with a silencer or muffler (30 years).

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). *Cf. Begay v. United States*, 553 U.S. 137 (2008) ("In determining whether [a] crime is a violent felony [for purposes of § 924(e)], we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."); *James v. United States*, 550 U.S. 192 (2007) (stating that in determining if a crime qualifies as a violent felony for purposes of § 924(e), "we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction").

Special Verdict

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

[Note: If you find the Defendant not guilty as charged in Count [___], you need not consider the paragraphs below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count that the firearm __________ [brandished] [discharged].

3. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count the firearm [used] [carried] [possessed] __________ a [short-barreled rifle] [short-barreled shotgun] [semiautomatic assault weapon] [machinegun] [destructive device] [equipped with a firearm silencer or firearm muffler].

So Say We All.

Date: _____________ ____________________

Foreperson

Offense Instruction 35.5
Aiding and Abetting: Possessing a Firearm
18 U.S.C. § 924(c)

The Defendant can be found guilty of aiding and abetting the crime of possessing a firearm in furtherance of a [violent crime] [drug-trafficking crime]. That is, the Defendant can be found guilty even if the Defendant did not personally possess the firearm. But to be found guilty on this basis, the Defendant must have actively participated in the [violent crime] [drug-trafficking crime] with advance knowledge that a confederate would possess a firearm in furtherance of the [violent crime] [drug-trafficking crime].

Advance knowledge means knowledge at a time when the Defendant chose to begin or continue the Defendant's participation in the [violent crime] [drug-trafficking crime]. The Defendant chose to continue the Defendant's participation if the Defendant learned of the firearm and continued to participate. But the Defendant did not choose to continue to participate if the Defendant learned of the firearm too late for the Defendant to be reasonably able to walk away.

ANNOTATIONS AND COMMENTS

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some

advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. If a defendant continues to participate in a crime after the firearm is used or displayed, a jury may determine that he had such knowledge. Therefore, in § 924(c) cases, it is recommended that this instruction be given together with Instruction 7.

In *Rosemond*, the Supreme Court said, "We hold that the Government makes its case by proving that the defendant *actively participated* in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 134 S. Ct. at 1243 (emphasis added). The instruction tracks this language. In most cases, this will present no issue; in most cases the defendant's alleged role in the drug-trafficking or violent crime will be as an active participant. Suppose, though, that the defendant only aided or abetted the underlying crime, perhaps by loaning a car knowing it would be used in an armed bank robbery. Perhaps, in the Supreme Court's view, loaning a car is "active" participation. But in a case with facts of that kind, the district court may wish to modify the standard instruction.

There are three possible charges under § 924(c): (1) used during and in violation to; (2) "carried" during and in relationship to; or (3) "possessed" in furtherance of; the offense. Moreover, enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

Offense Instruction 35.6
Aiding and Abetting: Using or Carrying a Firearm
18 U.S.C. § 924(c)

The Defendant can be found guilty of aiding and abetting the crime of [using] [carrying] a firearm during and in relation to a [violent crime] [drug-trafficking crime]. That is, the Defendant can be found guilty even if the Defendant did not personally [use] [carry] the firearm. But to be found guilty on this basis, the Defendant must have actively participated in the [violent crime] [drug-trafficking crime] with advance knowledge that a confederate would [use] [carry] a firearm during and in relation to the [violent crime] [drug-trafficking crime].

Advance knowledge means knowledge at a time when the Defendant chose to begin or continue the Defendant's participation in the [violent crime] [drug-trafficking crime]. The Defendant chose to continue the Defendant's participation if the Defendant learned of the firearm and continued to participate. But the Defendant did not choose to continue to participate if the Defendant learned of the firearm too late for the Defendant to be reasonably able to walk away.

ANNOTATIONS AND COMMENTS

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. If a defendant continues to participate in a crime after the firearm is used or displayed, a jury may determine that he had such knowledge. Therefore, in § 924(c) cases, it is recommended that this instruction be given together with Instruction 7.

In *Rosemond*, the Supreme Court said, "We hold that the Government makes its case by proving that the defendant *actively participated* in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 134 S. Ct. at 1243 (emphasis added). The instruction tracks this language. In most cases, this will present no issue; in most cases the defendant's alleged role in the drug-trafficking or violent crime will be as an active participant. Suppose, though, that the defendant only aided or abetted the underlying crime, perhaps by loaning a car knowing it would be used in an armed bank robbery. Perhaps, in the Supreme Court's view, loaning a car is "active" participation. But in a case with facts of that kind, the district court may wish to modify the standard instruction.

There are three possible charges under § 924(c): (1) used during and in violation to; (2) "carried" during and in relationship to; or (3) "possessed" in furtherance of; the offense. Moreover, enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

Offense Instruction 35.7
Aiding and Abetting: Using or Carrying and Possessing a Firearm
18 U.S.C. § 924(c)

The Defendant can be found guilty of aiding and abetting the crime of [using] [carrying] a firearm during and in relation to, or possessing a firearm in furtherance of, a [violent crime] [drug-trafficking crime]. That is, the Defendant can be found guilty even if the Defendant did not personally [use] [carry] or possess the firearm. But to be found guilty on this basis, the Defendant must have actively participated in the [violent crime] [drug-trafficking crime] with advance knowledge that a confederate would [use] [carry] a firearm during and in relation to, or possess a firearm in furtherance of, the [violent crime] [drug-trafficking crime].

Advance knowledge means knowledge at a time when the Defendant chose to begin or continue the Defendant's participation in the [violent crime] [drug-trafficking crime]. The Defendant chose to continue the Defendant's participation if the Defendant learned of the firearm and continued to participate. But the Defendant did not choose to continue to participate if the Defendant learned of the firearm too late for the Defendant to be reasonably able to walk away.

ANNOTATIONS AND COMMENTS

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. If a defendant continues to participate in a crime after the firearm is used or displayed, a jury may determine that he had such knowledge. Therefore, in § 924(c) cases, it is recommended that this instruction be given together with Instruction 7.

In *Rosemond*, the Supreme Court said, "We hold that the Government makes its case by proving that the defendant *actively participated* in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 134 S. Ct. at 1243 (emphasis added). The instruction tracks this language. In most cases, this will present no issue; in most cases the defendant's alleged role in the drug-trafficking or violent crime will be as an active participant. Suppose, though, that the defendant only aided or abetted the underlying crime, perhaps by loaning a car knowing it would be used in an armed bank robbery. Perhaps, in the Supreme Court's view, loaning a car is "active" participation. But in a case with facts of that kind, the district court may wish to modify the standard instruction.

There are three possible charges under § 924(c): (1) used during and in violation to; (2) "carried" during and in relationship to; or (3) "possessed" in furtherance of; the offense. Moreover, enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

Offense Instruction 35.8
Brandishing
18 U.S.C. § 924(c)

If you find the Defendant guilty of using or carrying a firearm during or in relation to a [crime of violence/drug trafficking crime], you must also determine if the Defendant brandished a firearm during and in relation to a [crime of violence/drug trafficking crime].

[The Defendant is guilty of aiding and abetting the brandishing of a firearm if he had advance knowledge that a confederate would display or make the presence of a firearm known for purposes of intimidation. The Defendant need not have had advance knowledge that a confederate would actually brandish the firearm. This requirement is satisfied if the Defendant knew that a confederate intended to brandish a firearm to intimidate if the need arose.]

ANNOTATIONS AND COMMENTS

Enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

"The defendant must have intended to brandish the firearm, because the brandishing must have been done for a specific purpose." *United States v. Dean*, 556 U.S. 568, 572-73 (2009) (comparing intent requirement for brandishing a firearm and discharging a firearm and explained that, unlike discharging, Congress included an intent requirement for

brandishing).

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. The Court emphasized that "[a]iding and abetting law prevents [the] outcome [of evading . . . penalties by leaving use of the gun to someone else], so long as the player knew the heightened stakes when he decided to stay in the game." 134 S. Ct. at 1250. "An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. . . . He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense— *i.e.,* an armed drug sale." *Id.* at 1249.

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

Offense Instruction 35.9
Discharge of Firearm
18 U.S.C. § 924(c)

If you find the Defendant guilty of using or carrying a firearm during and in relation to a [crime of violence/drug trafficking crime], you must then determine whether the firearm was discharged, even accidentally. [To aid and abet the possession or carrying of a firearm that was discharged, the Defendant need not have advance knowledge that the discharge would occur.]

ANNOTATIONS AND COMMENTS

Enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

See United States v. Dean, 556 U.S. 568 (2009) (holding accidental discharge of firearm in connection with crime of violence or drug trafficking crime gives rise to 10-year mandatory minimum under 18 U.S.C. § 924). The Supreme Court explained that, unlike discharging, Congress included an intent requirement for brandishing.

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. The Court explained that "[a]iding and abetting law prevents [the] outcome [of evading . . . penalties by leaving use of the gun to someone else], so long as the player knew the heightened stakes when he decided to stay in the game." 134 S. Ct. at 1250.

"An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. . . . He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense— *i.e.,* an armed drug sale." *Id.* at 1249.

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

Offense Instruction 35.10
Weapons Listed in
18 U.S.C. § 924(c)(1)(B)

If you find the Defendant guilty, you must then determine whether the firearm that was [possessed/used or carried] was [a short-barreled rifle/a short-barreled shotgun/a semiautomatic assault weapon/a machine gun/a destructive device/equipped with a firearm silencer or firearm muffler]. [To aid and abet the possession or carrying of such a firearm, the Defendant need not have advance knowledge of the type of firearm.]

ANNOTATIONS AND COMMENTS

Enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (seven years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

Offense Instruction 40.3
Aggravated Identity Theft
18 U.S.C. § 1028A(a)(1)

It’s a Federal crime to commit aggravated identity theft.

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

(1) the Defendant knowingly transferred, possessed, or used another person’s [means of identification] [identification documents];

(2) without lawful authority; and

(3) during and in relation to [the eligible felony alleged in the indictment].

The Government must prove that the Defendant knowingly transferred, possessed, or used another person’s identity “without lawful authority.” The Government does not have to prove that the Defendant stole the [means of identification] [identification documents], only that there was no legal authority for the Defendant to transfer, possess, or use them.

The Government must prove that the Defendant knew that the [identification] [documents], in fact, belonged to another actual person, [living or dead,] and not a fictitious person.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1028A(a)(1)provides:

(a) Offenses. - -

> (1) In general. - - Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

The Supreme Court recently clarified the elements of an offense under § 1028A(a)(1), and held that it "requires the Government to show that the defendant *knew* that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S. Ct. 1886, 1888 (2009) (emphasis in original). This part of the holding is contrary to *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam), in which the Eleventh Circuit had held that the government was not required to show that the Defendant used identification documents that he knew had actually been assigned to another individual, as opposed to a fictitious person.

Hurtado's holding that § 1028A(a)(1)does not require the Government to prove that the defendant obtained another person's identification documents by "stealing" has not been overruled. *See id.* at 608. In other words, the phrase "without lawful authority" prohibits methods of obtaining another person's identification beyond stealing. *See id.*; *see also Flores-Figueroa*, 556 U.S. at 655 (noting that examples of identity theft identified in the legislative history of § 1028A include "dumpster diving," "accessing information that was originally collected for an authorized purpose," "hack[ing] into computers," and "steal[ing] paperwork likely to contain personal information" (citing H. R. Rep No. 108-528, at 4-5 (2004))).

Accordingly, the elements of this offense (as originally set forth in *Hurtado*) have been modified and combined, as the Supreme Court requires. *See also United States v. Gomez*, 580 F.3d 1229 (11th Cir. 2009).

Offense Instruction 41.2
Fraudulent Use of Unauthorized Credit Cards or Other Access Devices
18 U.S.C. § 1029(a)(2)

It's a Federal crime to [use] [traffic in] unauthorized access devices, including ordinary credit cards, to obtain a thing or things of value totaling $1,000 or more in any 12-month period.

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

(1) the Defendant knowingly [used] [trafficked in] one or more unauthorized access devices;

(2) the Defendant, during a 12-month period, obtained a thing or things of value totaling $1,000 or more as a result of such [use of] [trafficking in] unauthorized access devices;

(3) the Defendant acted with the intent to defraud or deceive; and

(4) the Defendant's conduct affected interstate or foreign commerce.

An "access device" is a 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 get 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 a paper instrument).

An "unauthorized access device" is an access device that's lost, stolen,

expired, canceled, revoked, or obtained with the intent to defraud.

[To "use" 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.]

[To "traffic in" means to transfer, or otherwise dispose of an unauthorized access device to another, or to possess or control an unauthorized device with the intent to transfer or dispose of it to another person.]

To act "with intent to defraud" means to act with the intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else.

The heart of the crime is the intent to defraud. The Government does not have to prove that anyone was actually defrauded or deceived.

The term "interstate commerce" refers to any transaction or event that involves travel, trade, transportation or communication 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, trade, transportation or communication between a place in the United States and a place outside the United States.

The Government does not have to prove that the Defendant specifically intended to interfere with or affect interstate or foreign commerce. But the

Government must prove that the natural consequences of the acts alleged in the indictment would be to affect interstate or foreign commerce.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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 imprisonment (if the offense does not occur after a conviction for another offense under this section), or twenty (20) years imprisonment (if the offense occurs after a conviction for another offense under this section) and applicable fine.

United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997) (un-programmed 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).

See United States v. Klopf, 423 F.3d 1228 (11th Cir. 2005). The defendant in that case was a fugitive, who, without authorization, obtained credit cards from various banks in the names of four other individuals. He was charged with, and convicted of, *inter alia*, using unauthorized credit cards in violation of § 1029(a)(2). He argued on appeal that he could not be convicted under the statute because he merely "borrow[ed] the creditworthiness of unsuspecting individuals to open corporate accounts in order to utilize credit cards because he was unable to apply for credit cards under his own name because of his fugitive status." He contended that he did not possess the requisite intent to defraud because he made regular payments on the credit card accounts. The Eleventh Circuit rejected the arguments, holding that the credit cards were clearly obtained with intent to defraud and that it was "irrelevant" that the defendant made payments on the cards because, "in each application for a credit card, he intended to defraud the banks by representing to them that they were dealing with persons other than himself."

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.

Offense Instruction 50.2
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Public Official/Public Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

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

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the right to honest services of the Defendant through bribery or kickbacks;

(2) the Defendant did so with an intent to defraud the public of the right to the Defendant's honest services; and

(4) 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 the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to the public by participating in a bribery or kickback

scheme.

Public officials and public employees must act in the public's best interest; in other words, they have a duty to the public to do what's best and right for the public. If an [official] [employee] does something or makes a decision that serves the [official's] [employee's] personal interests by taking or soliciting a bribe or kickback, the official or employee defrauds the public of honest services, even if the public agency does not suffer any monetary loss.

Bribery and kickbacks involve the exchange of a thing or things of value for official action by a public official. Bribery and kickbacks also include solicitations of things of value in exchange for official action, even if the thing of value is not accepted or the official action is not performed. That is, bribery and kickbacks include the public [official's] [employee's] solicitation or agreement to accept something of value, whether tangible or intangible, in exchange for official action, whether or not the payor actually provides the thing of value, and whether or not the public official or employee ultimately performs the requested official action or intends to do so.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to or through another state. It doesn't matter whether a matter, communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

<u>ANNOTATIONS AND COMMENTS</u>

18 U.S.C. § 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: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. § 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.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 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.

In *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896 (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

In a public sector honest services fraud case involving a bribe, the Eleventh Circuit appears to have held that materiality is not an element of the offense. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). The Committee believes this to be the correct approach; if a public official or employee accepts a bribe or kickback, the breach of fiduciary duty is inherently material. Accordingly, the pattern charge does not include a materiality element. Nevertheless, the Supreme Court has held materiality is an essential element of the crimes of mail fraud, wire fraud and bank fraud and must be decided by the jury. *Neder v. United States,* 527 U.S. 1, 25 (1999). Because honest services fraud is a species of mail and wire fraud, this has led some circuits to hold that materiality is an element of honest services fraud. If a materiality element is included, the Committee suggests the following: the scheme to defraud had a natural tendency to influence, or was capable of influencing, a decision or action by the Defendant's employer.

Offense Instruction 50.3
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Private Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

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

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the Defendant's employer of the right to honest services of the Defendant through bribery or kickbacks;

(2) the Defendant did so with an intent to defraud the Defendant's employer of the right to the Defendant's honest services;

(3) the Defendant foresaw or reasonably should have foreseen that the Defendant's employer might suffer economic harm as a result of the scheme; and

(4) 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 the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty

to provide honest services to an employer by participating in a bribery or kickback scheme.

An employee who works for a private employer has a legal duty to be honest and faithful in all dealings with the private employer and to do business in the employer's best interests. For instance, the employee must tell an employer about any bribe or kickback the employee has received or expects to receive from working on any of the employer's business transactions.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the employer might suffer economic harm as a result of the breach.

A bribe or a kickback is any kind of secret payment, thing of value, whether tangible or intangible, or reward a person gives to an employee so that the employee's personal financial interest interferes with the employee's obligation to get the best deal for the employer.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to

or through another state. It doesn't matter whether a matter, communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. § 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.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 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.

In *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896 (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

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. It

seems clear that an employment relationship creates a sufficient fiduciary duty to support a conviction for honest services fraud by a private employee. *See Skilling*, 561 U.S. at 408 n.41 (identifying an employer-employee relationship as a clear example of a fiduciary relationship under pre-*McNally* case law); *United States v. Kalaycioglu*, 210 F. App'x 825, 832-33 (11th Cir. 2006); *United States v. Williams*, 441 F.3d 716, 723 (9th Cir. 2006) (noting that employer-employee relationship is sufficient for private sector honest service fraud); *deVegter*, 198 F.3d at 1327 (listing "purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions … defrauding their employers or unions by accepting kickbacks or selling confidential information" as a distinct category of honest services fraud pre-*McNally* (internal quotation marks and citation omitted)).

However, the Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegter*, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'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.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)).

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud. *deVegter*'s requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 726-27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368-69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769,

774-75 (5th Cir. 1996) (materiality). Therefore the Committee has not included a redundant materiality element in the pattern charge.

Offense Instruction 50.4
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Independent Contractor or Other Private Sector Contractual Relationship
Besides Employer/Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

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

(1) the Defendant owed a duty of honest services to the victim;

(2) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the victim of the right to honest services of the Defendant through bribery or kickbacks;

(3) the Defendant did so with an intent to defraud the victim of the right to the Defendant's honest services;

(4) the Defendant foresaw or reasonably should have foreseen that the victim might suffer economic harm as a result of the scheme; and

(5) 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 the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat

someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to another person by participating in a bribery or kickback scheme.

The Defendant owes a duty of honest services to the victim if, by the nature of their relationship, the Defendant is vested with a position of dominance, authority, trust, and de facto control. The relationship imposes this duty if trust is reposed on one side and there is resulting superiority and influence on the other.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the victim might suffer economic harm as a result of the breach.

A bribe or a kickback is any kind of secret payment, thing of value, whether tangible or intangible, or reward given to a person so that the person's personal financial interest interferes with the person's obligation to get the best deal for someone to whom the person owes a duty of loyalty.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else.

[A "private or commercial interstate carrier" includes any business that

transmits, carries, or delivers matters, communications or items from one state to or through another state. It doesn't matter whether a matter, communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. § 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.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 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.

In *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896 (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

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. The Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegter*, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'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.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)). The definition of the type of relationship necessary to give rise to a duty of honest services comes from *deVegter*'s definition of fiduciary duty, which is drawn from *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) and *United States v. Brennan*, 183 F.3d 139, 150-51 (2d Cir. 1999). *See deVegter*, 198 F.3d at 1331 & n.8.

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud. *deVegter*'s requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 726-27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368-69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (materiality). Therefore the Committee has not included a redundant materiality element in the pattern charge.

Offense Instruction 53
Health Care Fraud
18 U.S.C. § 1347

It's a Federal crime to knowingly and willfully execute, or attempt to execute, a scheme or artifice to defraud a health-care benefit program, or to get any of the money or property owned by, or under the custody or control of, a health-care benefit program by means of false or fraudulent pretenses, representations, or promises.

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

(1) the Defendant knowingly executed, or attempted to execute, a scheme or artifice to defraud a health-care benefit program, [or to obtain money or property owned by, or under the custody or control of, a health-care benefit program] by means of false or fraudulent pretenses, representations, or promises;

(2) the health care benefit program affected interstate commerce;

(3) the false or fraudulent pretenses, representations, or promises related to a material fact;

(4) the Defendant acted willfully and intended to defraud; and

(5) the Defendant did so in connection with the delivery of or payment for health-care benefits, items, or services.

"Health-care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided

to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

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

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference as to the truth and makes with intent to defraud. A statement or representation may be "false" or "fraudulent" when it's a half truth or effectively conceals a material fact and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to

decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to do something with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme substantially similar to the one alleged in the indictment.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1347 provides:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice - -
>
> (1) to defraud any health-care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health-care benefit program,

in connection with the delivery of or payment for health-care benefits, items, or services, [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment and applicable fine. (If the violation results in serious bodily injury or death, twenty (20) years or life imprisonment, respectively, and applicable fine.)

The Eleventh Circuit has stated that: "To prove health-care fraud under 18 U.S.C. §1347, the government must prove 'knowing and willful execution of or attempt to execute a scheme to defraud a health-care benefit program in connection with delivery of or payment for health-care." *United States v. Marti*, 294 F. App'x 439, 444 (11th Cir. 2008) (quoting *United States v. Mitchell*, 165 F. App'x 821, 824 (11th Cir. 2006). Thus, this instruction includes "willfully" to track the statute and circuit case law. The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

Affecting commerce is included as an element of this offense under the rationale of *United States v. Reddy*, 534 F. App'x 866, 877 (11th Cir. 2013). Other circuits have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Lucien*, 2003 WL 22336124 (2d Cir. Oct. 14, 2003); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002). The cases draw this inference from the Hobbs Act context, which also uses the words "affect commerce." The Eleventh Circuit has reached the same result where "affecting commerce" is used in other contexts. *See United States v. Guerra*, 164 F3d 1358 (11th Cir. 1999) (Hobbs Act).

The Eleventh Circuit has explained that the language "affecting commerce" when used in a statute has a specialized meaning. *United States v. Ballinger*, 395 F.3d 1218, 1231-32 (11th Cir. 2005). "The words 'affecting commerce,' as the Supreme Court has repeatedly explained, are 'words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.'" *Id.* at 1232. For example, while the Hobbs Act by its terms prohibits any act that "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . ," "[t]he government needs only to establish a minimal effect on interstate commerce to support a violation." *United States v. Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000) (citing 18 U.S.C. § 1951(a); *Stirone v. United States*, 361 U.S. 212, 215 (1960)).

Materiality is included as an element of this offense under the rationale of *Neder v. United States*, 527 U.S. 1, 25 (1999).

Offense Instruction 74.5
Money Laundering Conspiracy
18 U.S.C. § 1956(h)

It's a Federal crime to conspire to engage in money laundering or transactions involving the proceeds of specified unlawful activity that violates Title 18, United States Code, Section [1956 or 1957].

[Describe the elements of the relevant provision of 18 U.S.C. § 1956 (money laundering) or 18 U.S.C. §1957 (transactions involving the proceeds of specified unlawful activity).]

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

The Defendant can be found guilty of this crime only if all the following

facts are proved beyond a reasonable doubt:

(1) two or more people agreed to try to accomplish a common and unlawful plan to violate [18 U.S.C. Section 1956 or 1957]; and

(2) the Defendant knew about the plan's unlawful purpose and voluntarily joined in it.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and voluntarily joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 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. 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.

In *Whitfield v. United States*, 543 U.S. 209 (2005), the Supreme Court affirmed the Eleventh Circuit's holding that 1956(h) does not require proof of an overt act in furtherance of the alleged conspiracy.

The FERA was a direct response to *United States v. Santos*, 128 S. Ct. 2020 (2008). In *Santos*, a plurality of the U.S. Supreme Court held that the definition of the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) refers to "profits" rather than "receipts" when applied to a prosecution arising from an illegal stand-alone gambling operation. Until the FERA, the definition of "proceeds" in the money laundering statute remained unclear.

The Eleventh Circuit has construed the fragmented *Santos* opinion narrowly. In *United States v. Demarest*, 570 F.3d 1232 (11th Cir. 2009), a case in which the trial took place prior to the FERA's enactment, the Court noted:

> *Santos* has limited precedential value… The narrow holding in [the case], at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956…

Id. at 1242.

In *Cuellar v. United States*, 128 S. Ct. 1994 (2008), the Supreme Court held that although the Government doesn't need to show that the defendant attempted to make illegal funds appear legitimate, it is required to show that the defendant did more than merely hide the funds during transport. To sustain a conviction, the Government must prove that the defendant knew that a purpose of the transportation was to conceal or disguise the illicit funds' nature, locations, source, ownership, or control.

Offense Instruction 92.2
Coercion and Enticement of a Minor to Engage in Sexual Activity
18 U.S.C. § 2422(b)

It's a Federal crime for anyone, using [the mail or] any facility [or means] of interstate or foreign commerce [including transmissions by computer on the Internet], to [persuade] [induce] [entice] [coerce] anyone under 18 years old 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 this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly persuaded, induced, enticed, or coerced [individual named in the indictment] to engage in [prostitution] [sexual activity], as charged;

(2) the Defendant used [the mail] [a computer] [describe other interstate facility as alleged in indictment] to do so;

(3) when the Defendant did these acts, [individual named in the indictment] was less than 18 years old; and

(4) one or more of the individual(s) engaging in the sexual activity could have been charged with a criminal offense under the law of [identify the state].

So the Government must prove that one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of [state].

As a matter of law the following acts are crimes under [state] law. [Describe the applicable state law].

[As used in this instruction, "induce" means to stimulate the occurrence of or to cause.]

[As used in this instruction, the term "prostitution" means engaging in or agreeing or offering to engage in any lewd act with or for another person in exchange for money or other consideration.]

[[A telephone] [A cellular telephone] [The Internet] is a facility of interstate commerce.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 2422(b) provides:

> 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 fined under this title and imprisoned not less than 10 years or for life.

Maximum Penalty: Life imprisonment and applicable fine. Minimum sentence is ten (10) years imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

A defendant can also be guilty if he willfully attempts, via the mail or a facility of interstate commerce, to persuade, induce, entice or coerce anyone under eighteen years of age to engage in prostitution or sexual activity. In that circumstance, the court should give the appropriate charge on attempt.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The defendant need not communicate directly with the minor; it is sufficient if the defendant induces (or attempts to induce) the minor via an adult intermediary. *United States v. Hornaday*, 392 F.3d 1306, 1310-11 (11th Cir. 2004); *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). In *Murrell*, the Eleventh Circuit also approved "to stimulate the occurrence of; cause" as the definition of "induce."

The Internet is an instrumentality of interstate commerce. *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). Telephones and cellular telephones are instrumentalities of interstate commerce, even when they are used intrastate. *United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007).

United States v. Evans, 476 F.3d 1176 (11th Cir. 2007) involved a defendant who did not induce the minor into having sex with <u>him</u>; rather, he induced the minor into being a prostitute, and he was her pimp. The jury instructions as written contemplate a fact situation where the defendant attempts to induce a minor to have sex with <u>him</u>, and they would need to be rewritten for a case like *Evans*. *See also United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) (noting that § 2422(b)prohibits a person from persuading a minor to engage in sexual conduct, with himself or with a third party).

In some cases, the government may proceed under an "aiding and abetting" theory. 18 U.S.C. § 2 "permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense." *United States v. Hornaday*, 392 F.3d 1306, 1312-13 (11th Cir. 2004) (noting that indictment need not mention 18 U.S.C. § 2). In those cases, it is appropriate to give an instruction on aiding and abetting. However, it is not appropriate to give such an instruction if the theory is that an undercover agent acted as an intermediary to offer up a fictitious minor to the defendant. *Id*. at 1314.

See United States v. Daniels, 685 F.3d 1237, 1248 (11th Cir. 2012), *cert. denied,* 133 S. Ct. 1240 (2013), (holding that a defendant's knowledge of a victim's age is not an element of an offense under § 2422(b)); *U.S. v. Cox*, 577 F.3d 833 (7th Cir. 2009) (holding that 18 U.S.C. § 2423(a), a statute which the Committee finds to be substantively similar, does not require the Government to prove that the Defendant knew that the victim was under the age of 18).

The term "prostitution" is not defined in Title 18. The Supreme Court has defined the

term as the "offering of the body to indiscriminate lewdness for hire." *Cleveland v. United States*, 329 U.S. 14, 17 (1946). The term should not be defined by reference to state law, as doing so would make the term superfluous, since the statute already punishes "any sexual activity for which any person can be charged with a criminal offense."

Special Instruction 4
Similar Acts Evidence
(Rule 404(b), Fed. R. Evid.)

During the trial, you heard evidence of acts done by the Defendant on other occasions that may be similar to acts the Defendant is currently charged with. You must not consider any of this evidence to decide whether the Defendant committed the acts charged now. But you may consider this evidence for other very limited purposes.

If other evidence leads you to decide beyond a reasonable doubt that the Defendant committed the charged acts, you may consider evidence of similar acts done on other occasions to decide whether [the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the acts charged in the indictment] [the Defendant acted according to a plan or to prepare to commit a crime] [the Defendant was identified as the person who committed the crime charged in the indictment] [the Defendant committed the acts charged in the indictment by accident or mistake].

ANNOTATIONS AND COMMENTS

Rule 404. [Fed. R. Evid.] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

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> (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 (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.

Both the Supreme Court and the Eleventh Circuit have expressly endorsed the *Beechum* test. *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Miller*, 959 F.2d 1535 (11th Cir. 1992) (en banc), *cert. denied*, 506 U.S. 942 (1992).