JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

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On 6 April 2016, the Judicial Council approved the Eleventh Circuit Pattern Jury Instructions, Criminal Cases (2016 revision). Since that date, the Council has approved revisions on 9 December 2016, 7 September 2017, and 29 November 2017, and 24 January 2019, which are listed at the bottom of this memorandum.

On 10 December 2019, the Council also approved the following revised and new instructions:

PRELIMINARY INSTRUCTIONS

Revised

P1	Criminal Cases

BASIC INSTRUCTIONS

New

B8.1	Conjunctively Charged Counts

OFFENSE INSTRUCTIONS

Revised

O13.1	General Conspiracy Charge, 18 U.S.C. § 371
O24.2	Bribery Concerning a Program Receiving Federal Funds, 18 U.S.C. § 666(a)(1)(B)
O75.2	RICO - Conspiracy Offense, 18 U.S.C. § 1962(d)

O92.3	Attempted Coercion and Enticement of a Minor to Engage in Sexual Activity, 18 U.S.C. § 2422(b)
O98	Controlled Substances: Possession with Intent to Distribute, 21 U.S.C. § 841(a)(1)
O117.1	Controlled Substances: Possession of Vessel of the United States or Subject to the Jurisdiction of the United States, 46 U.S.C. § 70503(a)

New

O24.3	Bribery of Agent of Entity Receiving Benefits Under a Federal Assistance Program, 18 U.S.C. § 666(a)(2)
O60.1	Misuse of a Passport, 18 U.S.C. § 1544
O82.1	Advertising Child Pornography, 18 U.S.C. § 2251(d)
O96.4	Conspiracy to Encourage or Induce Aliens to Enter the United States, 8 U.S.C. § 1324(a)(1)(A)(v)(I)
O120	Procurement of Citizenship or Naturalization Unlawfully, 18 U.S.C. § 1425

All other instructions in the 2016 Pattern Jury Instructions for Criminal Cases and previous revisions remain in effect, including the following revisions:

- On 9 December 2016, the Judicial Council approved, and announced in a memorandum on 22 December 2016, revisions to offense instructions 5.1, 5.2, 24.2, 50.2, 70.2, 40.3, 49, and 82, as well as new offense instructions 117.1 and 117.2 new and special instruction 19.

- On 7 September 2017, the Council approved, and announced in a memorandum on 20 September 2017, a new offense instruction 92.3.

- On 29 November 2017, several non-substantive changes were incorporated into the instructions.

- On 24 January 2019, the Council approved, and announced in a memorandum on 1 February 2019, revisions to offense instructions 50.1, 50.2, 50.3, 50.4, 51, 52, 53.1, 98, 106.1, as well as new offense instruction 53.2.

The 6 April 2016 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2016 pattern jury instructions. Those limitations and conditions also apply to all of the instructions 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

P1
Preliminary Instructions – Criminal Cases

Members of the Jury:

Now that you have been sworn, I need to explain some basic principles about a criminal trial and your duty as jurors. These are preliminary instructions. At the end of the trial I will give you more detailed instructions.

Duty of jury:

It will be your duty to decide what happened so you can determine whether the defendant is guilty or not guilty of the crime charged in the indictment. At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you even if you do not agree with the law.

What is evidence:

You must decide the case solely on the evidence presented here in the courtroom. Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion. Some evidence proves a fact indirectly, such as a witness who saw wet grass outside and people walking into the courthouse carrying wet umbrellas. Indirect evidence, sometimes called circumstantial evidence, is simply a chain of circumstances that proves a fact. As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may

choose to believe or disbelieve either kind and should give every piece of evidence whatever weight you think it deserves.

What is not evidence:

Certain things are not evidence and must not be considered. I will list them for you now:

- Statements and arguments of the lawyers. In their opening statements and closing arguments, the lawyers will discuss the case, but their remarks are not evidence;
- Questions and objections of the lawyers. The lawyers' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because a lawyer's question suggests that it is. For instance, if a lawyer asks a witness, "you saw the defendant hit his sister, didn't you?" – that question is no evidence whatsoever of what the witness saw or what the defendant did, unless the witness agrees with it.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, then the question may be answered or the exhibit received. If I sustain the objection, then the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and not try to guess what the answer would have been.

Sometimes I may order that evidence be stricken and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider that evidence.

Some evidence is admitted only for a limited purpose. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and no other.

Credibility of witnesses:

In reaching your verdict, you may have to decide what testimony to believe and what testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- The opportunity and ability of the witness to see or hear or know the things testified to;
- The witness's memory;
- The witness's manner while testifying;
- The witness's interest in the outcome of the case and any bias or prejudice;
- Whether other evidence contradicted the witness's testimony;
- The reasonableness of the witness's testimony in light of all the evidence; and
- Any other factors that bear on believability.

I will give you additional guidelines for determining credibility of witnesses at the end of the case.

Rules for criminal cases:

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

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

Second, the burden of proof is on the government until the very end of the case. The defendant has no burden to prove [his] [her] innocence or to present any evidence, or to testify. Since the defendant has the right to remain silent and may choose whether to testify, you cannot legally put any weight on a defendant's choice not to testify. It is not evidence.

Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that the level of proof required is high.

Conduct of the jury:

Our law requires jurors to follow certain instructions regarding their personal conduct in order to help assure a just and fair trial. I will now give you those instructions:

> 1. Do not talk, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court, but you may not discuss with them or anyone else anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person, any type of payment or benefit in return for supplying any information about the trial.

3. You must promptly tell me about any incident you know of involving an attempt by any person to improperly influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use Internet maps or Google Earth or any other program or device to search for a view of any location discussed in the testimony.

5. Do not read, watch, or listen to any accounts or discussions related to the case which may be reported by newspapers, television, radio, the Internet, or any other news media.

6. Do not attempt to research any fact, issue, or law related to this case, whether by discussions with others, by library or Internet research, or by any other means or source.

In this age of instant electronic communication and research, I want to emphasize that in addition to not talking face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, Internet chat, chat rooms, blogs, or social-networking websites and apps such as Facebook, Instagram, Snapchat, YouTube, or Twitter. You may not use any similar technology of social media, even if I have not specifically mentioned it here.

You must not provide any information about the case to anyone by any means whatsoever, and that includes posting information about the case, or what

you are doing in the case, on any device or Internet site, including blogs, chat rooms, social websites, or any other means.

You also must not use Google or otherwise search for any information about the case, or the law that applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge. It is important that you understand why these rules exist and why they are so important:

Our law does not permit jurors to talk with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else is so qualified.

Our law also does not permit jurors to talk among themselves about the case until the court tells them to begin deliberations, because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you can't be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have a mistaken view of the scene that neither party may have a chance to correct. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. Also, the law often uses words and phrases in special ways, so it's important that any definitions you hear come only from me, and not from any other source. It wouldn't be fair to the parties for you to base your decision on some reporter's view or opinion, or upon other information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and our law accordingly sets forth serious consequences if the rules are not followed. I trust that you understand and appreciate the importance of following these rules, and in accord with your oath and promise, I know you will do so.

Taking notes:

Moving on now, if you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you so that you do not hear other answers by witnesses. When you leave the courtroom, your notes should be left in the jury room. Whether or not you take notes, you should rely on your own memory of what was said. Notes are to

assist your memory only. They are not entitled to any greater weight than your memory or impression about the testimony.

Separate consideration for each defendant:

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to a particular defendant and disregard any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Course of the trial:

The trial will now begin. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor argument.

The government will then present its witnesses, and counsel for the defendant may cross-examine them. Following the government's case, the defendant may, if [he] [she] wishes, present witnesses whom the government may cross-examine. After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and I will instruct you on the law. After that, you will go to the jury room to decide your verdict.

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

B8.1

Conjunctively Charged Counts

Where a statute specifies multiple alternative ways in which an offense may be committed, the indictment may allege the multiple ways in the conjunctive, that is, by using the word "and." If only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as you agree unanimously as to that alternative.

ANNOTATIONS AND COMMENTS

"[I]t is well-established . . . that a disjunctive statute may be pleaded conjunctively and proved disjunctively." *United States v. Williams*, 790 F.3d 1240, 1245 n.2 (11th Cir. 2015) (quoting *United States v. Haymes*, 610 F.2d 309, 310 (5th Cir. 1980) (citing *United States v. Quiroz-Carrasco*, 565 F.2d 1328, 1331 (5th Cir. 1978)); *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting as binding precedent all decisions of the former Fifth Circuit issued on or before September 30, 1981).

In other words, "when a defendant is charged in an indictment conjunctively with alternative means or alternative mental states, any one of which will satisfy an element of the crime, the 'jury instruction may properly be framed in the disjunctive' without a constructive amendment taking place." *United States v. Mozie*, 752 F.3d 1271, 1284 (11th Cir. 2014) (quoting *United States v. Simpson*, 228 F.3d 1294, 1300 (11th Cir. 2000)). "The rule applies not only to alternative acts that satisfy a statutory element, but also to alternative mental states that may satisfy an element." *Id.* (citing *Haymes*, 610 F.2d at 310–11).

"This is not only a permissible practice but also a common one." *Id.* (quoting *United States v. Howard*, 742 F.3d 1334, 1343 n.3 (11th Cir. 2014)) ("Prosecutors can and frequently do . . . charge alternative elements in the conjunctive and prove one or more of them in the disjunctive, which is constitutionally permissible."); *see also Simpson*, 228 F.3d at 1300.

O13.1
General Conspiracy Charge
18 U.S.C. § 371

It's a separate Federal crime for anyone to conspire or agree with someone else to do something that would be another Federal crime if it was actually carried out.

A "conspiracy" is an agreement by two or more people to commit an unlawful act. In other words, it is a kind of "partnership" for criminal purposes. Every member of a 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 Government does not have to prove that the members planned together all the details of the plan or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

The heart of a conspiracy is the making of the unlawful plan itself followed by the commission of any overt act. 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 persons in some way agreed to try to accomplish a shared and unlawful plan;

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it;

(3) during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and

(4) the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

An "overt act" is any transaction or event, even one that may be entirely innocent when viewed alone, that a conspirator commits to accomplish some object of the conspiracy

A person may be a conspirator 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 willfully 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. 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. § 371 provides:

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

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

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

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

The general conspiracy statute, 18 U.S.C. § 371, expressly makes an overt act an element of the offense. A conspiracy charged under other conspiracy statutes may not include an overt act as an element. *See, e.g.*, 18 U.S.C. §§ 286, 1349, 1956(h), 1962(d); and 21 U.S.C. §§ 846, 963. To the extent that district courts are relying on this instruction as guidance for drafting an instruction for a different conspiracy offense, the Committee cautions that the United States Supreme Court has held in several circumstances that proof of an overt act is not required when a conspiracy statute does not expressly contain an overt act requirement. *See Whitfield v. United States*, 543 U.S. 209, 214 (2005) (finding no overt act requirement in 18 U.S.C. § 1956(h)); *Salinas v. United States*, 522 U.S. 52, 63 (1997) (same as to 18 U.S.C. § 1962(d)); *United States v. Shabani* 513 U.S. 10, 11 (1994) (same as to 21 U.S.C. § 846). Reference to instructions related to those statutes may provide useful guidance. *See* O74.5, O75.2, O100.

O24.2
Bribery Concerning a
Program Receiving Federal Funds
18 U.S.C. § 666(a)(1)(B)

It's a Federal crime for anyone who is an agent of a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] receiving significant benefits under a Federal assistance program, to corruptly [solicit or demand] [accept] [agree to accept] anything of value from any person when the agent intends to be influenced or rewarded in connection with certain transactions of the [organization] [government] [agency].

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

(1) the Defendant was an agent of [name of entity claimed by the government to be the affected entity];

(2) [same name of affected entity as above] was a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] that received in any one-year period benefits in excess of $10,000 under a Federal program involving [a grant] [a contract] [a subsidy] [a loan] [a guarantee] [insurance] [other form of Federal assistance];

(3) during the one-year period the Defendant [solicited or demanded] accepted] [agreed to accept] a thing valued at approximately $_____ from someone other than [entity's name];

(4) in return for the [acceptance] [agreement], the Defendant intended to be influenced or rewarded for a transaction or series of transactions of [entity's name] involving something worth $5,000 or more; and

(5) the Defendant acted corruptly.

To act "corruptly" means to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.

An "agent" is a person authorized to act on behalf of another person, organization, or a government and, in the case of an organization or government, includes a servant or employee, partner, officer, or director.

[A "government agency" is a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program.]

["Local" means of or pertaining to a political subdivision within a State.] ["State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

"In any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

It is not necessary to prove that the Defendant's conduct directly affected the funds received by the [organization] [government] [agency] under the Federal program.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 666(a)(1)(B) and (b) provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists - -
>
> (1)being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof - -
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more [shall be guilty of an offense against the United States].
>
> (b)The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one-year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Maximum Penalty: Ten years imprisonment and applicable fine.

In *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010), the Eleventh Circuit held that neither § 666(a)(1)(B) nor (a)(2) requires "that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*." Other circuits have held the same. *See, e.g.*, *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) (stating that "the text says nothing of a quid pro quo requirement to sustain a conviction" and "while a *quid pro quo* of money for a specific [legislative] act is sufficient to violate [§ 666(a)(1)(B) or (a)(2)], it is not necessary") (internal quotation marks omitted); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (holding that "[a] *quid pro quo* of money for a specific legislative act" is not necessary under § 666(a)(1)(B) and that an exchange of money for the official's "influence" was enough").

However, defendants have argued that the Supreme Court's reasoning in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which concerned an 18 U.S.C. § 201 bribery prosecution, should apply to a § 666 bribery prosecution. Section 201, in relevant part, addresses bribes given or received to influence an "official act" or "in return for" an "official act." In *McDonnell*, the Supreme Court held that district courts should clearly define the type of conduct that constitutes official acts in § 201 prosecutions.

The Eleventh Circuit has not addressed whether *McDonnell* applies to § 666, but other circuits have held that it does not. *See, e.g.*, *United States v. Suhl*, 885 F.3d 1106, 1112 (8th Cir. 2018) ("Suhl asks us to apply *McDonnell* to both honest-services and federal-funds bribery. *McDonnell* interpreted the term 'official act' in § 201, and the parties agree that § 201 also defines the elements of honest-services bribery. Section 666, however, does not include the term 'official act.'"); *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) ("We do not see that the *McDonnell* standard applied to these counts [under § 666]."); *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018) ("Porter's reliance on *McDonnell* is misplaced. In *McDonnell*, the Supreme Court limited the interpretation of the term 'official act' as it appears in § 201, an entirely different statute than the one at issue here.").

In *United States v. Fischer*, 168 F.3d 1273, 1277 n.8 (11th Cir. 1999), *aff'd., Fischer v. United States*, 529 U.S. 667 (2000), the Court held that Medicare disbursements are "benefits" within the meaning of the statute, and that the Government is not required to prove a direct link between the federal assistance and the fraudulent conduct in issue.

O24.3
Bribery of Agent of Entity Receiving Benefits Under a Federal Assistance Program
18 U.S.C. § 666(a)(2)

It's a Federal crime for anyone to corruptly [give] [offer] [agree to give] anything of value to anyone who is an agent of a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] receiving significant benefits under a Federal assistance program, with the intent to reward or influence that agent in connection with certain transactions of the [organization] [government] [agency].

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

(1)that [name of agent claimed by the government to be rewarded or influenced by the Defendant] was an agent of [name of entity claimed by the government to be the affected entity];

(2)that [same name of affected entity as above] was a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] that received in any one-year period benefits in excess of $10,000 under a Federal program involving [a grant] [a contract] [a subsidy] [a loan] [a guarantee] [insurance] [other form of Federal assistance];

(3)that during the one-year period, the Defendant [gave] [offered] [agreed to give] something of value to [agent of entity] with the intent to influence or reward [the agent] in connection with any business, transaction, or series of transactions of [entity's name], involving something of value of $5,000 or more; and

(4)that in so doing, the Defendant acted corruptly.

To act "corruptly" means to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.

An "agent" is a person authorized to act on behalf of another person, organization, or a government and, in the case of an organization or government, includes a servant or employee, partner, officer, or director.

[A "government agency" is a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program.]

["Local" means of or pertaining to a political subdivision within a State.]

["State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

"In any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

It is not necessary to prove that the Defendant's conduct directly affected the funds received by the [organization] [government] [agency] under the Federal program.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 666(a)(2) provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists - -
>
> > (2)corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more [shall be guilty of an offense against the United States].
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one[-]year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Maximum Penalty: Ten years imprisonment and applicable fine.

In *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010), the Eleventh Circuit held that neither § 666(a)(1)(B) nor (a)(2) requires "that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*." Other circuits have held the same. *See, e.g.*, *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) (stating that "the text says nothing of a quid pro quo requirement to sustain a conviction" and "while a *quid pro quo* of money for a specific [legislative] act is sufficient to violate [§ 666(a)(1)(B) or (a)(2)], it is not necessary") (internal quotation marks omitted); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (holding that "[a] *quid pro quo* of money for a specific legislative act" is not necessary under § 666(a)(1)(B) and that an exchange of money for the official's "influence" was enough").

However, defendants have argued that the Supreme Court's reasoning in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which concerned an 18 U.S.C. § 201 bribery prosecution, should apply to a § 666 bribery prosecution. Section 201, in relevant part,

addresses bribes given or received to influence an "official act" or "in return for" an "official act." In *McDonnell*, the Supreme Court held that district courts should clearly define the type of conduct that constitutes official acts in § 201 prosecutions.

The Eleventh Circuit has not addressed in a reported decision whether *McDonnell* applies to § 666, but other circuits have held that it does not. *See, e.g.*, *United States v. Suhl*, 885 F.3d 1106, 1112 (8th Cir. 2018) ("Suhl asks us to apply *McDonnell* to both honest-services and federal-funds bribery. *McDonnell* interpreted the term 'official act' in § 201, and the parties agree that § 201 also defines the elements of honest-services bribery. Section 666, however, does not include the term 'official act.'"); *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) ("We do not see that the *McDonnell* standard applied to these counts [under § 666]."); *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018) ("Porter's reliance on *McDonnell* is misplaced. In *McDonnell*, the Supreme Court limited the interpretation of the term 'official act' as it appears in § 201, an entirely different statute than the one at issue here.").

In *United States v. Fischer*, 168 F.3d 1273, 1277 n.8 (11th Cir. 1999), *aff'd.*, *Fischer v. United States*, 529 U.S. 667 (2000), the Court held that Medicare disbursements are "benefits" within the meaning of the statute, and that the Government is not required to prove a direct link between the federal assistance and the fraudulent conduct in issue.

O60.1
Misuse of a Passport 18 U.S.C. § 1544
(First and Second Paragraphs)

It's a federal crime to knowingly and willfully [use] [attempt to use] a passport issued or designed for the use of another [in violation of the conditions or restrictions contained in the passport] [in violation of the rules pursuant to the laws regulating the issuance of passports].

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

(1) the Defendant [used] [attempted to use] a passport;

(2) [the passport was issued or designed for the use of someone other than the defendant] [the use or attempted use violated the conditions or restrictions contained in the passport] [the use or attempted use violated the rules governing the issuance of passports];

(3) the Defendant acted knowingly and willfully[.] [and]

[(4) the Defendant did so [to facilitate an act of international terrorism] [to facilitate a drug-trafficking crime].]

> [To "facilitate" an act simply means to help or further the accomplishment of that act.]
>
> [An "act of international terrorism" means (1) a criminal act that is dangerous to human life, (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping, and (3) occurs outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

> [A "drug-trafficking crime" means any felony punishable under the Controlled Substances Act, 21 U.S.C. § 801 et seq., the Controlled Substances Import and Export Act, 21 U.S.C. 951 et seq., or chapter 705 of title 46 of the United States Code.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1544 provides:

> Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or
>
> Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or
>
> Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed . . . .

Maximum Penalty: Ten (10) years imprisonment, applicable fine, or both. If the offense was committed to facilitate a drug trafficking crime, twenty (20) years imprisonment, applicable fine, or both. If the offense was committed to facilitate an act of international terrorism, twenty-five (25) years imprisonment, applicable fine, or both.

The optional fourth element is included in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) where the indictment alleges facts triggering the enhanced penalty under the statute.

O75.2
RICO – Conspiracy Offense
18 U.S.C. § 1962(d)

It's a Federal crime for anyone associated with an enterprise whose activities involve or affect interstate commerce to participate in conducting the activities of the enterprise through a pattern of racketeering activity.

The meaning of certain terms and an explanation of what the Government must prove for this crime are in the instructions covering Count _____ of the indictment. The Defendants named in Count _____ of the indictment – the conspiracy count – are not charged with violating Section 1962(c). They are charged with willfully and knowingly conspiring to violate that law by [insert alleged racketeering acts]. Conspiracy is a separate crime, and violates Section 1962(d).

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.

An "enterprise" includes legal entities such as any partnership, corporation, or association. It also includes a non-legal entity that is a group of people associated for a common purpose of engaging in a course of conduct.

"Racketeering activity" includes any acts that violate [cite relevant statute(s), e.g. Title 18 of the United States Code relating to mail fraud (Section 1341) and wire fraud (Section 1343)].

A "pattern of racketeering activity" means that at least two acts of racketeering activity were committed within ten (10) years. At least one of the acts must have occurred after October 15, 1970.

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

(1) two or more people agreed to try to accomplish an unlawful plan to participate in the affairs of an enterprise through a pattern of racketeering activity;

(2) that the unlawful plan affected interstate commerce;

(3) the Defendant knowingly and willfully joined in the conspiracy; and

(4) when the Defendant joined in the agreement, the Defendant had the specific intent either to personally participate in committing at least two other acts of racketeering, or else to participate in the enterprise's affairs, knowing that other members of the conspiracy would commit at least two other acts of racketeering and intending to help them as part of a pattern of racketeering activity.

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 willfully 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. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine, and forfeiture of certain property. Life imprisonment if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment. (The jury must find that defendant committed such a predicate act beyond a reasonable doubt. *See United States v. Nguyen*, 255 F.3d 1335 (11th Cir. 2001) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

United States v. Browne, 505 F.3d 1229, 1257 (11th Cir. 2007) (quoting *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir.1995)) (In order to establish a RICO conspiracy, the government must prove: "(1) that an enterprise existed; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; (4) that the defendants participated, either directly or indirectly, in the conduct of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity.").

United States v. To, 144 F.3d 737 (11th Cir. 1998) (discusses 'single objective' and 'overall objective' RICO conspiracy theories); *see also United States v. Beale*, 921 F.2d 1412 (11th Cir. 1991) (discusses the alternate methods of proving a RICO conspiracy).

Salinas v. United States, 522 U.S. 52, 63, 118 S. Ct. 469, 476 139 L. Ed. 2d 352 (1997) (finding that no overt act is required under the RICO conspiracy statute); *see also United States v. Starrett*, 55 F.3d 1525 (11th Cir. 1995) (observing that no overt act is required under § 1962(d)).

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

O82.1

Advertising Child Pornography

18 U.S.C. § 2251(d)

It's a Federal crime for any person to make, print, or publish, or cause to be made, printed, or published, any notice or advertisement seeking or offering [to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct] [participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct], if [such person knows or has reason to know such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed] or [such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed].

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 [made] [printed] [published] [[caused to be [made] [printed] [published]] a [[notice] [advertisement]] [[seeking] [offering]];

(2) to [receive] [exchange] [buy] [produce] [display] [distribute] [reproduce] any visual depiction involving the use of a minor engaged in sexually explicit conduct, and the visual depiction is of such conduct; or

(3) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct; and

(4) the Defendant [knows] [has reason to know] the [notice] [advertisement] would be transported [using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce] by any means, including by computer or mailed; or

(5) such [notice] [advertisement] [was transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce] by any means, including by computer or mailed.

The term "minor" means any person who is less than 18 years old.

The term "interstate or foreign commerce" means the movement of a person or property from one state to another state or from one state to another country. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

[It is not necessary for the Government to prove the Defendant knew the [notice] [advertisement] had moved in interstate or foreign commerce.]

The term "visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by any other electronic means that can be converted into a visual image.

The term "sexually explicit conduct" means actual or simulated:

> (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (b) bestiality;
>
> (c) masturbation;
>
> (d) sadistic or masochistic abuse; or
>
> (e) lascivious exhibition of the genitals or pubic area of any person.

The term "computer" means an electronic, magnetic, optical, electrochemical, or other high-speed data-processing device performing logical, arithmetic, or storage functions, and includes any data-storage facility or communications facility directly related to or operating in conjunction with that device; but the term does not include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices that are limited in function to only word-processing or mathematical calculations.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 2251(d) provides:

> (1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering –
>
> > (A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production or such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or
> >
> > (B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;
> >
> > shall be punished as provided under subsection (e).
>
> (2) The circumstance referred to in paragraph (1) is that –
>
> > (A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or
> >
> > (B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting foreign commerce by any means including by computer or mailed.

Maximum Penalty: Thirty (30) years' (minimum of fifteen (15) years') imprisonment and applicable fine when Defendant has no prior conviction. Minimum of twenty-five (25) years' imprisonment and maximum of fifty (50) years' imprisonment when the Defendant has one prior conviction. Minimum of thirty-five (35) years' imprisonment and maximum of life imprisonment when the Defendant has two or more prior convictions.

Definition of the relevant terms is taken from 18 U.S.C. § 2256.

"A defendant who allegedly took no directorial, editorial, or managerial role when he filmed minors engaged in explicit sexual conduct, or did not intend that the photographs be disseminated commercially, nonetheless "produces" child pornography, within the meaning of the statute prohibiting production of child pornography because Congress' intention was to enact a broad definition of "producing" that encompassed the various means by which an individual might actively participate in the creation and distribution of child pornography." *United States v. Fadl*, 498 F.3d 862, 867 (8th Cir. 2007).

In *United States v. Grovo*, 826 F.3d 1207, 1217 (9th Cir. 2016), the court rejected the defendants' argument an advertisement for child pornography must be published in the press or broadcast over the air, or be otherwise publicly and generally known. "The means of publication or broadcast are not the definitive features of an 'advertisement,' so long as the advertisement calls attention to its subject or makes a particular thing known. We therefore hold that an advertisement need not necessarily be published in the press or broadcast over the air." *Id.* at 1217–18. The court held "advertising to a particular subset of the public is sufficient to sustain a conviction under the statute." *Id.* at 1218. *See also United States v. Franklin*, 785 F.3d 1365, 1369 (10th Cir. 2015) (concluding even if "advertisement" in section 2251(d) has a "public" component, that component may be construed to encompass a "subset of the public," such as "an informal group of like-minded individuals").

Neither knowledge of the age of the minor nor knowledge of the interstate nexus is a required element of the crime. *United States v. Deverso*, 518 F.3d 1250, 1257 (11th Cir. 2008); *United States v. Smith*, 459 U.S. 1276, 1289 (11th Cir. 2006). In *Deverso*, the Eleventh Circuit found that the trial court did not err in declining to give a "mistake of age defense" jury instruction. *Deverso*, 518 F.3d at 1257.

In *United States v. Smith*, 459 F.3d 1276, 1296 n.17 (11th Cir. 2006), the Eleventh Circuit noted that the district court instructed the jury that answering the question whether conduct was "lascivious exhibition" involved consideration of "whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive, for example in a location or in a pose associated with sexual activity… and whether the depiction has been designed to elicit a sexual response in the viewer."

The Eleventh Circuit quoted the dictionary definition of "lascivious" as "exciting sexual desires; salacious." *United States v. Williams*, 444 F.3d 1286, 1299 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285, 128 S. Ct. 1830 (2008). The court also

noted: "What exactly constitutes a forbidden "lascivious exhibition of the genitals or pubic area" and how that differs from an innocuous photograph of a naked child (e.g., a family photograph of a child taking a bath, or an artistic masterpiece portraying a naked child model) is not concrete… While the pictures needn't always be "dirty" or even nude depictions to qualify, screening materials through the eyes of a neutral fact finder limits the potential universe of objectionable images." *Id.* The court further noted that most lower courts have embraced the six-factor "lascivious exhibition" test articulated in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986):

> (1)whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The *Dost* court also observed that "a visual depiction need not involve all of these factors to be a 'lascivious exhibition of the genitals or pubic area.' The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor." *Id.*

The Eleventh Circuit has held that producing a visual depiction need only be a purpose of the sexually explicit conduct; it need not be the sole or dominant purpose. *United States v. Miller*, 819 F.3d 1314 (11th Cir. 2016); *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012).

O92.3

Attempted 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 a cellular telephone or the Internet], to attempt to [persuade] [induce] [entice] [coerce] a minor to engage in [prostitution] [any sexual activity for which any person could be charged with a criminal offense], even if the attempt fails.

The Defendant is charged in [Count(s)] with attempting to commit the offense of enticement of a minor.

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

(1) the Defendant knowingly intended to persuade, induce, entice, or coerce [individual named in the indictment] to engage in [prostitution] [sexual activity], as charged;

(2) the Defendant used [the mail] [the Internet] [a cellular telephone] [describe other facility of interstate or foreign commerce as alleged in indictment] to do so;

(3) at the time, the Defendant believed that [individual named in the indictment] was less than 18 years old;

(4) if the sexual activity had occurred, one or more of the individual(s) engaging in sexual activity could have been charged with

a criminal offense under the law of [identify the state or specify the United States] [If only prostitution is charged, delete this element.]; and

(5) the Defendant took a substantial step towards committing the offense.

It is not necessary for the Government to prove that the intended victim was in fact less than 18 years of age; but it is necessary for the Government to prove that Defendant believed such individual to be under that age.

Also, it is not necessary for the Government to prove that the individual was actually [persuaded] [or induced] [or enticed] [or coerced] to engage in [prostitution or] sexual activity; but it is necessary for the Government to prove that the Defendant intended to cause agreement on the part of the individual to engage in [prostitution or] some form of unlawful sexual activity and knowingly took some action that was a substantial step toward causing agreement on the part of the individual to engage in [prostitution or] some form of unlawful sexual activity. A "substantial step" is an important action leading up to committing an offense – not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in the persuasion, inducement, enticement, or coercion.

So, the Government must prove that if the intended sexual activity had occurred, one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of [state] [the United States]. As a matter of law, the following acts are crimes under [state] [federal] law. [Describe the applicable state or federal law]. [If only prostitution is charged, delete this paragraph.]

[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 USC § 2422(b) provides:

> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be 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 of imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children. This offense also carries a minimum of five years of supervised release up to a maximum of lifetime supervised release.

United States v. Lee, 603 F.3d 904, 917 (11th Cir. 2010) ("We have explained what the government must establish to prove a violation of section 2422(b) when a defendant communicates directly with the target minor. With regard to intent, the government must prove that the defendant intended to cause assent on the part of the minor, not that he acted with the specific intent to engage in sexual activity. With regard to conduct, the government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact. Section 2422(b) expressly proscribes . . . the persuasion, inducement, enticement, or coercion of a minor to engage in illicit sexual activity, and not the sexual activity itself. The statute criminalizes an intentional attempt to achieve a *mental* state—a minor's assent.") (citations and internal punctuation omitted).

United States v. Murrell, 368 F.3d 1283, 1286 (11th Cir. 2004) ("Combining the definition of attempt with the plain language of § 2422(b), the government must first prove that [the defendant], using the internet, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex. The underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself. That is, if a person persuaded a minor to engage in sexual conduct (e.g. with himself or a third party), without then actually committing any sex act himself, he would nevertheless violate § 2422(b).") (internal footnotes omitted).

The existence of an actual minor victim is not required for an attempt conviction under § 2422(b), so long as the defendant intended to cause assent on the part of a minor and took a substantial step toward causing assent, not toward causing actual sexual contact. *United States v. Jockisch*, 857 F.3d 1122, 1129 (11th Cir. 2017). In addition, the defendant can be convicted under § 2422(b) even though he only communicated with an adult intermediary. *United States v. Lee*, 603 F.3d 904, 912 (11th Cir. 2010).

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).

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."

The term "sexual activity for which any person can be charged with a criminal offense" includes the production of child pornography, as defined in 18 U.S.C. § 2256(8). 18 U.S.C. § 2427.

O96.4

Conspiracy to Encourage or Induce Aliens

to Enter the United States

8 U.S.C. § 1324(a)(1)(A)(v)(I)

Title 8, United States Code, Section 1324 (a)(1)(A)(v)(I), makes it a crime for anyone to conspire with someone else to encourage or induce aliens to come to, enter, or reside in the United States, knowing and in reckless disregard of the fact that such coming to, entry, and residence is and will be in violation of the law.

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 only if all the following facts are proved beyond a reasonable doubt:

First: The defendant and one or more persons in some way agreed to try to accomplish a shared and unlawful plan;

Second: The defendant knew the unlawful purpose of the plan and willfully joined in it; and

Third: The object of the conspiracy was to encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, and residence was or would be in violation of law.

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 willfully joined the plan on at least one occasion – that is 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 does not establish proof of conspiracy. Also, a person who does not know about a conspiracy but happens to act in a way that advances some purpose of one does not automatically become a conspirator.

ANNOTATIONS AND COMMENTS

8 U.S.C. § 1324(a)(1)(A)(v)(I) provides:

Any person who –

> (i) knowing that a person is an alien, brings or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or
>
> (v)(I) engages in any conspiracy to commit any of the preceding acts, or
>
> > (II) aids or abets the commission of any of the preceding acts, shall be [guilty of an offense against the United States].

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

The Supreme Court has held that a conspiracy requires proof of an overt act only when explicitly stated in the statute's text. *See United States v. Shabani*, 513 U.S. 10, 13 (1994). Although the Eleventh Circuit has not yet held section 1324 (a)(1)(A)(v)(I) does not require proof of an overt act, other circuits have so decided. *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 363 (5th Cir. 2014); *United States v. Torralba-Mendia*, 784 F.3d 652, 663 (9th Cir. 2015).

O98
Controlled Substances –
Possession with Intent to Distribute
21 U.S.C. § 841(a)(1)

It's a Federal crime for anyone to possess a controlled substance with intent to distribute it.

[substance] is a "controlled substance."

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 possessed [substance]; and

(2) the Defendant intended to distribute the [substance].

The Defendant "knowingly" possessed the controlled substance if (1) the Defendant knew [he][she] possessed a substance listed on the federal schedules of controlled substances, even if the Defendant did not know the identity of the substance, or (2) the Defendant knew the identity of the substance [he][she] possessed, even if the Defendant did not know the substance was listed on the federal schedules of controlled substances.

To "intend to distribute" is to plan to deliver possession of a controlled substance to someone else, even if nothing of value is exchanged.

[The Defendant[s] [is] [are] charged with [distributing] [possessing and intending to distribute] at least [threshold] of [substance]. But you may find [the] [any] Defendant guilty of the crime even if the amount of the controlled

substance[s] for which [he] [she] should be held responsible is less than [threshold]. So if you find [the] [any] Defendant guilty, you must also unanimously agree on the weight of [substance] the Defendant possessed and specify the amount on the verdict form.]

ANNOTATIONS AND COMMENTS

21 U.S.C. § 841(a) provides:

> … it shall be unlawful for any person knowingly or intentionally
>
> (1) to manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Following the U.S. Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Eleventh Circuit has interpreted § 841 to provide "a clear dichotomy of offense elements and sentencing factors. Specifically, the plain language and structure of the statute reflect a congressional intent to create a single offense, defined in § 841(a), and to provide for penalties in § 841(b) dependent upon sentencing factors, such as drug types and quantities." *United States v. Sanchez*, 269 F.3d 1250, 1265 (11th Cir. 2001) (en banc), *abrogated in part on other grounds, United States v. Duncan*, 400 F.3d 1297, 1308 (11th Cir. 2005). The "elements of a § 841 offense do not include the weight of the drugs." *Id.* at 1267 (internal quotation marks and citation omitted). However, when drug quantity is charged in an indictment and may result in a sentence that "exceeds the catchall statutory maximum penalty" in § 841(b), the amount of drugs must be "proven to a jury beyond a reasonable doubt in light of *Apprendi*." *Id.* at 1277-79 (internal quotation marks and citation omitted); *see also United States v. Underwood*, 446 F.3d 1340, 1344, 1345 (11th Cir. 2006) (citations omitted). In such a case, the bracketed language in this instruction concerning weights should be made a part of the overall instructions, followed by use of the special verdict form below.

In *McFadden v. United States*, 135 S. Ct. 2298 (2015), the U.S. Supreme Court pronounced that there are two ways to satisfy the knowledge requirement under § 841(a)(1). "Th[e] knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was." *Id.* at 2304. "The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed," even if the defendant

did not know that the drug is "listed on the schedules" as a controlled substance. *Id.* (citation omitted).

The Committee has omitted the word "willfully" which was previously used in this instruction. "Willfully" is not used in the statute, and the essence of the offense is a knowing possession of a controlled substance with an intent to distribute it.

Special Verdict

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

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

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he] [she] [distributed] [possessed with intent to distribute] [conspired to possess with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -
(i) Weighing 1000 kilograms or more ☐
(ii) Weighing 100 kilograms or more ☐
(iii) Weighing less than 100 kilogram ☐]

[(b) Cocaine - -
(i) Weighing 5 kilograms or more ☐
(ii) Weighing 500 grams or more ☐
(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -
(i) Weighing 50 grams or more ☐
(ii) Weighing 5 grams or more ☐
(iii) Weighing less than 5 grams ☐]

SO SAY WE ALL.

Date: _____ _____

Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

O117.1
Controlled Substances:
Possession on Vessel of the United States
or Subject to the Jurisdiction of the United States
46 U.S.C. § 70503(a)

It's a Federal crime for anyone [on board a vessel of the United States] [on board a vessel subject to the jurisdiction of the United States] to knowingly possess a controlled substance with intent to distribute it. I instruct you as a matter of law that the vessel involved in this case [is a vessel of the United States][is subject to the jurisdiction of the United States].

[Substance] is a controlled substance within the meaning of the law.

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

(1) the Defendant was on board the vessel involved in this case;

(2) the Defendant knowingly possessed [substance];

(3) the Defendant intended to distribute the [substance].; and

(4) the weight of the [substance] was more than [threshold].

To "possess with intent to distribute" means to knowingly have something while intending to deliver or transfer it to someone else, even with no financial interest in the transaction.

[The Defendant[s] [is] [are] charged in the indictment with [distributing] [possessing with intent to distribute] a certain quantity or weight of the alleged controlled substance[s]. But you may find [the] [any] Defendant guilty of the

offense if the quantity of the controlled substance[s] for which [he] [she] should be held responsible is less than the amount or weight charged. Thus the verdict form prepared with respect to [the] [each] Defendant, as I will explain in a moment, will require that if you find [the] [any] Defendant guilty, you must specify on the verdict your unanimous finding concerning the weight of the controlled substance attributable to the Defendant].

ANNOTATIONS AND COMMENTS

The Maritime Drug Law Enforcement Act ("MDLEA") prohibits knowingly or intentionally possessing a controlled substance, with intent to distribute, onboard any vessel subject to the jurisdiction of the United States.

46 U.S.C. § 70502(b) provides that a vessel of the United States means:

> (1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;
>
> (2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless--
>
> > (A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and
> >
> > (B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and
>
> (3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

46 U.S.C. § 70502(c)(1) provides that a vessel subject to the jurisdiction of the United States includes:

> (A) a vessel without nationality;
>
> (B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;
>
> (C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;
>
> (D) a vessel in the customs waters of the United States;
>
> (E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and
>
> (F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that--
>
> > (i) is entering the United States;
> >
> > (ii) has departed the United States; or
> >
> > (iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

The MDLEA provides that the United States' jurisdiction over a vessel is not an element of the offense, and that the jurisdiction is a preliminary question of law to be resolved by the district court. 46 U.S.C. § 70504(a) ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge."). Because the jurisdictional requirement under the MDLEA is not an element of the offense, neither the Due Process Clause nor the Sixth Amendment are implicated when the jurisdictional requirement is not proven to the satisfaction of a jury. *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016); *United States v. Campbell*, 743 F.3d 802 (11th Cir. 2014), cert denied 135 S. Ct. 704 (2014). *See also United States v. Tinoco*, 304 F.3d 1088, 1110 (11th Cir. 2002) ("We have rejected the argument that a jury must determine jurisdiction under the Act.").

Maximum Penalty: Varies depending upon nature and weight of substance involved. See 21 U.S.C. § 960.

The offense of Possession of a Controlled Substance on a United States Vessel in Customs Waters, formerly codified at 21 U.S.C. § 955a(c) is now codified as part of 46 U.S.C. § 1903 by virtue of Congress including "a vessel located within the customs

waters of the United States" as part of the definition for a "vessel subject to jurisdiction of the United States." 46 U.S.C. § 1903(c)(1)(D).

Where the indictment alleges a factor that would enhance the possible maximum punishment applicable to the offense, that factor should be stated as an additional element in the instructions under the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In such case it may also be appropriate to give a lesser included offense instruction, Special Instruction 10.

The Committee has omitted the word "willfully" which was previously used in this instruction. "Willfully" is not used in the statute, and the essence of the offense is a knowing possession of a controlled substance with an intent to distribute it. The Committee has concluded that the use of the term "willfully" does not add clarity or certainty, and relying instead on the words "knowingly" and "intentionally" more closely comports with the legislative intent.

The Committee recognizes - - and cautions - - that sentence enhancing factors subject to the principle of *Apprendi*, including weights of controlled substances under 21 U.S.C. § 841(b), are not necessarily "elements" creating separate offenses for purposes of analysis in a variety of contexts. *See United States v. Sanchez*, 269 F.3d 1250, 1278 n.51 (11th Cir. 2001), abrogated in part, *United States v. Duncan*, 400 F.3d 1297, 1308 (11th Cir. 2005); *see also United States v. Underwood*, 446 F.3d 1340, 1344-45 (11th Cir. 2006). Even so, the lesser included offense model is an appropriate and convenient procedural mechanism for purposes of submitting sentence enhancers to a jury when required by the principle of *Apprendi*. This would be especially true in simpler cases involving single Defendants. *See* Special Instruction 10 and the verdict form provided in the Annotations And Comments following that instruction. If the lesser included offense approach is followed, using Special Instruction 10 and its verdict form, then the bracketed language in this instruction explaining the significance of weights and the use of a special verdict form specifying weights, should be deleted.

Alternatively, in more complicated cases, if the bracketed language in this instruction concerning weights is made a part of the overall instructions, followed by use of the special verdict form below, then the Third element of the instructions defining the offense should be deleted. The following is a form of special verdict that may be used in such cases.

Special Verdict

(1)We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment. [Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

(2)We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he] [she] [distributed] [possessed with intent to distribute] [conspired to possess with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -

(i) Weighing 1000 kilograms or more ☐

(ii) Weighing 100 kilograms or more ☐

(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -

(i) Weighing 5 kilograms or more ☐

(ii) Weighing 500 grams or more ☐

(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -

(i) Weighing 50 grams or more ☐

(ii) Weighing 5 grams or more ☐

(iii) Weighing less than 5 grams ☐]

SO SAY WE ALL.

_____

_____

Date Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

O120

Procurement of Citizenship

or Naturalization Unlawfully

18 U.S.C. § 1425

It's a Federal crime for any person to [(a) knowingly procure or attempt to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or citizenship] or [(b) for himself or another person not entitled thereto, to knowingly issue, procure, or obtain, or apply for or otherwise attempt to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing].

The Defendant can be found guilty of a violation of section 1425(a), only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly [procured] [attempted to procure];

(2) contrary to law;

(3) the naturalization of any person, or documentary or other evidence of naturalization or citizenship[.] [; and]

[(4) the Defendant did so [to facilitate an act of international terrorism] [to facilitate a drug trafficking crime].]

The Defendant can be found guilty of a violation of section 1425(b), only if all of the following facts are proved beyond a reasonable doubt:

> (1) the Defendant [for himself] [for another person not entitled thereto] knowingly [issued, procured, obtained, applied for], [attempted to procure or obtain] [naturalization or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicate copies of the foregoing];
>
> (2) [the Defendant is not entitled to naturalization or citizenship] [the other person is not entitled to naturalization or citizenship]; and
>
> (3) [the Defendant knows he or she is not entitled to naturalization or citizenship]; [the Defendant knows the other person is not entitled to naturalization or citizenship[.] [; and]
>
> [(4) the Defendant did so [to facilitate an act of international terrorism] [to facilitate a drug trafficking crime].]

[An "act of international terrorism" means (1) a criminal act that is dangerous to human life, (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping, and (3) occurs outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

[A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., the Controlled Substances Import and Export Act, 21 U.S.C. 951 et seq., or chapter 705 of title 46 of the United States Code.]

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1425 provides:

> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or
>
> (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing [shall be guilty of an offense against the United States].

Maximum Penalty: Imprisonment of not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both; and applicable fine.

The optional Fourth element is included in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the indictment alleges facts triggering the enhanced penalties under the statute.

The definition of "act of international terrorism" is taken from 18 U.S.C. § 2331.

The definition of "drug trafficking crime" is taken from 18 U.S.C. § 929.

In *Maslenjak v. United States*, – U.S. –, 137 S. Ct. 1918 (2017), the Supreme Court held that to obtain a conviction under section 1425, the Government must show an illegal act by the defendant played some role in his or her acquisition of citizenship. *See id.* at 1923. "When the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result." *Id.* Furthermore, "the proper causal inquiry under § 1425(a) is framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law." *Id.* at 1928.

United States v. Lopez, 704 F.2d 1382 (5th Cir. 1983), held a birth certificate is "other evidence of citizenship" and its fraudulent procurement as proof of U.S. citizenship for an alien is proscribed by section 1425.