

## APPENDIX

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2018 WL 3342275

Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Mark A. DUBARRY, Defendant-Appellant.

No. 16-4067

|

Filed July 9, 2018

**Synopsis**

**Background:** Prisoner filed motion to vacate, set aside, or correct sentence on conviction for use of firearm during commission of crime of violence, specifically Hobbs Act robbery. The United States District Court for the District of Utah, [2016 WL 1411361](#), denied motion as untimely filed, and alternatively on merits, and then denied certificate of appealability (COA). Prisoner requested COA.

**[Holding:]** The Court of Appeals, [Harris L Hartz](#), Circuit Judge, held that Hobbs Act robbery was crime of violence that subjected prisoner to mandatory minimum sentence of seven years for brandishing firearm during crime of violence.

COA denied; appeal dismissed.

West Headnotes (1)

**[1] Weapons**

Hobbs Act robbery was “crime of violence”, within meaning of statute imposing mandatory minimum sentence of seven years imprisonment for brandishing firearm during

crime of violence, in addition to sentence imposed for robbery, under elements clause of statute, despite defendant's assertion that Hobbs Act also criminalized threatening injury to intangible property, which did not require use of any force, where Hobbs Act set out two separate crimes, robbery and extortion, threatening injury to intangible property was crime of Hobbs Act extortion, and defendant was convicted of Hobbs Act robbery, which required proof of use of violent force. [18 U.S.C.A. § 924\(c\)\(1\)\(A\)](#), [\(c\)\(3\)\(A\)](#); [18 U.S.C.A. § 1951\(a\)](#).

**Cases that cite this headnote**

(D.C. Nos. 2:16-CV-00260-DAK & 2:09-CR-00680-DAK-1) (D. Utah)

**Attorneys and Law Firms**

[Tyler Murray](#), [Elizabethanne Claire Stevens](#), Esq., Office of the United States Attorney, District of Utah, Salt Lake City, UT, for Plaintiff-Appellee

[Benji McMurray](#), Office of the Federal Public Defender, District of Utah, Salt Lake City, UT, for Defendant-Appellant

Before [LUCERO](#), [HARTZ](#), and [MORITZ](#), Circuit Judges.

## ORDER DENYING CERTIFICATE OF APPEALABILITY<sup>\*</sup>

Harris L [Hartz](#), Circuit Judge

<sup>\*1</sup> Mark A. Dubarry seeks a certificate of appealability (COA) to appeal the district court's denial of his motion under [28 U.S.C. § 2255](#). He claims that his conviction under [18 U.S.C. § 924\(c\)\(1\)\(A\)](#)—for which the predicate crime of violence was Hobbs Act robbery—is unconstitutional in light of the Supreme Court's decision in *Johnson v. United States*, — U.S. —, [135 S.Ct. 2551](#), [192 L.Ed.2d 569](#) (2015). We deny a COA and dismiss the appeal.

## I. BACKGROUND

In 2009 Mr. Dubarry pleaded guilty in the United States District Court for the District of Utah to one count of Hobbs Act robbery, *see* 18 U.S.C. § 1951(a), and one count of using or carrying a firearm during that robbery, *see* 18 U.S.C. § 924(c)(1)(A). He received a 180-month sentence —96 months for the robbery conviction and a consecutive 84 months for the § 924(c)(1)(A) conviction. As relevant here, § 924(c)(1)(A) provides:

[A]ny person who, *during and in relation to any crime of violence* ... 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 ...

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years[.]

§ 924(c)(1)(A)(emphasis added). The term *crime of violence* for purposes of this provision means an offense that is a felony and “(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” § 924(c)(3). The crime of violence underlying Mr. Dubarry’s § 924(c)(1)(A) conviction was the Hobbs Act robbery. (He does not dispute that the firearm was brandished.)

In *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 2557, 2563, 192 L.Ed.2d 569 (2015), the Supreme Court struck down the so-called “residual clause” in the Armed Career Criminal Act (ACCA) as unconstitutionally vague. That clause defines *violent felony* as a crime that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii) (internal quotation marks omitted).

Within one year of *Johnson*, Mr. Dubarry filed a pro se § 2255 motion to vacate his sentence. He argued that his conviction under § 924(c)(1)(A) should be vacated because the definition of *crime of violence* in § 924(c)(3)(B)’s residual clause was unconstitutional under *Johnson*. The district court denied the motion, holding that it was barred by the one-year statute of limitations in 28 U.S.C. § 2255(f), and that *Johnson* did not restart

the one-year period because the Supreme Court had not made *Johnson* retroactively applicable to cases on collateral review.<sup>1</sup> Alternatively, the district court denied relief on the merits, concluding that *Johnson*’s reasoning regarding the ACCA’s residual clause was inapplicable to the residual clause of § 924(c)(3)(B). The court also denied a COA. Now with the assistance of appointed counsel, Mr. Dubarry seeks a COA from this court.

## II. DISCUSSION

\*2 To obtain a COA, Mr. Dubarry need only make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, he must demonstrate that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

In his COA application and opening brief, Mr. Dubarry argues that his § 924(c) conviction should be vacated because § 924(c)(3)(B)’s residual clause is unconstitutionally vague, and because Hobbs Act robbery is not categorically a crime of violence under § 924(c)(3)(A)’s elements clause. We have recently addressed both of these issues in published decisions. In *United States v. Salas*, 889 F.3d 681, 684–86 (10th Cir. 2018), we held that § 924(c)(3)(B)’s definition of *crime of violence* is unconstitutional under *Sessions v. Dimaya*, — U.S. —, 138 S.Ct. 1204, 1215–16, 200 L.Ed.2d 549 (2018), in which the Supreme Court extended *Johnson*’s reasoning to hold that this same definition in 18 U.S.C. § 16(b) was unconstitutionally vague. But in *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), we held that Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)(3)(A) because that clause requires the use of violent force, *id.* at 1064, and the force element in Hobbs Act robbery “can only be satisfied by violent force,” *id.* at 1064–65. As a result, a reasonable jurist could not debate that Mr. Dubarry’s Hobbs Act robbery conviction is a crime of violence under the elements clause.

Mr. Dubarry advances one argument not addressed in *Melgar-Cabrera* or elsewhere by this court: that Hobbs Act robbery does not satisfy § 924(c)(3)(A) “because it can be accomplished by threatening injury to intangible

property, which does not require the use of any force at all.” Aplt. Opening Br. at 30. But the only cases he cites in support concern Hobbs Act *extortion*, not Hobbs Act robbery. See *United States v. Arena*, 180 F.3d 380, 385, 392 (2d Cir. 1999), *abrogated in part on other grounds by Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 403 n.8, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003); *United States v. Local 560 of the Int’l Bhd. of Teamsters*, 780 F.2d 267, 281–82 (3d Cir. 1985); and *United States v. Iozzi*, 420 F.2d 512, 515 (4th Cir. 1970). And “[t]he Hobbs Act ... is a divisible statute setting out two separate crimes—Hobbs Act robbery and Hobbs Act extortion.” *United States v. O’Connor*, 874 F.3d 1147, 1152 (10th Cir. 2017). Mr. Dubarry does not argue that he was convicted of Hobbs Act extortion, and the cases he cites do not call

into question *Melgar-Cabrera*’s holding that Hobbs Act robbery is categorically a crime of violence. We note that several district courts have rejected reliance on these same cases in support of the same argument. See *United States v. McCallister*, No. 15-0171 (ABJ), 2016 WL 3072237, at \*8–9 (D.D.C. May 31, 2016) (unpublished); *United States v. Clarke*, 171 F.Supp.3d 449, 453–54 & nn. 5–6 (D. Md. 2016); *United States v. Hancock*, 168 F.Supp.3d 817, 822–23 & n.3 (D. Md. 2016).

We deny a COA and dismiss the appeal.

#### All Citations

--- Fed.Appx. ----, 2018 WL 3342275

#### Footnotes

- \* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with [Fed. R. App. P. 32.1](#) and [10th Cir. R. 32.1](#).
- 1 A few days after the district court denied Mr. Dubarry’s [§ 2255](#) motion, the Supreme Court made *Johnson* retroactively applicable to cases on collateral review. See *Welch v. United States*, — U.S. —, 136 S.Ct. 1257, 1268, 194 L.Ed.2d 387 (2016).

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FILED  
U.S. DISTRICT COURT

2009 SEP -9 P 1:26

DISTRICT OF UTAH

BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

INDICTMENT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARK A. DUBARRY,  
SHAWN SPENCE DUBARRY,  
JUSTIN RICHARD HAWKINS,  
BRITTNEY JEROME HOUSTON,  
JESSE SPENCE KIRBY;

Defendants.

:  
:  
: VIO: HOBBS ACT ROBBERY, 18  
U.S.C. § 1951(a);  
: VIO: CARRYING A FIREARM  
DURING AND IN RELATION TO A  
: CRIME OF VIOLENCE, 18 U.S.C. §  
924(c).

Case: 2:09-cr-00680  
Assigned To : Kimball, Dale A.  
Assign. Date : 09/09/2009  
Description: USA v (Indictment)

The Grand Jury Charges:

COUNT I

(18 U.S.C. § 1951(a))

On or about July 13, 2009, in the Central Division of the District of Utah,

**MARK A. DUBARRY, SHAWN SPENCE DUBARRY**

**and BRITTNEY JEROME HOUSTON,**

the defendants herein, did take from an employee, against their will, at the Rite-Aid Pharmacy located at 635 East 3300 South, in Salt Lake County, Utah, by physical force and violence, threatened force and violence and fear of injury, OxyContin pills, which belonged to and were in the care, custody, control, management and possession of the Rite-Aid Pharmacy, and by committing such robbery obstructed, delayed and affected commerce and the movement of articles and commodities in interstate commerce, and did aid and abet therein; all in violation of 18 U.S.C. §§ 1951(a) and 2.

**COUNT II**

**(18 U.S.C. § 924(c))**

On or about July 13, 2009, in the Central Division of the District of Utah,

**MARK A. DUBARRY, SHAWN SPENCE DUBARRY**

**and BRITTNEY JEROME HOUSTON,**

the defendants herein, during and in relation to the crime of violence of Hobbs Act Robbery, as set forth in Count I herein, did knowingly and intentionally use, carry, and possess a firearm, that is, a .45-caliber Kimber handgun, and did aid and abet therein, all in violation of 18 U.S.C. §§ 924(c) and 2.

**COUNT III**

**(18 U.S.C. § 1951(a))**

On or about August 23, 2009, in the Central Division of the District of Utah,

**MARK A. DUBARRY, SHAWN SPENCE DUBARRY, BRITTNEY JEROME**

**HOUSTON, JESSE SPENCE KIRBY and JUSTIN RICHARD HAWKINS,**  
the defendants herein, did take from an employee, against their will, at the Rite-Aid Pharmacy located at 635 East 3300 South, in Salt Lake County, Utah, by physical force and violence, threatened force and violence and fear of injury, OxyContin pills, which belonged to and were in the care, custody, control, management and possession of the Rite-Aid Pharmacy, and by committing such robbery obstructed, delayed and affected commerce and the movement of articles and commodities in interstate commerce, and did aid and abet therein, all in violation of 18 U.S.C. §§ 1951(a) and 2.

**COUNT IV**

**(18 U.S.C. § 924(c))**

On or about August 23, 2009, in the Central Division of the District of Utah,

**MARK A. DUBARRY, SHAWN SPENCE DUBARRY,**

**BRITTNEY JEROME HOUSTON, JESSE SPENCE KIRBY and JUSTIN**

**RICHARD HAWKINS,**

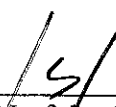
the defendants herein, during and in relation to the crime of violence of Hobbs Act Robbery, as set forth in Count V herein, did knowingly and intentionally use, carry, and possess a firearm, that is, a Ruger 9-millimeter handgun, and did aid and abet therein, all in violation of 18 U.S.C. §§ 924(c) and 2.

**NOTICE OF INTENTION TO SEEK CRIMINAL FORFEITURE**

As a result of the offenses in Count I-IV, the above-named defendants shall forfeit to the United

States pursuant to 18 U.S.C. § 924(d)(1), all firearms or ammunition involved in or used in any knowing violation of 18 U.S.C. § 922 and § 924, including but not limited to the firearms listed in Counts I-IV.

A TRUE BILL:

  
\_\_\_\_\_  
FOREPERSON of the GRAND JURY

BRETT L. TOLMAN  
United States Attorney

 FOR  
\_\_\_\_\_  
ERIC G. BENSON  
Assistant United States Attorney



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FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

NOV 02 2009

D. MARK JONES, CLERK  
BY [Signature]  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	
	:	Case No. 2:09 CR 00680 DAK
Plaintiff,	:	
	:	STATEMENT BY DEFENDANT IN
vs.	:	ADVANCE OF PLEA OF GUILTY
	:	
MARK A. DUBARRY,	:	
	:	
Defendant.	:	Judge Dale Kimball

I hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights, and that I have had the assistance of counsel in reviewing, explaining, and completing this form:

1. As part of this agreement with the United States, I intend to plead guilty to Counts I and II of the Indictment. My attorney has explained the nature of the charges against me, and I have had an opportunity to discuss the nature of the charges with her. I understand the charges and what the government is required to prove in order to convict me. The elements of Count I, 18 U.S.C. Section 1951(a), Hobbs Act Robbery, are: 1. The defendant used force violence or intimidation; 2. In order to take from the person or presence of others, employees of the Rite-Aid pharmacy; 3. OxyContin pills belonging to and in the care, custody, control, management and possession of that establishment; 4. The robbery obstructed, delayed and affected commerce, and affected the movement of articles and commodities in interstate commerce. The elements of Count II, 18 U.S.C. § 924(c), Using or Carrying a Firearm During a Crime of Violence, are: 1. The defendant knowingly and intentionally used or carried a firearm; 2. During and in relation to a federal crime of violence.

2. I know that the maximum possible penalty provided by law for Count I of the Indictment, a violation of 18 U.S.C. Section 1951(a), Hobbs Act Robbery, is a term of imprisonment of up to twenty (20) years, a fine of up to \$250,000.00, and a term of

supervised release of up to five years. I understand that if the supervised release term is violated, I can be returned to prison for the length of time provided in 18 U.S.C. § 3583(e)(3). I also know that the maximum possible penalty provided by law for Count II of the Indictment, a violation of 18 U.S.C. § 924(c) is a term of imprisonment of up to life imprisonment, and a fine of \$250,000.00. I am also aware that the charge carries a mandatory minimum term of imprisonment of seven (7) years. Additionally, I know the court is required to impose an assessment in the amount of \$100.00 for each offense of conviction, pursuant to 18 U.S.C. § 3013.

3. I know that the sentencing procedures in this case and the ultimate sentence will be determined pursuant to 18 U.S.C. § 3553(a), and that the Court must consider, but is not bound by, the United States Sentencing Guidelines, in determining my sentence. I have discussed these procedures with my attorney. I also know that the final calculation of my sentence by the Court may differ from any calculation the United States, my attorney, or I may have made, and I will not be able to withdraw my plea if this occurs.

4. I know that I can be represented by an attorney at every stage of the proceeding, and I know that if I cannot afford an attorney, one will be appointed to represent me.

5. I know that I have a right to plead "Not Guilty," and I know that if I do plead "Not Guilty," I can have a trial.

6. I know that I have a right to a trial by jury, and I know that if I stand trial by a jury:

(a) I have a right to the assistance of counsel at every stage of the proceeding.

(b) I have a right to see and observe the witnesses who testify against me.

(c) My attorney can cross-examine all witnesses who testify against me.

(d) I can call witnesses to testify at trial, and I can obtain subpoenas to require the attendance and testimony of those witnesses. If I cannot afford to pay for the appearance of a witness and mileage fees, the government will pay them.

(e) I cannot be forced to incriminate myself, and I do not have to testify at any trial.

(f) If I do not want to testify, the jury will be told that no inference adverse to me may be drawn from my election not to testify.

(g) The government must prove each and every element of the offense charged against me beyond a reasonable doubt.

(h) It requires a unanimous verdict of a jury to convict me.

(I) If I were to be convicted, I could appeal, and if I could not afford to appeal, the government would pay the costs of the appeal, including the services of appointed counsel.

7. If I plead guilty, I will not have a trial of any kind.

8. I know that 18 U.S.C. § 3742(a) sets forth the circumstances under which I may appeal my sentence. However, fully understanding my right to appeal my sentence, and in consideration of the concessions and/or commitments made by the United States in this plea agreement, I knowingly, voluntarily and expressly waive my right to appeal as set forth in paragraph 12 below.

9. I know that 18 U.S.C. § 3742(b) sets forth the circumstances under which the United States may appeal my sentence.

10. I know that under a plea of guilty the judge may ask me questions under oath about the offense. The questions, if asked on the record and in the presence of counsel, must be answered truthfully and, if I give false answers, I can be prosecuted for perjury.

11. I stipulate and agree that the following facts accurately describe my conduct. These facts provide a basis for the Court to accept my guilty plea and for calculating the sentence in my case:

Count I—On July 13, 2009, I participated in a robbery of the Rite-Aid Pharmacy, 635 East 3300 South, Salt Lake City, Utah. During the robbery, my co-defendant demanded OxyContin pills by force or intimidation from a clerk inside the pharmacy. After the clerk handed over the pills, my co-defendant fled from the store. During the robbery, my co-defendant used a firearm in order to intimidate the clerk while I acted as the getaway driver.

I further acknowledge that Rite-Aid is, and was at the time of the robbery, an establishment that carries articles and goods which travel in interstate commerce.

Count II—On July 13, 2009, during the robbery mentioned above, I aided and abetted my co-defendant when he knowingly and intentionally carried a .45-caliber Kimber handgun. While he robbed the Rite-Aid pharmacy, he brandished the firearm. I then acted as the getaway driver as he fled the pharmacy.

12. The only terms and conditions pertaining to this plea agreement between the defendant and the United States are as follows:

A. The defendant agrees:

(1) To plead guilty to Counts I and II of the Indictment.

(2) To pay the appropriate amount of restitution as determined by the United States Probation Office at the time of sentencing.

(3)(a) Fully understanding my limited right to appeal my sentence, as explained above in paragraph 8, and in consideration of the concessions and/or commitments made by the United States in this plea agreement, I knowingly, voluntarily, and expressly waive my right to appeal any sentence imposed upon me, and the manner in which the sentence is determined, on any of the grounds set forth in 18 U.S.C. § 3742 or on any ground whatever, except I do not waive my right to appeal (1) a sentence above the maximum penalty provided in the statute of conviction as set forth in paragraph 2 above; and (2) a sentence above the high-end of the guideline range as determined by the district court at sentencing, or, in the event that no such determination is made by the district court, a sentence above the high-end of the guideline range as set forth in the final presentence report;

(b) I also knowingly, voluntarily, and expressly waive my right to challenge my sentence, and the manner in which the sentence is determined, in any collateral review motion, writ or other procedure, including but not limited to a motion brought under 28 U.S.C. § 2255;

(c) I understand that this waiver of my appeal and collateral review rights concerning my sentence shall not affect the government's right to appeal my sentence pursuant to 18 U.S.C. § 3742(b). However, I understand that the United States agrees that if it appeals my sentence, I am released from my waiver;

(d) I further understand and agree that the word "sentence" appearing throughout this waiver provision is being used broadly and applies to all aspects of the Court's sentencing authority, including, but not limited to: (1) sentencing determinations; (2) the imposition of imprisonment, fines, supervised release, probation, and any specific terms and conditions thereof; and (3) any orders of restitution;

(4) To forfeit all interests in any firearm related asset that I currently own, have previously owned or over which I have in the past, exercised control, directly or indirectly, and any property I have transferred, as well as any property that is traceable to, derived from, fungible with, or a substitute for property that constitutes the proceeds of his offense, including the following specific property:

- Kimber .45-caliber handgun

I further agree to waive all interest in any such asset in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal. I agree to consent to the entry of orders of forfeiture for such property and waive the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. I acknowledge that I understand that the forfeiture of assets is part of the sentence that may be imposed in this case and waive any failure by the court to advise me of this, pursuant to Rule 11(b)(1)(J), at the time the guilty plea is accepted.

B. The United States agrees:

(1) To move to dismiss Counts III and IV of the Indictment at the time of sentencing.

C. The parties jointly agree:

(1)(a) That, pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P., the sentence imposed by the Court will be 180 months' imprisonment. The defendant understands that if the Court refuses to sentence the defendant to 180 months' imprisonment, the defendant will have the right to withdraw the plea of guilty.

(2) That all other sentence provisions (e.g. supervised release, restitution, assessments, etc.) will be imposed in accordance with applicable law.

\* \* \* \*

I make the following representations to the Court:

1. I am 42 years of age. My education consists of some college. I can [can/cannot] read and understand English.

2. This Statement in Advance contains all terms of the agreements between me and the government; if there are exceptions, the Court will be specifically advised, on the record, at the time of my guilty plea of the additional terms. I understand the government and I cannot have terms of this plea agreements that are not disclosed to the Court. .

2. No one has made threats, promises, or representations to me that have caused me to plead guilty.

3. Neither my attorney nor the government has represented to me that I would receive probation or any other form of leniency because of my plea.

4. I have discussed this case and this plea with my lawyer as much as I wish, and I have no additional questions.

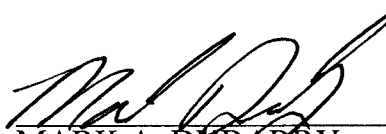
5. I am satisfied with my lawyer.

6. My decision to enter this plea was made after full and careful thought; with the advice of counsel; and with a full understanding of my rights, the facts and circumstances of the case and the consequences of the plea. I was not under the influence of any drugs, medication, or intoxicants when I made the decision to enter the plea was made, and I am not now under the influence of any drugs, medication, or intoxicants.

7. I have no mental reservations concerning the plea.


8. I understand and agree to all of the above. I know that I am free to change or delete anything contained in this statement. I do not wish to make changes to this agreement because I agree with the terms and all of the statements are correct.

DATED this 2nd day of November, 2009.

  
\_\_\_\_\_  
MARK A. DUBARRY  
Defendant

I certify that I have discussed this statement with the defendant, that I have fully explained his rights to him, and I have assisted him in completing this form. I believe that he is knowingly and voluntarily entering the plea with full knowledge of his legal rights and that there is a factual basis for the plea.


DATED this 2<sup>nd</sup> day of November, 2009.

  
JAMIE ZENGER  
Attorney for Defendant

I represent that all terms of the plea agreement between the defendant and the government have been, or will be at the plea hearing, disclosed to the Court, and there are no off-the-record agreements between the defendant and the United States.

DATED this 2<sup>nd</sup> day of NOVEMBER, 2009.

BRETT L. TOLMAN  
United States Attorney

  
ERIC G. BENSON  
Assistant United States Attorney

## UNITED STATES DISTRICT COURT

Central Division

U.S. DISTRICT COURT

District of

Utah

UNITED STATES OF AMERICA

2010 JAN -6 JUDGMENT IN A CRIMINAL CASE

V.

Mark Dubarry

DISTRICT OF UTAH

BY: *[Signature]*

Case Number: DUTX2:09-CR-00680-001 DAK

USM Number: 16476-081

Jamie Zenger

Defendant's Attorney

## THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2 of the Indictment.☐ pleaded nolo contendere to count(s) \_\_\_\_\_  
which was accepted by the court.☐ was found guilty on count(s) \_\_\_\_\_  
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951(a)	Hobbs Act Robbery	8/28/2009	1
18 U.S.C. § 924(c)	Using or Carrying a Firearm During a Crime of Violence	8/28/2009	2

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) \_\_\_\_\_☒ Count(s) 3 and 4 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/5/2010

Date of Imposition of Judgment

*[Signature of Dale A. Kimball]*

Signature of Judge

Dale A. Kimball

U.S. District Judge

Name of Judge

Title of Judge

January 6, 2010

Date



DEFENDANT: Mark Dubarry

CASE NUMBER: DUTX2:09-CR-00680-001 DAK

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

As to Count 1, 96 months; as to Count 2, 84 months, to run consecutively for a total of 180 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in the same federal correctional institution as his son, Shawn Spence Dubarry.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at \_\_\_\_\_ ☐ a.m. ☐ p.m. on \_\_\_\_\_

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on \_\_\_\_\_

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Mark Dubarry

CASE NUMBER: DUTX2:09-CR-00680-001 DAK

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

60 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

**STANDARD CONDITIONS OF SUPERVISION**

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Mark Dubarry

CASE NUMBER: DUTX2:09-CR-00680-001 DAK

**SPECIAL CONDITIONS OF SUPERVISION**

1. The defendant shall submit to drug/alcohol testing as directed by the United States Probation Office and pay a one-time \$115 fee to partially defray the costs of collection and testing;
2. The defendant shall participate in a substance-abuse evaluation and/or treatment under a co-payment plan as directed by the U. S. Probation Office. During the course of treatment, the defendant shall not consume alcohol nor frequent any establishment where alcohol is the primary item of order;
3. The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the U. S. Probation Office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition; and
4. The defendant shall remove any surveillance cameras and/or video equipment throughout the term of supervision at the direction of the U. S. Probation Office.

DEFENDANT: Mark Dubarry

CASE NUMBER: DUTX2:09-CR-00680-001 DAK

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 0.00	\$ 28,778.05

☐ The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Rite Aid Pharmacy 635 East 3300 South Salt Lake City, UT	\$28,778.05	\$28,778.05	

TOTALS	\$ <u>28,778.05</u>	\$ <u>28,778.05</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Mark Dubarry  
CASE NUMBER: DUTX2:09-CR-00680-001 DAK

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 200.00 due immediately, balance due
- ☐ not later than \_\_\_\_\_, or  
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

The Special Assessment Fee of \$200 is due immediately. The restitution shall be paid jointly and severall with the co-defendants in accordance with a schedule established by the Bureau of Prisons Inmate Financial Responsibility Program while incarcerated, and at a minimum rate of \$100 per month as directed by the U. S. Probation Office upon release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

All co-defendants found guilty in this case.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:  
Kimber .45-caliber handgun

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10  
are the  
Statement of Reasons,  
which will be docketed  
separately as a sealed  
document

# CRIMINAL PATTERN JURY INSTRUCTIONS

Prepared by the  
Criminal Pattern Jury  
Instruction Committee  
of the United States  
Court of Appeals for the  
Tenth Circuit

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**2011 Edition**  
Updated February 2018

**[ROBBERY] [EXTORTION] BY FORCE, VIOLENCE OR FEAR**  
**18 U.S.C. § 1951(a) (Hobbs Act)**

The defendant is charged in count\_\_\_\_\_with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime to obstruct, delay or affect interstate commerce by [robbery] [extortion].

To find the defendant guilty of this crime you must be convinced that the government has proved beyond a reasonable doubt that:

*First*: the defendant obtained [attempted to obtain] property from another [without][with] that person's consent;

*Second*: the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

*Third*: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree;

[Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property. "Property" includes money and other tangible and intangible things of value. "Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.]

[Extortion is the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear. The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.]

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.



The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

### Comment

The extortion provision of the Hobbs Act requires not only the deprivation, but also the acquisition, of property. 18 U.S.C. §1951(b)(2). Thus, the property, whether tangible or intangible, must actually be "obtained" in order for there to be a violation. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (holding that by interfering with, disrupting, and in some instances "shutting down" clinics that performed abortions, individual and corporate organizers of antiabortion protest network did not "obtain or attempt to obtain property from women's rights organization or abortion clinics, and so did not commit "extortion" under the Hobbs Act).

The Tenth Circuit has consistently upheld the Hobbs Act as a permissible exercise of the authority granted to Congress under the Commerce Clause, both in the context of robbery, *United States v. Shinault*, 147 F.3d 1266, 1278 (10th Cir. 1998), and extortion, *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996). It also has made clear that only a *de minimis* effect on commerce is required, *United States v. Wiseman*, 172 F.3d 1196, 1214-15 (10th Cir. 1999), and has upheld a trial court's refusal to instruct that a substantial effect is required, *United States v. Battle*, 289 F.3d 661, 664 (10th Cir. 2002).

The court seems to have struggled with the language that "commerce . . . was actually or potentially . . . affected" and that the government can meet its burden by evidence that the defendant's actions caused or "would probably cause" an effect on interstate commerce. In *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998), the court observed that use of the words probable and potential "while perhaps not the best way to explain to the jury the interstate commerce requirement, did not constitute error." *Id.* at 1229. In *United States v. Wiseman*, *supra*, the court upheld an instruction which stated, in pertinent part, that the government could meet its burden by evidence that money stolen for businesses "*could* have been used to obtain such foods or services" from outside the state, opposed to "would" have been so used. *Id.* at 1215 (emphasis in original). The court, citing *Nguyen*, held that the instruction was not prejudicial because only a potential effect on commerce is required. *Id.* at 1216. The Tenth Circuit continues to approve instructions requiring proof of actual, potential, *de minimis* or even just probable effect on commerce. *See United States v. Curtis*, 344 F.3d 1057, 1068-69 (10th Cir. 2003).

### Use Note

When the government's evidence is that the robbery or extortion actually affected commerce, the words "potentially," "probably" and "could" can be eliminated from the instruction.

The instruction should be modified in the case of an "attempt." *See* Instruction 1.32.

# PATTERN JURY INSTRUCTIONS (Criminal Cases)

Prepared by the  
Committee on Pattern  
Jury Instructions  
District Judges Association  
Fifth Circuit  
2015 Edition



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## **2.73A**

## **PATTERN JURY INSTRUCTIONS**

### **2.73A**

#### **EXTORTION BY FORCE, VIOLENCE, OR FEAR 18 U.S.C. § 1951(a) (HOBBS ACT)**

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct, delay, or affect commerce by extortion. Extortion means the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear.

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

*First:* That the defendant obtained [attempted to obtain] [conspired to obtain] property from another with that person's consent;

*Second:* That the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

*Third:* That the defendant's conduct in any way or degree obstructed [delayed] [affected] commerce [the movement of any article or commodity in commerce].

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

The term "property" includes money and other tangible and intangible things of value.

The term “fear” includes fear of economic loss or damage, as well as fear of physical harm.

It is not necessary that the government prove that the fear was a consequence of a direct threat; it is sufficient for the government to show that the victim’s fear was reasonable under the circumstances.

The use of actual or threatened force, violence, or fear is “wrongful” if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.

The term “commerce” means commerce within the District of Columbia [commerce within the Territory or Possession of the United States] [all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof] [all commerce between points within the same State through any place outside such State] [all other commerce over which the United States has jurisdiction].

#### Note

Interference with commerce is the “express jurisdictional element” of the Hobbs Act. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

That the defendant’s conduct affected commerce is an essential element of the offense, and must be submitted to the jury for determination. *See United States v. Gaudin*, 115 S. Ct. 2310 (1995); *United States v. Hebert*, 131 F.3d 514, 521–22 (5th Cir. 1997); *United States v. Miles*, 122 F.3d 235, 239–40 (5th Cir. 1997).

“Commerce” is defined in § 1951(b)(3). The statute requires that commerce or the movement of goods in commerce be affected “in any way or degree.” 18 U.S.C. § 1951(a). However, Fifth Circuit jurisprudence reveals tension regarding the degree of proof required to establish the element of effect on commerce. *See United States v. Mann*, 493 F.3d 484, 494 (5th Cir. 2007) (“A Hobbs Act prosecution requires the government to prove that the defendant committed, or attempted or conspired to commit, a robbery or act of extortion that caused an interference with interstate commerce.”); *United States v. McFarland*, 311 F.3d 376 (5th Cir.

## 2.73A

## PATTERN JURY INSTRUCTIONS

2002) (en banc) (affirming the constitutionality of the federal Hobbs Act robbery and extortion statute by an equally divided court); *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) (conviction affirmed by equally divided vote).

The Hobbs Act proscribes attempts and conspiracies as well as substantive offenses. In a prosecution for attempt or conspiracy, proof that a successful completion of the scheme would have affected commerce may suffice, but substantive convictions require proof that each act of robbery or extortion affected commerce. *See Mann*, 493 F.3d at 494–96; *United States v. Jennings*, 195 F.3d 795, 801–02 (5th Cir. 1999); *Robinson*, 119 F.3d at 1215.

It is not necessary to prove that the defendant caused the victim’s fear by a direct threat, so long as the victim’s fear was actual and reasonable, and the defendant took advantage of that fear to extort property. *See United States v. Rashad*, 687 F.3d 637, 642 (5th Cir. 2012); *United States v. Tomblin*, 46 F.3d 1369, 1384 (5th Cir. 1995); *United States v. Quinn*, 514 F.2d 1250, 1266–67 (5th Cir. 1975).

For a discussion of the meaning of “wrongful,” see *United States v. Enmons*, 93 S. Ct. 1007 (1973) (holding that the Hobbs Act “does not apply to the use of force to achieve legitimate labor ends”).

Extortion requires not only deprivation, but also acquisition of property. The Supreme Court held that anti-abortion protesters did not violate the Hobbs Act by using violence or threats of violence against a clinic, their employees, or their patients because the defendants did not “obtain” property from the plaintiffs. *See Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057, 1066 (2003) (dismissing injunction because defendants “neither pursued nor received something of value from respondents that they could exercise, transfer, or sell”).

The Hobbs Act does not apply where the federal government is the intended beneficiary of the alleged extortion. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2607 (2007) (holding that Congress did not intend to expose all federal employees “to extortion charges whenever they stretch in trying to enforce Government property claims”).

This instruction addresses extortion by force, violence, or fear, not robbery. If the indictment charges robbery, the second element should be amended to replace “extortion” with “robbery.” In that circumstance, the judge may also wish to define “robbery” pursuant to 18 U.S.C. § 1951(b)(1).

**ELEVENTH CIRCUIT**

**PATTERN JURY INSTRUCTIONS**

**(CRIMINAL CASES)**

**2016**

**O70.1**  
**Interference with Commerce by Extortion**  
**Hobbs Act: Racketeering**  
**(Force or Threats of Force)**  
**18 U.S.C. § 1951(a)**

It's a Federal crime to extort something from someone else and in doing so to obstruct, delay, or affect interstate commerce.

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

- (1) the Defendant caused [person's name] to part with property;
- (2) the Defendant did so knowingly by using extortion; and
- (3) the extortionate transaction delayed, interrupted, or affected interstate commerce.

“Property” includes money, other tangible things of value, and intangible rights that are a source or part of income or wealth.

“Extortion” means obtaining property from a person who consents to give it up because of the wrongful use of actual or threatened force, violence, or fear.

“Fear” means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

“Interstate commerce” is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce in any way. But it must prove that the



natural consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

### **ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1951(a) provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce... by extortion [shall be guilty of an offense against the United States].

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

In *United States v. Blanton*, 793 F.2d 1553 (11<sup>th</sup> Cir. 1986), the Eleventh Circuit upheld the District Court's refusal to instruct the jury that the Defendant must cause or threaten to cause the force, violence or fear to occur. The Court explained that the Defendant need only be aware of the victim's fear and intentionally exploit that fear to the Defendant's own possible advantage.

In *United States v. Kaplan*, 171 F.3d 1351, 1356-58 (11<sup>th</sup> Cir. 1999), the Eleventh Circuit held that under § 1951 the effect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See, e.g., Kaplan*, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.*; *see also United States v. Le*, 256 F.3d 1229 (11<sup>th</sup> Cir. 2001); *U. S. v. Verbitskaya*, 405 F.3d 1324 (11<sup>th</sup> Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 2007 U.S. App. LEXIS 27819 (11<sup>th</sup> Cir. Nov. 29, 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11<sup>th</sup> Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11<sup>th</sup> Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11<sup>th</sup> Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (i.e. drugs in a sting operation) or its victims are fictional.

**O70.3**  
**Interference with Commerce by Robbery**  
**Hobbs Act – Racketeering**  
**(Robbery)**  
**18 U.S.C. § 1951(a)**

It's a Federal crime to acquire someone else's property by robbery and in doing so to obstruct, delay, or affect interstate commerce.

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 acquired someone else's personal property;
- (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and
- (3) the Defendant's actions obstructed, delayed, or affected interstate commerce.

“Property” includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.

“Fear” means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

“Interstate commerce” is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce. But it must prove that the natural

consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

### **ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1951(a) provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery [shall be guilty of an offense against the United States].

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

In *United States v. Thomas*, 8 F.3d 1552, 1562-63 (11<sup>th</sup> Cir. 1993), the Eleventh Circuit suggested that the Government need not prove specific intent in order to secure a conviction for Hobbs Act robbery. See also *United States v. Gray*, 260 F.3d 1267, 1283 (11<sup>th</sup> Cir. 2001) (noting that the Court in *Thomas* suggested that specific intent is not an element under § 1951).

In *United States v. Kaplan*, 171 F.3d 1351, 1356-58 (11<sup>th</sup> Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. See, e.g., *Kaplan*, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. See *id.*; see also *United States v. Le*, 256 F.3d 1229 (11<sup>th</sup> Cir. 2001); *U.S. v. Verbitskaya*, 405 F.3d 1324 (11<sup>th</sup> Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 2007 U.S. App. LEXIS 27819 (11<sup>th</sup> Cir. Nov. 29, 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11<sup>th</sup> Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11<sup>th</sup> Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11<sup>th</sup> Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (i.e. drugs in a sting operation) or its victims are fictional.



# **EIGHTH CIRCUIT**

## **MODEL JURY INSTRUCTIONS**

**The 2017 edition Manual, available soon in print, is updated here to reflect new and revised instructions approved by the Judicial Committee on Model Jury Instructions for the Eighth Circuit since publication of the 2014 edition Manual.**

**MANUAL OF  
MODEL CRIMINAL  
JURY INSTRUCTIONS**  
for the  
**DISTRICT COURTS OF THE  
EIGHTH CIRCUIT**

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Prepared by Judicial Committee on Model  
Jury Instructions  
for the Eighth Circuit

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**2017 Edition**



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Mat #41646753

6.18.1951B INTERFERENCE WITH COMMERCE BY MEANS OF  
COMMITTING OR THREATENING PHYSICAL VIOLENCE  
(18 U.S.C. § 1951) (Hobbs Act)

The crime of interference with commerce by means of [committing physical violence][threatening physical violence]<sup>1</sup> as charged in [Count\_\_\_\_] of the Indictment, has three elements, which are:

*One*, on or about [date], the defendant knowingly [committed physical violence] [threatened physical violence] while at (describe place/entity, e.g. John’s Mini Mart in Mason City, Iowa);

*Two*, the defendant [committed][threatened] the physical violence against (describe person or property); and

*Three*, the defendant’s actions [obstructed][delayed][affected] commerce in some way or degree.

The term “commerce” includes, among other things, travel, trade, transportation, and communication. And, it also means (1) all commerce between any point in one State and any point outside of that State, and (2) all commerce between points within the same State through any place outside of that State.<sup>2</sup>

The phrase “[obstructed][delayed][affected] commerce” in element three means any action which, in any manner or to any degree interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce.

[In considering the third element, you must decide whether there is an actual effect on commerce. If you decide that there was any effect at all on commerce, then that is enough to satisfy this element. The effect can be minimal.] Such effect can be proved by one or more of the following: [depletion of the assets of a business operating in commerce,] [the temporary closing of a business to recover from the [threatened] physical violence,] [[threatened] physical violence of a business covered by an out-of-state insurer,] [loss of sales of an out-of-state commercial product,] or [business slowdown as a result of the [threatened] physical violence]. [The [threatened] physical violence at a local or “mom and pop” business can have the necessary



minimal effect on commerce, so long as the business dealt in goods that moved through “commerce,” as defined above.]<sup>3</sup>

It is not necessary for the [government] [prosecution] to show that the defendant actually intended or anticipated an effect on commerce. All that is necessary is that commerce was affected as a natural and probable consequence of the defendant’s actions.

(Insert paragraph describing government’s burden of proof; *see* Instruction 3.09, *supra*.)

#### **Notes of Use**

1. If the defendant is alleged to have committed a Hobbs Act violation by extortion, use Instruction 6.18.1951, *supra*. If the defendant is alleged to have committed a Hobbs Act violation by robbery, use Instruction 6.18.1951, *supra*.

2. *See also* 18 U.S.C. § 1951(b)(3) and Instruction 6.18.1956J(2), *infra*, for definitions of commerce.

3. Include this sentence only if the business at issue is a “mom and pop” type business.

#### **Committee Comments**

For background on the Hobbs Act, see the Committee Comments at Instructions 6.18.1951 and 6.18.1951A, *supra*.

INSTRUCTION NO. 1

*original*  
08-CR-758 TC  
FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH  
OCT 06 2011  
BY D. MARK JONES, CLERK  
~~DEPUTY CLERK~~

MEMBERS OF THE JURY:

Now that you have heard the evidence and the arguments, it becomes my duty to instruct you on the law that applies to this case.

It is your duty as jurors to follow the law as stated in the instructions of the court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

Counsel may refer to these instructions in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the court in these instructions, you are of course to be governed by the court's instructions.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in these instructions of the court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

INSTRUCTION NO. 36

I am now going to define some of the other terms that were just used:

As used throughout these instructions, "property" includes money and other tangible and intangible things of value.

As used throughout these instructions, "fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.

As used throughout these instructions, "force" means any physical act directed against a person as a means of gaining control of property.

INSTRUCTION NO. 38

Three Counts of the Second Superseding Indictment charge violations of what is called “The Hobbs Act.” Specifically:

- Count 2 of the Second Superseding Indictment charges Mr. Kamoto with a violation of the Hobbs Act by committing a Hobbs Act Robbery or aiding and abetting in that Robbery.
- Count 10 of the Second Superseding Indictment charges Mr. Kepa Maunau with a violation of the Hobbs Act by committing a Hobbs Act Robbery or aiding and abetting in that Robbery.
- Count 17 of the Second Superseding Indictment charges Mr. Kamahele and Mr. Tuai with a violation of the Hobbs Act by committing a Hobbs Act Robbery or aiding and abetting in that Robbery.

Before I explain to you what the government must prove to establish violation of the Hobbs Act, I want to repeat that the rights of each Defendant in this case are separate and distinct. You must separately consider the evidence against each Defendant and return a separate verdict for each. Similarly, each of these three Counts, Count 2, Count 10, and Count 17, charges a separate crime against the particular Defendant. Your verdict as to one Defendant and as to any one of the three Counts, whether it is not guilty or guilty, should not affect your verdict as to any other Defendant or Count.

The Hobbs Act makes it a crime to obstruct, delay or affect interstate commerce by robbery.

For each particular Count and for each particular Defendant, the government must prove beyond a reasonable doubt that:

*First:* the particular Defendant obtained or attempted to obtain property from another without that person's consent as alleged in the particular Count;

*Second:* the particular Defendant did so by wrongful use of actual or threatened force, violence, or fear; and

*Third:* as a result of the particular Defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree.

"Robbery" is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property. I have previously defined "property," "force," and "fear."

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

The particular Defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the particular Defendant intended to take certain actions — that is, he did the acts charged in the particular Count in order to obtain property — and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

I have already defined "aiding and abetting" and "attempt" for you.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO. H-13-491SS
	§	
vs.	§	JUDGE DAVID HITTNER
	§	
CLARENCE BERNARD BUCK,	§	
Aka BB, and	§	
KENDALL ALLEN,	§	
Aka Cutter,	§	
Defendants.	§	

**JURY INSTRUCTIONS AND VERDICT FORM**

Members of the Jury:

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

COUNT ONE: CONSPIRACY TO INTERFERE WITH  
COMMERCE BY ROBBERY

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to conspire to obstruct, delay, or affect commerce by robbery.

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

"Robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property.

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

First: The defendant and at least one other person made an agreement to commit the crime of Interfering with Commerce by Robbery;

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

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

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



The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

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

The first element of the conspiracy crime charged in this case refers to the alleged underlying crime of Interfering with Commerce by Robbery. It is against federal law to obstruct, delay or affect commerce by committing robbery. For you to find the Defendants guilty of this crime, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:

First: That the defendant knowingly and willfully obtained property from persons;

Second: That defendant did so by means of robbery;

Third: That the defendants knew that the persons robbed or their employees parted with the property because of the robbery; and

Fourth: That the robbery affected commerce.

It is not necessary for you to find that the defendants knew or intended that their actions would affect commerce. It is only necessary that the natural consequences of the acts committed by the defendants as charged in the indictment would affect commerce in any way or degree. The term "commerce" means commerce

between any point in a state and any point outside the state.

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

The term "property" includes money and other tangible and intangible things of value.

The term "fear" includes fear of economic loss or damage, as well as fear of physical harm.

It is not necessary that the government prove that the fear was a consequence of a direct threat; it is sufficient for the government to show that the victim's fear was reasonable under the circumstances.

The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.

The term "commerce" means all commerce between points within the same State through any place outside such State.

### Multiple Conspiracies

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

Counts Two, Four, Six, Ten, Twelve and Fourteen  
Aiding and Abetting Interference with Commerce by  
Robbery

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

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

Before any defendant may be held criminally responsible for the acts of others, it is necessary

that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

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

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

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

First: That the offense of Interference with Commerce by Robbery was committed by some person;

Second: That the defendant associated with the criminal venture;

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

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

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

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

Title 18, United States Code, Section 1951(a), and 2, make it a crime for anyone to aid and abet another in obstructing, delaying, or affecting commerce by robbery.

For you to find the Defendants guilty of this crime, you must be convinced that the Government has



proven each of the following things beyond a reasonable doubt:

First: That the defendant knowingly and willfully obtained property from persons;

Second: That defendants did so by means of robbery;

Third: That the defendants knew that the persons robbed or their employees parted with the property because of the robbery; and

Fourth: That the robbery affected commerce.

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

The terms "property," and "fear," have been previously defined.

The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the

victim to give property to someone who has no  
legitimate claim to the property.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

FILED  
AUG 29 2014  
CLERK'S OFFICE  
U.S. DISTRICT COURT  
EASTERN MICHIGAN

UNITED STATES OF AMERICA

Plaintiff,

No. 14-20154

v.

Hon. Bernard A. Friedman

D-1 CHRISTOPHER LAJUAN TIBBS,  
a/k/a "K," "KT," "Fatah",

Defendant.

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JURY INSTRUCTIONS

Section 1951(a) of Title 18 of the United States Code provides, in part, that:

“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [guilty of a felony].”

(1) Count One of the Indictment accuses the defendant of aiding and abetting the Interference with Commerce by Robbery, in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant took or aided and abetted the taking, from the Little Caesars Pizza located at 15839 Telegraph Road, Redford, Michigan, the property described in Count One of the Indictment;

(B) Second, that the defendant did so knowingly and willfully by robbery; and

(C) Third, that as a result of the defendant's actions, interstate commerce was obstructed, delayed, or affected.

(2) Definitions

(A) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against her will, by means of actual or threatened force, or violence, or fear of injury, whether immediately or in the future, to her person or property, or property in her custody or possession, or the person or property of a relative or member of her family or of anyone in her company at the time of the taking or obtaining.

(B) The term "property" includes money and other tangible and intangible things of value.

(C) The third element that the government must prove beyond a reasonable doubt is that the defendant's conduct affected or could have affected interstate commerce. Conduct affects interstate commerce if it

in any way interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states. The effect can be minimal.

It is not necessary to prove that the defendant intended to obstruct, delay or interfere with interstate commerce or that the purpose of the alleged crime was to affect interstate commerce. Further, you do not have to decide whether the effect on interstate commerce was to be harmful or beneficial to a particular business or to commerce in general.

You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the offense potentially caused an effect on interstate commerce to any degree, however minimal or slight.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

CASE NO: 8:09-cr-234-T-26TGW

DARRYL EARL MOODY

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**COURT'S INSTRUCTIONS TO THE JURY**

Title 18, United States Code, Section 1951(a), makes it a federal crime or offense for anyone to obtain or take the property of another by robbery and in so doing to obstruct, delay or affect commerce or the movement of articles in commerce.

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

- First: That the Defendant knowingly obtained or took the personal property of another, or from the presence of another, as charged;
- Second: That the Defendant took the property against the victim's will, by means of actual or threatened force or violence or fear of injury, whether immediately or in the future; and
- Third: That, as a result of the Defendant's actions, commerce, or an item moving in commerce, was delayed, obstructed or affected in any way or degree.

The term "property" includes not only money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.

The term "fear" means a state of anxious concern, alarm or apprehension of harm.

While it is not necessary to prove that the Defendant specifically intended to affect commerce, it is necessary that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or adversely affect "interstate commerce," which means the flow of commerce or business activities between a state and any point outside of that state.



You are instructed that you may find that the requisite effect upon commerce has been proved if you find beyond a reasonable doubt that the IHOP restaurant, the Kangaroo convenience store, and the McDonalds restuarant described in the indictment bought goods from outside the state of Florida, sold food to patrons from outside the state of Florida, or otherwise did business outside the state of Florida.