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APPENDIX A

908 F.3d 395
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jack HOLDEN, Defendant-Appellant.

No. 16-30186
|
Argued and Submitted June 8, 2018 Portland, Oregon
|
Filed July 26, 2018
|
Amended October 30, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Oregon, Anna J. Brown, J., of mail and wire fraud, conspiracy to commit mail and wire fraud, and several money laundering offenses, and was ordered to forfeit more than $1.4 million, pay more than $1.4 million in restitution, and sentenced to 87 months in prison. Defendant appealed.

Holdings: The Court of Appeals, Susan P. Graber, Circuit Judge, held that:

[1] courts' interpretation of mail and wire fraud statutes to criminalize "participation in" schemes to defraud constituted permissible judicial statutory interpretation;

[2] defendant did not exercise sufficient control or organizational authority over co-conspirator to qualify for two-level "organizer" sentencing enhancement; and

[3] Court of Appeals would construe internally inconsistent written restitution schedule to conform to district court's oral ruling.

Affirmed in part, vacated in part, and remanded.

Opinion, 897 F.3d 1057, amended and superseded.

West Headnotes (20)

[1] **Criminal Law**
Review De Novo

The Court of Appeals reviews de novo whether a jury instruction correctly stated the elements of a crime.

Cases that cite this headnote

[2] **Criminal Law**
Review De Novo

The Court of Appeals reviews constitutional issues de novo.

Cases that cite this headnote

[3] **Postal Service**
Persons liable

Telecommunications
Persons liable

Courts' interpretation of mail and wire fraud statutes to criminalize "participation in" schemes to defraud, even though statutes only expressly punished those who devised or intended to devise any scheme to defraud, constituted permissible judicial statutory interpretation, rather than improper judicial lawmaking; courts' interpretation that anyone whose intent was to defraud when he joined a fraudulent scheme becomes a part of the scheme gave effect to the will of the legislature, which was to prosecute a fraudulent purpose. 18 U.S.C.A. §§ 1341, 1343.

Cases that cite this headnote

[4] **Postal Service**
Persons liable

Telecommunications
Persons liable

Anyone who knowingly and intentionally participates in the execution of a fraudulent scheme comes within the prohibition of the mail and wire fraud statutes regardless of

whether the defendant devised the scheme. 18 U.S.C.A. §§ 1341, 1343.

Cases that cite this headnote

[5] **Constitutional Law**
Criminal Law

Criminal laws are for courts to construe, and they do not usurp the role of Congress simply by construing a criminal statute broadly.

Cases that cite this headnote

[6] **Constitutional Law**
Criminal Law

Separation-of-powers principles may inform how the courts interpret a statute and may even prevent them from reading an unwritten defense into a statute, but, so long as the courts are engaged in interpretation, or an effort to give effect to the will of the legislature or to the will of the law, courts do not infringe on Congress' exclusive power to make conduct criminal.

Cases that cite this headnote

[7] **Sentencing and Punishment**
Organizers, leaders, managerial role

Defendant did not exercise sufficient control or organizational authority over co-conspirator to qualify for two-level "organizer" sentencing enhancement to his sentence for mail and wire fraud, conspiracy to commit mail and wire fraud, and money laundering, where co-conspirator was only other participant in conspiracy to defraud investors in refinery project, co-conspirators were co-equal conspirators, joint venture agreement between defendant and co-conspirator specified that their companies would split profits from project evenly, and defendant's instructions to co-conspirator for sending investors' funds to defendant's accounts was more akin to facilitation than organization. 18 U.S.C.A. §§ 1341, 1343; U.S.S.G. § 3B1.1(c).

Cases that cite this headnote

[8] **Criminal Law**
Review De Novo

Criminal Law
Sentencing

The Court of Appeals reviews de novo the district court's construction of the Sentencing Guidelines, but any factual findings that underlie an enhancement are reviewed for clear error.

Cases that cite this headnote

[9] **Criminal Law**
Application of guidelines

The Court of Appeals reviews for abuse of discretion the district court's determination as to whether the specific constellation of facts at issue meets the governing legal standard set out in the Sentencing Guidelines.

Cases that cite this headnote

[10] **Sentencing and Punishment**
Defendant's role in offense

Sentencing and Punishment
Necessity

It is not necessary that the district court make specific findings of fact to justify the imposition of the "organizer" sentencing enhancement; there must, however, be evidence in the record that would support the imposition of the enhancement. U.S.S.G. § 3B1.1(c).

Cases that cite this headnote

[11] **Sentencing and Punishment**
Organizers, leaders, managerial role

In order to impose the "organizer" sentencing enhancement, there must be a showing that the defendant had control over other participants or organized other participants for the purpose of carrying out the charged crimes. U.S.S.G. § 3B1.1(c).

Cases that cite this headnote

[12] **Sentencing and Punishment**
Organizers, leaders, managerial role

A defendant organizes other participants, as required for application of "organizer" sentencing enhancement, if he has the necessary influence and ability to coordinate their behavior so as to achieve the desired criminal results. U.S.S.G. § 3B1.1(c).

Cases that cite this headnote

[13] **Sentencing and Punishment**
Organizers, leaders, managerial role

Mere facilitation of criminal activity is not sufficient to support the "organizer" sentencing enhancement. U.S.S.G. § 3B1.1(c).

Cases that cite this headnote

[14] **Sentencing and Punishment**
Organizers, leaders, managerial role

It is not sufficient for a defendant to have organized property or activities in order to apply "organizer" sentencing enhancement; the defendant must have organized participants. U.S.S.G. § 3B1.1(c).

Cases that cite this headnote

[15] **Sentencing and Punishment**
Organizers, leaders, managerial role

Only those who are criminally responsible for the commission of the offense qualify as "participants" in a scheme for purpose of "organizer" sentencing enhancement; unwitting facilitators of an offense, even if they are "participants" in the usual sense of the word, do not count. U.S.S.G. § 3B1.1.

Cases that cite this headnote

[16] **Criminal Law**
Restitution

The Court of Appeals reviews a restitution schedule for abuse of discretion.

Cases that cite this headnote

[17] **Sentencing and Punishment**
Payment plan or schedule

A district court necessarily abuses its discretion in setting a restitution schedule if it makes a legal error.

Cases that cite this headnote

[18] **Sentencing and Punishment**
Payment plan or schedule

Restitution order that required defendant to pay more than $1.4 million to victims of his crimes was internally inconsistent, where such order first specified that entire amount of restitution was "due immediately" in a lump sum payment, but then proceeded to set out a schedule of small payments that defendant was required to make during his period of incarceration, without specifying that payment schedule was conditional on defendant's inability to make lump sum payment. 18 U.S.C.A. §§ 1341, 1343, 3664.

Cases that cite this headnote

[19] **Sentencing and Punishment**
Offender's Ability to Pay

Sentencing and Punishment
Payment plan or schedule

In order to meet its obligations in ordering a defendant to pay restitution, a court must consider a defendant's financial resources; if the court determines that the defendant is unable to make immediate restitution, the court must set a repayment schedule in the judgment of conviction. 18 U.S.C.A. § 3664.

Cases that cite this headnote

[20] **Sentencing and Punishment**
Offender's Ability to Pay

Sentencing and Punishment

Payment plan or schedule

Even though written restitution schedule, which required defendant to pay lump sum of over $1.4 million in restitution immediately and also set out schedule of small payments that defendant was required to make during his period of incarceration, was internally inconsistent, Court of Appeals would construe schedule as conforming to district court's oral ruling, in which district court found that defendant lacked the ability to make immediate restitution in full; lump sum requirement was not necessary for an enforceable judgment as to the total amount of restitution, as restitution amount was not set out in payment schedule, and eliminating lump sum requirement did not prevent government or victim from recouping any unexpected windfalls received by defendant. 18 U.S.C.A. §§ 1341, 1343, 3572, 3664.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Oregon, Anna J. Brown, District Judge, Presiding, D.C. No. 3:13-cr-00444-BR-2

Before: Susan P. Graber and Milan D. Smith, Jr., Circuit Judges, and Edward R. Korman, * District Judge.

ORDER

GRABER, Circuit Judge:

***398** The opinion filed July 26, 2018, and published at 897 F.3d 1057, is amended by the opinion filed concurrently with this order.

With these amendments, Appellee's petition for rehearing is **DENIED**. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

A jury convicted Defendant Jack Holden of mail and wire fraud, conspiracy to commit mail and wire fraud, and several money laundering offenses. Defendant appeals his convictions for mail and wire fraud, arguing that the district court misinstructed the jury on the elements of those crimes. Defendant also challenges the two-level "organizer" sentencing enhancement applied by the district court and the district court's restitution schedule. We reject Defendant's arguments concerning the jury instructions, but we vacate both his custodial sentence and the restitution portion of the judgment and remand for further proceedings. [1]

FACTUAL AND PROCEDURAL HISTORY

In the fall of 2007, Defendant and his associate, Lloyd Sharp, met with a group of investors from the Portland, Oregon, area to discuss the possibility of investing in a biofuel operation in Ghana. [2] Defendant and Sharp had known each other for a long time, but they had reconnected and entered into a joint venture agreement only recently. The joint venture agreement provided that Defendant and Sharp would work together to start refining biofuel in Ghana. Sharp's company was supposed to invest in the refining operation. Defendant's company was responsible for getting the refinery up and running. At the time he signed the joint venture agreement, Defendant was already engaged in the biofuel business in Ghana, but he had not done any large-scale refining; his operations were limited to planting the jatropha plant, [3] the seeds of which eventually would be used to create biofuel.

At the meetings with the investors, Defendant suggested that the Ghana biofuel operation was on the verge of going online; all that was needed was a refinery to start producing fuel. Defendant and Sharp sought $350,000

from the investors to initiate operations at the refinery, and they made specific representations (based on the joint venture agreement) about how that $350,000 would be used. The investors eventually decided to put their money into the project in early 2008. Defendant never completed the purchase of the refinery. Much of the money that he and Sharp received from the investors was not spent on the Ghana refinery project but was, instead, used to pay personal expenses or funneled to family members.

***399** In 2008 and 2009, Defendant began to concentrate his efforts on various biofuel projects in Chile. Defendant conveyed to investors—some of whom had already invested in the Ghana project—that the Chile projects would lead to quick profits that could then be poured back into the Ghana venture. After receiving money from the investors, Defendant again failed to spend the money as he had promised. Defendant's offices in Chile were shut down in mid-2009.

Defendant continued to seek investments for the Ghana project throughout the next couple of years. He consistently told investors that he just needed a little more money in order to get the operation up and running. But Defendant never purchased the refinery, never launched a full-scale biofuel operation in Ghana, and never earned any profits for his investors.

In September 2013, Defendant and Sharp were indicted on one count of conspiracy to commit mail and wire fraud, six counts of wire fraud, three counts of mail fraud, six counts of money laundering, and one count of conspiracy to commit money laundering. Sharp pleaded guilty. Defendant went to trial and was convicted on all counts for which he was indicted except for one mail fraud count, which was dismissed at the Government's request. He was sentenced to 87 months in prison, ordered to pay more than $1.4 million in restitution, and ordered to forfeit more than $1.4 million. He timely appeals.

DISCUSSION

A. Mail and Wire Fraud Instructions

[1] **[2]** **[3]** Defendant challenges the mail and wire fraud jury instructions given by the district court. We review de novo whether a jury instruction correctly stated the elements of a crime. *United States v. Kilbride*, 584 F.3d 1240, 1247 (9th Cir. 2009). At bottom, though, Defendant's beef is not with the instructions, which accurately reflected our caselaw, but with our circuit's longstanding construction of the mail and wire fraud statutes. Defendant argues that our "interpretations" of those statutes are not interpretations at all, but instead amount to judicially created crimes in violation of separation-of-powers principles. We review de novo such constitutional issues. *United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006).

The mail fraud instruction[4] given by the district court reads as follows:

> In order for the Defendant to be found guilty of [mail fraud], the government must prove each of the following elements beyond a reasonable doubt:
>
> **First**, the Defendant knowingly participated in, devised or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent statements, representations, promises, or omissions of material facts, **or** the Defendant knowingly aided and abetted Lloyd Sharp in doing so;
>
> **Second**, the statements, representations, or promises made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;
>
> **Third**, the Defendant acted with the intent to defraud; that is, the intent to deceive or to cheat; and
>
> **Fourth**, the Defendant used, or caused to be used, the mails to carry out an essential part of the scheme, **or** the Defendant knowingly aided and abetted Lloyd Sharp in doing so ....

***400** **[4]** Under our longstanding precedent, "anyone who knowingly and intentionally *participates in* the execution of [a] fraudulent scheme comes within the prohibition of the mail and wire fraud statutes regardless of whether the defendant devised the scheme." *United States v. Manion*, 339 F.3d 1153, 1156 (9th Cir. 2003) (per curiam) (emphasis added) (internal quotation marks and brackets omitted). But, as Defendant correctly points out, the mail and wire fraud statutes, by their terms, punish only those who "devise[ ] or intend[ ] to devise any scheme or artifice to defraud"; the word "participate" does not

appear in the statutes. 18 U.S.C. §§ 1341, 1343. According to Defendant, by reading the mail and wire fraud statutes to prohibit "participation in" schemes to defraud, we have essentially created new crimes, thus violating separation-of-powers principles. *See, e.g.*, *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) (stating that, "under our constitutional system, ... federal crimes are defined by statute rather than by common law").

[5] **[6]** Assuming, without deciding, that Defendant's argument is not foreclosed by precedent, we reject the argument on its merits. "[C]riminal laws are for courts ... to construe," *Abramski v. United States*, 573 U.S. 169, 134 S.Ct. 2259, 2274, 189 L.Ed.2d 262 (2014), and we do not usurp the role of Congress simply by construing a criminal statute broadly. Separation-of-powers principles may inform how we interpret a statute and may even prevent us from reading an unwritten defense into a statute. *See United States v. Lanier*, 520 U.S. 259, 265 n.5, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (discussing how separation-of-powers principles form part of the theoretical underpinning of the "fair warning" requirement, which itself underlies the void-for-vagueness doctrine and the rule of lenity); *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 490, 121 S.Ct. 1711 ("[I]t is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute."). But so long as we are engaged in interpretation—that is, an effort to "giv[e] effect to the will of the Legislature; or, in other words, to the will of the law," *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 866, 6 L.Ed. 204 (1824)—we do not infringe on Congress' exclusive power to make conduct criminal. *See Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 97, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981) ("[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.").

"Of course, the line separating statutory interpretation and judicial lawmaking is not always clear and sharp." *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991). Here, though, we clearly have *interpreted* the mail and wire fraud statutes to criminalize "participating in" schemes to defraud. In *Nemec v. United States*, 178 F.2d 656, 661 (9th Cir. 1949), we endorsed the Sixth Circuit's view that, "[i]f one's intent is to defraud when he *joins* a dishonest [mail fraud] scheme, he becomes a part of the scheme, although he may know nothing but his own share in the aggregate wrongdoing," *Blue v. United States*, 138 F.2d 351, 358–60 (6th Cir. 1943) (emphasis added).[5] That view rests on the ***401** idea that "the substance of an offense under [the mail fraud statute] is the prosecution of a fraudulent purpose, toward the execution or fulfillment whereof the mail is used," so that all those who work toward that fraudulent purpose—who actively "participate in" the scheme—should be held liable. *Schwartzberg v. United States*, 241 F. 348, 352 (2d Cir. 1917). As one court noted more than a century ago, a "joint scheme to defraud with acts to effectuate it has the features of a conspiracy," *Blanton v. United States*, 213 F. 320, 325 (8th Cir. 1914), and, as in a conspiracy, "[a]ll with criminal intent who join themselves even slightly to the principal scheme are subject to [liability], although they were not parties to the scheme at its inception,"[6] *Blue*, 138 F.2d at 359. Whatever the merits of that interpretation, it is undoubtedly an *interpretation* of the mail fraud statute: an attempt to "giv[e] effect to the will of the Legislature." *Osborn*, 22 U.S. (9 Wheat.) at 866.

In short, our caselaw holding that "participating in" a scheme to defraud is forbidden by the mail and wire fraud statutes does not amount to the creation of a common-law crime in violation of separation-of-powers principles. The district court therefore did not err by instructing the jury that it could find Defendant guilty for "participating in" a scheme to defraud.[7] We therefore affirm Defendant's mail and wire fraud convictions.[8]

B. "Organizer" Enhancement

[7] **[8]** **[9]** **[10]** Defendant next argues that the district court erred by applying a two-level "organizer" sentencing enhancement under § 3B1.1 of the Sentencing Guidelines. We review de novo the district court's construction of the Sentencing Guidelines, but any factual findings that underlie an enhancement are reviewed for clear error. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir.) (en banc), *cert. denied*, —— U.S. ——, 138 S.Ct. 229, 199 L.Ed.2d 149 (2017). We review for abuse of discretion the district court's determination as to "whether the specific constellation of facts at issue meets the governing legal standard" set out in the Guidelines. *Id.* at 1171. "It is not necessary that the district court make specific findings of fact to justify the imposition of the role enhancement. There must, however, be evidence in the record that would support" the imposition of the enhancement. *United*

States v. Whitney, 673 F.3d 965, 975 (9th Cir. 2012) (citation omitted).

[11] **[12]** **[13]** **[14]** The Guidelines allow for a two-level "organizer" enhancement "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity" involving fewer than five "participants," provided that the criminal activity was not "extensive." U.S.S.G. § 3B1.1(c) (2015). "A 'participant' is a person who is criminally responsible ***402** for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense ... is not a participant." *Id.* cmt. n.1. In order to impose the enhancement, there must be a "showing that the defendant had control over other[ ]" participants or "organiz[ed] other[ ] [participants] for the purpose of carrying out" the charged crimes. *Whitney*, 673 F.3d at 975 (internal quotation marks omitted). A defendant "organizes" other participants if he has "the necessary influence and ability to coordinate the[ir] behavior ... so as to achieve the desired criminal result[s]." *United States v. Doe*, 778 F.3d 814, 826 (9th Cir. 2015); *see also United States v. Avila*, 95 F.3d 887, 890 (9th Cir. 1996) (stating that "some degree of control or organizational authority over others is required" in order for a § 3B1.1 enhancement to be proper (internal quotation marks omitted)). Mere *facilitation* of criminal activity is not sufficient to support the enhancement. *Doe*, 778 F.3d at 825. Nor is it sufficient for a defendant to have organized property or activities—the defendant must have organized *participants*. *Id.* at 824 n.4.

At the sentencing hearing, the district court found that Defendant and Sharp were "pretty much comparable in their responsibility" and that "they were ... co-equal." The court then rejected the Government's argument that Defendant should receive a four-level enhancement under § 3B1.1(a) as "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." But the court found that Defendant "was certainly an organizer, he with Sharp," and that he should thus receive a two-level enhancement under § 3B1.1(c) because he and Sharp "organized [the scheme] together."

[15] For the organizer enhancement to be proper, there must be evidence in the record to support the conclusion that Defendant exercised control *over Sharp* or was able to influence *Sharp*, who was the only other "participant."[9] As the district court noted, the record demonstrates that Defendant and Sharp were "co-equal" conspirators—neither was "in charge" of the other. Furthermore, the joint venture agreement between Defendant and Sharp specified that their respective companies would split the profits from the Ghana refinery project evenly. Given those facts, the Sentencing Guidelines suggest that the "organizer" enhancement does not apply. *See* U.S.S.G. § 3B1.1 cmt. background ("Th[e] adjustment [of § 3B1.1] is included primarily because of concerns about relative responsibility. ... [I]t is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it ...."); *see also United States v. Egge*, 223 F.3d 1128, 1133 (9th Cir. 2000) ("Section 3B1.1 ***403** attempts to apportion *relative* responsibility where an offense involves multiple participants ...." (emphasis added)).

The Government argues that the two-level enhancement is proper nonetheless because Defendant gave Sharp "instructions for sending investors' funds to accounts [Defendant] controlled in Ghana." We think that act is best characterized as "facilitation" rather than "organization." *Compare Whitney*, 673 F.3d at 969, 975–76 (holding that an organizer enhancement was not warranted where the defendant merely "supplied [a co-conspirator] with tax forms and information on filing false returns"), *with Doe*, 778 F.3d at 826 (upholding an organizer enhancement where the defendant "put the [drug] deal[s] together by negotiating the type, quantity, and price of drugs for each transaction, and then ensured the drugs, money, and participants arrived when and where needed"). Defendant did not exercise control or "organizational authority" over Sharp by telling him how to go about depositing money in an account any more than if he had given Sharp directions to his house. Indeed, if Defendant "organized" Sharp by telling him how to go about making deposits, then it would follow that nearly every co-conspirator in a limited conspiracy of equals would be an "organizer" of his or her comrades, and the enhancement of § 3B1.1(c) would be all but automatic for *all* conspirators in such cases. Such a result is inconsistent with the main purpose of the "organizer" enhancement, which is to "apportion *relative* responsibility where an offense involves multiple participants." *Egge*, 223 F.3d at 1133 (emphasis added).

The record does not support the conclusion that Defendant exercised sufficient control or organizational authority over Sharp to qualify for the two-level

enhancement of § 3B1.1.(c).[10] Because "we cannot say whether the district court would impose the same sentence if it kept the correct Guidelines range in mind throughout the process," we vacate Defendant's 87-month prison sentence and remand for resentencing. *United States v. Flores*, 725 F.3d 1028, 1042 (9th Cir. 2013).

C. Restitution

[16] **[17]** **[18]** The district court ordered Defendant to pay more than $1.4 million in restitution to the victims of his crimes. The written judgment specifies that the entire amount of restitution is "due immediately" in a "[l]ump sum payment," but it also sets out a schedule of small payments that Defendant must make during his period of incarceration. During the sentencing hearing, the court found that Defendant lacked the ability to make full restitution immediately and that, "[n]o matter how long [Defendant] spends ... in prison, ... the victims will not be made whole." Defendant argues that the district court erred by ordering immediate restitution in full in light of its finding that he lacked the funds to make such restitution. We review for abuse of discretion a restitution schedule. *United States v. Inouye*, 821 F.3d 1152, 1156 (9th Cir. 2016) (per curiam). A district court necessarily abuses its discretion in setting a restitution schedule if it makes a legal error. *Id.*; *see also United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1162 (9th Cir. 2010) ("We review de novo the legality of a restitution order ...." (internal quotation marks omitted)).

[19] When a district court orders a defendant to pay restitution under 18 U.S.C. § 3664, it must "specify in the restitution ***404** order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of ... the financial resources and other assets of the defendant." *Id.* § 3664(f)(2)(A). In order to meet its obligation under § 3664, a court must "consider" a defendant's financial resources. *Ward v. Chavez*, 678 F.3d 1042, 1049–50 (9th Cir. 2012). If the court determines that the defendant is unable to make immediate restitution, the court "must set a repayment schedule in the judgment of conviction." *Id.* at 1050.

[20] At first blush, the restitution portion of the judgment appears internally inconsistent: it orders Defendant to pay *full* restitution immediately *and* orders him to make payments while incarcerated. According to the Government, though, the order is not internally inconsistent, because the payment schedule portion of the order is conditional—it kicks in only if Defendant cannot make full immediate restitution. By ordering full immediate restitution even in the face of evidence that such restitution is impossible, argues the Government, the district court helps to ensure that the Government can seek restitution up to the full amount if Defendant's financial circumstances should change in the future.

We cannot construe the written restitution schedule in the manner urged by the Government. First, the schedule of payments during incarceration is not phrased in conditional terms—the order simply directs Defendant to pay a certain amount of restitution while incarcerated. Second, the district court found that Defendant lacked the ability to make immediate restitution in full, so it already had found the supposed "condition" that would trigger the payment schedule to be satisfied. Finally, we doubt that an order setting a "conditional" payment schedule during the period of incarceration would be consistent with the statutory scheme. The relevant statutory provisions can be read to suggest that requiring a single lump-sum payment of immediate restitution in full and setting a payment schedule are mutually exclusive orders. *See United States v. Martinez*, 812 F.3d 1200, 1205 (10th Cir. 2015) ("[Section 3572(d)(1)] implies that full payment is due immediately *only if* the district court does not provide for installment payments."); 18 U.S.C. § 3664(f)(3)(A) ("A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments."). For those reasons, we read the district court's judgment as both requiring immediate restitution in full *and* setting a mandatory, unconditional schedule of payments during the period of incarceration.

So construed, the restitution schedule is internally inconsistent. But that inconsistency does not require us to seek clarification from the district court. Again, the district court orally announced that Defendant lacked the ability to make immediate restitution in full. The written restitution schedule, insofar as it purports to order immediate restitution, is inconsistent with that finding. In this situation, we construe the written judgment to conform to the court's oral ruling. *United States v. Jones*, 696 F.3d 932, 938 (9th Cir. 2012). We therefore vacate the restitution schedule and remand so that the district court

can strike the lump-sum payment requirement from the judgment. *Id.*

The Government's concern with this result appears to be two-fold. First, the Government argues that the lump-sum requirement is necessary "to have an enforceable judgment for the full amount of the debt owed." That concern is not well taken because the total amount of restitution ordered by the court is set out in a ***405** different portion of the judgment, not in the payment schedule. The judgment contains a required "Amount of Restitution Ordered" of $1,410,760.00; the judgment also provides that Defendant "shall pay the following *total* criminal monetary penalties," including restitution in the amount of $1,410,760.00. (Emphasis added.) That total amount and that portion of the judgment are not at issue; only the details of the payment schedule are.

Second, the Government asserts that a schedule that does not require immediate restitution in full prevents the Government or a victim from recouping unexpected windfalls the defendant receives, such as a bequest. But the judgment separately provides "that resources received from any source, including inheritance, settlement, or any other judgment, shall be applied to any restitution or fine still owed, pursuant to 18 [U.S.C.] § 3664(n)." Moreover, 18 U.S.C. §§ 3572(d)(3) and 3664(k) provide mechanisms by which the Government or a victim may seek to modify a restitution schedule if a defendant acquires assets that change the defendant's financial circumstances.

Defendant's convictions and the forfeiture order **AFFIRMED**; Defendant's custodial sentence and the restitution schedule **VACATED**; case **REMANDED** for further proceedings.

All Citations

908 F.3d 395, 18 Cal. Daily Op. Serv. 10,418, 2018 Daily Journal D.A.R. 10,531

Footnotes

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

1 In this opinion, we address only the separation-of-powers challenge to the mail and wire fraud instructions, the challenge to the "organizer" sentencing enhancement, and the challenge to the restitution schedule. We address all remaining issues in a memorandum disposition filed July 26, 2018.

2 Lloyd Sharp presented himself to the investors as "Kevin Thomas."

3 The jatropha plant is "a big bush that can grow into a small tree. ... [I]nside [its fruit] pods are several black seeds, each one about twice the size of a coffee bean. Crush those seeds, and you get oil." Dan Charles, *How a Biofuel Dream Called Jatropha Came Crashing Down*, NPR.org (Aug. 21, 2012), https://www.npr.org/sections/thesalt/2012/08/22/159391553/how-a-biofuel-dream-called-jatropha-came-crashing-down.

4 The wire fraud instruction was substantially the same as the mail fraud instruction.

5 That view was shared by other circuits at the time. *See Schwartzberg v. United States*, 241 F. 348, 352 (2d Cir. 1917) ("[A]ll who with criminal intent join themselves even slightly to the principal schemer are subject to the [mail fraud] statute, although they may know nothing but their own share in the aggregate wrongdoing."); *Alexander v. United States*, 95 F.2d 873, 880–81 (8th Cir. 1938) (same).

6 We have often noted the similarities between conspiracies and joint schemes to defraud. *See, e.g.*, *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992) ("Mail and wire fraud share as a common first element the existence of a scheme to defraud, which, when more than one person is involved, is analogous to a conspiracy.").

7 To the extent that Defendant argues that he was denied due process because he was punished for committing acts that are not prohibited by statute, his argument necessarily fails, because "participating in" a scheme to defraud *is* prohibited by the mail and wire fraud statutes as we have interpreted them.

8 We address—and reject—Defendant's remaining challenges to his mail and wire fraud convictions in a concurrently filed memorandum disposition.

9 At oral argument, the Government suggested that the two-level enhancement could be upheld on the theory that Defendant "coordinated the activities of the many ... non-criminal participants in this case." But only those who "are criminally responsible for the commission of the offense" qualify as "participants"; unwitting facilitators of an offense, even if they are "participants" in the usual sense of the word, do not count. *See United States v. Melvin*, 91 F.3d 1218, 1225–26, 1226 n.5 (9th Cir. 1996) (holding that the defendant's former girlfriend was a "participant" in his scheme to defraud because she "was aware that the scheme was fictitious" and helped to further the scheme); *see also United States v.*

Brodie, 524 F.3d 259, 271 (D.C. Cir. 2008) ("A person is 'criminally responsible' under § 3B1.1 only if he commits all of the elements of a statutory crime *with the requisite mens rea*." (internal quotation marks and brackets omitted)). To the extent that the Government is now arguing that the enhancement is proper because Defendant "organized" some *culpable* "participants" besides Sharp, that argument is both unsupported by the record and inconsistent with the Government's position in the district court that "there w[ere] two ... knowing participants" in Defendant's scheme.

10 We need not decide whether the district court misinterpreted § 3B1.1(c) or, alternatively, interpreted § 3B1.1(c) correctly but misapplied it to the facts in the record. Either way, the court erred.

APPENDIX B

732 Fed.Appx. 619 (Mem)
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. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jack HOLDEN, Defendant-Appellant.

No. 16-30186
|
Argued and Submitted June 8, 2018 Portland, Oregon
|
Filed July 26, 2018

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Oregon, Anna J. Brown, District Judge, Presiding, D.C. No. 3:13-cr-00444-BR-2

Before: GRABER and M. SMITH, Circuit Judges, and KORMAN,[*] District Judge.

MEMORANDUM[**]

Defendant Jack Holden was convicted of mail and wire fraud, conspiracy to commit mail and wire fraud, money laundering, and conspiracy to commit money laundering. He appeals his convictions, his 87-month prison sentence, the district court's order requiring more than $1.4 million in restitution, and the district court's order requiring more than $1.4 million in forfeiture. In this disposition, we reject several of Defendant's arguments.[1]

1. Reviewing de novo, United States v. You, 382 F.3d 958, 965 (9th Cir. 2004), we conclude that the mail and wire fraud instructions adequately conveyed to the jury that it had to find that Defendant acted with a sufficiently culpable mental state in order to convict him of mail and wire fraud. We also conclude that the district court did not abuse its discretion by formulating the jury instructions in the manner that it did—the instructions were "[ ]adequate to guide the jury's deliberations." United States v. Tagalicud, 84 F.3d 1180, 1183 (9th Cir. 1996) (internal quotation marks omitted).

2. The district court did not abuse its discretion by excluding the "Gold Star Soap Opera" from evidence under Rule 403. See United States v. Jayavarman, 871 F.3d 1050, 1063 (9th Cir. 2017) (stating the standard of review). Given the confusing nature of the Soap Opera and the layers of hearsay contained therein, it was within the court's discretion to conclude that the probative value of the Soap Opera was far ***620** outweighed by its potential to "confus[e] the issues, mislead[ ] the jury, [or] wast[e] time." Fed. R. Evid. 403. We are satisfied that the district court conducted a sufficient review of the contents of the Soap Opera before conducting its Rule 403 analysis. See Jayavarman, 871 F.3d at 1063-64 (discussing the requirement that a district court thoroughly review a piece of evidence before conducting a Rule 403 analysis).

3. Even assuming that the district court erred by excluding the Gold Star promotional video and by allowing the jury to take the Government's demonstrative exhibit into the jury room, those errors, considered separately or together, were harmless. United States v. Pineda-Doval, 614 F.3d 1019, 1032 (9th Cir. 2010) ("A conviction may be reversed on the basis of an incorrect evidentiary ruling only if the error more likely than not affected the verdict." (internal quotation marks omitted)). The promotional video had very limited relevance, and the district court's limiting instruction mitigated any prejudice that resulted from allowing the jury to have the demonstrative exhibit during its deliberations.[2]

4. The district court did not violate 18 U.S.C. § 981 by ordering forfeiture in the form of a personal money judgment. United States v. Newman, 659 F.3d 1235, 1242-43 (9th Cir. 2011). We are not persuaded that our decision in Newman is "clearly irreconcilable" with any recent Supreme Court decisions, Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), so we are bound

by its conclusion that, "at least where the proceeds of the criminal activity are money, the government may seek a money judgment as a form of criminal forfeiture" under 18 U.S.C. § 981. Newman, 659 F.3d at 1242. We also conclude that the district court's forfeiture order did not violate either the Sixth Amendment right to a trial by jury or the Double Jeopardy Clause. See United States v. Lo, 839 F.3d 777, 794-95 (9th Cir. 2016) (rejecting a Sixth Amendment challenge to a money judgment forfeiture order), cert. denied, —— U.S. ——, 138 S.Ct. 354, 199 L.Ed.2d 262 (2017); Newman, 659 F.3d at 1241 (explaining that a defendant may be ordered to pay both forfeiture and restitution because restitution is not a form of punishment).

Defendant's convictions and the forfeiture order **AFFIRMED**; Defendant's custodial sentence and the restitution order **VACATED**; case **REMANDED** for further proceedings.

All Citations

732 Fed.Appx. 619 (Mem)

Footnotes

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 In a concurrently filed opinion, we reject Defendant's remaining challenge to his convictions, but we vacate both his custodial sentence and the restitution order and remand for further proceedings.

2 Insofar as Defendant's evidentiary challenges are framed in constitutional terms, we reject those challenges. See United States v. Waters, 627 F.3d 345, 353-54 (9th Cir. 2010) (rejecting a defendant's effort to "constitutionalize" her evidentiary claim when she "was able to present the substance of her" defense).

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APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

UNDER SEAL

UNITED STATES OF AMERICA,

v.

LLOYD BENTON SHARP, aka Kevin Thomas and JACK HOLDEN,

Defendants.

Case No. 3:13-CR- 00444-BR

INDICTMENT
[UNDER SEAL]

18 U.S.C. § 1349
18 U.S.C. § 1343
18 U.S.C. § 1341
18 U.S.C. § 1957
18 U.S.C. § 1956(h)
18 U.S.C. § 981(a)(1)(C)
28 U.S.C. § 2461(c)

THE GRAND JURY CHARGES:

COUNT 1
CONSPIRACY TO COMMIT MAIL AND WIRE FRAUD
[18 U.S.C. § 1349]

I. INTRODUCTION

At all times material and relevant to this Indictment:

A. The Individuals.

1. Defendant **LLOYD BENTON SHARP**, aka Kevin Thomas, was at times a resident of Oregon and Nevada. Defendant **SHARP** was the founder and Chief Executive Officer (CEO) of an entity called Club 120 Holding, also known as Club CXX Holding, Inc. (hereinafter referred to as Club 120 Holding). **SHARP**, using his alias Kevin Thomas, also formed and was president of an Oregon non-profit religious corporation called Clean Energy Association. **SHARP** is an authorized signatory on Bank of America account number X8034 in the name of Clean Energy Association, an account into which investor funds were deposited.

SHARP was also associated with an entity called AAG Enterprises, aka AAG Enterprises, Inc. and AAG Holding, Inc., an Oregon non-profit religious corporation. **SHARP** was an authorized signatory on U.S. Bank account No. X5649 in the name of AAG Enterprises, an account into which investor funds were deposited. Defendant **SHARP** and co-defendant **JACK HOLDEN** used Club 120 Holding, AAG Enterprises, and Clean Energy Association to solicit investment funds for: (1) a project that was supposed to produce and sell biodiesel fuel in the West African nation of Ghana; and (2) a related project that was supposed to transport biodiesel fuel from Argentina to Chile, and build biodiesel refineries in Chile.

2. Defendant **JACK HOLDEN** was at times, a resident of Oregon, and of the West African nation of Ghana. Defendant **HOLDEN** is a self-described "successful serial entrepreneur", and is the Executive Director of Goldstar Farms, Ltd., a company in Ghana. **HOLDEN** was also the manager of Gold Star Bio-Diesel LLC, an Illinois domestic limited liability company. **HOLDEN** and co-defendant **SHARP** solicited investment funds for: (1) a project that was supposed to produce and sell biodiesel fuel in the West African nation of Ghana, and (2) a related project that was supposed to transport biodiesel fuel from Argentina to Chile, and build biodiesel refineries in Chile.

B. The Entities.

3. Gold Star Bio-Diesel LLC was formed as an Illinois Domestic Limited Liability Company on March 7, 2008. Defendant **JACK HOLDEN** was listed as Manager, and H. M. O. was listed as agent. Defendant **HOLDEN** was a signatory on Bank of America account No. X2701 in the name of Gold Star Bio-Diesel LLC and on J.P. Morgan Chase account No. X0784 in the name of Gold Star Bio-Diesel LLC. Investor funds were deposited to both of these accounts.

4. Goldstar Farms Ltd., hereinafter referred to as Goldstar Farms, is a company in Ghana, West Africa. According to the company's website, at www.goldstarfarms.com, Goldstar Farms is a "vertically integrated" company that grows renewable feedstock, extracts oils from the seeds of the fruit on jatropha trees, refines the oil into biodiesel, and pumps the biodiesel to fuel tanks around the world. Included in the Goldstar Farms Ltd. family of companies are Gold Star Biofuels, Gold Star Biodiesel, Gold Star Bio-Diesel LLC, Gold Star Ltd., and Gold Star Refineries Ltd and Gold Star Refinery #3 Ltd. Defendant **JACK HOLDEN** is the Executive Director of Goldstar Farms, Ltd. and the Manager of Gold Star Bio-Diesel LLC. Diana Holden, aka Lady D, defendant **JACK HOLDEN**'S wife, is the Managing Director of Goldstar Farms Ltd.

5. AAG Enterprises, aka AAG Enterprises, Inc., and AAG Holding, Inc., was formed as an Oregon non-profit religious corporation on June 26, 2001. Its registered agent was listed as South Beach Missions, 15113 S. Maple Lane Road, Oregon City, Oregon 97045. Defendants **SHARP** and **HOLDEN** used AAG Enterprises to solicit investment funds in the Ghana biodiesel fuel project. Defendant **SHARP** is listed as an authorized signatory on U.S. Bank account No. X5649 in the name of AAG Enterprises, an account into which investor funds were deposited.

6. Club 120 Holding, also known as Club 120 Holding Inc., Club 120 Resort Living, Club CXX Holdings, Inc., was founded by defendant **SHARP**. He is the Chief Executive Officer. Defendants **SHARP** and **HOLDEN** used Club 120 Holding as part of their efforts to solicit investments for the project to produce and sell biodiesel fuel in Ghana.

7. Clean Energy Association was formed as an Oregon non-profit religious corporation on September 10, 2008. Defendant **SHARP**, using his alias Kevin Thomas, is

President and Marilyn Sharp, aka Maril Fitzgerald, defendant **SHARP**'S wife, is Secretary. Its principal place of business is 15113 S. Maple Lane Road, Oregon City, Oregon 97045, the same address as AAG Enterprises. Defendants **SHARP** and **HOLDEN** used Clean Energy Association as part of their efforts to solicit investments for: (1) the project to produce and sell biodiesel fuel in Ghana, and (2) a related project that was supposed to transport biodiesel fuel from Argentina to Chile, and build biodiesel refineries in Chile. **SHARP** is an authorized signatory on Bank of America account No. X8034 in the name of Clean Energy Association into which investor funds were deposited.

II. OBJECTS OF THE CONSPIRACY

8. Beginning in or about July 2007, and continuing to the date of this Indictment, in the District of Oregon and elsewhere, defendants **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, conspired and agreed, together with others known and unknown to the Grand Jury, to commit the following offenses, in violation of Title 18, United States Code, Section 1349:

a. Mail Fraud – To knowingly and willfully use or cause the use of the United States mails or private or commercial interstate carrier in furtherance and execution of a material scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1341;

b. Wire Fraud – To knowingly and willfully transmit or cause to be transmitted by wire communication in interstate or foreign commerce any writings, signs, signals, pictures, or sounds in furtherance and execution of a material scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1343.

III. THE CONSPIRACY

9. The purpose of the defendants' conspiracy was twofold: (1) to defraud investors who were told they were investing in a project to produce and sell biodiesel fuel in Ghana; and (2) when this investment failed, to continue to defraud those same investors by soliciting additional funds for a project to transport existing biodiesel fuel from Argentina to Chile, and build biodiesel refineries in Chile.

10. It was part of the conspiracy that on or about July 3, 2007, defendant **SHARP**, using his alias Kevin Thomas and acting on behalf of Club 120 Holding, Inc., and defendant **HOLDEN**, acting on behalf of Gold Star Farms Ltd., entered into a Joint Venture Agreement, wherein Club 120 Holding, Inc., and Gold Star Farms, Ltd. agreed to form a limited liability company in Ghana, West Africa called Gold Star Refinery #3 Ltd. to build and operate a biodiesel refinery. As part of the Joint Venture Agreement, Club 120 Holding agreed to contribute $350,000.00 toward the purchase and operation of the refinery, and Gold Star agreed to provide the land in Ghana to locate the refinery, train personnel to operate the refinery, and provide the initial supplies and feedstock to run the factory for the first 30 days. Club 120 Holding was to receive 49% of the shares of Gold Star Refinery #3 Ltd. and 50% of the net profit from the sale of biodiesel produced. Gold Star Farms Ltd. was to retain 51% of the shares of Gold Star Refinery #3 Ltd. and the balance of the net profits from the sale of the biodiesel.

11. It was part of the conspiracy that on or about October 14, 2007, defendant **SHARP**, using his alias Kevin Thomas and acting on behalf of AAG Enterprises, Inc., and defendant **HOLDEN**, acting on behalf of Gold Star Ltd., entered into a Joint Venture agreement, wherein AAG Enterprises, Inc. and Gold Star Ltd. agreed to form a limited liability company in Ghana, West Africa called Gold Star Refinery #3 Ltd. to build and operate a biodiesel refinery.

As part of the Joint Venture agreement, AAG Enterprises, Inc. agreed to contribute $350,000.00 toward the purchase and operation of the refinery, and Gold Star Ltd. agreed to provide the land in Ghana to locate the refinery, train personnel to operate the refinery, and initial supplies and feedstock to run the factory for the first 30 days. AAG Enterprises, Inc. was to receive 49% of the shares of Gold Star Refinery #3 Ltd. and 50% of the net profit from the sale of biodiesel produced. Gold Star Ltd. was to retain 51% of the shares of Gold Star Refinery #3 Ltd. and the balance of the net profits from the sale of the biodiesel.

12. It was part of the conspiracy that in or about Fall 2007, defendants **SHARP** and **HOLDEN** held meetings in the District of Oregon with investors and potential investors to solicit investment funds for a project to produce and sell biodiesel fuel in Ghana, West Africa.

13. It was part of the conspiracy that defendants **SHARP** and **HOLDEN**, among other things, told the investors the following: (1) that **HOLDEN** was the "idea man" and **SHARP** was the "money man"; (2) that **HOLDEN** had 5 million acres of land in Ghana that was under contract with local tribes to grow jatropha trees, and that the seeds of the jatropha fruit would be refined into biodiesel fuel; (3) that **HOLDEN** had a large supply of jatropha seeds, and all he needed was $350,000.00 to get the operation up and running; (4) that they would buy a prefabricated refinery that would be shipped to Ghana, and able to produce biodiesel fuel immediately; (5) that **HOLDEN** was sending his engineer, S.S., to ensure that the refinery was set up and running smoothly; and (6) that **HOLDEN** had signed contracts with bus companies in Ghana to buy all the biodiesel they could produce.

14. It was part of the conspiracy that defendant **SHARP** told investors that as part of the investment, they would actually be purchasing shares of his company Club 120 Holding, that **SHARP** would own 50% of Club 120 Holding, and that the investors would own the other 50%.

15. It was part of the conspiracy that defendants **SHARP** and **HOLDEN** falsely told investors that the refinery would be up and running within two months of receiving the $350,000.00 of investment funds.

16. It was part of the conspiracy that defendants **SHARP** and **HOLDEN** falsely told investors that if they each made a $50,000.00 investment, they would each receive a return of $7,000.00 per month for an indefinite period of time as soon as the biodiesel refinery was operational.

17. Both defendants falsely told investors that their investment funds would be used to purchase the equipment, feedstock, and to bring in **HOLDEN**'S engineer to operate the refinery. Both **SHARP** and **HOLDEN** reiterated that all they needed was $350,000.00 to make it happen. Defendants **SHARP** and **HOLDEN** told investors that the return of $7,000.00 per month was realistic based on the cost of production and the amount they could sell the biodiesel for. Both **SHARP** and **HOLDEN** told investors that their making the investment was a "no-brainer."

18. It was part of the conspiracy that defendant **SHARP** would falsely guarantee the safety of the investors' money. Defendant **SHARP** falsely told investors that at any time, they could get 100% of their money back. **SHARP** stated that he could guarantee the return of 100% of the investors' money, because he was involved many profitable ventures, including gold investments, and that several of these investments would produce millions of dollar for him.

19. It was part of the conspiracy that defendants made statements about Christianity, God, and religion that were designed to make the investors feel more secure and less skeptical about the representations made regarding the biodiesel investment scheme.

20. It was part of the conspiracy that in order to induce investors to invest in the project to produce and sell biodiesel in Ghana, defendants claimed to be "good Christians." **HOLDEN** claimed to have been a former Christian missionary and a pastor, and stated to potential investors that **SHARP** had been a member of his congregation and was a good "tither." **HOLDEN** also told investors that, "God was going to bless the project."

21. It was part of the conspiracy that defendants **SHARP** and **HOLDEN** knowingly and willfully failed to truthfully and accurately disclose, and omitted to state certain material facts to investors to make the statements made, in light of the circumstances under which they were made, not misleading, including, but not limited to the following :

a. that in 1984, the U.S. District Court in the District of Oregon issued a permanent injunction barring defendant **SHARP** from selling securities;

b. that in 1988, the State of Indiana Office of Secretary of State, Securities Division, issued a Cease and Desist Order barring defendant **SHARP** from offering and selling unregistered securities;

c. that in 1989 the Arizona Corporation Commission issued a Cease and Desist Order barring defendant **SHARP** from selling unregistered securities;

d. that defendant **SHARP** had previously been convicted in Arizona in 1989 of Operating a Fraudulent Schemes and Artifices, Sale of Unregistered Securities, Sale of Securities by Unregistered Salesman, and Illegally Conducting an Enterprise;

e. that defendant **SHARP** had previously been convicted in 1991 of Mail Fraud and Aiding and Abetting;

UNDER SEAL

f. that in 1991, the U.S. District Court in the District of Nevada issued a permanent injunction barring defendant **SHARP** from selling "ore purchase contracts";

g. that in 1992, defendant **HOLDEN** had been convicted in the District of Oregon of Wire Fraud, Interstate Transportation of Stolen Property, and Money Laundering;

h. that in 2003, the Texas State Securities Board issued an Emergency Cease and Desist Order barring defendant **SHARP** from acting as a securities dealer and from offering securities for sale;

i. that in 2003, the U.S. District Court for the Western District of Washington issued a permanent injunction barring defendant **SHARP** from selling unregistered securities and ordered him to pay a civil penalty of $120,000.00 for the sale of unregistered securities to the public;

22. It was part of the conspiracy that based on defendants' false pretenses, representations, promises, and omissions of material facts, investors invested substantial funds in the defendants' projects to: (1) produce and sell biodiesel fuel in Ghana, and (2) transport biodiesel fuel from Argentina to Chile, and build biodiesel refineries in Chile.

23. It was part of the conspiracy that defendants **SHARP** and **HOLDEN** did not use the investors' funds to produce and sell biodiesel fuel in Ghana as promised.

24. It was part of the conspiracy that the Ghana biodiesel refinery would never become operational and that defendants **SHARP** and **HOLDEN** would fail to produce and sell biodiesel as promised.

25. It was part of the conspiracy that defendants **SHARP** and **HOLDEN** failed to provide the promised return on investment of $7,000.00 per month per $50,000.000 invested by each of the investors.

26. It was part of the conspiracy that contrary to the promises made by defendants **SHARP** and **HOLDEN**, they failed to return 100% of the investors' funds when requested. In fact, they returned little, if any, investment money to the investors.

27. It was part of the conspiracy that when asked by investors why the Ghana refinery was not operational, defendants **SHARP** and **HOLDEN** represented to investors that the Ghana refinery project was underfunded, that a more promising investment opportunity had been found in Chile, and that a successful investment in Chile would provide sufficient funds to get the Ghana refinery operational.

28. It was part of the conspiracy that in Fall 2008, defendant **SHARP** solicited and received from investor R.S., $100,000.00 in additional funds for an investment in five biodiesel plants in Chile. In return, **SHARP** falsely promised that investor R.S. would receive a return of his principal, along with 40% interest, in one year, and a 50/50 split of the profits made by the five biodiesel plants. **SHARP** falsely told investor R.S. that he (**SHARP**) would use the investment funds to purchase a certificate of deposit in the amount of $100,000.00, and that he (**SHARP**) would use the certificate of deposit as collateral for a $100,000.00 loan he (**SHARP**) would obtain from Bank of America to finance the project. Investor R.S. made this investment based upon **SHARP**'s false representations. Investor R.S. never received his principal or any return on his investment.

29. It was part of the conspiracy that between approximately Summer 2008 and December 2008, defendants **SHARP** and **HOLDEN** told investors that **HOLDEN**, acting on

behalf of his company Gold Star, entered into a contract with a power-generating company located in Degan, Chile, to deliver $900 million worth of biodiesel fuel over a six-year period. Initially, the defendants falsely represented that this biodiesel fuel would be provided by refineries that the defendant operated in Chile. Later, when it was apparent that the defendants had no refineries in Chile, the defendants falsely represented that this biodiesel would be obtained in Argentina and shipped via truck tankers, to Chile.

30. It was part of the conspiracy that between approximately November 2008 and approximately March 2009, **SHARP** and **HOLDEN** falsely represented to investors that a supplier for the biodiesel in Argentina had already been secured, that tanker trucks to transport the biodiesel were ready, and all that was needed was $100,000.00 cash to get the operation going.

31. It was part of the conspiracy that defendants **SHARP** and **HOLDEN** falsely promised investors that if they invested $100,000.00 to fund the transportation of biodiesel from Argentina to Chile, they would double their investment money and receive a return of funds within 120 days.

32. It was part of the conspiracy that **SHARP** and **HOLDEN** falsely represented to investors that the cash generated from the sale of the biodiesel fuel to the Chilean power-generating plant would be sufficient to pay the investors back and to fund the completion of the Ghana biodiesel refinery operation.

33. It was part of the conspiracy that contrary to defendants' promises and representations to the investors, defendants **SHARP** and **HOLDEN** never purchased biodiesel in Argentina, and never delivered biodiesel to the Chilean power-generating company.

34. It was also part of the conspiracy that defendants **SHARP** and **HOLDEN** never provided investors with their promised return on investment or their principal invested in the project to purchase and transport biodiesel from Argentina to Chile.

35. It was further part of the conspiracy that contrary to defendants' promises and representations to investors, defendants **SHARP** and **HOLDEN** never used the supposed profits from the sale of biodiesel fuel to the Chilean power-generating plant to get the Ghana biodiesel refinery operating.

36. It was part of the conspiracy that defendants **SHARP** and **HOLDEN** would use a large portion of the funds from investors in the project to produce and sell biodiesel fuel in Ghana, and from investors in the project to transport biodiesel from Argentina to Chile for their personal benefit.

IV. OVERT ACTS

37. In furtherance of the conspiracy, and to promote the objects thereof, defendant **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, and other persons known and unknown to the grand jury, committed and caused to be committed, among others, the interstate wire transfers of funds set forth in Counts 2 through 7 of this Indictment, incorporated herein by this reference.

38. In furtherance of the conspiracy, and to promote the objects thereof, defendant **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, and other persons known and unknown to the grand jury, committed and caused to be committed, among others, sent materials via the U.S. Postal Service set forth in Counts 8 through 10 of this Indictment, incorporated herein by this reference.

All in violation of Title 18, United States Code, Section 1349.

COUNTS 2 THROUGH 7
WIRE FRAUD
[18 U.S.C. § 1343]

1. The Grand Jury re-alleges each and every allegation contained in each of the paragraphs of Count 1 of this Indictment, and incorporates them by reference as if fully set forth herein.

Between in or about July 2007 and the date of this Indictment, in the District of Oregon and elsewhere, defendants **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, together with persons known and unknown to the Grand Jury, did knowingly and intentionally devise and intend to devise a material scheme and artifice to defraud investors in a biodiesel fuel project in Ghana, and in a related project to transport existing biodiesel fuel from Argentina to Chile, and build biodiesel refineries in Chile, and to obtain money and property of those investors by means of materially false and fraudulent pretenses, representations, and promises, and through omissions of material facts. The material scheme and artifice to defraud is more particularly set forth in each of the paragraphs of Count 1 of this Indictment, and are incorporated herein by this reference.

2. On or about the dates set forth below, in the District of Oregon and elsewhere, defendants **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, aided and abetted by one another, together with others known and unknown to the Grand Jury, for the purposes of executing the aforementioned material scheme and artifice to defraud, and attempting to do so, did knowingly transmit and cause to be transmitted in interstate commerce by means of wire communications, signals, and sounds, that is, wire transfers of money across state lines, as set forth below, each such use of the wires being a separate count of this Indictment:

COUNT	DATE	ORIGINATION	DESTINATION	DESCRIPTION OF WIRE
2	10/17/2008	OREGON	ILLINOIS	Wire Transfer of $80,000.00 from Bailey Hill Family Dental Center PC to Gold Star Bio-Diesel LLC.
3	11/10/2008	OREGON	ILLINOIS	Wire Transfer of $215,000.00 from Bank and Vogue Limited to Gold Star Bio-Diesel LLC.
4	12/30/2008	OREGON	ILLINOIS	Wire Transfer of $35,000.00 from Professional Consulting Services, Inc. to Gold Star Bio-Diesel LLC.
5	03/09/2009	OREGON	ILLINOIS	Wire Transfer of $100,000.00 from T.D. to Gold Star Bio-Diesel LLC.
6	03/10/2009	OREGON	ILLINOIS	Wire Transfer of $25,000.00 from R.B. to Gold Star Bio-Diesel LLC.
7	05/18/2009	OREGON	ILLINOIS	Wire Transfer of $10,000.00 from T.D. to Gold Star Bio-Diesel LLC.

All in violation of Title 18, United States Code, Sections 1343 and 2.

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COUNTS 8 THROUGH 10
MAIL FRAUD
[18 U.S.C. § 1341]

1. The Grand Jury re-alleges each and every allegation contained in each of the paragraphs of Counts 1 through 7 of this Indictment, and incorporates them by reference as if fully set forth herein.

2. Between in or about July 2007 and the date of this Indictment, in the District of Oregon and elsewhere, defendants **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, together with persons known and unknown to the Grand Jury, did knowingly and intentionally devise and intend to devise a material scheme and artifice to defraud investors in a biodiesel fuel project in Ghana, and in a related project to transport existing biodiesel fuel from Argentina to Chile, and build biodiesel refineries in Chile, and to obtain money and property of those investors by means of materially false and fraudulent pretenses, representations, and promises, and through omissions of material facts. The material scheme and artifice to defraud is more particularly set forth in each of the paragraphs of Counts 1 through 7 of this Indictment, and are incorporated herein by this reference.

3. On or about the dates set forth below, in the District of Oregon, and elsewhere, defendants **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, aided and abetted by one another, and others known and unknown to the Grand Jury, for the purpose of executing the aforementioned material scheme and artifice to defraud, and attempting to do so, knowingly caused to be sent and delivered by the United States Postal Service according to the directions thereon, the items listed below, each of which constitutes a representative sample of the use of the mails in furtherance of the material scheme and artifice to defraud, and each such use of the mails being a separate count of this Indictment:

COUNT	DATE	DESCRIPTION OF ITEM MAILED
8	11/26/2008	Bank of America Certificate of Deposit receipt mailed to West Linn, Oregon.
9	12/29/2008	Joint Venture Agreement mailed from Oregon to Illinois.
10	03/11/2009	Joint Venture Agreement mailed from Lake Oswego, Oregon to West Linn, Oregon.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS 11 THROUGH 16
ENGAGING IN MONETARY TRANSACTIONS WITH CRIMINALLY DERIVED PROPERTY
[18 U.S.C. § 1957]

1. The Grand Jury re-alleges each and every allegation contained in each of the paragraphs of Counts 1 through 10 of this Indictment, and incorporates them by reference as if fully set forth herein.

2. On or about the dates listed below, in the District of Oregon and elsewhere, the defendants set forth below with respect to each count, together with others known and unknown to the grand jury, did knowingly engage in and attempt to engage in monetary transactions by, through, or to a financial institution affecting interstate or foreign commerce, with criminally derived property of a value greater than $10,000.00, that is the purchase of cashier's checks, the making of wire transfers, and the withdrawal of cash from bank accounts on the dates listed below, such property having been derived from specified unlawful activity, that is the material mail and wire fraud scheme described in Counts 1 through 10 of this Indictment, each such monetary transaction being a separate count of this Indictment:

COUNT	DEFENDANT	DATE	AMOUNT	DESCRIPTION OF TRANSACTION
11	HOLDEN	10/17/2008	$20,000.00	Purchase of Bank of America cashier's check No. 0012561 made payable to Chase Bank
12	HOLDEN	11/12/2008	$17,000.00	Cash withdrawal from Gold Star Bio-Diesel LLC account No. X2701 at Bank of America.
13	SHARP HOLDEN	11/12/2008	$24,000.00	Transfer from Gold Star Bio-Diesel LLC account No. X2701 at Bank of America to Clean Energy Association account No. X8034 at Bank of America.
14	SHARP	11/12/2008	$12,000.00	Purchase of Bank of America cashier's check No. 1084149 made payable to J.L.
15	HOLDEN	03/10/2009	$93,500.00	Wire transfer from Gold Star Bio-Diesel LLC account No. X2701 at Bank of America to Gold Star Bio-Diesel LLC account No. X0784 at JP Morgan Chase Bank.
16	HOLDEN	03/11/2009	$15,000.00	Wire transfer to J.E.T. from Gold Star Bio-Diesel LLC, account No. X0784 at JP Morgan Chase Bank.

All in violation of Title 18, United States Code, Sections 1957 and 2.

COUNT 17
MONEY LAUNDERING CONSPIRACY
[18 U.S.C. § 1956(h)]

1. The Grand Jury re-alleges each and every allegation contained in each of the paragraphs of Counts 1 through 16 of this Indictment, and incorporates them by reference as if fully set forth herein.

2. From in or about approximately July 2007 and continuing until the date of this Indictment, in the District of Oregon and elsewhere, defendants **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN**, together with others known and unknown to the Grand Jury, did knowingly and unlawfully combine, conspire, confederate and agree with each other and with others known and unknown to the grand jury, to engage or attempt to engage in monetary transactions affecting interstate commerce, in criminally derived property of a value greater than $10,000, such property having been derived from specified unlawful activity, namely the material mail and wire fraud scheme described in Counts 1 through 10 of this Indictment, more fully described above.

All in violation of Title 18, United States Code, Section 1956(h).

FORFEITURE ALLEGATION
[18 U.S.C. §§ 1341, 1343 Proceeds]

1. The Grand Jury re-alleges each and every allegation contained in each of the paragraphs of Counts 1 through 17 of this Indictment, and incorporates them by reference as if fully set forth herein.

2. Upon conviction of one or more offenses alleged in Counts 2 through 10 of this Indictment, **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN** shall forfeit to the United States pursuant to 18 U.S.C. § 981 (a)(1)(c) and (D), and 28 U.S.C. § 2461(c) any property constituting or derived from proceeds obtained directly or indirectly as a result of the said violations(s), including but not limited to, a sum of money representing the amount of proceeds obtained as a result of the offenses of Wire Fraud, in violation of Title 18 U.S.C. §1343 as alleged in the above-listed Counts 2 through 7, or Mail Fraud, in violation of Title 18 U.S.C. § 1341 as alleged in the above-listed Counts 8 through 10.

3. If any of the above-described forfeitable property, as a result of any act of omission of the defendant(s):

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third party;

c. Has been placed beyond the jurisdiction of the court;

d. Has been substantially diminished in value; or

e. Has been commingled with other property which cannot be divided without difficulty;

It is the intent of the United States, pursuant to 21 U.S.C. § 853(p) as incorporated by 18 U.S.C. § 982(b), to seek forfeiture of any other property of **LLOYD BENTON SHARP**, aka Kevin Thomas, and **JACK HOLDEN** up to the value of the forfeitable property described above.

DATED this 24th day of September, 2013.

A TRUE BILL.

_____
OFFICIATING FOREPERSON

Presented by:

S. AMANDA MARSHALL, OSB #95347
United States Attorney
District of Oregon

Claire M. Fay
CLAIRE M. FAY, DCB #358218
Assistant United States Attorney

APPENDIX D

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACK HOLDEN,

Defendant

No. 3:13-cr-00444-BR

DEFENDANT'S REVISED REQUESTED JURY INSTRUCTIONS

The defendant Jack Holden, through counsel Federal Public Defender Lisa C. Hay and Ellen C. Pitcher, Attorney at Law, hereby submits four revisions to the previously filed joint proposed jury instructions. The Government objects to these revisions.

The requested revision to "Scheme to Defraud – vicarious liability" is made in order to correct an error in the previous request, which did not follow the Ninth Circuit Model 8.122, and also to clarify the scheme charged. The defense objects to any instruction on this ground but requests this revised instruction if the Court provides one.

The defense also requests a modification to the Model Ninth Circuit Instruction for Mail and Wire Fraud, and objects to the previously submitted versions.

Lastly, the defense requests that the word "only" be inserted in the Ninth Circuit Model conspiracy instruction, to clarify that no other method of joining a conspiracy is possible than the one described.

The revised instructions follow.

Respectfully submitted this 20st day of September, 2015.

/s/*Lisa Hay*
Lisa Hay
Federal Public Defender

SCHEME TO DEFRAUD – VICARIOUS LIABILITY

If you decide that the defendant was a member of ~~the conspiracies or~~ [a] [the charged] scheme to defraud and that the defendant had the intent to defraud, the defendant may be responsible for other ~~coconspirators or~~ co-schemers' statements made or actions taken during the course of and in furtherance of the ~~conspiracy or~~ scheme, even if the defendant did not know what they said or did.

For the defendant to be guilty of an offense committed by a ~~co-conspirator or~~ co-schemer in furtherance of the ~~conspiracy or~~ scheme, the offense must be one that the defendant could reasonably foresee as a necessary and natural consequence of the ~~conspiracy or~~ scheme to defraud.

Authority: Model Jury Instructions for the Ninth Circuit, § 8.122 (2010) [one edit]

Government requests the instruction as previously submitted; defense objects to the instruction being provided at all, but requests this modification if the objection is overruled.

NOTES:

The redacted portions are not part of the Model Ninth Circuit Instruction and the defense did not intend to agree to this change when agreeing to the previously submitted joint instructions. The defense objects to the instruction because, in combination with the conspiracy instruction, it is likely to confuse the jury. In the context of the acts of this case, there is no difference between being a "member of the scheme" and a "member of the conspiracy." Yet the jury will not be instructed on how someone becomes a "member" of a scheme (e.g., the need for an agreement and for willful participation in a conspiracy). If the instruction is given, the defense requests that the Model Instruction be modified to refer to "the charged scheme" rather than "a scheme." Without this modification, there is a risk the jury will convict based on an offense not presented to the grand jury, in violation of the Fifth and Sixth Amendments. *Hamling v. United States*, 418 U.S. 87 (1974) (Sixth Amendment guarantees to all criminal defendants of the right "to be informed of the nature and cause of the accusation"); *Russell v. United States*, 369 U.S. 749, 768–69 (1962) (noting that an important corollary purpose of requirement that indictment state elements of offense is to allow court to evaluate whether facts alleged could support conviction).

MAIL FRAUD - SCHEME TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY FALSE PROMISES

(18 U.S.C. § 1341)

Defendant is charged in Counts 8 through 10 of the indictment with mail fraud in violation of Section 1341 of Title 18 of the United States Code. In order for the defendant to be found guilty of ~~that charge~~ [any of those counts], the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly ~~participated in,~~ devised or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth, the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme as follows:

As to Count 8, the mailing of a Bank of America Certificate of Deposit receipt mailed to West Linn, Oregon.

As to Count 9, the mailing of a Joint Venture Agreement mailed from Oregon to Illinois.

As to Count 10, the mailing of a Joint Venture Agreement from Lake Oswego, Oregon to West Linn, Oregon.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Authority: Model Jury Instructions for the Ninth Circuit, § 8.121 (2010) [edits noted].

Government objects to the proposed deletions. The defense requests this instruction, with the deletion, because the mail fraud statute, 18 U.S.C. 1341, punishes one who "knowingly devised or intended to devise" a scheme, not one who "participates." Although the Ninth Circuit Model Instruction includes this addition, the defense objects that this instruction will confuse the jury and undermine the conspiracy instruction. Under this language, there need be neither agreement nor willful participation in order for the defendant to be convicted. The required *mens rea* is diluted in violation of the Fifth and Sixth Amendment. *Elonis v. U.S.*, 135 S.Ct. 2001 (2015); *Hamling v. United States*, 418 U.S. 87 (1974) (Sixth Amendment guarantees to all criminal defendants of the right "to be informed of the nature and cause of the accusation"); *Russell v. United States*, 369 U.S. 749, 763 (1962) (indictment must apprise defendant of what he must be prepared to meet).

WIRE FRAUD – SCHEME TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY FALSE PROMISES (18 U.S.C. § 1343)

Defendant is charged in Counts 2 through 7 with wire fraud in violation of Section 1343 of Title 18 of the United States Code. In order for a defendant to be found guilty of these charges, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly devised ~~participated in,~~ or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth, the defendant used, or caused to be used, the interstate wires to carry out or attempt to carry out an essential part of the scheme as follows:

As to Count 2 – the transmission by wire across state lines of $80,000 from an account of Bailey Hill Family Dental Center PC in Oregon to an account of Gold Star Biodiesel LLC in Illinois.

As to Count 3 - the transmission by wire across state lines of $215,000 from an account of Bank and Vogue Limited in Oregon to an account of Gold Star Biodiesel LLC in Illinois.

As to Count 4 - the transmission by wire across state lines of $35,000 from an account of Professional Consulting Services, Inc. in Oregon to the account of Gold Star Biodiesel LLC in Illinois.

As to Count 5 - the transmission by wire across state lines of $100,000 from an account of T.D. in Oregon to an account of Gold Star Biodiesel LLC in Illinois.

As to Count 6 - the transmission by wire across state lines of $25,000 from an account of R.B. in Oregon to an account of Gold Star Biodiesel LLC in Illinois.

As to Count 7 - the transmission by wire across state lines of $10,000 from an account of T.D. in Oregon to an account of Gold Star Biodiesel LLC in Illinois.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A wiring is caused when one knows that the wires will be used in the ordinary course of business or when one can reasonably foresee such use. It need not have been reasonably foreseeable to the defendant that the wire communication would be interstate in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate wire communication must have actually occurred in furtherance of the scheme.

The government objects to the deletions and requests the previously submitted instruction. The defense requests this instruction for the reasons stated under the mail fraud instruction.

Authority: Ninth Circuit Model Instructions § 8.124 (2014) [edits noted]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. JACK HOLDEN (2), Defendant.	Case No. 3:13-CR-444-BR September 21, 2015 Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

(Pretrial Conference)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

COURT REPORTER: AMANDA M. LeGORE, RDR, FCRR, CRR, CE
U.S. Courthouse
1000 SW Third Avenue Rm 301
Portland, OR 97204
(503)326-8184

mail fraud and wire fraud statute, just say "knowingly devised or intended to devise a scheme or plan to defraud."

And "participated" should be taken out.

That's also -- I participate is part of the model instruction but not part of how the statute reads. And I think -- the argument I'm going to make, your Honor, is in a case like this, where the Court -- the Government is charging a conspiracy to aid and abet a scheme, at some point the levels of liability have become so convoluted that we've lost the culpability required for criminal conviction. And I can give you some additional citations for that but -- we're trying to avoid that. But in this case, where you have somebody knowingly aiding and abetting someone who's participated in a fraud -- a scheme, and then there can be a conspiracy to do that, we've gone beyond what the juror can process.

So I think we should take out "participated in." I recognize that's a request to change -- I believe that's a change from the model instruction.

THE COURT: The model does use the verb "participated in."

Is it necessary, from the Government's perspective? I mean, some of this repetitive wordsmithing doesn't really fundamentally advance or detract from a case.

MS. FAY: Just one moment, your Honor.

(Pause, referring.)

MS. FAY: We would prefer it be left in, your Honor.

THE COURT: Do you have a case, Ms. Hay, to say it's error to define the scheme --

MS. HAY: No.

THE COURT: -- or the element as knowingly participating in, devising, or intending to devise?

MS. HAY: No, your Honor, I don't. And I know the Government cited a case that says it's okay to have a conspiracy to commit a scheme.

So -- I know they decided that was their jury instruction request. But I read that and think at some point we've gone too far, and I make an objection to it. And, obviously, it's based on due process, the First Amendment, and Sixth Amendment, to have the defendant actually convicted of what was presented to the grand jury.

THE COURT: Well, the Indictment language -- by the way, I'm not sending an indictment to the jury. I want to be clear on that. The actual indictment won't go to the jury.

MS. HAY: Your Honor, we may request that it do go to the jury, depending on how the evidence comes in.

THE COURT: Well, you can request. But I find and have found, over the years, that jurors get confused and misled by legalese in indictments. And the charge is the charge is the charge. And the Government's burden is to prove the elements of the charge. And -- and that is my firm conviction.

So the reason I take the pains that I do about organizing the instructions in a way that laypeople can track is I want to be sure they know the elements and they know what to listen for. And I find giving the jurors the indictment is confusing.

So you should proceed on the premise it's not going. And if there's a good reason why I need to revisit that, you can tell me before we get to the end of the case.

All right. I'm going to leave "participated" in for now. I'll listen for evidence that suggests that isn't -- that's extraneous. If it's not, then it will stay.

Are there other concerns about the elements of the Count 1 and Count 17? Or -- yes, Count 1 and Count 17.

MS. HAY: Yes. Your Honor, we objected in the filed pleadings. We continue to object to the addition of statements or -- or omissions of material fact that's not part of the model.

I think it's repetitive, and I think we should use the model language, which is --

THE COURT: But one of the Government's key theories is omissions of material fact. Is it error not to instruct, then, on a theory of the case?

I mean, we're told repeatedly the parties get to try their theories of the case, and the Court has to instruct on the law that the evidence permits the jurors to consider. So

instruction says, "The defendant used or caused to be used interstate wires." So --

THE COURT: So you would like -- you would like the first sentence deleted?

MS. HAY: Yes.

THE COURT: I can do that.

MS. FAY: I think it needs to be there, your Honor.

THE COURT: Well, no, it doesn't need to be there because the definition that follows leads to that first sentence conclusion.

But -- but then I -- I could make it more particular, you know. A defendant causes a -- the defendant caused when -- I'll consider it. I have to think through that.

Okay. What other comment about the content here, Counts 2 through 7?

MS. HAY: None other from us, your Honor.

MS. FAY: Not from the Government, your Honor.

THE COURT: Okay. Counts 8 through 10.

MS. HAY: The same objection I had to the previous ones. That I would take out the "knowingly aided and abetted." I would take out "participated in." And I would not have the redundant "statements, representations, promises."

And I wouldn't --

THE COURT: Okay.

MS. HAY: -- include "omissions." So -- I won't

MS. HAY: I had made objections to the jury instructions before. Did you want objections today?

THE COURT: Well, any that remain. I thought we had resolved substantively the jury instruction with respect to good faith and intent. I thought you agreed --

MS. HAY: Good faith, we did agree, your Honor.

THE COURT: All right. So --

MS. HAY: You had asked us just to reserve the objections that we were just repeating over and over.

THE COURT: So what objections do you continue to have to this form of instruction?

MS. HAY: I object to the wire fraud and mail fraud instructions in the first element, where they include that the defendant knowingly devised and participated in and intended to devise a scheme or plan to defraud. I have objected throughout, through the --

THE COURT: The two-prong theory.

MS. HAY: To the idea that the "participated" is in there, your Honor. That that's not part of the statute.

I agree that it's in the case law. It says participated. That's in the model jury instruction. But I want to preserve an objection that if you're going to instruct the defendant [sic] on other forms of liability as well; vicarious liability, aiding and abetting liability, other forms like that, that this is then -- it creates confusion because

the -- the crime itself says the defendant can participate in. And then you instruct that he could aid and abet in that or that he could be vicariously liable, so there are levels of mens rea that I think get confusing for the jury.

So I have objected to including vicarious liability or aiding and abetting or objecting to the participating, but either way, it shouldn't be both.

THE COURT: All right. Does the Government have any change it wants to agree to at this point, to --

MS. FAY: No, I think it's appropriate, your Honor.

THE COURT: All right. Then your objection is preserved, Ms. Hay.

Any other issues?

MS. HAY: I wanted to look one more time at the aiding and abetting. That was the -- that was the main objection, your Honor.

THE COURT: All right.

So Mr. Rifer will make those few changes just discussed. He'll e-mail a set to you. And if you want to wait, you can receive a physical copy in the same pagination that the jurors will have it. If you want to wait that long, it won't take long. Or you can rely on the electronic version that you have.

The courtroom is available to you this afternoon. If you want to get yourselves organized, that's fine, too.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. JACK HOLDEN, Defendant.	Case No. 3:13-CR-444-2-BR October 13, 2015 Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

(Jury Trial - Day 11)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

COURT REPORTER: AMANDA M. LeGORE, RDR, FCRR, CRR, CE
U.S. Courthouse
1000 SW Third Avenue Rm 301
Portland, OR 97204
(503)326-8184

other charges either by proving the defendant personally committed such crimes or by proving the defendant aided and abetted Lloyd Sharp in committing such crimes as defined in later instructions.

So when you deliberate on each of Counts 2 through 8, 10 through 13, and 15 and 16, you will consider whether the Government has proved guilty -- the defendant guilty beyond a reasonable doubt because the Government proved the defendant personally committed a particular crime or because the Government proved the defendant aided and abetted Lloyd Sharp in doing so. That term, "aiding and abetting," is one of the terms defined later. So it will track back when I get to that point.

The elements of Count 2 through 7, then. In each of these counts, the defendant is charged with wire fraud in violation of Section 1343 of Title 18, United States Code.

In order for the defendant to be found guilty of these charges, the Government must prove each of the following elements beyond a reasonable doubt.

First, the defendant knowingly devised, participated in, or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent statements, representations, promises, or omissions of material fact. Or the defendant knowingly aided and abetted Lloyd Sharp in doing so.

So, again, I'm trying to make clear here in Count 1, the Government may prove the defendant is guilty -- or, I'm sorry. The first element, they can prove the defendant is guilty by showing the defendant personally did all of these things, as laid out, or he knowingly aided and abetted Lloyd Sharp in doing all of those things; not both. So it's either one or the other.

Secondly, statements, representations, or promises made or facts omitted as part of the scheme were material. That is, they had a natural tendency to influence or were capable of influencing a person to part with money or property.

Third, the defendant acted with the intent to defraud. That is, the intent to deceive or to cheat.

And, fourth, the defendant used or caused to be used the interstate wires to carry out an essential part of the scheme, or the defendant knowingly aided and abetted Lloyd Sharp in doing so as follows:

And then with respect to Count 2, 3, 4, 5, 6, and 7, I'm not going to read these to you but you'll note that each of them has a specified transmission or a specified transaction. A certain date -- let me just read them just to be clear. But each of them are separate.

So the generic description of the four elements I just described applies to each of the counts. But the specific transmission is -- is outlined here for the separate counts.

And then this tracks on your verdict form with the dates, so that there isn't, hopefully, any confusion among you as to which transaction is charged where.

So as to Count 2, the transmission by wire across state lines of $80,000 from an account of Bailey Hill Family Dental Center, PC, in Oregon to an account of Gold Star Biodiesel, LLC, in Illinois, on or about October 17, 2008.

As to Count 3, the transmission by wire across state lines of $215,000 from an account of Bank and Vogue, Limited, in Oregon, to an account of Gold Star Biodiesel, LLC, in Illinois, on or about November 10, 2008.

As to Count 4, the transmission by wire across state lines of $35,000 from an account of Professional Consulting Services, Inc., in Oregon, to the account of Gold Star Biodiesel, LLC, in Illinois, on or about December 30, 2008.

As to Count 5, the transmission by wire across state lines of $100,000 from an account of TD, in Oregon, to an account of Gold Star Biodiesel, LLC, in Illinois, on or about March 9, 2009.

As to Count 6, the transmission by wire across straight lines of 20 -- I'm sorry. Across state lines of $25,000 from an account of RB, in Oregon, to an account of Gold Star Biodiesel, LLC, in Illinois, on or about March 10, 2009.

And, as to Count 7, the transmission by wire across state lines of $10,000 from an account of TD, in Oregon, to an

account of Gold Star Biodiesel, LLC, in Illinois, on or about May 18, 2009.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements but also the circumstances in which they are used as a whole. The defendant need not have made wire transmission himself. It is sufficient if the defendant caused the wire transmission. A wiring is caused when one knows that the wires will be used in the ordinary course of business or when one can reasonably foresee such use.

It need not have been reasonably foreseeable to the defendant that the wire communications would be interstate in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate wire communication must have actually occurred in furtherance of the scheme. It does not matter whether the material wired was itself false or deceptive, so long as the wire was used as part of the scheme. Nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Now, turning to the mail fraud counts, which are Counts 8 and 10. The defendant is charged in Counts 8 and 10 with mail fraud, in violation of Section 1341 of Title 18 of the United States Code.

In order for the defendant to be found guilty of that

charge, the Government must prove each of the following elements beyond a reasonable doubt.

First, the defendant knowingly participated in, devised, or intended to devise a scheme or a plan to defraud or a scheme or plan for obtaining money or property by means of false or fraudulent statements, representations, promises, or omissions of material facts; or the defendant knowingly aided and abetted Lloyd Sharp in doing so.

Second, the statements, representations, or promises made or facts omitted as part of the scheme were material. That is, they had a natural tendency to influence or were capable of influencing a person to part with money or property.

Third, the defendant acted with the intent to defraud. That is, the intent to deceive or to cheat.

And, fourth, the defendant used or caused to be used the mails to carry out an essential part of the scheme, or the defendant knowingly aided and abetted Lloyd Sharp in doing so.

As to Count 8, the mailing of a Bank of America certificate deposit -- certificate of deposit received -- mailed to West Linn, Oregon, on or about November 6, 2008, is the alleged mailing.

And as to Count 10, the alleged mailing is the mailing of a joint venture agreement from Lake Oswego, Oregon, to West Linn, Oregon, on or about March 11, 2009.

Again, as was the point with wire fraud, the

(Jurors enter at 12:40 p.m.)

THE COURT: Thank you, everyone. Please be seated.

All right, jurors. Did you have enough time for lunch? Yes?

THE JURORS: (Nodding heads.)

THE COURT: All right. Please now give your attention to Ms. Hay on behalf of Mr. Holden.

Counsel.

MS. HAY: Thank you, your Honor.

What you just heard during the Government's closing argument is exactly what is wrong with this case: A failure to listen to the evidence, a flawed and biased investigation, a willingness to act on assumptions.

If Jack Holden never intended to get a biodiesel refinery going in Ghana, how do you explain employees like Jerry Boglo? That young man who trained in Russia, who flew 11,000 miles to come here and to tell you about the work he did for Gold Star. You get to decide if he was honest, credible, if he was impressive.

He told you that he worked every single day when he was at Gold Star to create biodiesel. He was there in 2007, and he worked and he worked.

He told you the plan that he used, he told you the chemicals, he told you how he failed. He told you how he submitted that biodiesel for testing to the Ghana standards

board, and he kept failing. They built that flash vacuum dryer and managed finally to pass the testing boards.

He put that on his resume. Remember? He said, on his resume, he has the first biodiesel based from jatropha in Ghana to pass the Ghana standards board.

Why, if Jack Holden is faking this, even send it in for testing? Why not just say you passed the test? Why even try to make biodiesel? Why not just pretend?

The facts don't fit the Government's story.

There are more facts, too. Right?

I mean, why apply for bulldozers? Why have land contracts? Why plow the fields? Why plant jatropha? Why pay health insurance for employees? Why have employees? And why meet with the minister of renewable energy and be a pain in the neck and try to get regulations passed?

Remember, he flew here. Mr. Otu-Danquah, the minister of renewable energy from Ghana. And told us he knows Jack Holden from Ghana, from Gold Star, and knows that he is pushy and he was a troublesome person because he was trying to get regulations passed. That's an awful lot of work going on for a fraud, for a sham, for what the Government called in their opening statement "the trappings of legitimacy."

And the same with Chile. Right?

If Jack Holden was just trying to create the trappings of a company, why pay a lawyer -- Alvaro Estrada, who

you heard testify here by video, that you -- to pay him to incorporate the company legally, to set it up so it could function in Chile?

Why get Mr. Holden an RUT number so he could legally do business in Chile? You don't need those things to impress investors. No investors saw those. You need those if you want to do business in Chile.

If Mr. Holden wanted to create a sham company, why not create one the way Lloyd Sharp did? Lloyd Sharp created sham corporations, just incorporated them. There was nothing to them.

And there's more about Chile, of course. Right? I mean, why recruit and pay highly qualified employees to be in your office?

You heard Dr. Hector Ortiz come in here and, with pride, tell you, I hired those people in Chile. All but one, he said. Right? He didn't hire the administrative assistant who wasn't working out too well. He hired the others.

He hired the chemist, Dana Gonzalez, who had a lab in the garage and tested biodiesel samples.

He hired the agronomist who met with -- with government officials, looked at land, tried to figure out where to plant jatropha.

We heard from Steve Stout, who worked in Chile.

Now, the Government said in their closing argument,

well, nothing was really done. Essentially nothing, they said, because there were three plants that were looked at and none of them worked out.

Well, actually, there's work that goes into looking at those three plants and figuring out which ones work. Steve Stout told you he went and looked at them. Mr. Ortiz told you he looked at them. There was one that uses chocolate bars, remember? There was one that uses old McDonald's grease. They looked at them. And you have in evidence the e-mails where Steve Stout is reporting; what did he see? Could it be used?

And actually one, he said, the FAME plant -- remember the fatty acid methyl ester-something plant. That one could be used, and it would be a good training ground for their employees.

They were doing work in Chile. They weren't sitting around. Why do that if you're just creating a sham company?

It's kind of an odd fraud, having to work all the time. Right? Mr. Holden, when he went to Chile, we heard that he made them work all the time. Alvaro Estrada said he had to drive all over. Mr. Cardenas had to work all the time, taking Mr. Holden places, meetings, businesses, looking at land, looking at plants. It's an odd kind of fraud to do that.

We know what fraud looks like. Right?

Let me see if I can make this work for us.

That's fraud. That's Lloyd Sharp's house in Nevada.

$6,000 a month, swimming pool. So Lloyd Sharp and his wife can crank out fake insurance certificates, fake brochures, reports about fake companies. That's what fraud looks like.

The problem in this case is the Government's tried to lump a bunch of different activities together into one label. It's guilt by association, guilt by insinuation.

The Court's instructions told you, you have to look at all of the evidence. You have to separate it. You have to follow and figure out what actually happened.

The only way to make sense of this case is to step back and figure out what did Mr. Holden honestly believe at the time he was acting? What did he honestly believe when he said things, when he wrote things?

It's not fair to judge him using hindsight. There's a difference between fraud and breach of contract. There's a difference between fraud and business failure. There's a difference between fraud and mistake and mismanagement.

The judge gave you an instruction about the good faith defense to the fraud charge. It's on page 27 of your instructions, you can look at it over and over.

She said, A person does not act with the intent to defraud if the person acts with an honest and good faith belief, even if the belief or the opinion is wrong.

If they have an honest or good faith belief in what they're saying, even if they're wrong, that's not fraud. You

burden of proof here. The Government is the one that has to prove what Lloyd Sharp did.

And all of us know Lloyd Sharp is a fraudster. Lloyd Sharp is a wild card. He is a liar. He would do anything to manipulate people. But one thing he wants is to get his sentence lower.

One thing he wants is --

MS. FAY: Objection, your Honor.

THE COURT: Basis?

MS. FAY: Arguing facts not in evidence.

THE COURT: Sustained.

MS. HAY: Your Honor, I want to make the argument to the jury about what they can understand about this defendant.

THE COURT: Mr. Sharp is not a witness in the case. He did not testify. Your argument's improper.

Please proceed on another point.

MS. HAY: I would like to tell the jury, and I will, that Mr. Sharp is not here as a witness. And the Government has the burden of proving what happened in this case.

What they're charging Mr. Holden with is a conspiracy with Mr. Sharp. They're saying that he agreed with Mr. Sharp to commit wire fraud. And that's the central count and the central charge in this case, and the Government said that in their opening and in their closing. The central charge against Mr. Holden is that he was in an agreement to commit a crime.

The judge will tell you -- and she did in the instructions -- that it's not enough to help somebody that's committing a crime, just because your actions help. It's not enough to associate with somebody. You have to knowingly be part of their scheme to defraud. You have to knowingly assist them. You have to intend to defraud.

And we can't tell from the evidence that was put in here what it was that Lloyd Sharp was saying, what it was that Lloyd Sharp was doing. In order to decide the conspiracy, you have to figure out the meeting of the minds.

Was Mr. Holden defrauded by Mr. Sharp, like these other investors? He's not here to tell you. That's a hole in the case. The Government has the burden of proving that case, and they didn't prove it.

There's one e-mail, an e-mail that Mr. Holden sends to Dewey Hayes. And we looked at that, from January 2009.

And it says something like, If Kevin brings in as much money as he says he's going to do, and he doesn't spend it before I get it, I'm going to hire you to be my manager and go around the world. And he mentions a bunch of animals and crocodiles and painted blondes.

You remember that e-mail.

And that's the e-mail you look at and you think, what does that mean? Does that mean that Mr. Holden was in a conspiracy with Kevin Thomas? Or does that mean that Kevin

it at the time. All right?

So, now, the Government does have the burden of proof, and they do have an opportunity to make a rebuttal argument. Ms. Maddux is going to do that for the Government. Please give her your attention now.

Go ahead, Counsel.

MS. MADDUX: Thank you, your Honor.

Well, it appears, after listening to defense counsel's closing, that defense counsel and the Government can agree on at least two things. And maybe only two things.

The first is that Lloyd Sharp is absolutely and positively a conman. No doubt about that.

The second is that the best evidence in this case, and the evidence that you can rely on without any issues related to bias or to memory or to any other filter, are the documentary evidence exhibits that are in in this case.

The e-mails that show you exactly what was said and when it was said, over time. Not just by Lloyd Sharp but in many cases by the defendant, Jack Holden. And we'll go over some of those.

But also, most importantly in this case, as I said in the beginning, this is a fraud case. And a great deal of the records you will have in front of you, and the ability to go over in the jury room, are the bank records. And it's been the Government's contention throughout this case that the best

evidence of what defendant's real intent was from the beginning, whether or not he had an intent to deceive and to cheat, is what he did with the money right after he got it.

You will have that information in the bank records. And you have the summaries that have been provided to you by the Government, that go over each and every step of the money that is coming in from each of the victims in this case, and what happens with that money directly after Lloyd Sharp and Jack Holden receive those funds over a two-year time period.

I want to refocus on sort of what this case was about. Defense counsel was talking about different witnesses and different pieces of evidence. But, as defense counsel pointed out, this case really comes down to fraud and the Government establishing the necessary elements of wire fraud and mail fraud in order to meet our burden.

Now, the judge had instructed you earlier on the elements of those, but again, for purposes of this rebuttal closing, I just want to refocus on what it was -- and it is -- the Government is actually seeking to prove.

So, when you are looking at your jury instructions, I will be referring to what's on page -- I believe 21 and 22, where the instructions begin to talk about the elements of wire fraud. And the fraud elements related to wire fraud and mail fraud are -- are close to the same in terms of the language around fraud, but obviously we're dealing with interstate wires

and then uses of mails in -- in the different counts.

But, again, in order for the Government to prove the elements of these counts beyond a reasonable doubt, we have to show first that the defendant, Jack Holden, knowingly devised, participated in, or intended to devise a scheme or a plan to defraud; or a scheme or a plan for obtaining money or property by means of false or fraudulent statements, representations, promises, or omissions of material fact; or that the defendant knowingly aided and abetted Lloyd Sharp in doing so.

Second, that those statements, representations or promises made or facts omitted as part of the scheme were material.

And I'll talk in a minute about -- you know, there's been a lot of lies and a lot of statements that have come forth in the evidence as coming both from Lloyd Sharp and the defendant, Jack Holden. We'll talk about which one of those the Government's alleging are material in this particular case and, in sense of the materiality, that those statements had a natural tendency to influence or were capable of influencing a person to part with money.

So what are the statements that were made to the victims in this case that actually caused them to part with their money, and what is the evidence around that?

Third, that the defendant acted with the intent to defraud. That is the intent to deceive or to cheat.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. JACK HOLDEN, Defendant.	Case No. 3:13-CR-444-2-BR May 5, 2016 Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

(Imposition of Sentence)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

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provide him with medical care. There are facilities that have hospitals attached to them or medical units that are part of the Bureau of Prisons. So I think that they can see to whatever needs he has medically. But I do think our recommendation does take into account his age.

THE COURT: Your papers indicated a need to address forfeiture in addition to restitution.

MS. FAY: Yes, your Honor. And I have an order of forfeiture -- a preliminary order of forfeiture for the Court.

I know that the defense objects to it.

THE COURT: All right. Well, I haven't seen it. I would like to hear the objection. So you can hand it up, and we'll -- I'll hear from Ms. Hay on that point, too.

What about conditions of supervision as recommended in the PSR? Does the Government have any concern with the proposed conditions?

MS. FAY: We have no concern with the proposed conditions, your Honor.

THE COURT: All right. Thank you.

Counsel, Ms. Hay.

MS. HAY: Thank you, your Honor.

Your Honor, the -- the theme that was repeated both with Ms. Hoover and the Government was the idea that Mr. Holden's only interested in money and that the real motivation is money and to steal money.

the materials assembled for sentencing -- and even the presentations today -- that the fraud was inextricably intertwined with this venture. It -- Mr. Holden was either this naive, magical thinker who lied incidentally to trying to create some dreamed-of outcome, or he was far more culpable than that and deliberately deceiving friends and investors in order to -- to line his own pockets, basically, when things did not go the way he was magically thinking they would because he is naive or because he was not sophisticated or because conditions in Ghana or Chile were not what he had hoped.

That may be the background in context, but the fact is, we come back to deliberate fraud.

Mr. Holden's right to thank his lawyers. They put on a masterful defense. They left no stone unturned.

People went to Ghana to try to -- try to find a way to avoid today on his behalf, and we're still here. The victims are still victims. The losses are real. And as I speak, I continue to look for wisdom here.

No matter how long Mr. Holden spends in jail, in prison, unfortunately the victims will not be made whole. I don't see any source of real restitution that -- that can be found.

Perhaps the Government will be resourceful. Perhaps some asset of Mr. Holden's can be attached and found and some money can ultimately find its way, in small proportions, to the

victims. But that does not look promising.

The sentence, having him sit in prison, is not going to make the victims whole either. There's really nothing the Court can do to put them back together again in terms of the loss of faith they sustained in someone they trusted. Not -- not just in the representations Mr. Holden but the way their own inner relationships broke down and the consequences thereafter.

I understand what they're saying. I wish there was some way to resolve it. But that's one of the powers I was never given as a judge. I can't, I can't make it right, because it isn't fixable. It is a true loss that will be there.

At the same time I do believe Mr. Holden's age, at 76, and his health are factors I should take into account in imposing a fair sentence here. This is not a 35-year-old man who, if he does five or six or seven years, will be out again tormenting the world. I -- I just don't believe it's necessary to sentence him for nine years. Which is -- what? 108 months it is. So I am adjusting downward because of his advanced age, because I don't believe there is viable risk he is going to be around to be a menace to the community.

And if I'm wrong, I fully apologize to anybody he victimizes. I just don't see that it's rational here.

So I'm going to -- I'm going to adjust downward from

APPENDIX H

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JACK HOLDEN, *et al*,** **Defendant.**	**Case No. 3:13-cr-00444-BR-2** **DEFENDANT'S RESPONSE TO GOVERNMENT'S MEMORANDUM IN SUPPORT OF FORFEITURE (DOCKET NO. 240)**

I. Introduction

At the start of the sentencing proceeding held on May 5, 2016, the government provided defense counsel a proposed preliminary and final order of forfeiture. The defense objected to the entry of the order on the grounds that it was not timely; the defense had not received notice of the amount of forfeiture requested; and the forfeiture would violate Mr. Holden's constitutional rights.

The government filed a pleading in support of its forfeiture request (Docket 240). The defense continues to object and files this pleading in response.

In brief, the government's pleading is not persuasive because it relies in part on cases addressing forfeiture under different statutes, including RICO, criminal forfeiture under 18 U.S.C. § 982, and money laundering, and it seeks $1,410,760 in restitution. In contrast, the forfeiture claim in the indictment provides notice only of forfeiture for specific mail and wire fraud offenses (counts 2-10) totaling $465,000, and relies on the civil forfeiture statute, 18 U.S.C. § 981. Because the government failed to follow the procedures set out in Rule 32.2 of the Federal Rules of Criminal Procedure for providing notice; deprived the defense of the ability to contest the forfeiture amount at a hearing; and because entry of a personal money judgment in the amount of $1.4 million would violate the Constitution, this Court should deny the government's proposed forfeiture order.

II. Statutory Arguments

Numerous statutes provide for forfeiture to the federal government of specified property. Because the statutes are not identically worded, it is important to identify the statute at issue. In this case, the indictment seeks forfeiture for only certain counts, based on specific statutes:

> Upon conviction of one or more offenses alleged in Counts 2 through 10 of this Indictment, LLOYD BENTON SHARP, aka Kevin Thomas, and JACK HOLDEN shall forfeit to the United States pursuant to 18 U.S.C. § 981 (a)(1)(c) and (D), and 28 U.S.C. § 2461(c) any property constituting or derived from proceeds obtained directly or indirectly as a result of the said violations(s), including but not limited to, a sum of money representing the amount of proceeds obtained as a result of the offenses of Wire Fraud, in violation of Title 18 U .S.C. § 1343 as alleged in the above-listed Counts 2 through 7, or Mail Fraud, in violation of Title 18 U.S.C. § 1341 as alleged in the above-listed Counts 8 through 10.

Indictment p. 18. Counts 2-7 are associated with specific dollar amounts that total $465,000. Counts 8-10 are associated with specific actions for which a loss amount could be established (e.g.,

count 8 refers to the mailing of a void certificate of deposit for $100,000 by Lloyd Sharp), but the total is far less than the $1,410,760 sought by the government.

The government relied in the Indictment on two portions of the civil forfeiture statute, 18 U.S.C. § 981 (a)(1)(C) and (D). As explained by the Ninth Circuit in *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011), reliance on the civil forfeiture statutes in a criminal case is allowed under 28 U.S.C. § 2461(c), which states:

> If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code.

In other words, "28 U.S.C. § 2461(c) permits the government to seek *criminal* forfeiture whenever civil forfeiture is available *and* the defendant is found guilty of the offense." *Newman*. 659 F.3d at 1239. More precisely, the inquiry is two-part: what civil forfeiture of property is authorized by statute if the defendant is convicted, and then what criminal forfeiture procedures "shall" be employed under the Federal Rules of Criminal Procedure and 18 U.S.C. § 3554 to effectuate that forfeiture.

First, what civil forfeiture of property is authorized by statute, based on Mr. Holden's convictions? The government cited both subpart (C) and (D) of the civil forfeiture statute in the indictment. Subpart (D) provides for broader forfeiture than part (C), but it is clear after trial that subpart (D) is not relevant. Specifically, subpart (D) allows for forfeiture of any property "which represents or is traceable to the gross receipts obtained, directly or indirectly" from specified offenses, including wire and mail fraud, but only if the mail or wire fraud offenses relate to the

sale of assets of named financial institutions, such as the Resolution Trust Corporation. 18 U.S.C. § 981 (a)(1)(D). The government presented no evidence at trial that would support forfeiture on this basis.

Instead, because mail and wire fraud constitute "specified unlawful activity" as defined in subpart (C), and because the jury convicted Mr. Holden of mail and wire fraud, this more limited subpart of the civil forfeiture statute applies. It allows for forfeiture not of property that "represents" or "is traceable" to "gross receipts," but rather property that "constitutes" or is 'derived from" "proceeds." 18 U.S.C. § 981 (a)(1)(C). The government's brief ignores this difference in the statutory authorization.

The civil forfeiture statute further defines "proceeds" in a manner that would require factual findings in this case. 18 U.S.C. § 981(a)(2). In cases involving "illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes," "proceeds" is defined to include any property obtained directly or indirectly, as a result of the offense. On the other hand, in cases like this one involving a lawful product (biodiesel refinery) that was "sold or provided in an illegal manner," proceeds means "the amount of money acquired through the illegal transactions … less the direct costs incurred in providing the goods or services." 18 U.S.C. § 981 (a)(2)(A) and (B). The statute places the burden on claimants like Mr. Holden to prove the direct costs. Because the government did not provide notice to Mr. Holden that it was seeking forfeiture of amounts invested in the Ghanaian biodiesel refinery, however, Mr. Holden did not seek a hearing to prove the payroll, lease and equipment expenses related to that enterprise. Relevant witnesses from Ghana and California testified at the trial and sentencing but are no longer available here in Portland.

The notice requirements in Rule 32.2 are clear. "As soon as practical after a verdict or finding of guilty," if the government seeks a personal money judgment, the court "must determine the amount of money that the defendant will be ordered to pay." Fed.R.Crim. P. 32.2(b)(1)(A). If the forfeiture is contested, on either party's request "the court must conduct a hearing after the verdict." Fed.R.Crim. P. 32.2(b)(1)(B). Further, "unless doing so is impractical, the court must enter a preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications." Fed.R.Crim. P. 32.2(b)(2)(B). None of these procedural protections were followed by the government. Thus, although forfeiture is mandatory when the government meets the statutory requirements, *Newman*, 659 F.3d at 1240, in this case the government failed to follow the required procedures. It cannot bear its burden of proving the validity of the requested forfeiture of $1.4 million and the court should deny the request.

III. Constitutional Arguments Preserved for Appellate Review

A. A Criminal Forfeiture Money Judgment Is A Punishment For Which Mr. Holden Was Entitled To A Jury Finding.

Mr. Holden acknowledges the Ninth Circuit has continued to rely on *Libretti v. United States*, 516 U.S. 29, 49 (1995), to find that defendants do not have a constitutional right to have a jury decide the forfeiture amount. *See United States v. Christensen*, 801 F.3d 970, 1026 (9th Cir. 2015) (internal quotation and citation omitted). However, to preserve this issue for possible *en banc* or Supreme Court review, Mr. Holden submits the Ninth Circuit's position is irreconcilable with the Supreme Court's decisions in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and *Southern Union Company v. United States*, 132 S. Ct. 2344 (2012), both of which expanded the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pursuant to post-

Libretti Supreme Court decisions, the government was required to obtain a jury finding as to the forfeiture amount this Court may impose.

Since the Supreme Court's decision in *Libretti*, the Court has expanded Sixth Amendment protection to require jury fact-finding in a greater range of procedures, specifically identifying factors a jury must decide for sentencing purposes. In *Apprendi*, the Supreme Court held a jury—not a judge—must determine any fact other than a prior conviction that increases a defendant's maximum sentence. 530 U.S. at 476. In *Southern Union Co.*, the Supreme Court extended *Apprendi* to the imposition of criminal fines. 132 S. Ct. at 2357. The Supreme Court reasoned the historical, predominant practice in prosecutions for offenses that "peg the amount of a fine to the determination of specified facts" involved such facts being "alleged in the indictment and proved to the jury." *Id.* at 2354. In *Alleyn*e, the Supreme Court held any fact that increases a defendant's mandatory minimum sentence is an element of the offense that must be submitted to the jury. 133 S. Ct. at 2155.

The logical extension of the Supreme Court's post-*Libretti* decisions dictates the imposition of a criminal forfeiture order must likewise be determined by a jury in the first instance. Criminal forfeitures and fines are both forms of monetary penalties imposed as part of a criminal sentence. Mr. Holden submits the Sixth Amendment applies equally to fines and criminal forfeitures, rendering it unconstitutional for this Court to impose the forfeiture order the government now seeks. In light of current Ninth Circuit precedent, however, he raises this issue for purposes of appellate preservation.

B. Imposition Of Both Restitution And Forfeiture Would Violate Double Jeopardy.

In addition to seeking a criminal forfeiture money judgment, the government is seeking a restitution order against Mr. Holden. The Ninth Circuit has held forfeiture and restitution serve distinct purposes. *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012). Forfeiture is a punishment for the crime; restitution is a means to make the victim whole. *Id*. (citations omitted). Entering both an order of restitution and a forfeiture money judgment doubles the amount of money Mr. Holden would be required to pay for the very same offense because this Court is forbidden from offsetting the forfeiture and restitution amounts. *See United States v. Davis*, 706 F.3d 1081 (9th Cir. 2014).

Mr. Holden submits that imposing multiple financial penalties for the same conduct is a violation of the prohibition against double jeopardy. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Ninth Circuit's differentiation of the goals underlying forfeiture and restitution does not cure the double jeopardy violation that occurs when forfeiture and restitution are imposed for the exact same conduct. *Compare Newman*, 659 F.3d at 1241-42.

If this Court could offset the forfeiture and restitution, the Double Jeopardy Clause would not be violated. Offset, however, is not permitted in this Circuit. *See Davis*, 706 F.3d 1081. As such, and for purposes of appellate preservation, Mr. Holden submits a forfeiture order in this case would violate double jeopardy principles.

C. Because Money Judgments Are Not Authorized By The Forfeiture Statutes At Issue Here, Any Order Imposing A Money Judgment Would Violate Due Process.

"Forfeitures are not favored; they should be enforced only when within both the letter and spirit of the law." *United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219, 226 (1939) (citation omitted). Here, the government seeks forfeiture under 18 U.S.C. § 981(a)(1)(C), the civil forfeiture statute made applicable to criminal cases by operation of 28 U.S.C. § 2461(c). However, § 981 does not authorize the entry of a personal money judgment. Rather, § 981 states that forfeitable property includes "[a]ny *property*, real or personal" involved in or proceeds of the relevant criminal offense. 18 U.S.C. § 981(a)(1)(A) (emphasis added). Only forfeiture of "property" is authorized under § 981(a)(1), not the entry of personal money judgments.

Unlike other forfeiture statutes that expressly authorize the imposition of money judgments, *see* 31 U.S.C. § 5332(b)(4)[1] (authorizing forfeiture for bulk cash smuggling), 18 U.S.C. § 981 does not mention personal money judgments. Instead of a personal money judgment, § 981 authorizes a sentencing court to order a defendant to forfeit specific property that has a sufficient statutory nexus to the offense of conviction or, if that property is not available, substitute property. In either case, the statutory forfeiture procedure targets property that exists. Because § 981 does

[1] 31 U.S.C. § 3532(b)(4) provides:

> (4) Personal money judgment.—
>
> If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled Substances Act, the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture.

not authorize the entry of a personal judgment enforceable against money and property the government has not even shown to exist, the requested forfeiture should be rejected.

Mr. Holden acknowledges that in *Newman*, the Ninth Circuit relied on the reference to personal money judgments in Rule 32.2 to rule that the government may seek a money judgment as a form of forfeiture. 659 F.3d at 1242. The Advisory Committee expressly reserved judgment on whether personal money judgments were authorized by forfeiture statutes, however. Fed. R. Crim. P. 32.2, Advisory Committee's note (2000 Adoption). The Advisory Committee's notes recognize "[a] number of cases have approved use of money judgment forfeitures," but the "Committee [took] no position on the correctness of those rulings." *Id.* Because the statute at issue in this case does not refer to money judgments, and because due process is violated by imposition of a punishment not authorized by statute, Mr. Holden objects to any issuance of a money judgment as the form of forfeiture ordered. In light of *Newman*, Mr. Holden raises this issue for purposes of appellate preservation.

IV. Conclusion

For these reasons, Mr. Holden requests the Court find that the government failed to establish the factual basis for forfeiture of $1.4 million. The requested preliminary and final order of forfeiture should be rejected.

RESPECTFULLY SUBMITTED on May 31, 2016.

/s/ Lisa Hay
Lisa Hay
Federal Public Defender

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:13-cr-00444-BR**
Plaintiff,	**OPINION AND ORDER**
v.	
JACK HOLDEN,	
Defendant.	

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BROWN, Judge.

This matter comes before the Court on the government's request that the Court order Defendant Jack Holden to forfeit $1,410,760.00 as a result of his conviction for mail and wire fraud.

BACKGROUND

In the Indictment (#1) the government included a forfeiture allegation as to each of the mail and wire fraud counts (Counts Two through Ten) against Defendant and his co-Defendant Lloyd Benton Sharp. In that allegation the government indicated forfeiture was appropriate pursuant to 18 U.S.C. § 981(a)(1)(C) and (D) and 28 U.S.C. § 2461(c).

At Defendant Holden's trial the government dismissed Count Nine of the Indictment. The jury found Defendant guilty of all remaining counts as to Defendant Jack Holden, including, as relevant here, Counts Two through Eight and Count Ten.

After the verdict the government did not seek and the Court did not issue any preliminary order of forfeiture. On page 57 of the government's Sentencing Memorandum (#228) filed April 27, 2016, however, the government requested the Court to order Defendant to forfeit $1,410,760.00 and indicated it would submit the appropriate documentation at sentencing.

At sentencing on May 5, 2016, Defendant objected to any

order of forfeiture on the grounds that the government did not provide sufficient notice of forfeiture, Defendant was entitled to a jury trial as to forfeiture, and the Court cannot order forfeiture when it has already ordered Defendant to pay restitution. Because these disputed forfeiture issues had not yet been addressed by the parties, the Court directed the parties to brief Defendant's objections to forfeiture.

DISCUSSION

Defendant and the government agree if forfeiture is appropriate in this case, 18 U.S.C. § 981(a)(1)(C) governs. Section 981(a)(1)(C) provides "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to" mail or wire fraud is subject to forfeiture. Section 981(a)(2) contains three definitions of "proceeds":

> (A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.
>
> (B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods

> or services, or any part of the income taxes paid by the entity.
>
> (C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

Defendant now raises four arguments in opposition to forfeiture: (1) Defendant contends he is entitled to a jury finding as to forfeiture; (2) Defendant asserts an order of both forfeiture and restitution would constitute a double recovery and, therefore, would violate the Double Jeopardy Clause of the Fifth Amendment; (3) Defendant contends forfeiture should not be ordered in the amount of $1,410,760.00 because the narrower definition of "proceeds" in § 981(a)(2)(B) applies to this case, and, moreover, Defendant has not been provided with an opportunity to submit evidence as to the "direct costs incurred"; and (4) Defendant contends the government failed to provide adequate notice of forfeiture pursuant to Federal Rule of Criminal Procedure 32.2.

I. Entitlement to Jury Finding

Defendant contends for the purpose of preserving the issue for appeal that he has a right under the Sixth Amendment to the United States Constitution to a jury determination as to whether the government is entitled to forfeiture and, if necessary, the amount thereof. Nevertheless, Defendant notes the Ninth Circuit

has held a Defendant does not have a right to a jury determination on forfeiture. *See United States v. Christensen*, 801 F.3d 970, 1026 (9th Cir. 2015).

Accordingly, on this record the Court concludes Defendant does not have a right to a jury determination regarding forfeiture.

II. Double Jeopardy

Defendant also asserts for the purpose of preserving the issue for appeal that the issuance of both an order of restitution and an order of forfeiture would violate the Double Jeopardy Clause of the Fifth Amendment because it would result in the imposition of multiple financial penalties for the same conduct. Nevertheless, Defendant acknowledges the Ninth Circuit has held the imposition of both restitution and criminal forfeiture "is not an impermissible 'double recovery'" because forfeiture and restitution serve distinct purposes. *United States v. Newman*, 659 F.3d 1235, 1240-42 (9th Cir. 2011).

Accordingly, on this record the Court concludes the imposition of both forfeiture and restitution would not violate the Double Jeopardy Clause.

III. Calculation of "Proceeds" Subject to Forfeiture

Defendant contends the narrower definition of "proceeds" that are subject to forfeiture under § 981(a)(2)(B) applies to this case because the scheme underlying the charges in the

Indictment involves the production and potential sale of biodiesel, a legal product. The government, however, contends the broader definition of "proceeds" in § 981(a)(2)(A) applies because the fraud in this case qualifies as "unlawful activities" and this case does not involve the sale or provision of lawful goods or services because Defendant never actually sold any biodiesel.

In this case whether "proceeds" are calculable under § 981(a)(2)(A) or (B) depends on whether the case involves "unlawful activities" under § 981(a)(2)(A) or instead is appropriately categorized as involving "lawful goods or lawful services that are sold or provided in an illegal manner" under § 981(a)(2)(B). That question is an inquiry that depends on the particular facts of the case. *See United States v. Nacchio*, 573 F.3d 1062, 1089 (10th Cir. 2009).

Based on the evidence presented at trial, the Court concludes the "proceeds" traceable to Defendant's mail and wire fraud must be calculated pursuant to § 981(a)(2)(A). Ultimately, the misrepresentations that Defendant made to investors constituted the criminal conduct of mail and wire fraud. Moreover, although there was evidence that at least one of Defendant's employees produced a small quantity of biodiesel in an experiment, there was not any evidence introduced at trial that Defendant sold or otherwise provided any biodiesel to a

third party. Accordingly, the Court concludes this is a case that involves "unlawful activities" rather than a case "involving lawful goods or lawful services that are sold or provided in an illegal manner." *See* 18 U.S.C. § 981(a)(2).

On this record, therefore, the Court concludes the proceeds traceable to Defendant's mail and wire fraud must be calculated pursuant to § 981(a)(2)(A).

IV. Compliance with Federal Rule of Criminal Procedure 32.2

Federal Rule of Criminal Procedure 32.2(b)(2)(A) provides:

> If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria.

"Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4)." Fed. R. Crim. P. 32.2(b)(2)(B). "At sentencing - or at any time before sentencing if the defendant consents - the preliminary forfeiture order becomes final as to the defendant." Fed. R. Crim. P. 32.2(b)(4)(A). A failure to enter a preliminary order of forfeiture before sentencing is harmless when the Defendant has "actual notice of the forfeiture." *United States v. Moreno*, 618 F. App'x 308, 314 (9th Cir. 2015).

In this case the government did not request and the Court did not issue a preliminary order of forfeiture before sentencing. The government contends the lack of a preliminary order of forfeiture was harmless, however, because Defendant had actual notice through the forfeiture allegation in the Indictment and the government's representation in its Sentencing Memorandum that it requested a forfeiture money judgment in the amount of $1,410,760.00.

Although Defendant had notice of forfeiture in general as a result of the Indictment, the Court concludes the notice of the specific amount of forfeiture the government stated in its Sentencing Memorandum was not the functional equivalent of the notice provided by a preliminary order of forfeiture because it was only entered one week before sentencing, which is not "sufficiently in advance of sentencing" as required by Rule 32.2. Defendant, therefore, did not have sufficient time to prepare to contest genuinely the amount of forfeiture together with all of the many other issues to be addressed at sentencing, and, as a result, the Court did not have a meaningful opportunity to consider and resolve this contested issue.

The Court, therefore, concludes it must conduct further inquiry to develop the record on the disputed forfeiture amount under 18 U.S.C. § 981(a)(1)(c). To that end, the Court (1) directs the government to submit to the Court a proposed form

of preliminary order of forfeiture **no later than July 13, 2016,** and (2) directs the parties to confer regarding the amount of forfeiture to be ordered pursuant to § 981(a)(2)(A) and to file concurrently with the proposed preliminary order of forfeiture a single, Joint Statement Regarding Forfeiture that concisely states any remaining disputes and the parties' positions as to such disputes. The Court will advise the parties if the Court determines a hearing is needed to resolve such disputes.

IT IS SO ORDERED.

DATED this 30th day of June, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

APPENDIX J

BILLY J. WILLIAMS, OSB #901366
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Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,	**Case No. 3:13-cr-00444-02-BR**
v.	**JOINT STATEMENT OF PARTIES REGARDING FORFEITURE**
JACK HOLDEN,	
Defendant.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, through Claire M. Fay and Donna B. Maddux, Assistant United States Attorneys, submits the following joint statement of the parties regarding forfeiture in the above-captioned case.

On July 7, 2016, the parties conferred about forfeiture matters pursuant to the Court's order (Document 248). In light of the Court's ruling on the issues surrounding forfeiture in this case (Document 248), and the Court's order imposing $1,410,760.00 in restitution over defendant's objection, the parties agree that the forfeiture amount in this case is $1,410,760.00.

The government acknowledges that by agreeing to the amount of forfeiture, defendant Holden is not waiving any argument he has made regarding forfeiture.

The government has submitted the Preliminary Order of Forfeiture to the defense for its review, and defendant has no objections to the Order. There are no remaining disputes between the parties with respect to forfeiture. Mr. Holden waives his right to be present when the Court imposes forfeiture.

DATED this 13th day of July, 2016.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

/s/ Claire M. Fay
CLAIRE M. FAY
Assistant United States Attorney
DONNA B. MADDUX
Assistant United States Attorney

APPENDIX K

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,

v.

JACK HOLDEN,

Defendant.

3:13-CR-00444-02-BR

PRELIMINARY ORDER OF FORFEITURE AND MONEY JUDGMENT AND FINAL ORDER OF FORFEITURE AS TO DEFENDANT JACK HOLDEN

IT IS HEREBY ORDERED:

1. On October 15, 2015, a jury of his peers found defendant Jack Holden guilty on Counts 1-8, 10-13 and 15-17. As a result of the guilty verdict on Counts 2 through 8 and Count 10 of the Indictment, for which the Government sought forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), defendant shall forfeit to the United States all property representing proceeds of the offense.

2. Defendant is ordered to forfeit proceeds in the amount of $1,410,760.00 in United States currency, a money judgment representing a portion of the proceeds of defendant's criminal activity.

3. Upon the entry of this Order, the United States is authorized to conduct discovery to identify, locate, or determine disposition of the property subject to forfeiture, in accordance with Fed. R. Crim. P. 32.2(b)(4).

4. Rule 32.2(c)(1) provides that "no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment."

5. Pursuant to Rule 32.2(b)(4), this Preliminary Order of Forfeiture shall become final as to the defendant at the time of sentencing and shall be a part of the sentence and shall be included in the judgment.

6. The Court shall retain jurisdiction to enforce this order, and to amend it as necessary, pursuant to Fed.R.Crim.P. 32.2(e).

7. When property is located, it is to be held by the United States Marshal in its secure custody pending resolution of all third-party interests as provided in 21 U.S.C. § 853(n).

8. Mr. Holden has waived his right to be present when the Court imposes forfeiture.

IT IS SO ORDERED this 20th day of July, 2016.

HONORABLE ANNA J. BROWN
United States District Judge

Submitted by:

BILLY J. WILLIAMS, OSB #901366
United States Attorney

/s/ Claire M. Fay
CLAIRE M. FAY, DCB #358218
Assistant United States Attorney
DONNA B. MADDUX, OSB #023757
Assistant United States Attorney

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

V.

JACK HOLDEN

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:13-CR-00444-BR-02

USM Number: 24751-013

Lisa Hay & Rich Federico
Defendant's Attorney

Donna Maddux & Claire Fay
Assistant U.S. Attorney

THE DEFENDANT:

[X was found guilty on Counts 1-8, 10-13 and 15-17 of the Indictment after a plea of not guilty at trial.

The defendant is adjudicated guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1349	Conspiracy to Commit Mail & Wire Fraud	Beginning in or about July 2007, and continuing to the date of Indictment	1
18 U.S.C. 1343 and 2	Wire Fraud	October 17, 2008	2
18 U.S.C. 1343 and 2	Wire Fraud	November 10, 2008	3

The defendant is sentenced as provided in pages 2 through 9 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) _____, and is discharged as to such count(s).
[X] Count 9 was dismissed on the motion of the United States.
[X] The defendant shall pay a special assessment in the amount of $100.00 for each count, Counts 1-8, 10-13 and 15-17 for a total due of $1500.00 payable immediately to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties sheet.)

IT IS ORDERED that the defendant shall 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 shall notify the court and the United States Attorney of any material change in the defendant's economic circumstances.

May 5, 2016
Date of Imposition of Sentence

Signature of Judicial Officer

ANNA J. BROWN, UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

August 5, 2016
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1343 and 2	Wire Fraud	December 30, 2008	4
18 U.S.C. 1343 and 2	Wire Fraud	March 9, 2009	5
18 U.S.C. 1343 and 2	Wire Fraud	March 10, 2009	6
18 U.S.C. 1343 and 2	Wire Fraud	May 18, 2009	7
18 U.S.C. 1341 and 2	Mail Fraud	November 26, 2008	8
18 U.S.C. 1341 and 2	Mail Fraud	March 11, 2009	10
18 U.S.C. 1957 and 2	Engaging in Monetary Transaction with Criminally Derived Property	October 17, 2008	11
18 U.S.C. 1957 and 2	Engaging in Monetary Transaction with Criminally Derived Property	November 12, 2008	12
18 U.S.C. 1957 and 2	Engaging in Monetary Transaction with Criminally Derived Property	November 12, 2008	13
18 U.S.C. 1957 and 2	Engaging in Monetary Transaction with Criminally Derived Property	March 10, 2009	15
18 U.S.C. 1957 and 2	Engaging in Monetary Transaction with Criminally Derived Property	March 11, 2009	16
18 U.S.C. 1956(h)	Money Laundering Conspiracy	Beginning in July 2007 and continuing to date of Indictment	17

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: **Eighty-Seven (87) months on each count, counts 1-8, 10-13 and 15-17 to be served concurrently.**

[X] The court makes the following recommendation to the Bureau of Prisons: that the defendant be placed at the Sheridan, OR to be near family.

[X] 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 2:00 p.m. on _____.

[ ] as notified by the United States Marshal and/or Pretrial Services.

The Bureau of Prisons will determine the amount of prior custody that may be credited towards the service of sentence as authorized by Title 18 USC §3585(b) and the policies of the Bureau of Prisons.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years on each count, counts 1-8, 10-13 and 15-17 to be served concurrently.**

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.

[ ] 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.)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties section of this judgment.

The defendant shall comply with the Standard Conditions of Supervised Release that have been adopted by this court as set forth in this judgment. The defendant shall also comply with the Special Conditions of Supervision as set forth below and any additional conditions attached to this judgment.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall cooperate in the collection of DNA as directed by the probation officer, if required by law.

2. The defendant shall pay full restitution to the victims (list attached to judgment), jointly and severally with co-defendant Lloyd Sharp in 3:13-CR-00444-BR-01, in the amount of $1,410,760.00 payable immediately. If there is any unpaid balance at the time of release from custody, it shall be paid at the maximum installment possible and not less than $100.00 per month.

3. The defendant shall authorize release to the US Probation Officer any and all financial information by execution of a release of financial information form, or by any other appropriate means, as directed by the probation officer.

4.The defendant shall maintain a single checking and/or savings account in his/her name. The defendant shall deposit into this account all income, monetary gains or other pecuniary proceeds, and make use of this account for payment of all personal expenses. All other accounts must be disclosed to the probation officer.

5. The defendant shall disclose all assets and liabilities to the probation officer. The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500.00 without the approval of the probation officer.

6. The defendant shall not make applications for any loan, enter into any credit arrangement, or enter into residential or business lease agreement without approval of the probation officer.

7.The defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer.

8. The defendant's employment shall be subject to approval by the probation officer.

9. The defendant is prohibited from engaging in any form of self-employment without the prior approval of the probation officer.

10. The defendant is prohibited from engaging in financial transactions with overseas entities without the prior approval of the probation officer.

11. The defendant is prohibited from employment involving sales or representation of products or investments without the prior approval of the probation officer.

12. The defendant shall have no contact with co-defendant Lloyd Sharp, in person, by telephone, through correspondence, or through a third part.

13. The defendant is prohibited from raising or soliciting funds, goods, or capital from any individual or entity, directly, or indirectly, for any purpose, without the prior approval of the probation officer.

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

The Judges of the District of Oregon adopt the following standard conditions of probation and supervised release to apply in every case in which probation and/or supervised release is imposed upon a defendant. The individual judge may impose other conditions deemed advisable in individual cases of probation or supervised release supervision, as consistent with existing or future law.

1. The defendant shall report in person to the probation office for the district to which he or she is released within 72 hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation or supervised release is mandatory for illegal possession of a controlled substance.
3. The defendant shall not possess a firearm, destructive, or dangerous device.
4. If the defendant illegally uses drugs or abuses alcohol, has a history of drug or alcohol abuse, or drug use or possession is determined to be an element of the defendant's criminal history or instant offense, the defendant shall participate in a substance abuse treatment program as directed by the probation officer which may include urinalysis testing to determine if the defendant has used drugs or alcohol. In addition to urinalysis testing that may be part of a formal drug treatment program, the defendant shall submit up to eight (8) urinalysis tests per month.
5. The defendant shall submit to a search of his/her person, residence, office or vehicle, when conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn other residents that the premises may be subject to searches pursuant to this condition.
6. The defendant shall not leave the judicial district without the permission of the court or probation officer.
7. The defendant shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.
8. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer. The defendant may decline to answer inquiries if a truthful response would tend to incriminate him/her. Such a refusal to answer may constitute grounds for revocation.
9. The defendant shall support his or her dependents and meet other family responsibilities to the best of his or her financial ability.
10. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.
11. The defendant shall notify the probation officer **within 72 hours** of any change in residence or employment.
12. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. If, at any time, the probation officer has reasonable cause to believe the defendant is using illegal drugs or is abusing alcohol, the defendant shall submit to urinalysis testing, breathalyzer testing, or reasonable examination of the arms, neck, face, and lower legs.
13. The defendant shall not knowingly frequent places where controlled substances are illegally sold, used, distributed, or administered.
14. The defendant shall not knowingly associate with any persons engaged in criminal activity, and shall not knowingly associate with any person convicted of a felony, unless granted permission to do so by the probation officer.
15. The defendant shall permit a probation officer to visit him or her at any reasonable time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer.
16. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer.
17. The defendant shall not enter into any agreement to act as an informant or special agent of a law enforcement agency without the permission of the court.
18. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by his or her criminal record or personal history and characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such a notification requirement. This requirement will be exercised only when the probation officer believes a reasonably foreseeable risk exists or a law mandates such notice. Unless the probation officer believes the defendant presents an immediate threat to the safety of an identifiable individual, notice shall be delayed so the probation officer can arrange for a court hearing and the defendant can obtain legal counsel.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth in this Judgment:

	Assessment (as noted on Sheet 1)	Fine	Restitution	TOTAL
TOTALS	**$1500.00**	**$0.00**	**$1,410,760.00**	**$1,412,260.00**

[ ] The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

[ ] The defendant shall 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 non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss*	Amount of Restitution Ordered	Priority Order or Percentage of Payment
See attached list of restitution payees	$	$1,410,760.00	
TOTALS	**$**	**$1,410,760.00**	

[ ] If applicable, restitution amount ordered pursuant to plea agreement $_____.

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution 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 the Schedule of Payments 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 and/or [ ] restitution.

[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

Any payment shall be divided proportionately among the payees named unless otherwise specified.

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

SCHEDULE OF PAYMENTS

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

A. [X] Lump sum payment of **$1,412,260.00** due immediately, balance due

[ ] not later than _____, or
[ ] in accordance with [ ] C or [ ] D below; or

B. [X] Payment to begin immediately (may be combined with C below), or

C. [ ] If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than $_____Until paid in full to commence immediately upon release from imprisonment.

D. [X] Special instructions regarding the payment of criminal monetary penalties: If there is any unpaid balance at the time of release from custody, it shall be paid at the maximum installment possible and not less than $100.00 per month.

[X] Payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) $25 per quarter if the defendant is not working in a prison industries program.

It is ordered that resources received from any source, including inheritance, settlement, or any other judgment, shall be applied to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

[X] Clerk of Court
US District Court - Oregon
1000 SW Third Avenue
Suite 740
Portland, OR 97204

[ ] Clerk of Court
US District Court - Oregon
405 East 8th Avenue
Suite 2100
Eugene, OR 97401

[ ] Clerk of Court
US District Court - Oregon
310 West Sixth Street
Room 201
Medford, OR 97501

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

[X] Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Lloyd Sharp, 3:13-cr-00444-BR-01 (See attached list of payees)		1,410,760.00	

[ ] The defendant shall pay the cost of prosecution.
[ ] The defendant shall pay the following court cost(s):
[X] The defendant shall forfeit the defendant's interest in the following property to the United States: **Preliminary Order of Forfeiture and Money Judgment and Final Order of Forfeiture signed July 20, 2016.**

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.

Joint and Several Restitution List

First	Last	Address	Other	City	State	Zip	Phone	Amount
Richard	Barton							$100,000.00
Bob	Bauer							$75,000.00
Cal	Dean							$125,000.00
Thomas	Dean							$593,000.00
Edwin	Greenwood							$10,000.00
Mark	Hoover							$25,000.00
Steve	Madey							$50,000.00
Mark	Mann							$31,920.00
Glen	Mitzel							$75,000.00
Bob	Straton							$200,000.00
Patricia & Harold	Van Horn							$100,000.00
Richard	Zwicker							$25,840.00
							TOTAL	**1,410,760.00**

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

2018 REVISIONS

TO

PATTERN

CRIMINAL JURY INSTRUCTIONS

FOR THE DISTRICT COURTS

OF THE FIRST CIRCUIT

DISTRICT OF MAINE INTERNET SITE EDITION

Updated 10/24/18 by Chief District Judge Nancy Torresen

4.18.1341 Mail Fraud, 18 U.S.C. § 1341

[Updated: 5/5/17]

[Defendant] is charged with violating the federal statute making mail fraud illegal.

For you to find [defendant] guilty of mail fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that there was a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, that the scheme to defraud involved the misrepresentation or concealment of a material fact or matter [or the scheme to obtain money or property by means of false or fraudulent pretenses involved a false statement, assertion, half-truth or knowing concealment concerning a material fact or matter];
>
> Third, that [defendant] knowingly and willfully participated in this scheme with the intent to defraud; and
>
> Fourth, that for the purpose of executing the scheme or in furtherance of the scheme, [defendant] caused the United States mail to be used, or it was reasonably foreseeable that for the purpose of executing the scheme or in furtherance of the scheme, the United States mail would be used, on or about the date alleged.

A scheme includes any plan, pattern or course of action. It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the alleged scheme actually succeeded in defrauding anyone. But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment.

The term "defraud" means to deceive another in order to obtain money or property. [It includes a scheme to deprive another of the intangible right of honest services.]

[The term "false or fraudulent pretenses" means any false statements or assertions that were either known to be untrue when made or were made with reckless indifference to their truth and that were made with the intent to defraud. The term includes actual, direct false statements as well as half-truths and the knowing concealment of facts.]

A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted "knowingly" if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her] and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. [Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of the crime.] The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

The mailing does not itself have to be essential to the scheme, but it must have been made for the purpose of carrying it out. There is no requirement that [defendant] [him/herself] was responsible for the mailing, that the mailing itself was fraudulent or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud. But the government must prove beyond a reasonable doubt that [defendant] knew, or could reasonably have foreseen, that use of the mail would follow in the course of the scheme in furtherance of the scheme or for the purpose of executing the scheme.

Comment

(1) According to United States v. Hebshie, 549 F.3d 30, 35-36 (1st Cir. 2008) (citations and footnotes omitted),

> The crime of mail fraud includes three elements: "(1) a scheme to defraud based on false pretenses; (2) the defendant's knowing and willing participation in the scheme with the intent to defraud; and (3) the use of interstate mail . . . communications in furtherance of that scheme." United States v. Cheal, 389 F.3d 35, 41 (1st Cir. 2004). Importantly, the last element, which we will refer to as the "mailing element," requires that the defendant both (1) *cause* the use of the mails, which includes reasonably foreseeable mailings, *and* (2) use the mails *for the purpose*, or *in furtherance*, of executing the scheme to defraud. See United States v. Moss, 591 F.2d 428, 436 (8th Cir. 1979).

Although the First Circuit enumerates three elements, the Supreme Court provides a fourth—materiality. Neder v. United States, 527 U.S. 1, 20-23, 25 (1999) ("[w]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."). Materiality must go to the jury. Id. at 25.

(2) Hebshie, 549 F.3d at 42, found plain error in the following instruction:

> The third element is the use of the mail on or about the date charged. The government must establish beyond a reasonable doubt that the defendant used the mail in . . . *furtherance* of the crime charged. . . . [T]he crime of mail fraud does require that the government prove beyond a reasonable doubt that the mails were in fact used in some manner *to further* such a scheme for the purposes of obtaining money by means of false or fraudulent pretenses *or* that the use of the mails would ordinarily follow in the usual course of business or events or that the use of the mails was reasonably foreseeable.

According to Hebshie, "[u]sing the word 'or' in the last sentence above, instead of 'and,' made the instruction incorrect." Id. (citations omitted).

> As mentioned, the district court's error occurred when it explained the mailing element of the statute, conflating the "causation" requirement with the "in furtherance" requirement. "The mailing element of 18 U.S.C. § 1341 consists of two requirements: (1) that the defendant 'caused' the use of the mails and (2) that the use was [in furtherance, or] 'for the purpose of executing' the scheme to defraud." Moss, 591 F.2d at 436; see also Cheal, 389 F.3d at 41; United States v. Pimental, 380 F.3d 575, 584 (1st Cir. 2004). But the district court's instruction here allowed the jury to find the mailing element satisfied if "the use of the mails would ordinarily follow in the usual course of business" *or* if "the use of the mails was reasonably foreseeable." Although the instruction stated the government must demonstrate "that the mails were in fact used in some manner *to further*" Defendant's insurance fraud scheme, the instruction phrased this mandatory element of mail fraud as a permissible *alternative* that was unnecessary if the jury found causation.

Id. To prove causation, the government must demonstrate "that the defendant knew, or could have reasonably foreseen, that the use of the mails [would] follow in the ordinary course of business. It is not necessary to prove that the defendant personally executed the mailings, but merely that the defendant caused the mailing by doing some act from which it is reasonably foreseeable that the mails will be used." Pimental, 380 F.3d at 584 (citations omitted). Moreover, "it is simply 'the use of the mails' in the course of the scheme rather than the particular mailing at issue that must be reasonably foreseeable. . . ." Id. at 589. The same is true for a charge of conspiracy to commit mail fraud. United States v. Morales-Rodríguez, 467 F.3d 1, 8 (1st Cir. 2006), abrogated on other grounds by Cuellar v. United States, 553 U.S. 550 (2008).

(3) According to Hebshie, 549 F.3d at 36:

> The "in furtherance" requirement is to be broadly read and applied. See United States v. Koen, 982 F.2d 1101, 1107 (7th Cir. 1992). To further Defendant's fraudulent scheme, the mailings need not be an "essential element" of the scheme. Pereira v. United States, 347

> U.S. 1, 8 (1954). They simply must be "sufficiently closely related" to the scheme, United States v. Maze, 414 U.S. 395, 399 (1974), such that they are "incident to an essential part of the scheme," Pereira, 347 U.S. at 8, or "a step in [the] plot." Schmuck v. United States, 489 U.S. 705, 715 (1989).

Although "[t]he mailing need not be an essential element of the scheme," it must be "a step in [the] plot" or "incident to an essential part of the scheme." Pimental, 380 F.3d at 586 (citations omitted); see also United States v. McCann, 366 F.3d 46, 52 (1st Cir. 2004), vacated on other grounds, 543 U.S. 1104 (2005) ("the mailing must be for the purpose of executing the scheme" but need not be an "essential element"); United States v. Sawyer, 239 F.3d 31, 39-40 (1st Cir. 2001) (same). A mailing is incident to an essential part of the scheme "where it is a normal concomitant of a transaction that is essential to the fraudulent scheme." United States v. Contenti, 735 F.2d 628, 631 n.2 (1st Cir. 1984) (quoting United States v. Lea, 618 F.2d 426, 431 (7th Cir. 1980)). "[T]he defendant need not personally mail anything so long as it is reasonably foreseeable that the mails will be used in the ordinary course of business to further the scheme." United States v. Cacho-Bonilla, 404 F.3d 84, 90 (1st Cir. 2005) (citation omitted). "[T]he use of the mails or wires to further the fraudulent scheme need only be 'incidental.'" United States v. Woodward, 149 F.3d 46, 63 (1st Cir. 1998) (quoting United States v. Sawyer, 85 F.3d 713, 723 n.6 (1st Cir. 1996)). See also United States v. Stergios, 659 F.3d 127, 132-33 (1st Cir. 2011). "The government need only prove that use of the mails was "'incident to an essential part of the scheme" or "a step in the plot,'" not that it was involved in every step of a particular scheme." United States v. Desimone, 699 F.3d 113, 124 (1st Cir. 2012) (citations omitted). "From this, two propositions emerge. First, a mailing can serve as the basis for a mail fraud conviction even if the fraud would have been successful had the mailing never occurred. Second, however, that mailing—even if dispensable—must at least have some tendency to facilitate execution of the fraud." United States v. Tavares, 844 F.3d 46, 59 (1st Cir. 2016) (court held rejection letters to unsuccessful applicants for probation officer positions were insufficient to meet the mailing element in a patronage hiring scheme).

(4) Following a 1994 amendment, the mail fraud statute applies to the use of any private or commercial interstate carrier as well as the use of the United States mail. 18 U.S.C. § 1341 (amended by Pub. L. 103-322, § 250006, 108 Stat. 1796). For a case involving a private or commercial carrier, "mail" in the pattern charge could be changed to "mail or delivery by a private or commercial interstate carrier."

(5) The definition of defraud comes from United States v. Kenrick, 221 F.3d 19, 26-27 (1st Cir. 2000) (en banc), which was overruled on the false pretenses portion of the bank fraud statute by Loughrin v. United States, ___ U.S. ___, 134 S. Ct. 2384, 2391 (2014). Note that the Supreme Court distinguishes § 1341 mail fraud "as setting forth just one offense—using the mails to advance a scheme to defraud" from § 1344 bank fraud, which has two components, (1) defrauding a financial institution, and (2) obtaining money by false or fraudulent pretenses, which does not require intent to defraud the financial institution. Loughrin v. United States, 134 S. Ct. at 2391. See comment (1) to Pattern 1344.

(6) We have dropped the statutory term "artifice" as archaic. It adds nothing to "scheme," a term more understandable to most jurors. In a civil RICO case, the First Circuit said that "[t]here

may perhaps be situations in which 'a scheme or artifice to defraud' . . . can have some purpose other than the usual aim 'to obtain . . . money or other property' by means of deceit," but that defamation, standing alone, is not enough. Méndez Internet Mgmt. Servs., Inc. v. Banco Santander de Puerto Rico, 621 F.3d 10, 15 (1st Cir. 2010) (citing Kenrick, 221 F.3d at 26-27).

(7) The "false or fraudulent pretenses" part of the statute extends it to "false promises and misrepresentations as to the future." McNally v. United States, 483 U.S. 350, 359 (1987), superseded by statute on other grounds, Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508. But a scheme to defraud can also be proven using false statements. United States v. LaPlante, 714 F.3d 641, 645-46 (1st Cir. 2013).

(8) Except for honest services fraud, a fraud charge must involve money or "property." Cleveland v. United States, 531 U.S. 12, 15, 20-25 (2000) (statute does not extend to fraud in obtaining state or municipal licenses because, although they are valuable, they are not "property" in the government regulators' hands). For honest services fraud, see Instruction 4.18.1346.

(9) "It is not necessary to establish that the intended victim was *actually* defrauded." United States v. Allard, 926 F.2d 1237, 1242 (1st Cir. 1991) (citations omitted). Mail fraud does "not require that the victims be pure of heart." United States v. Camuti, 78 F.3d 738, 742 (1st Cir. 1996). There is no requirement that the person deceived be the same person who is deprived of money or property. United States v. Christopher, 142 F.3d 46, 53-54 (1st Cir. 1998). There is no requirement that the conspirators know the identity of the fraud victim, only that there be a scheme to defraud. United States v. Tum, 2013 WL 388002, at *7 (1st Cir. Feb. 1, 2013).

(10) Good faith is an absolute defense. United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991). The sentence concerning good faith is bracketed because "[a] separate instruction on good faith is not required in this circuit where the court adequately instructs on intent to defraud." Camuti, 78 F.3d at 744 (citing Dockray, 943 F.2d at 155), and the First Circuit has admonished that "[i]f references to good faith are made in fraud instructions, this must be done with great care" and has attached an example of an excessively defense-favorable good faith instruction. United States v. Mueffelman, 470 F.3d 33, 37, 41-42 (1st Cir. 2006).

(11) The First Circuit has approved the following instruction in a duty to disclose case:

> A failure to disclose a material fact may also constitute a false or fraudulent misrepresentation if, one, the person was under a general professional or a specific contractual duty to make such a disclosure; and, two, the person actually knew such disclosure ought to be made; and, three, the person failed to make such disclosure with the specific intent to defraud.
>
> . . . .
>
> The government has to prove as to each count considered separately, that the alleged misrepresentation as charged in the indictment was made with the intent to defraud, that is, to advance the scheme or artifice to defraud. Such a scheme in each case has to be reasonably

> calculated to deceive a lender of ordinary prudence, ordinary care and comprehension.
>
> . . . .
>
> [I]t is not a crime simply to be careless or sloppy in discharging your duties as an attorney or a[s] an appraiser. That may be malpractice, but it's not a crime.

United States v. Cassiere, 4 F.3d 1006, 1022 (1st Cir. 1993) (alterations in original).

(12) Although the mail and wire fraud statutes require that the defendant "*hav[e] devised or intend[ed] to devise* any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C §§ 1341, 1343 (emphasis added), the First Circuit has held that in mail and wire fraud cases "[t]he government need not prove that the defendant devised the fraudulent scheme," United States v. Serrano, 870 F.2d 1, 6 (1st Cir. 1989). The First Circuit has, in dicta in cases after Serrano, made inconsistent statements on this issue. See United States v. Carrington, 96 F.3d 1, 7 (1st Cir. 1996) ("The crime of wire fraud . . . requires that the defendant devise a scheme to defraud and then transmit a wire communication for the purposes of executing the scheme."). Compare Pimental, 380 F.3d at 584 (the first element the government must show to prove mail fraud is "the devising or attempting to devise a scheme or artifice to defraud") and Stergios, 659 F.3d at 132 (same) with United States v. Martin, 228 F.3d 1, 15 (1st Cir. 2000) (the first element the government must show to prove wire or mail fraud is "a scheme to defraud by means of false pretenses") and Cheal, 389 F.3d at 41 (same). Given the clear holding in Serrano and the more recent statement in Martin, these pattern charges for mail and wire fraud do not require that the defendant have devised or intended to devise the scheme.

(13) In United States v. Berroa, 856 F.3d 141 (1st Cir. 2017), five doctors bribed an employee of the Puerto Rico Board of Medical Examiners to alter the results of their qualifying examinations to change failing grades to passes. After completing some additional requirements, the would-be doctors received notice by mail that their licenses had been issued. Each of them eventually established his or her own medical practice, recruited patients, and in the ensuing years billed and received money for their services. In overturning the mail fraud convictions, the Court noted that what was missing was any connection between the "means" and the "end" that amounted to "something more than oblique, indirect, and incidental." Id. at 149 (quoting Loughrin v. United States, 134 S. Ct. 2384, 2393 (2014)). What mail fraud requires is that the fraud be the mechanism that induces a victim to part with money in the sense evoked by "the familiar concept [in tort law] of proximate causation." Id. at 149 n.4. "[T]he defendants' alleged fraud in obtaining their medical licenses cannot be said to have 'naturally induc[ed]' health care consumers to part with their money years later." Id. at 149-50.

(14) The jury is not required to agree on a means or a particular false statement that a defendant used to carry out a fraudulent scheme. United States v. LaPlante, 714 F.3d 641, 647 (1st Cir. 2013).

4.18.1343 Wire Fraud, 18 U.S.C. § 1343

[Updated: 2/1/13]

[Defendant] is charged with violating the federal statute making wire fraud illegal.

For you to find [defendant] guilty of wire fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that there was a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, that the scheme to defraud involved the misrepresentation or concealment of a material fact or matter [or the scheme to obtain money or property by means of false or fraudulent pretenses involved a false statement, assertion, half-truth or knowing concealment concerning a material fact or matter];
>
> Third, that [defendant] knowingly and willfully participated in this scheme with the intent to defraud; and
>
> Fourth, that for the purpose of executing the scheme or in furtherance of the scheme, [defendant] caused an interstate [or foreign] wire communication to be used, or it was reasonably foreseeable that for the purpose of executing the scheme or in furtherance of the scheme, an interstate [or foreign] wire communication would be used, on or about the date alleged.

A scheme includes any plan, pattern or course of action. It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the alleged scheme actually succeeded in defrauding anyone. But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment.

The term "defraud" means to deceive another in order to obtain money or property. [It includes a scheme to deprive another of the intangible right of honest services.]

[The term "false or fraudulent pretenses" means any false statements or assertions that were either known to be untrue when made or were made with reckless indifference to their truth and that were made with the intent to defraud. The term includes actual, direct false statements as well as half-truths and the knowing concealment of facts.]

A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted "knowingly" if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her] and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. [Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of the crime.] The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

An "interstate [or foreign] wire communication" includes a telephone communication from one state to another [or between the United States and a foreign country.] [The term also includes a wire transfer of funds between financial institutions as well an e-mail transmission or other internet communication.] The wire communication does not itself have to be essential to the scheme, but it must have been made for the purpose of carrying it out. There is no requirement that [defendant] [him/herself] was responsible for the wire communication, that the wire communication itself was fraudulent or that the use of wire communications facilities in interstate commerce was intended as the specific or exclusive means of accomplishing the alleged fraud. But the government must prove beyond a reasonable doubt that [defendant] knew, or could reasonably have foreseen, that use of a wire communication would follow in the course of the scheme.

Phone calls designed to lull a victim into a false sense of security, postpone injuries or complaints or make the transaction less suspect are phone calls in furtherance of a scheme to defraud.

Comment

(1) See the Comments to Instruction 4.18.1341 (Mail Fraud). "The mail and wire fraud statutes share the same language in relevant part" and are therefore subject to the same analysis. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987); accord McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791 n.8 (1st Cir. 1990) (same). "Accordingly, . . . caselaw construing § 1341 is instructive for purposes of § 1343." United States v. Castillo, 829 F.2d 1194, 1198 (1st Cir. 1987).

(2) To prove causation, the government need not prove that the defendant "personally use[d] the wires as long as such use was a reasonably foreseeable part of the scheme in which [he] participated." United States v. Woodward, 149 F.3d 46, 63 (1st Cir. 1998) (citations omitted).

(3) "[U]se of the wires must be 'incident to an essential part of the scheme,'" United States v. Lopez, 71 F.3d 954, 961 (1st Cir. 1995) (quoting a mail fraud case, Pereira v. United States, 347 U.S. 1, 8 (1954)) abrogated on other grounds by United States v. Wells, 519 U.S. 482 (1997), which means that the wire communication must be "a normal concomitant of a transaction that

[was] essential to the fraudulent scheme." Castillo, 829 F.2d at 1199 (alteration in original) (quoting a mail fraud case, United States v. Contenti, 735 F.2d 628, 631 n.2 (1st Cir. 1984)). The concept is construed broadly, and includes use of the wires to "'lull the victims into a sense of false security, [and] postpone their ultimate complaint to the authorities.'" Lopez, 71 F.3d at 961 (quoting United States v. Lane, 474 U.S. 438, 451-52 (1986) (Lane actually reads "false sense of security")). There is no "strict sequence" between devising and executing a scheme. "What is necessary is that the [wire transmission] be sent 'for the purpose' of fostering that execution." United States v. Potter, 463 F.3d 9, 17 (1st Cir. 2006). "[T]he use of the mails or wires to further the fraudulent scheme need only be 'incidental.'" United States v. Woodward, 149 F.3d 46, 63 (1st Cir. 1998) (quoting United States v. Grandmaison, 77 F.3d 555, 566 (1st Cir. 1996)).

(4) The term "interstate or foreign wire communication" includes an e-mail transmission or other internet communication. See, e.g., United States v. Martin, 228 F.3d 1, 18 (1st Cir. 2000) (affirming wire fraud conviction based on e-mails).

(5) A plot to defraud a foreign government of tax revenue violates the statute. Pasquantino v. United States, 544 U.S. 349, 355 (2005).

(6) On good faith, see Comment 9 to 4.18.1341.

(7) Except for honest services fraud, a fraud charge must involve money or "property." Cleveland v. United States, 531 U.S. 12, 15, 20-25 (2000) (statute does not extend to fraud in obtaining state or municipal licenses because, although they are valuable, they are not "property" in the government regulators' hands). For honest services fraud, see Instruction 4.18.1346.

(8) There is no requirement that the conspirators know the identity of the fraud victim. United States v. Tum, 2013 WL 388002, at *7 (1st Cir. Feb. 1, 2013).

COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS
THIRD CIRCUIT

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REPORTERS:

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STAFF:

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INTRODUCTION:

In the summer of 2004 Chief Judge Anthony J. Scirica appointed a Committee of district judges to draft model criminal jury instructions to help judges communicate more effectively with juries. He and the Committee enlisted Professor James A. Shellenberger of Temple University Law School and Professor Anne Bowen Poulin of Villanova University School of Law to serve as Reporters for the Committee.[2] The Committee also appointed an Advisory Committee including representatives of the U.S. Attorney's

[1] Judge William H. Yohn, Jr., of the Eastern District of Pennsylvania, served as Committee Chair until his retirement from the bench in 2015. Judge Ronald L. Buckwalter of the Eastern District of Pennsylvania; Judge Raymond L. Finch of the District of the Virgin Islands; Judge Joseph E. Irenas of the District of New Jersey; Judge John C. Lifland of the District of New Jersey; Judge Terrence F. McVerry of the Western District of Pennsylvania; Judge Sylvia H. Rambo of the Middle District of Pennsylvania; and Judge Gregory M. Sleet of the District of Delaware also served on this Committee.

[2] Professor Shellenberger served as a Reporter for the Committee until 2017, at which time Professor Andrew Rossner of the Rutgers University School of Law assumed the duties of Reporter.

Office, the Federal Defender's Office and private defense counsel from each of the Districts in the Circuit. (A current list of the members of the Advisory Committee follows.) Throughout its work the Committee and the Reporters also received assistance from the Circuit Executive's Office for the Third Circuit. The project was funded by contributions from the Court of Appeals and each District Court in the Third Circuit.[3]

The Committee commenced its work in September 2004. The final set of model instructions include preliminary and final instructions, instructions for use during trial, and instructions covering the most frequently litigated federal crimes and defenses. In addition to model instructions, the Committee and the Reporters prepared Comments to accompany those instructions, summarizing relevant Third Circuit and Supreme Court precedent. Although we believe the Comments are accurate in every respect, they do not pretend to be exhaustive discussions of the subject matter. The extraordinary efforts of the Reporters and the scholarly strength they brought to the task of drafting these instructions cannot be overly emphasized. In addition, the members of the Committee wish to acknowledge the leadership and tireless efforts of Judge Yohn as the former Chair, which were indispensable to a project of this nature. Finally, the suggestions of the Advisory Committee on our proposed instructions have been invaluable.

We recognize that the manner of instructing a jury varies widely among judges. These model instructions are available to judges and litigants to be used in their discretion in tailoring the instructions in a particular case. They are intended to be model, not mandatory, instructions. Every effort has been made to assure conformity with current Third Circuit law; however, it cannot be assumed that all of these model instructions in the form given will necessarily be appropriate under the facts of a particular case or that the Third Circuit will approve these instructions, if given.

The model instructions are available electronically on the Third Circuit website at www.ca3.uscourts.gov. A "Quick Link" on the home page will take you to another page that contains the model civil and criminal jury instructions. The documents are provided in Microsoft Word and PDF formats. All instructions have been published by Thomson West, but not all of the annual updates.

The subject matter of the Model Criminal Jury Instructions is set forth in the Table of Contents. We call your attention particularly to the instructions in Chapter 2, which we believe will be extremely helpful to trial judges and lawyers, both as to the language of the instruction and the law which applies to its use, in order to resolve issues that arise during the course of a trial.

By referring to the Table of Contents beginning with General Instruction No. 1.01 and then proceeding through the Table of Contents one may select particular instructions.

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[3] Neither the Court of Appeals nor any judge of that Court participated in the drafting of the model instructions and the Court of Appeals has not approved the use of these instructions.

It must be emphasized, however, that every case is unique, having its particular fact pattern, and care must be exercised when adapting the model instructions to the individual case. Some of the instructions may contain paragraphs or sentences that address issues not relevant to the case actually being tried. All unnecessary concepts and terms should be removed so the instructions may properly focus the attention of the jury only on the precise issue or issues that it is being asked to resolve and nothing else.

These Model Criminal Jury Instructions remain a work in progress. The law develops as time passes. Even as the instructions were being assembled in final form, opinions of the Court of Appeals came down that required additions or revisions. Undoubtedly, judges and lawyers who use these instructions will have suggestions for improvement. As these instructions are used, if a judge or lawyer believes improvements can made in the clarity of any instruction, or that a particular instruction is in error, we would appreciate being advised. You may e-mail any comments to the e-mail address provided on the Model Jury Instructions section of the Third Circuit Website. The Committee meets annually with its Reporters to review developments in the law and the comments of those who use the model instructions. These updates are posted annually on the website. In addition, revised editions will be printed from time to time. The Committee hopes that this work will ease the burden of district judges in preparing their jury instructions and will also provide a technique for the rapid preparation and assembly of complete instructions in suitable form for submission to the jury.

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[4] Although not officially a member of the Advisory Committee, the Committee wants to acknowledge the very substantial contributions made by Nancy Hoppock, Esquire.

6.18.1341 Mail Fraud - Elements of the Offense (18 U.S.C. § 1341)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with mail fraud, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **knowingly devised a scheme to defraud or to obtain money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises** *(or willfully participated in such a scheme with knowledge of its fraudulent nature)*;

Second: That *(name)* **acted with the intent to defraud; and**

Third: That in advancing, furthering, or carrying out the scheme, *(name)* **used the mails** *(a private or commercial interstate carrier)*, **or caused the mails** *(a private or commercial interstate carrier)* **to be used.**

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 44-3 (Matthew Bender 2003) [hereinafter, Sand et al., supra].

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or

attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The court should also give the following instructions: 6.18.1341-1 (Mail, Wire, or Bank Fraud - "Scheme to Defraud or to Obtain Money or Property" Defined), 6.18.1341-4 (Mail or Wire Fraud – "Intent to Defraud" Defined), and 6.18.1341-5 (Mail Fraud – "Use of the Mails" Defined). The court should give the following instructions when appropriate: 6.18.1341-2 (Mail, Wire, or Bank Fraud- Unanimity Required), 6.18.1341-3 (Mail or Wire Fraud - Protected Interests: Honest Services), and 6.18.1341-6 (Mail Fraud - Each Use of the Mails a Separate Offense). In addition, if the indictment charges violation through use of a private or commercial interstate carrier, the language of the instruction should be modified by replacing the word "mail" with the term "private or commercial interstate carrier" throughout. If the indictment charges that the violation affected a financial institution, the court should add language instructing the jury of the additional element and may also wish to instruct on ordinary mail fraud as a lesser included offense. *See* Instruction 3.11 (Lesser Included Offenses).

18 U.S.C. § 1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

If the prosecution proceeds on the theory that the defendant defrauded the victim of honest services, the instruction should be modified accordingly. If the prosecution neither alleges nor proves deprivation of intangible rights, it is error to instruct on fraud through the deprivation of intangible rights. *See United States v. Leahy*, 445 F.3d 634, 655 (3d Cir. 2006) (recognizing error but holding it harmless).

In *Pereira v. United States*, 347 U.S. 1, 8 (1954), the Supreme Court stated that "[t]he elements of the offense of mail fraud . . . are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." However, the Third Circuit has adopted a three-element statement of the offense, clarifying the intent requirement:

> The essential elements of an offense under 18 U.S.C. § 1341 are (1) the existence of a scheme to defraud; (2) the participation by the defendant in the particular scheme charged with the specific intent to defraud; and (3) the use of the United States mails in furtherance of the fraudulent scheme.

United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994); *see also United States v. Riley*, 621F.3d 312 (3d Cir. 2010) (stating elements); *United States v. Pharis*, 298 F.3d 228, 234 (3d Cir. 2002); *United States v. Copple*, 24 F.3d 535, 544 (3d Cir. 1994). In *United States v. Pearlstein*, 576 F.2d 531, 537 (3d Cir. 1978), the court explained that the prosecution must establish either that the defendant devised the fraudulent scheme or that the defendant "wilfully participated in it with knowledge of its fraudulent nature."

18 U.S.C. § 2326 provides enhanced penalties for certain violations of § 1341:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing--
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
> (2) in the case of an offense under any of those sections that--
> (A) victimized ten or more persons over the age of 55; or
> (B) targeted persons over the age of 55,
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

If the indictment alleges any of these circumstances, the instruction should be modified to add the aggravating factor as an element essential for conviction. The court may then also wish to give a lesser included offense instruction. *See* Instruction 3.11 (Lesser Included Offenses).

18 U.S.C.A. § 1349, which makes it a crime to attempt or conspire to commit any of the federal fraud offenses, provides

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The statute does not require proof of an overt act. *See United States v. Obaygbona*, 556 F. App'x. 161, 2014 WL 764764 (3d Cir. 2014).

(Revised 2014)

6.18.1341-1 Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined

The first element that the government must prove beyond a reasonable doubt is that *(name)* **knowingly devised** (or willfully participated in) **a scheme to defraud** *(the victim)* **of money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises.**

A "scheme" is merely a plan for accomplishing an object.

"Fraud" is a general term which embraces all the various means by which one person can gain an advantage over another by false representations, suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property *(or the intangible right of honest services)* **by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.**

In this case, the indictment alleges that the scheme to defraud was carried out by making false *(or fraudulent)* **statements** *(representations) (claims) (documents).* **The representations which the government charges were made as part of the scheme to defraud are set forth in the indictment** *(which I have already read to you).* **The government is not required to prove every misrepresentation charged in the indictment. It is sufficient if the government proves beyond a reasonable doubt that**

one or more of the alleged material misrepresentations were made in furtherance of the alleged scheme to defraud. However, you cannot convict the defendant unless all of you agree as to at least one of the material misrepresentations.

A statement, representation, claim or document is false if it is untrue when made and if the person making the statement, representation, claim or document or causing it to be made knew it was untrue at the time it was made.

A representation or statement is fraudulent if it was falsely made with the intention to deceive.

In addition, deceitful statements of half truths or the concealment of material facts or the expression of an opinion not honestly entertained may constitute false or fraudulent statements. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance.

The deception need not be premised upon spoken or written words alone. If there is deception, the manner in which it is accomplished is immaterial.

[The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.]

The false or fraudulent representation *(or failure to disclose)* **must relate to a material fact or matter. A material fact is one which would reasonably be expected**

to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision *(describe relevant decision; e.g., with respect to a proposed investment)*.

This means that if you find that a particular statement of fact was false, you must determine whether that statement was one that a reasonable person *(or investor)* **might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.**

In order to establish a scheme to defraud, the government must also prove that the alleged scheme contemplated depriving another of money or property *(or of the intangible right of honest services)*.

However, the government is not required to prove that *(name) (himself)(herself)* **originated the scheme to defraud. Furthermore, it is not necessary that the government prove that** *(name)* **actually realized any gain from the scheme or that** *(the)(any)* **intended victim actually suffered any loss.** *(In this case, it so happens that the government does contend that the proof establishes that persons were defrauded and that (name) profited. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.)*

If you find that the government has proved beyond a reasonable doubt that the *(overall)* **scheme to defraud charged in the indictment did exist and that the**

defendant knowingly devised or participated in the *(overall)* scheme charged in the indictment, you should then consider the second element.

Comment

Sand et al., supra, 44-4.

This instruction seeks to provide a comprehensive definition of the first element of the offense: the existence of a scheme to defraud or to obtain money or property or the intangible right of honest services. The instruction contains optional language that may be used if the prosecution rests at least in part on the defendant's failure to disclose information.

The two phrases in the statute - "any scheme or artifice to defraud" and "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" are not used in the disjunctive. *United States v. Monostra*, 125 F.3d 183, 187 (3d Cir. 1997). Instead, Congress added the second phrase to the statute "simply [to make] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *See Monostra*, 125 F.3d at 187 (quoting *McNally v. United States*, 483 U.S. 350, 359 (1987)).

In *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987), the Third Circuit noted that "[t]he term 'scheme to defraud' . . . is not capable of precise definition." In *United States v. Leahy*, 445 F.3d 634, 649 (3d Cir. 2006), a bank fraud case, the court gave the following instruction over the defendants' objection, and the defendants challenged the instruction, arguing that the trial court committed error by including the italicized language:

> Members of the jury, the first element is that the government must prove beyond a reasonable doubt that there was a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain any of the money owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representation or promises.
>
> . . .
>
> The term false or fraudulent pretenses, representations or promises, means a statement or an assertion which concerns a material or important fact, or material or important aspect of the matter in question that was either known to be untrue at the time that it was made or used, or that it was made or used with reckless indifference as to whether it was, in fact, true or false and made or used with the intent to defraud.
>
> . . .
>
> The fraudulent nature of a scheme is not defined according to any technical standards. *Rather, the measure of a fraud in any fraud case is whether the scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings in*

a general light of the community.

> Fraud embraces all of the means which human ingenuity can devise to gain advantage over another by false representation, suggestions or suppression of truth or deliberate disregard or omission of truth. (Emphasis added).

The Third Circuit affirmed the convictions, considering the challenged language in the context of the entire instruction, but expressed disapproval of the italicized language. *Leahy*, 445 F.3d at 350-51. This language, found in a number of older cases, has not been included in the model instruction.

The Third Circuit has indicated that a court may properly instruct the jury that the negligence of the victims is not a defense to fraud. *See United States v. Hoffecker*, 530 F.3d 137, 177 (3d Cir. 2008); *United States v. Arena*, 629 F. App'x. 453 (3d Cir. 2015). In *United States v. Newmark*, 2010 WL 850200 (3d Cir. 2010) (non-precedential), a mail fraud case, the trial court failed to instruct the jury that a "scheme to defraud" is a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension." The court included in its instructions the statement that "[i]t is immaterial that the alleged victims may have acted gullibly, carelessly, naively or negligently, which led to their being defrauded." The defense did not object to the instructions at trial, and the Third Circuit held that the trial court had not committed plain error. However, the court rejected the prosecution's argument that the instruction setting out the material fact requirement and defining material fact adequately covered the concept of "ordinary prudence," declining to adopt the position taken in *United States v. Zomber*, 358 F. Supp.2d 442, 459 (E.D. Pa.2005). The court explained:

> The materiality instruction concerns whether a reasonable person would consider a fact important, whereas the "ordinary prudence" instruction concerns whether a reasonable person would be deceived by a scheme. Moreover, because of the apparent tension between an instruction that a victim's gullibility or negligence is no defense and an instruction that a scheme must be calculated to deceive a person of ordinary prudence and comprehension, there is some force to [the defendant]'s argument that the error was compounded by the district court's inclusion of the former instruction.

In *Cleveland v. United States*, 531 U.S. 12, 15 (2000), the Supreme Court clarified the meaning of the term "property" in the statute, holding that state and municipal licenses in general are not "property" within Section 1341. The Court stated:

> It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim.

531 U.S. at 15. In *Pasquantino v. United States*, 544 U.S. 349 (2005), the Court held that a scheme to smuggle liquor from the United States into Canada to avoid Canadian taxes

constituted a scheme to defraud in violation of the wire fraud statute. Canada's right to the uncollected taxes constituted property within the meaning of the statute. 544 U.S. at 354-55. *See also United States v. Tulio Landscaping, Inc.*, 263 F. App'x. 258 (3d Cir. 2008) (holding that the jury could find the defendant, a contractor, guilty of a scheme to defraud a governmental agency where: (1) the governmental agency required contractors to participate in a program using minority subcontractors; (2) defendant submitted bids to the agency representing that the requisite percentage of work would be subcontracted to a minority subcontractor; (3) defendant paid a fee to a minority subcontractor to use that company's name in making false representations to the governmental agency; (4) the work was actually done by the defendant; and, (5) defendant never intended to use a minority subcontractor but submitted fraudulent documents to the agency to prove that it had done so.)

The statute also reaches schemes to deprive another of the "intangible right of honest services." 18 U.S.C. § 1346. If the prosecution proceeds on the theory that the defendant defrauded the victim of honest services, the court should give Instruction 6.18.1341-3 (Mail or Wire Fraud - Protected Interests: Honest Services).

The scheme "need not be fraudulent on its face." However, it must involve "fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (citation omitted). The instruction incorporates this objective standard. Some circuits permit the jury to convict even if the misrepresentations would not deceive an ordinary reasonable person. *See United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996) (discussing circuit split and adopting an objective standard). Although the Third Circuit does not appear to have addressed this issue directly, in *Pearlstein* the court included an objective standard in its statement of the requirements for a mail fraud conviction. 576 F.2d at 535. In *United States v. Hucks*, 557 F.App'x. 183, 187 (3d Cir. 2014) (non-precedential), the court explained:

> The "person of ordinary prudence" language that courts have imputed to the mail fraud statute, is intended, in part, to police the border between fraud and harmless sales puffing. It is not a license for criminals to prey on people of "below-average judgment or intelligence"—those most in need of the law's protection. (citations omitted)

In *United States v. Ferriero*, 866 F.3d 107 (3d Cir. 2017), the Third Circuit upheld a wire fraud conviction based on the failure to disclose information. The court explained that the "issue . . . is whether the evidence was sufficient for a rational juror to conclude [the defendant's] failure to disclose . . . amounted to a materially false or fraudulent misrepresentation." *Ferriero*, 866 F.3d at 120. The court also noted that "[a]ssessing whether a communication is fraudulent, truthful, or otherwise is a highly contextual inquiry." *Ferriero*, 866 F.3d at 120.

The representations must relate to material facts. The Supreme Court held in *Neder v. United States*, 527 U.S. 1, 25 (1999), that materiality is an essential element of the crime of mail fraud, wire fraud, and bank fraud to be decided by the jury. *See also United States v. Riley*, 621

F.3d 312 (3d Cir. 2010) (discussing materiality requirement); *United States v. Lucas*, --- F. App'x. ----, 2017 WL 4118346 (3d Cir. 2017) (non-precedential) (recognizing that materiality is an objective concept). However, the prosecution need not prove that the deception was successful. *Neder v. United States*, 527 U.S. 1, 25 (1999); *United States v. Moleski*, 641 F. App'x. 172 (3d Cir. 2016).

The prosecution need not prove that the defendant benefitted personally from the scheme to defraud. *United States v. Riley*, 621 F.3d 312 (3d Cir. 2010).

The last paragraph of the instruction refocuses the jury on the question of the defendant's involvement in the scheme charged in the indictment as well as the existence of that scheme. If the evidence in the case on trial may lead the jury to convict a defendant for involvement in some lesser scheme rather than the scheme charged in the indictment, the court may insert the adjective "overall" to emphasize that the conviction cannot rest on involvement in some scheme other than the overall scheme charged. Alternatively, depending on the particular facts, the court should make clear that the jury must find that the defendant joined the particular scheme charged in the indictment, and not some other fraudulent scheme. In *United States v. Dobson*, 419 F.3d 231, 237 (3d Cir. 2005), the court explained:

> [T]he relevant inquiry is not whether the defendant acted knowingly in making any misstatement, but whether she did so with respect to the overarching fraudulent scheme-that is, the particular "illicit enterprise" charged in the indictment.

In *Dobson*, the court held that the instructions to the jury were deficient because they

> nowhere advised the jury that it could convict only on finding that [the defendant] in fact knew of [the broader] fraudulent scheme [alleged in the indictment]. * * * [T]he language of the charge easily, but erroneously, encompassed the possibility that [the defendant's] own misrepresentations, without knowledge of [the charged scheme's] broader illicit purpose, could constitute her creation of, or participation "in a scheme to defraud, or to obtain money or property by materially false or fraudulent[ ] pretenses, misrepresentations, or promises . . . ."

419 F.3d at 238.

In *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007), the Third Circuit rejected a challenge based on *Dobson*. The court held that the trial court's instructions adequately protected the defendant against the risk that the defendant would be convicted for aiding and abetting a different scheme from that charged.[1]

---

[1] The court described the instructions as follows:

The District Court defined honest services fraud extensively, and then referred the jurors to the

verdict sheet, which, as relevant here, charged Hawkins with aiding and abetting honest services wire fraud. The Court explained that:

> [O]nly a public official owes a duty of honest services to the people he serves. Thus, of the defendants in this case, only Kemp is a public official. Each of the other defendants, who are private citizens, by himself or herself may not commit a substantive offense of honest services fraud as charged in the indictment.
>
> However, you may nevertheless find one or more of the other defendants guilty of honest services fraud, if you find beyond a reasonable doubt that such a defendant aided and abetted; that is, assisted a public official who was committing this crime to commit this crime.

The District Court went on to instruct the jury that:

> Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime.
>
> In order to be found guilty of aiding and abetting the commission of a crime, the government must prove beyond a reasonable doubt that the defendant:
> First, knew that the crime charged was to be committed or was being committed.
> Second, knowingly did some act for the purpose of aiding the commission of that crime.
> And third, acted with the intention of causing the crime charged to be committed.

These instructions contained the direct link between Hawkins's actions and the specific scheme that was charged in the indictment-the scheme to deprive the public of Kemp's honest services-that was lacking in Dobson. The instructions left no danger that Hawkins would be convicted for aiding and abetting some other scheme.

Kemp, 500 F.3d at 300.

In some cases, the defendant may claim to have withdrawn from the scheme to defraud. In *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir. 1982), the Third Circuit discussed the correct way to address such a claim:

> The controlling precepts are familiar and require only a brief restatement. Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal. The defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals. When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, however, the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal. (Citations omitted.)

In *United States v. Detelich*, 351 F. App'x. 616, 620 (3d Cir. 2009) (non-precedential), the Third Circuit rejected the defendant's argument that the jury instruction on the question of withdrawal improperly shifted the burden:

> The District Court instructed the jury that they must find that Detelich "completely withdrew from the scheme. A partial or temporary withdrawal is not sufficient." The Court continued, "If you find that the defendant produced evidence that he withdrew from this scheme before November 3, 2000, the government cannot rest on its proof that he participated at one time in the illegal scheme. In that circumstance, the government has the burden to prove beyond reasonable doubt that the defendant was participating in the scheme on or after November 3, 2000."

See also Instruction 6.18.371J (Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy).

(Revised 2017)

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(Criminal Cases)

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MAIL FRAUD; MONEY/PROPERTY OR HONEST SERVICES
18 U.S.C. § 1341
[18 U.S.C. § 1346]

Title 18, United States Code, Section 1341, makes it a crime for anyone to use the mails [any private or commercial interstate carrier] in carrying out a scheme to defraud.

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

First: That the defendant knowingly devised or intended to devise a scheme to defraud, that is _____ (describe scheme from the indictment);

Second: That the scheme to defraud employed false material representations [false material pretenses] [false material promises];

Third: That the defendant mailed something [caused something to be [sent] [delivered]] through the United States Postal Service [a private or commercial interstate carrier] for the purpose of executing such scheme or attempting so to do; and

Fourth: That the defendant acted with a specific intent to defraud.

A "scheme to defraud" means any plan, pattern, or course of action intended to deprive another of money or property. [It can also involve any scheme to deprive an employer [shareholders] [citizens] [government agency] of the intangible right to honest services through soliciting or accepting bribes or kickbacks. [Define "bribery" pursuant to 18 U.S.C. §§ 201(b) or

665(a)(2) or state law; define "kickback" pursuant to 41 U.S.C. § 52(2) or state law].]

A "specific intent to defraud" means a conscious, knowing intent to deceive or cheat someone.

A representation [pretense] [promise] is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation [pretense] [promise] would also be "false" if it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with the intent to defraud.

A representation [pretense] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme. What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud by means of false or fraudulent pretenses, representations, or promises that was substantially the same as the one alleged in the indictment.

It is also not necessary that the government prove that the mailed material [material sent by private or commercial interstate carrier] was itself false or fraudulent, or that the use of the mail [a private or commercial interstate carrier] was intended as the specific or exclusive means of accomplishing the alleged fraud. What must be proved beyond a reasonable doubt is that the use of the mails [private or commercial interstate carrier] was closely related to the scheme because the defendant either mailed something or caused it to be mailed [defendant either sent or delivered something or caused it to be sent or delivered by a private or com-

mercial interstate carrier] in an attempt to execute or carry out the scheme.

The alleged scheme need not actually have succeeded in defrauding anyone.

To "cause" the mails [private or commercial interstate carrier] to be used is to do an act with knowledge that the use of the mails [private or commercial interstate carrier] will follow in the ordinary course of business or where such use can reasonably be foreseen even though the defendant did not intend or request the mails [private or commercial interstate carrier] to be used.

Each separate use of the mails [a private or commercial interstate carrier] in furtherance of a scheme to defraud by means of false or fraudulent pretenses, representations, or promises constitutes a separate offense.

Note

This instruction incorporates 18 U.S.C. § 1346, which states that, "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." That language should be in the jury charge only if the indictment alleges § 1346. *See United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003). In *Skilling v. United States*, the Supreme Court held that "honest services" fraud under § 1346 consists only of bribery and kickbacks, not undisclosed self-dealing. 130 S. Ct. 2896, 2931–32 (2010); *see also United States v. Barraza*, 655 F.3d 375, 382 (5th Cir. 2011). Section 1346 reaches both private and public sector fraud. *See Skilling*, 130 S. Ct. at 2934 n.45. The Fifth Circuit has held that § 1346 prosecutions may involve bribery and kickbacks as defined by federal or state law. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012).

"The government need not establish that the defendant used the mails himself or that he actually intended that the mails be used. The government need only prove that the scheme depended for its success in some way upon the information and documents which passed through the mail." *United States v. Akpan*, 407 F.3d

360, 370 (5th Cir. 2005); *see also Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138 (2008) ("Any mailing that is incident to an essential part of the scheme satisfies the mailing element, even if the mailing itself contains no false information.") (internal quotation marks omitted); *United States v. Traxler*, 764 F.3d 486, 488–91 (5th Cir. 2014); *United States v. Ingles*, 445 F.3d 830, 835 (5th Cir. 2006) (discussing requirement that mail be "incidental" to an essential part of the scheme and the meaning of "causing" the mail to be used). This may also include a post-purchase mailings "designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect." *See United States v. Strong*, 371 F.3d 225, 230 n.3 (5th Cir. 2004); *but see United States v. Evans*, 148 F.3d 477, 483 (5th Cir. 1998) (a mailing after the scheme to defraud already "reached fruition" did not constitute mail fraud).

The Fifth Circuit has also held that there is no requirement that "the victim who loses money or property in a mail fraud scheme also be the party that was deceived by the defendant's scheme." *United States v. McMillan*, 600 F.3d 434, 449 (5th Cir. 2010). It is irrelevant to whom the misrepresentations are directly made, as long as the object of the fraud is the victim's property and the victim's property rights were affected by the misrepresentations. *Id.*; *see also Ingles*, 445 F.3d at 837 ("Both innocent mailings (i.e. those that do not contain a misrepresentation) and mailings between innocent parties can support a mail fraud conviction."). Actual loss by the victim need not be proven. *See McMillan*, 600 F.3d at 450.

For the elements of mail fraud, see *United States v. Imo*, 739 F.3d 226, 236 (5th Cir. 2014); *United States v. Read*, 710 F.3d 219, 227 (5th Cir. 2012); *McMillan*, 600 F.3d at 447. *See also United States v. Stephens*, 571 F.3d 401, 404 (5th Cir. 2009) ("To prove a scheme to defraud, the Government must show fraudulent activity and that the defendant had a conscious, knowing intent to defraud."); *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994) (stating definition of "false statement"); *United States v. Restivo*, 8 F.3d 274, 280 (5th Cir. 1993) (stating definitions of "scheme to defraud" and "intent to defraud").

Where use of private or commercial interstate carrier is involved, the government need not prove that state lines were crossed, only that the carrier engages in interstate deliveries. *See United States v. Marek*, 238 F.3d 310, 318 (5th Cir. 2001).

The requirement of "materiality of falsehood" is derived from *Neder v. United States*, 119 S. Ct. 1827, 1841 (1999) ("We hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."). *See also United States v.*

Radley, 632 F.3d 177, 185 (5th Cir. 2011). "The test for materiality is whether a misrepresentation 'has a natural tendency to influence, or is capable of influencing, the decisionmaking body to which it was addressed.' " *Radley*, 632 F.3d at 185 (quoting *United States v. Valencia*, 600 F.3d 389, 426 (5th Cir. 2010)).

Because the language of the mail fraud and wire fraud statutes are so similar, cases construing one are applicable to the other. *See United States v. Phipps*, 595 F.3d 243, 245 (5th Cir. 2010). Accordingly, the Note to Instruction No. 2.57, 18 U.S.C. § 1343, Wire Fraud, should also be consulted.

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2351–63 (2000). If these are disputed issues, the court should consider giving a lesser included instruction. *See* Instruction No. 1.33.

2.57

WIRE FRAUD; MONEY/PROPERTY OR HONEST SERVICES
18 U.S.C. § 1343
[18 U.S.C. § 1346]

Title 18, United States Code, Section 1343, makes it a crime for anyone to use interstate [foreign] wire [radio] [television] communications in carrying out a scheme to defraud.

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

First: That the defendant knowingly devised or intended to devise any scheme to defraud, that is _____ (describe scheme from the indictment);

Second: That the scheme to defraud employed false material representations [false material pretenses] [false material promises];

Third: That the defendant transmitted [caused to be transmitted] by way of wire [radio] [television] communications, in interstate [foreign] commerce, any writing [sign] [signal] [picture] [sound] for the purpose of executing such scheme; and

Fourth: That the defendant acted with a specific intent to defraud.

A "scheme to defraud" means any plan, pattern, or course of action intended to deprive another of money or property. [It can also involve any scheme to deprive an employer [shareholders] [citizens] [government agency] of the intangible right to honest services through soliciting or accepting bribes or kickbacks. [Define "bribery" pursuant to 18 U.S.C. §§ 201(b) or

665(a)(2) or state law; define "kickback" pursuant to 41 U.S.C. § 52(2) or state law].]

A "specific intent to defraud" means a conscious, knowing intent to deceive or cheat someone.

A representation [pretense] [promise] is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation [pretense] [promise] would also be "false" if it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with the intent to defraud.

A representation [pretense] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme. What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud by means of false or fraudulent pretenses, representations, or promises that was substantially the same as the one alleged in the indictment.

It is also not necessary that the government prove that the material transmitted by wire [radio] [television] communications was itself false or fraudulent, or that the use of the interstate [foreign] wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud. What must be proved beyond a reasonable doubt is that the use of the interstate [foreign] wire communications facilities was closely related to the scheme because the defendant either wired something or caused it to be wired in interstate [foreign] commerce in an attempt to execute or carry out the scheme.

The alleged scheme need not actually succeed in defrauding anyone.

To "cause" interstate [foreign] wire [radio] [television] communications facilities to be used is to do an act with knowledge that the use of the wire [radio] [television] communications facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate [foreign] wire [radio] [television] communications facilities in furtherance of a scheme to defraud by means of false or fraudulent pretenses, representations, or promises constitutes a separate offense.

Note

On the elements of a wire fraud offense, see *United States v. Radley*, 632 F.3d 177, 184–85 (5th Cir. 2011); *United States v. Dowl*, 619 F.3d 494, 499–500 (5th Cir. 2010); and *United States v. Valencia*, 600 F.3d 389, 430–31 (5th Cir. 2010). *See also United States v. Stephens*, 571 F.3d 401, 404 (5th Cir. 2009); *United States v. Ford*, 558 F.3d 371, 375 (5th Cir. 2009); *United States v. Brown*, 459 F.3d 509, 518 (5th Cir. 2006); *United States v. Freeman*, 434 F.3d 369, 377 (5th Cir. 2005); *United States v. Rivera*, 295 F.3d 461, 466 (5th Cir. 2002).

In wire fraud schemes, "the wire need not be an essential element of the scheme; rather, it is sufficient for the wire to be incident to an essential part of the scheme or a step in the plot. The underlying question is whether the [use of the wire] somehow contributed to the successful continuation of the scheme—and, if so, whether [it was] so intended by the defendant." *United States v. Barraza*, 655 F.3d 375, 383 (5th Cir. 2011) (citations omitted) (holding that an email was sufficient to sustain a wire fraud conviction); *see also United States v. Phipps*, 595 F.3d 243, 246–47 (5th Cir. 2010) (holding a single fax, not sent by the defendant and incidental to the scheme, to be sufficient to support a charge of wire fraud). The Committee notes that, as technology advances, the definition of what constitutes a "wire" becomes unclear and the instruction may need to be altered accordingly. *See United States v. Nunez*, 78 F. App'x 989, 991 (5th Cir. 2003) (upholding wire fraud conviction when scheme used cell phone).

"Once membership in a scheme to defraud is established, a

knowing participant is liable for any wire communication which subsequently takes place or which previously took place in connection with the scheme." *United States v. Dula*, 989 F.2d 772, 778 (5th Cir. 1993); *see also United States v. Arledge*, 553 F.3d 881, 892 (5th Cir. 2008).

The requirement of "materiality of falsehood" is derived from *Neder v. United States*, 119 S. Ct. 1827, 1841 (1999) ("[W]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."). *See also Radley*, 632 F.3d at 185. "The test for materiality is whether a misrepresentation 'has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed.' " *Id.* (quoting *Valencia*, 600 F.3d at 426).

This instruction incorporates 18 U.S.C. § 1346, which states that, "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." That language should be in the jury charge only if the indictment alleges § 1346. *See United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003). In *Skilling v. United States*, the Supreme Court held that "honest services" fraud under § 1346 consists only of bribery and kickbacks, not undisclosed self-dealing. 130 S. Ct. 2896, 2931–32 (2010); *see also United States v. Barraza*, 655 F.3d 375, 382 (5th Cir. 2011). Section 1346 reaches both private and public sector fraud. *See Skilling*, 130 S. Ct. at 2934 n. 45. The Fifth Circuit has held that § 1346 prosecutions may involve bribery and kickbacks as defined by federal or state law. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012).

The Note to Instruction No. 2.56, 18 U.S.C. § 1341, Mail Fraud, should also be consulted generally. Because the language of the mail fraud and wire fraud statutes are so similar, cases construing one are applicable to the other. *See Phipps*, 595 F.3d at 245.

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. *See Apprendi v. New Jersey*, 120 S. Ct. 2348, 2351–63 (2000). If these are disputed issues, the court should consider giving a lesser included instruction. *See* Instruction No. 1.33.

PATTERN CRIMINAL JURY INSTRUCTIONS

Prepared by
Sixth Circuit Committee
on Pattern Criminal Jury Instructions

Updated as of January 1, 2019

Chapter 10.00

FRAUD OFFENSES

Introduction to Fraud Instructions
(current through January 1, 2019)

The pattern instructions cover fraud offenses with five elements instructions:

Instruction 10.01 Mail Fraud (18 U.S.C. § 1341);
Instruction 10.02 Wire Fraud (18 U.S.C. § 1343);
Instruction 10.03A Bank Fraud Scheme to Defraud a Bank (18 U.S.C. § 1344(1));
Instruction 10.03B Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)); and
Instruction 10.05 Health Care Fraud (18 U.S.C. § 1347).

In addition, Instruction 10.04 covers the good faith defense.

The elements of mail and wire fraud are similar except for the jurisdictional elements. The Committee drafted separate instructions for the two offenses as the most efficient way to reflect the different jurisdictional bases. Beyond the jurisdictional bases, the mail and wire fraud offenses are read in tandem and case law on the two is largely interchangeable. See Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); United States v. Daniel, 329 F.3d 480, 486 n.1 (6th Cir. 2003); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) ("This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.") (citations omitted).

The crime of bank fraud is distinguishable from mail and wire fraud. The two numbered clauses in the bank fraud statute have "separate meanings." Loughrin v. United States, 134 S. Ct. 2384, 2391 (2014). Instructions 10.03A Bank Fraud Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and 10.03B Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)) reflect these different clauses.

These instructions do not cover fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

10.01 MAIL FRAUD (18 U.S.C. § 1341)

(1) Count ___ of the indictment charges the defendant with mail fraud. For you to find the defendant guilty of mail fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to obtain money or property, that is _____ [*describe scheme from indictment*];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used the mail] [caused another to use the mail] in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

(B) The term "false or fraudulent pretenses, representations or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(C) An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(F) To "cause" the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] [that the material transmitted by mail was itself false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud] [that someone relied on the misrepresentation or false statement] [that the defendant obtained money or property for his own benefit].]

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

Use Note

If the prosecution is based on a violation of § 1341 that relates to a major disaster or affects a financial institution, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If the prosecution is based on a violation of § 1341 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

Throughout the instruction, the word "mail" should be replaced by the term "private or commercial interstate carrier" if the facts warrant.

Paragraph (1)(D) should be amended to include the receipt of mail if the facts warrant.

In paragraph (2)(D), the word "person" should be replaced with entity or corporation or agency as the facts warrant.

The provisions of paragraph (3) should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud Good Faith Defense.

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 10.01
(current through January 1, 2019)

The mail fraud statute provides:

18 U.S.C. § 1341 Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

This instruction does not cover mail fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

To define the elements of mail fraud, the Committee relied primarily on Neder v. United States, 527 U.S.1 (1999); United States v. Gold Unlimited, Inc., 177 F.3d 472 (6th Cir. 1999) and United States v. Frost, 125 F.3d 346 (6th Cir. 1997). The mail fraud and wire fraud statutes are the same except for the jurisdictional element. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) (*citing* United States v. Bibby, 752 F.2d 1116, 1126 (6th Cir. 1985)); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) ("This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.")

The specific language used in paragraph (1) of the instruction is drawn from two cases. Paragraphs (1)(A), (1)(C) and (1)(D) are based on United States v. Gold Unlimited, Inc., *supra* at

478-79. Paragraph (1)(B), which covers materiality, is based on Neder v. United States, *supra*.

In paragraph (1)(A), the statement that the scheme must be a scheme "to obtain money or property" is based on Cleveland v. United States, 531 U.S. 12 (2000) and McNally v. United States, 483 U.S. 350 (1987). In *McNally*, the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to "a scheme to defraud, or for obtaining money or property," it was arguable that the two phrases should be construed independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In *Cleveland*, the Court reiterated this interpretation of the statute:

> We reaffirm our reading of § 1341 in McNally. . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities. . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

Cleveland, 531 U.S. at 25-26.

In paragraph (1)(A) the reference to participation is based on United States v. Kennedy, 714 F.3d 951, 957 (6th Cir. 2013).

The definition of "scheme to defraud" in paragraph (2)(A) is based on United States v. Daniel, 329 F.3d 480, 485-86 (6th Cir. 2003), *citing* United States v. Gold Unlimited, Inc., *supra* at 479. In the instruction, the words "by deception" were omitted because that requirement is adequately covered in paragraph (2)(E) defining intent to defraud. In *Daniel*, the court further states, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Daniel*, 329 F.3d at 486 (brackets and some internal quotation marks omitted), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

The definition of "false or fraudulent pretenses, representations or promises" in paragraph (2)(B) is based on the definition of "false or fraudulent pretenses" in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *Kennedy*, 714 F.3d at 958 ("The government met the mail- and wire-fraud statutes' intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.") (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of "knowingly" in paragraph (2)(C) is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of "material" in paragraph (2)(D) is based on Neder v. United States, *supra* at 16, *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

The "intent to defraud" definition in paragraph (2)(E) is a restatement of the language in United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997). The court quoted this definition with approval in United States v. McAuliffe, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003) (*quoting* United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998)).

The definition of "cause" in paragraph (2)(F) is based on *Frost*, 125 F.3d at 354, *citing* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after First Circuit Instruction 4.12; Fifth Circuit Instruction 2.59; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant. The final bracketed provision, that the government need not prove that the defendant obtained money or property for his own benefit, is based on United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013).

To define the mens rea for mail fraud, some authority requires that the defendant knowingly devised or intended to devise a scheme to defraud, and that the defendant acted with the intent to defraud. The court endorses these terms several times in *Gold Unlimited, Inc.*, 177 F.3d at 478-79, 485, 488. *See also* United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003) (bank fraud requires "intent to defraud"); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001) (same). In other cases, the court has referred to the mens rea as the "specific" intent to defraud, *see, e.g., Daniel*, 329 F.3d at 487; *Frost*, 125 F.3d at 354 ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud . . . ."); United States v. Smith, 39 F.3d 119, 121-22 (6th Cir. 1994). The instruction omits the word "specific." *See also* Committee Commentary to Instruction 2.07 Specific Intent.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge.

In Neder v. United States, *supra* at 25, the Court held that materiality is an element of a "scheme or artifice to defraud" under mail, wire and bank fraud. Although this element is not found in a "natural reading" of the statute, the court relied on the rule of construction " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " 527 U.S. at 21. At common law, the word "fraud" required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate "materiality."

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Id.* at 16, *quoting Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g.*, United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berent v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); and United States v. Bohn, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: "the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice."). In *Frost, supra*, the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *Frost*, 125 F.3d at 371 (affirming instruction which provided, "There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension."). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that "[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence." *Id.* at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the "'ordinary prudence' language was invoked to . . . affirm [a] conviction . . . ." *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* Henderson v. United States, 218 F.2d 14, 19 (6th Cir. 1955); Tucker v. United States, 224 F. 833, 837 (6th Cir. 1915); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904).

Jurisdiction for a mail fraud conviction requires the defendant to deposit, receive, or cause to be deposited any matter or thing to be sent or delivered by the United States Postal Service or any private or commercial interstate carrier for the purpose of executing a scheme to defraud. 18 U.S.C. § 1341.

As to the required connection between the scheme to defraud or obtain property and the use of the mails, the Supreme Court has stated: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . ." Schmuck v. United States, 489 U.S. 705, 710 (1989). The Court explained: "To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part

of the scheme,' or 'a step in [the] plot.'" *Schmuck*, 489 U.S. at 710 (internal citations and quotation marks omitted). The Court then stated: "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Id.* at 715.

A mail fraud conviction can be based on mailings that were legally required. As the court explains, "Further, 'the mailings may be innocent or even legally necessary.'" *Frost*, 125 F.3d at 354, *quoting* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988), *in turn quoting* United States v. Decastris, 798 F.2d 261, 263 (7th Cir. 1986).

It is not necessary that the defendant actually mail the material. *See* 18 U.S.C. § 1341 (mail fraud committed where defendant causes the mails to be used). The Supreme Court has explained that one causes a mailing when "one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." Pereira v. United States, 347 U.S. 1, 8-9 (1954); *accord*, Frost, 125 F.3d at 354 (mailing need only be reasonably foreseeable).

A pyramid scheme is a scheme to defraud. See United States v. Gold Unlimited, Inc., *supra* at 484-85.

If the prosecution is based on a violation of § 1341 that relates to a major disaster or affects a financial institution, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the major disaster or effect on a financial institution must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B). *See also* 18 U.S.C. § 2326 (maximum penalty increased for violation in connection with telemarketing).

It is also a crime to conspire to violate § 1341. Conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft a separate instruction for conspiracy to commit mail fraud because an instruction may be compiled by combining the mail fraud instruction with the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. See United States v. Rogers, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit mail fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (§ 371) Basic Elements should be used as is, but if the conspiracy is charged based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

10.02 WIRE FRAUD (18 U.S.C. § 1343)

(1) Count ___ of the indictment charges the defendant with wire fraud. For you to find the defendant guilty of wire fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to obtain money or property, that is _____ [*describe scheme from indictment*];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used wire, radio or television communications] [caused another to use wire, radio or television communications] in interstate [foreign] commerce in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

(B) The term "false or fraudulent pretenses, representations or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(C) An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(F) To "cause" wire, radio or television communications to be used is to do an act with knowledge that the use of the communications will follow in the ordinary course of business or where such use can reasonably be foreseen.

(G) The term "interstate [foreign] commerce" includes wire, radio or television communications which crossed a state line.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] or [that the material transmitted by wire, radio or television communications was itself false or fraudulent] or [that the alleged scheme actually succeeded in defrauding anyone] or [that the use of the wire, radio or television communications] was intended as the specific or exclusive means of accomplishing the alleged fraud] or [that someone relied on the misrepresentation or false statement] or [that the defendant obtained money or property for his own benefit].]

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

Use Note

If the prosecution is based on a violation of § 1343 that relates to a major disaster or affects a financial institution, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If the prosecution is based on a violation of § 1343 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

In paragraph (2)(D), the word "person" should be replaced with entity or corporation or agency as the facts warrant.

The provisions of paragraph (3) should be used only if relevant to the case.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud Good Faith Defense.

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 10.02
(current through January 1, 2019)

The wire fraud statute provides:

18 U.S.C. § 1343 Fraud by wire, radio, or television

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

This instruction does not cover wire fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

The wire fraud statute was modeled after the mail fraud statute, and therefore the same analysis should be used for both. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987); United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) (*citing* United States v. Bibby, 752 F.2d 1116, 1126 (6th Cir. 1985)). "The wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute." Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988). The only difference in the two offenses is the jurisdictional element.

To define the elements of wire fraud, the Committee relied primarily on Neder v. United States, 527 U.S.1 (1999); United States v. Gold Unlimited, Inc., 177 F.3d 472 (6th Cir. 1999) and United States v. Frost, 125 F.3d 346 (6th Cir. 1997). In the context of wire fraud, the Sixth Circuit identified the elements in United States v. Smith, 39 F.3d 119, 122 (6th Cir. 1994) and United States v. Ames Sintering Company, 927 F.2d 232, 234 (6th Cir. 1990).

The specific language of the instruction is drawn from three sources. Paragraphs (1)(A) and (1)(C) are based on United States v. Gold Unlimited, Inc., *supra* at 478. Paragraph (1)(B), which describes materiality, is based on the language from Neder v. United States, *supra*. Paragraph (1)(D) is based on United States v. Smith, *supra* at 122.

In paragraph (1)(A), the statement that the "scheme to defraud" must be a "scheme to defraud in order to obtain money or property" is based on Cleveland v. United States, 531 U.S. 12 (2000) and McNally v. United States, 483 U.S. 350 (1987). In McNally, the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to "a scheme to defraud, or for obtaining money or property," it was arguable that the two phrases should be construed

independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In *Cleveland*, the Court reiterated this interpretation of the statute:

> We reaffirm our reading of § 1341 in McNally . . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities . . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

Cleveland, 531 U.S. at 25-26.

In paragraph (1)(A) the reference to participation is based on United States v. Kennedy, 714 F.3d 951, 957 (6th Cir. 2013).

In paragraph (1)(D), the phrase "wire, radio or television communications" is drawn from the statute. Some Sixth Circuit cases use the term "electronic communications," *see, e.g.*, United States v. Daniel, 329 F.3d 480, 489 (6th Cir. 2003); VanDenBroeck v. CommonPoint Mortgage Co., 210 F.3d 696, 701 (6th Cir. 2000), *overruled on other grounds*, Bridge v. Phoenix Bond & Indemnity Co., 128 S.Ct. 2131 (2008); United States v. Smith, *supra* at 122.

The definition of "scheme to defraud" in paragraph (2)(A) is based on United States v. Daniel, *supra* at 485-86, *citing* Gold Unlimited, Inc., 177 F.3d at 479. In the instruction, the words "by deception" were omitted because that requirement is adequately covered in paragraph (2)(E) defining intent to defraud. In *Daniel*, the court further states, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Daniel*, 329 F.3d at 486 (6th Cir. 2003) (brackets and some internal quotation marks omitted), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

The definition of "false or fraudulent pretenses, representations or promises" in paragraph (2)(B) is based on the definition of "false or fraudulent pretenses" in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *Kennedy*, 714 F.3d at 958 ("The government met the mail- and wire-fraud statutes' intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.") (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of "knowingly" in paragraph (2)(C) is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of "material" in paragraph (2)(D) is based on Neder v. United States, *supra* at 16, *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

The "intent to defraud" definition in paragraph (2)(E) is a restatement of the language in Frost, 125 F.3d at 371. The court quoted this definition with approval in United States v. McAuliffe, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* United States v. Daniel, *supra* at 487, *quoting* United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998).

The "cause" language in paragraph (2)(F) is drawn from United States v. Frost, 125 F.3d 346, 354 (6th Cir. 1997), *citing* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after the language used in First Circuit Instruction 4.12; Fifth Circuit Instruction 2.61; Eighth Circuit Instruction 6.18; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant. The final bracketed provision, that the government need not prove that the defendant obtained money or property for his own benefit, is based on United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013).

To define the mens rea for wire fraud, some authority requires that the defendant knowingly devised or intended to devise a scheme to defraud, and that the defendant acted with the intent to defraud. The court endorses these terms several times in *Gold Unlimited, Inc.*, 177 F.3d at 478-79, 485, 488. *See also* United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003) (bank fraud requires "intent to defraud"); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001) (same). In other cases, the court has referred to the mens rea as the "specific" intent to defraud, *see, e.g.*, United States v. Daniel, *supra* at 487 (6th Cir. 2003); United States v. Frost, *supra* at 354 ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud...."); United States v. Smith, *supra* at 121-22. The instruction omits the word "specific." *See also* Committee Commentary to Instruction 2.07 Specific Intent.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In Neder v. United States, *supra*, the Court held that materiality is an element of a "scheme or artifice to defraud" under mail, wire and bank fraud. Although this element is not found in a "natural reading" of the statute, the court relied on the rule of construction " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " 527 U.S. at 21. At common law, the word "fraud" required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate "materiality."

The definition of materiality is as follows: "In general, a false statement is material if it

has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Id.* at 16, *quoting Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g.*, United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berent v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); and United States v. Bohn, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: "the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice."). In *Frost, supra*, the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *Frost*, 125 F.3d at 371 (affirming instruction which provided, "There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension."). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that "[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence." *Id.* at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the "'ordinary prudence' language was invoked to . . . affirm [a] conviction . . . ." *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* Henderson v. United States, 218 F.2d 14, 19 (6th Cir. 1955); Tucker v. United States, 224 F. 833, 837 (6th Cir. 1915); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904).

As to the required connection between the scheme to defraud and the use of the wires, in the context of mail fraud the Supreme Court has stated: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . ." Schmuck v. United States, 489 U.S. 705, 710 (1989). The Court explained: "To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.'" *Id.* at 710-11 (internal citations and quotation marks omitted). The Court then stated: "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Id.* at 715.

A pyramid scheme is a scheme to defraud. *See Gold Unlimited, Inc.*, 177 F.3d at 484-85.

If the prosecution is based on a violation of § 1343 that relates to a major disaster or affects a financial institution, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the major disaster or effect on a financial institution must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B). *See also* 18 U.S.C. § 2326 (maximum penalty increased for violation in connection with telemarketing).

It is also a crime to conspire to violate § 1343. Conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft a separate instruction for conspiracy to commit wire fraud because an instruction may be compiled by combining the wire fraud instruction with the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. See United States v. Rogers, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit wire fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (§ 371) Basic Elements should be used as is, but if the conspiracy is charged under § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT

(2012 Ed.)

(plus 2015-2017 changes)

Prepared by
The Committee on Federal Criminal Jury Instructions
of the Seventh Circuit

18 U.S.C. §§ 1341 & 1343 MAIL/WIRE/CARRIER FRAUD - ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [mail] [wire] [carrier] fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. That the defendant knowingly [devised] [or] [participated in] a scheme [to defraud], as described in Count[s] ___; and

2. That the defendant did so with the intent to defraud; and

3. The scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and

4. That for the purpose of carrying out the scheme or attempting to do so, the defendant [used [or caused the use of]] [the United States Mails] [a private or commercial interstate carrier] [caused interstate wire communications to take place] in the manner charged in the particular count.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

Section 1341 (and § 1343) of Title 18 begins, "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...." The 1999 pattern instruction set forth the elements as if there are two separate types of prohibited schemes, using bracketed language to signify the different types: a scheme "[to defraud] [or] [to obtain money or property by means of false pretenses, representations, or promises]." In other words, the current pattern instruction treats § 1341 as prohibiting (a) schemes to defraud and (b) schemes to obtain money or property by false representations.

To conform the instruction to controlling case law and to improve the instruction's comprehensibility, the Committee proposes that the instruction refer only to a singular "scheme to defraud," with another instruction further defining "scheme to defraud." In *Cleveland v. United States*, 531 U.S. 12, 25–26 (2000), the Supreme Court rejected the argument that § 1341 prohibits two separate types of schemes. The Supreme Court acknowledged that, "[b]ecause the two

phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." *Id.* at 26. But the Court rejected that interpretation and reaffirmed a prior decision that had construed the second phrase—the "for obtaining money or property" phrase—as "simply modif[ying] the first" to make clear that the statute covered false representations as to future events, not just already-existing facts. *Id.* (citing *McNally v. United States*, 483 U.S. 350, 359 (1987)). Accordingly, the pattern instruction should refer only to a "scheme to defraud," with a further instruction defining that term, and should not refer to a separate scheme to obtain money or property.

Another substantive change involves the addition of the materiality element. See *Neder v. United States*, 527 U.S. 1 (1999). Cases recommend inclusion of the materiality element in jury instructions. See *United States v. Fernandez*, 282 F.3d 500, 509 n. 6 (7th Cir. 2002); *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 2000).

Because the honest services statute defines a form of a "scheme to defraud," *United States v. Boscarino*, 437 F.3d 634, 636 (7th Cir. 2006), it has not been separately identified as a type of mail/wire/carrier fraud in the elements instruction.

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.

6.18.1341 MAIL FRAUD (18 U.S.C. § 1341)

The crime of [mail] fraud, as charged in [Count ____ of] the Indictment, has [three] [four] elements, which are:

One, the defendant voluntarily and intentionally [devised or made up a scheme to defraud another out of [money, property or property rights][1] [participated in a scheme to defraud with knowledge of its fraudulent nature] [devised or participated in a scheme to obtain [money, property or property rights] by means of material false representations or promises][2] [which scheme is described as follows: (describe scheme in summary form or in manner charged in the Indictment)];[3]

Two, the defendant did so with the intent to defraud; [and]

Three, the defendant used, or caused to be used, [the mail] [a private interstate carrier, that is, (name carrier)] [a commercial interstate carrier, that is, (name carrier)][4] in furtherance of, or in an attempt to carry out, some essential step in the scheme; [and]

[*Four*, the scheme was in connection with the conduct of telemarketing.]

or

[*Four*, the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Four*, the scheme affected a financial institution.][5]

[The phrase "scheme to defraud" includes any plan or course of action intended to deceive or cheat another out of [money, property or property rights] by [employing material falsehoods] [concealing material facts] [omitting material facts].[6] It also means the obtaining of [money or property] from another by means of material false representations or promises. A scheme to defraud need not be fraudulent on its face but must include some sort of fraudulent misrepresentation or promise reasonably calculated to deceive a reasonable person.][7]

A statement or representation is "false" when it is untrue when made or effectively conceals or omits a material fact.[8]

A [fact] [falsehood] [representation] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction.[9] [However, whether a [fact] [falsehood] [representation] [promise] is "material" does not depend on whether the person was actually deceived.][10]

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some [financial loss] [loss of property or property rights] to another or bringing about some financial gain to oneself or another to the detriment of a third party.[11] [With respect to false statements, the defendant must have known the statement was untrue when made or have made the statement with reckless indifference to its truth or falsity.][12]

[The term "property rights," as used in the mail fraud statute, includes intangible as well as tangible property rights. It includes any property right which has a value—not necessarily a monetary value—to the owner of the property right. For example, a scheme to

deprive a company of the exclusive use of confidential business information obtained by the employees would be a scheme to deprive the company of intangible property rights.][13]

It is not necessary that the use of [the mail] [an interstate carrier] by the participants themselves be contemplated or that the defendant do any actual [mailing] [sending of material by an interstate carrier] or specifically intend that [the mail] [an interstate carrier] be used. It is sufficient if [the mail] [an interstate carrier] was in fact used to carry out the scheme and the use of [the mail] [an interstate carrier] by someone was reasonably foreseeable.[14]

[Mailings] [Deliveries by an interstate carrier] which are designed to lull victims into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are [mailings] [deliveries] in furtherance of the scheme.][15]

[Each separate use of [the mail] [an interstate carrier] in furtherance of the scheme to defraud constitutes a separate offense.][16]

[The [mail] fraud counts of the Indictment charge that each defendant, along with the other defendants, devised or participated in a scheme. The [government] [prosecution] need not prove, however, that the defendants met together to formulate the scheme charged, or that there was a formal agreement among them, in order for them to be held jointly responsible for the operation of the scheme and the use of [the mail] [an interstate carrier] for the purpose of accomplishing the scheme. It is sufficient if only one person conceives the scheme and the others knowingly, voluntarily and intentionally join in and participate in some way in the operation of the scheme in order for such others to be held jointly responsible.][17]

[It is not necessary that the [government] [prosecution] prove [all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme] [that the material [mailed] [sent by an interstate carrier] was itself false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of [the mail] [an interstate carrier] was intended as the specific or exclusive means of accomplishing the alleged fraud].][18]

[If you find proof beyond a reasonable doubt of a business custom (describe custom, e.g., to date stamp only items received through the mail), that is evidence from which you may, but are not required to, find or infer that [the mail] [an interstate carrier] was used to deliver those items.][19]

[Insert paragraph describing [government's] [prosecution's] burden of proof; *see* Instruction 3.09, *supra*.]

Notes on Use

1. For a violation of 18 U.S.C. § 1346 (depriving another of the intangible right of honest services), *see* 6.18.1346.

2. The proper mail fraud theory charged in the indictment should be selected and included in the body of the instruction. If more than one theory is part of the evidence in the case, and the theories constitute a separate offense or an element of the offense, such alternatives can be submitted in the disjunctive and the jury instructed that all jurors must agree as to the particular theory. *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997). In such a case, the jury may be instructed as follows:

> You need not find that all of the theories charged in Count ____ of the Indictment are proven; instead, you must find unanimously and beyond a reasonable doubt that at least one of the theories set out in Count ____ of the Indictment is proven.

If more than one false promise or statement is part of the evidence in the case, and the promises or statements set out different ways of committing the offense but do not constitute a separate of-

fense or an element of the offense, then the jury may be instructed that all the jurors need not agree as to the particular theory, or the particular false promise or statement, that was made. In such a case, the jury may be instructed as follows:

> Count ___ of the Indictment accuses the defendant of committing the crime of ___ in more than one possible way. The first is that he ___. The second is that he ___. The [government] [prosecution] does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all twelve of you must agree that at least one of these has been proved; however, all of you need not agree that the same one has been proved.

See Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), in which the Supreme Court rejected the approach of requiring unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id.* at 630–33. On the other hand, if the means used to commit an offense are deemed an element of the crime, unanimity is required. *See also Richardson v. United States*, 526 U.S. 813, 817 (1999) (plurality opinion), in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Id.* On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used *to commit an element of the crime*." *Richardson*, 526 U.S. at 817 (citing *Schad v. Arizona*, 501 U.S. 624 (1991)).

3. In a simple case a brief description of the fraud should be given in the first element. An example would be:

> *One*, that the defendant devised a scheme to defraud the brokerage firm of Smith & Jones by pledging counterfeit stock certificates as collateral on margin loans given to the defendant, thus causing a loss to Smith & Jones of 5 million dollars.

Some schemes will be too complicated to lend themselves to short descriptions. In those schemes the court may more fully summarize the scheme or refer to the description of the scheme contained in

the indictment.

In submitting a summary of the scheme to the jury, the court should be aware that on occasion some allegations and misrepresentations charged in the indictment are not proven. These may be deleted from the summary; however, the court should be aware that if many allegations are not proven, there may be a material and prejudicial variance between what is alleged in the indictment and what is proven at trial.

4. 18 U.S.C. § 1341 covers schemes carried out by depositing matter to be sent or delivered by any private or commercial interstate carrier.

5. A fourth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1341, 2326, including increased minimum sentences. *See Alleyne v. United States*, 133 S. Ct. 2151, 2013 WL 2922116 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Consideration should also be given to the use of a special verdict form (interrogatories to follow finding of guilt).

6. "Intent to defraud" and "scheme to defraud" should be defined in the instruction. A scheme to defraud need not be fraudulent on its face. *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993).

7. The mail and wire fraud statutes provide independent and distinct avenues for violating the statute, the first two of which are (1) a scheme or artifice to defraud, and (2) a scheme or artifice to obtain money or other property by means of false or fraudulent pretenses, representations, or promises. If the scheme is under the second alternative (i.e., a scheme to obtain money or property by means of false or fraudulent pretenses or representations), it must involve some sort of fraudulent misrepresentation or omission reasonably calculated to deceive persons of ordinary prudence and comprehension, *Goodman*, 984 F.2d at 237, and some loss or at least an attempt to cause a loss. *United States v. Steffen*, 687 F.3d 1104, 1111–13 (8th Cir. 2012). If the scheme is under the first alternative of the statute (i.e., a scheme to defraud"), there are no similar requirements; the scheme to defraud may be established by demonstrating either an affirmative misrepresentation, *id.*, or an actual or intended loss, *id.* at 1110, but the scheme must be "reasonably calculated to deceive persons of ordinary prudence." *Id.* at 1113 (citing *United States v. McNeive*, 536 F.2d 1245, 1249 n.10 (8th Cir. 1976)). If the scheme is under the first alternative (a

scheme to defraud) and there is no affirmative misrepresentation, the instruction should be modified accordingly. For further discussion of the *Steffen* case, *see* Committee Comments to 6.18.1344.

8. *Preston v. United States*, 312 F.3d 959 (8th Cir. 2002).

9. *Preston v. United States*, 312 F.3d 959 (8th Cir. 2002).

10. *See United States v. Henderson*, 416 F.3d 686 (8th Cir. 2005) (material under 42 U.S.C. § 408(a)(3, 4); *United States v. Mitchell*, 388 F.3d 1139 (8th Cir. 2004) (18 U.S.C. § 1001 (materiality)).

11. *United States v. Ervasti*, 201 F.3d 1029 (8th Cir. 2000). False statements have been defined as those which were known to be untrue at the time they were made, or made with reckless indifference as to their truth or falsity, and made with the intent to deceive. *United States v. Marley*, 549 F.2d 561 (8th Cir. 1977). Reckless indifference is sufficient in these cases, and a deliberate ignorance instruction, Model Instruction 7.04, should not be necessary. *Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991), is not applicable to these cases.

12. *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985).

13. This is not meant to include the intangible right of honest services (18 U.S.C. § 1346), for which see 6.18.1346.

In *Carpenter v. United States*, 484 U.S. 19 (1987), the Supreme Court adopted a very broad definition of property rights under the mail and wire fraud statutes. The Court stated that the statute covered intangible as well as tangible property rights and included the *Wall Street Journal*'s right to control the use of information obtained by its reporters in the course of their duties. The Court held that the right of the *Journal* to decide how and when to use its confidential business information obtained by its reporters was a property right and that a scheme to deprive the *Journal* of this confidential business information was a scheme within the scope of the mail fraud statutes, even if no monetary loss to the *Journal* was caused by the scheme.

In *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990), the court held that the right to exercise control over spending is a property right protected by the mail fraud statute and approved the following instruction:

The term "property rights" as used in the mail fraud statute

includes intangible as well as tangible property. Intangible property rights include any valuable right considered as a source of wealth, and include the right to exercise control over how one's money is spent.

See also United States v. Granberry, 908 F.2d 278 (8th Cir. 1990).

However, the Supreme Court held in *Cleveland v. United States*, 532 U.S. 12 (2000), that state and municipal licenses are not property under the mail fraud statute.

14. *See Pereira v. United States*, 347 U.S. 1, 8–9 (1954), which holds as follows:

> The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Young*, 232 U.S. 155 (1914). Here, the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established. There remains only the question whether Pereira "caused" the mailing. That question is easily answered. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. *United States v. Kenofskey*, 243 U.S. 440 (1917).

This Circuit has defined "reasonably foreseeable" in a variety of contexts. In a mail fraud scheme in which an insurance company was a victim, the court stated as follows:

> One who engages in carrying out a scheme to defraud is therefore responsible . . . for a use made of the mail to effect a necessary or facilitating incident thereof where such use is from the nature of the business and the incident one of such ordinary course as to constitute a matter of natural expectability. A use of the mail which is of such a general expectable occurrence is entitled to be found to be reasonably foreseeable. Thus, we observed generally . . . as to the ordinary course of such an insurance business as is here involved:
>
> > Certainly in dealing with insurance agents it will be contemplated that the mails will have to be employed in

> carrying on business with the different companies for whom the agent does business.

United States v. Minkin, 504 F.2d 350, 353–54 (8th Cir. 1974) (citation omitted).

In *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979), the court held:

> Conduct is within the mail fraud statute when, as in this case, the use of the mails for the purpose of executing the flow of payoff funds is a reasonably foreseeable possibility in furthering the transaction.

See also United States v. Rabbitt, 583 F.2d 1014, 1022–23 (8th Cir. 1978).

In *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976), the court stated:

> [T]hus . . . Brown was on notice that transfer of funds from Reliance to Mansion House by mail rather than by hand delivery was a reasonable possibility. This was sufficient evidence from which the jury could find that Brown caused the use of the mails to accomplish the ultimate objective of the scheme.

15. *United States v. Sampson*, 371 U.S. 75 (1962); *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976); *United States v. Tackett*, 646 F.2d 1240, 1243 (8th Cir. 1981).

In *Schmuck v. United States*, 489 U.S. 705, 713 (1989), the Court held that all mailings that are in any way part of the execution of the scheme will supply the mailing element of the offense even if the mailing later may turn out to be counterproductive and allow the discovery of the scheme.

16. *Atkinson v. United States*, 344 F.2d 97 (8th Cir. 1965); *United States v. Calvert*, 523 F.2d 895, 903 n.6, 914 (8th Cir. 1975).

17. *Reistroffer v. United States*, 258 F.2d 379, 395 (8th Cir. 1958); *United States v. Porter*, 441 F.2d 1204, 1211 (8th Cir. 1971).

18. *See United States v. West*, 549 F.2d 545, 552 (8th Cir. 1977); *United States v. Gross*, 416 F.2d 1205, 1210 (8th Cir. 1969); *Atkinson v. United States*, 344 F.2d 97, 98 (8th Cir. 1965); *United States v. Calvert*, 523 F.2d 895, 912 (8th Cir. 1975) (use of mail need not be specifically nor exclusively intended).

19. *United States v. Shyres*, 898 F.2d 647, 658 (8th Cir. 1990); *United States v. Cady*, 567 F.2d 771, 775 (8th Cir. 1977); *United States v. Minkin*, 504 F.2d 350, 352–53 (8th Cir. 1974); *United States v. Joyce*, 499 F.2d 9, 17 (7th Cir. 1974); *Bolen v. United States*, 303 F.2d 870, 875 (9th Cir. 1962). Likewise mailing can be inferred from the presence of a regular postmark. *United States v. Noelke*, 1 Fed. 426 (C.C.N.Y. 1880). *See also* Instruction 4.13, *supra*, on specific inferences.

Committee Comments

The crime of mail fraud is very broad in scope. As the Eighth Circuit restated in *United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987):

> The crime of mail fraud is broad in scope; . . . the fraudulent aspect of the scheme to "defraud" is measured by a nontechnical standard . . . . Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of the members of society." This is indeed broad. For as Judge Holmes once observed, "The law does not define fraud; it needs no definition. It is as old as falsehood and as versatile as human ingenuity."

The definition of "scheme" as used in these instructions is very old and is similar to one of the first definitions used in this circuit in *United States v. Dexter*, 154 Fed. 890, 896 (N.D. Ia. 1907). The court there stated:

> A scheme may be said to be a design or plan formed to accomplish some purpose. An artifice may be said to be an ingenious contrivance or device of some kind and when use in a bad sense of the word corresponds with trick or fraud. Hence, a scheme or artifice to defraud within the meaning of this statute would be to form some plan or devise some trick to perpetrate a fraud upon another.

The scheme must be one "reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993), and must employ material falsehoods. *Neder v. United States*, 527 U.S. 1 (1999). A scheme under the statute encompasses false representations as to future intentions as well as existing facts. *Durland v. United States*, 161 U.S. 306 (1896). Indeed, as stated above, a scheme to defraud

may be actionable even though no actual misrepresentations are made. *See United States v. Clausen*, 792 F.2d 102, 104–05 (8th Cir. 1986). A scheme to defraud may also involve the concealment of material facts. *United States v. Bessesen*, 433 F.2d 861, 863, 864 (8th Cir. 1970).

Because of the diverse types of mail fraud schemes prosecuted, it is difficult to tailor a "model" instruction that does not refer to the indictment in the case. Because of the broad application of the mail fraud statute, it will be necessary to define certain terms in the instructions to the jury.

In *Clausen*, the court stated that the mail fraud statute prohibited both schemes to defraud *and* the obtaining of money and property by means of false pretenses. The court held that false pretenses were not essential in order to prove a scheme to defraud. Thus, it is proper to instruct the jury that the mail fraud statute may be violated either by devising a scheme to defraud or by obtaining money or property by means of false or fraudulent pretenses, representations or promises.

One who participates in an ongoing mail fraud devised by others is guilty of the crime of mail fraud. *United States v. Wilson*, 506 F.2d 1252, 1258 (7th Cir. 1974).

Intent to defraud is an element of mail fraud. *DeMier v. United States*, 616 F.2d 366, 369 (8th Cir. 1980). Thus, good faith can be a theory of defense. *United States v. Arnold*, 543 F.2d 1224 (8th Cir. 1976). A defendant is entitled to an instruction on a good-faith theory of defense and one should be given if there is evidence to support the theory, *United States v. Casperson*, 773 F.2d 216, 222–24 (8th Cir. 1985); *United States v. Sherer*, 653 F.2d 334, 337 (8th Cir. 1981), but not where the defendant denies the conduct which is charged and the issue is one of credibility. *United States v. Kimmel*, 777 F.2d 290, 292–93 (5th Cir. 1985). *See* Instruction 9.08, *infra*, for good-faith instructions.

The elements of wire fraud in violation of 18 U.S.C. § 1343 are identical to the elements of mail fraud with one exception; the defendant must cause interstate wire facilities to be used instead of the mail. *See generally, United States v. Tackett*, 646 F.2d 1240, 1242–43 (8th Cir. 1981); *United States v. Mendenhall*, 597 F.2d 639, 641 (8th Cir. 1979); *United States v. West*, 549 F.2d 545, 549–53 (8th Cir. 1977); *United States v. Gross*, 416 F.2d 1205, 1209–10 (8th Cir. 1969). *But see United States v. Bryant*, 766 F.2d 370 (8th Cir. 1985).

6.18.1341 CRIMINAL INSTRUCTIONS

Each use of the mail or the wires is a separate offense notwithstanding the fact that the defendant devised only one scheme to defraud. *See, e.g., United States v. Massa*, 740 F.2d 629, 645–46 (8th Cir. 1984); *United States v. Calvert*, 523 F.2d 895, 914 (8th Cir. 1975).

If a conspiracy to commit mail fraud is charged, one should be aware that the Eighth Circuit at the present time requires proof that the conspiracy "contemplated the use of the mails," *United States v. Donahue*, 539 F.2d 1131, 1135, 1136 (8th Cir. 1976). That decision relied heavily on the case of *Blue v. United States*, 138 F.2d 351 (6th Cir. 1943). In *United States v. Reed*, 721 F.2d 1059 (6th Cir. 1983), the Sixth Circuit rejected *Blue* in its entirety and held that only a reasonably foreseeable use of the mail need be proven in a conspiracy case. Of the circuits which have decided this issue, it appears that only the Eighth Circuit requires that a mail fraud conspiracy "contemplate the use of the mails." *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977). Of note, however, the Eighth Circuit held in *United States v. Fiorito*, 640 F.3d 338, 349 (8th Cir. 2011), that it did "need not address the continuing vitality of *Donahue*," as it was harmless error for the district court to give an instruction that use of the mails was "reasonably foreseeable" and refuse an instruction that required the jury to find that the scheme "contemplated use of mails."

6.18.1343 WIRE FRAUD (18 U.S.C. § 1343)

The crime of wire fraud,[1] as charged in [Count ___of] the indictment, has [three][four] elements:

One, the defendant voluntarily and intentionally [devised or made up a scheme to defraud another out of [money, property or property rights] [participated in a scheme to defraud with knowledge of its fraudulent nature] [devised or participated in a scheme to obtain [money, property or property rights] by means of material false representations or promises][2,3] [which scheme is described as follows: (describe scheme in summary form or in manner charged in the indictment)];[4]

Two, the defendant did so with the intent to defraud;[5] [and]

Three, the defendant used, or caused to be used, an interstate wire communication, that is, (describe the communication, i.e., a fax, an e-mail, a wire transfer of funds), in furtherance of, or in an attempt to carry out, some essential step in the scheme[.][; and]

[Four, the scheme was in connection with the conduct of telemarketing.]

or

[Four, the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) Targeted persons over the age of 55.]

or

[*Four*, the scheme affected a financial institution.][6]

[The phrase "scheme to defraud" includes any plan or course of action intended to deceive or cheat another out of [money, property or property rights] by [employing material falsehoods] [concealing material facts] [omitting material facts]. It also means the obtaining of [money or property] from another by means of material false representations or promises. A scheme to defraud need not be fraudulent on its face but must include some sort of fraudulent misrepresentation or promise reasonably calculated to deceive a reasonable person.][7]

A statement or representation is "false" when it is untrue when made or effectively conceals or omits a material fact.[8]

A [fact] [falsehood] [representation] [promise] is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction.[9] [However, whether a [fact] [falsehood]

[representation] [promise] is "material" does not depend on whether the person was actually deceived.][10]

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some [financial loss] [loss of property or property rights] to another or bringing about some financial gain to oneself or another to the detriment of a third party.[11] [With respect to false statements, the defendant must have known the statement was untrue when made or have made the statement with reckless indifference to its truth or falsity.][12]

[The term "property rights" includes intangible as well as tangible property rights. It includes any property right which has a value – not necessarily a monetary value – to the owner of the property right. For example, a scheme to deprive a company of the exclusive use of confidential business information obtained by the employees would be a scheme to deprive the company of intangible property rights.][13]

[It is not necessary that the use of the (describe interstate wire communication, e.g., fax) by the participants themselves be contemplated or that the defendant actually (describe interstate wire communication, e.g., send a fax) or specifically intend that (describe interstate wire communication, e.g., a fax) be [used] [sent]. It is sufficient if (describe interstate wire communication, e.g., a fax) was in fact [used] [sent] to carry out the scheme and the use of a [describe interstate wire communication, e.g., fax] by someone was reasonably foreseeable.][14]

[(Describe wire communications, e.g., faxes) which are designed to lull victims into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are wire communications in furtherance of the scheme.][15]

[Each separate (describe wire communication, e.g., fax) in furtherance of the scheme to defraud constitutes a separate offense.][16]

[The wire fraud counts of the indictment charge that each defendant, along with the other defendants, devised or participated in a scheme. The [government] [prosecution] need not prove, however, that the defendants met together to formulate the scheme charged, or that there was a formal agreement among them, in order for them to be held jointly responsible for the operation of the scheme and the use of a (describe wire communication, e.g., fax) for the purpose of accomplishing the scheme. It is sufficient if only one person conceives the scheme and the others knowingly, voluntarily and intentionally join in and participate in some way in the operation of the scheme in order for such others to be held jointly responsible.][17]

[It is not necessary that the [government] [prosecution] prove [all of the details alleged in the

indictment concerning the precise nature and purpose of the scheme] [that the (describe wire communication, e.g., fax)] was itself false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone][18] [that the (describe wire communication, e.g., fax) was intended as the specific or exclusive means of accomplishing the alleged fraud].][19]

[It is not necessary that the [government] [prosecution] prove that the (describe wire communication, e.g., fax) was an essential part of the scheme. A (describe wire communication, e.g., fax) may be routine or sent for a legitimate purpose so long as it assists in carrying out the fraud.][20]

[If you find proof beyond a reasonable doubt of a business custom (describe custom, e.g., fax lines on documents sent by fax), that is evidence from which you may, but are not required to, find or infer that a (describe wire communication, e.g., fax) was used.][21]

(Insert paragraph describing [government's] [prosecution's] burden of proof; *see* Instruction 3.09, *supra.*)

Notes on Use

1. The elements of wire fraud are identical to the elements of mail fraud, except that interstate wire facilities are used instead of the mail. See Instruction No. 6.18.1341, Committee Comments. *United States v. Cole*, 721 F.3d 1016, 1021 (8th Cir. 2013); *United States v. Louper-Morris,* 672 F.3d 539, 555 (8th Cir. 2012).

2. For a violation of 18 U.S.C. § 1346 (depriving another of the intangible right of honest services), *see* Instruction No. 6.18.1346.

3. The proper wire fraud theory charged in the indictment should be selected and included in the body of the instruction. If more than one theory is part of the evidence in the case, and the theories constitute a separate offense or an element of the offense, such alternatives can be submitted in the disjunctive and the jury instructed that all jurors must agree as to the particular theory. *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997). In such a case, the jury may be instructed as follows:

> You need not find that all of the theories charged in Count____of the indictment are proven; instead, you must find unanimously and beyond a reasonable doubt that at least one of the theories set out in Count ___ of the indictment is proven.

If more than one false promise or statement is part of the evidence in the case, and the promises or statements set out different ways of committing the offense but do not constitute a separate offense or an element of the offense, then the jury may be instructed that all the jurors need not agree as to the particular theory, or the particular false promise or statement, that was made. In such a case, the jury may be instructed as follows:

Count____of the indictment accuses the defendant of committing the crime of_____in

> more than one possible way. The first is that he_____. The second is that he_____. The [government] [prosecution] does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all twelve of you must agree that at least one of these has been proved; however, all of you need not agree that the same one has been proved.

See Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), in which the Supreme Court rejected the approach of requiring unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id.* at 630-33. On the other hand, if the means used to commit an offense are deemed an element of the crime, unanimity is required. *See also Richardson v. United States*, 526 U.S. 813, 817 (1999) (plurality opinion), in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Id.* On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used *to commit an element of the crime*." *Richardson*, 526 U.S. at 817 (citing *Schad v. Arizona*, 501 U.S. 624 (1991)). *See also, United States v. Rice,* 699 F.3d 1043, 1048 (8th Cir. 2012) (in fraud cases jurors need not agree on "the precise manner in which the scheme violated the law," only the "general thrust" of the scheme, citing *United States v. Blumeyer*, 114 F.3d at 769 (upholding instruction that jurors needed to agree that one of the means alleged had been used, but that not all needed to agree on the same one)).

4. In a simple case a brief description of the fraud should be given in the first element. An example would be:

> *One*, that the defendant devised a scheme to defraud the brokerage firm of Smith & Jones by pledging counterfeit stock certificates as collateral on margin loans given to the defendant, thus causing a loss to Smith & Jones of 5 million dollars.

Some schemes will be too complicated to lend themselves to short descriptions. In those schemes the court may more fully summarize the scheme or refer to the description of the scheme contained in the indictment.

In submitting a summary of the scheme to the jury, the court should be aware that on occasion some allegations and misrepresentations charged in the indictment are not proven. These may be deleted from the summary; however, the court should be aware that if many allegations are not proven, there may be a material and prejudicial variance between what is alleged in the indictment

and what is proven at trial.

5. "Intent to defraud" and "scheme to defraud" should be defined in the instruction. A scheme to defraud need not be fraudulent on its face. *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993).

6. A fourth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1343, 2326, including increased minimum sentences. *See Alleyne v. United States,* S. Ct. , 2013 WL 2922116 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Consideration should also be given to the use of a special verdict form (interrogatories to follow finding of guilt).

7. The wire fraud and mail fraud statutes provide independent and distinct avenues for violating the statutes, the first two of which are (1) a scheme or artifice to defraud, and (2) a scheme or artifice to obtain money or other property by means of false or fraudulent pretenses, representations, or promises. If the scheme is under the second alternative (i.e., a scheme to obtain money or property by means of false or fraudulent pretenses or representations), it must involve some sort of fraudulent misrepresentation or omission reasonably calculated to deceive persons of ordinary prudence and comprehension, *Goodman,* 984 F.2d at 237, and some loss or at least an attempt to cause a loss. *United States v. Steffen,* 687 F.3d 1104, 1111-13 (8th Cir. 2012). If the scheme is under the first alternative of the statute (i.e., a scheme to defraud"), there are no similar requirements; the scheme to defraud may be established by demonstrating either an affirmative misrepresentation, *id.,* or an actual or intended loss, *id.* at 1110, but the scheme must be "reasonably calculated to deceive persons of ordinary prudence." *Id.* at 1113 (citing *United States v. McNeive,* 536 F.2d 1245, 1249 n.10 (8th Cir. 1976)). If the scheme is under the first alternative (a scheme to defraud) and there is no affirmative misrepresentation, the instruction should be modified accordingly. For further discussion of the *Steffen* case, *see* Committee Comments to Instruction No. 6.18.1344.

8. *Preston v. United States*, 312 F.3d 959 (8th Cir. 2002).

9. *Preston v. United States*, 312 F.3d 959 (8th Cir. 2002).

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v. United States, 924 F.2d 785 (8th Cir. 1991), is not applicable to these cases.

12. *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985). In *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650 (2nd Cir. 2016), the Second Circuit held that where the false statement or fraud is part of a contractual promise, fraudulent intent is identified at the time the promise is made, not when a victim relies on the promise or is injured by it. "Only if a contractual promise is made with no intent ever to perform it can the promise itself constitute a fraudulent misrepresentation." *Id.* at 662. "[A] contractual promise can only support a claim for fraud upon proof of fraudulent intent not to perform the promise at the time of contract execution. Absent such proof, a subsequent breach of that promise – even where willful and intentional – cannot in itself transform the promise into a fraud." *Id.* at 662.

13. This is not meant to include the intangible right of honest services (18 U.S.C. § 1346), for which see Instruction No. 6.18.1346.

In *Carpenter v. United States*, 484 U.S. 19 (1987), the Supreme Court adopted a very broad definition of property rights under the mail and wire fraud statutes. The Court stated that the statute covered intangible as well as tangible property rights and included the *Wall Street Journal*'s right to control the use of information obtained by its reporters in the course of their duties. The Court held that the right of the *Journal* to decide how and when to use its confidential business information obtained by its reporters was a property right and that a scheme to deprive the *Journal* of this confidential business information was a scheme within the scope of the mail fraud statutes, even if no monetary loss to the *Journal* was caused by the scheme.

In *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990), the court held that the right to exercise control over spending is a property right protected by the mail fraud statute and approved the following instruction:

> The term "property rights" as used in the mail fraud statute includes intangible as well as tangible property. Intangible property rights include any valuable right considered as a source of wealth, and include the right to exercise control over how one's money is spent.

See also United States v. Granberry, 908 F.2d 278 (8th Cir. 1990). *But cf., Cleveland v. United States*, 532 U.S. 12 (2000) (state and municipal licenses are not property under the mail fraud statute).

14. *See Pereira v. United States*, 347 U.S. 1, 8-9 (1954), which holds as follows:

> The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Young*, 232 U.S. 155 (1914). Here, the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established. There remains only the question whether Pereira "caused" the mailing. That question is easily

> answered. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. *United States v. Kenofskey*, 243 U.S. 440 (1917).

This Circuit has defined "reasonably foreseeable" in a variety of contexts. In *United States v. Anderson*, 570 F.3d 1025, 1030 (8th Cir. 2009), where defendant used a bank's electronic banking system to transfer loan proceeds into his account, the court held a reasonable jury could determine it was reasonably foreseeable that loan proceeds would be transferred interstate by wire. In *United States v. Minkin*, 504 F.2d 350, 353-54 (8th Cir. 1974), a mail fraud scheme in which an insurance company was a victim, the court stated as follows:

One who engages in carrying out a scheme to defraud is therefore responsible . . . for a use made of the mail to effect a necessary or facilitating incident thereof where such use is from the nature of the business and the incident one of such ordinary course as to constitute a matter of natural expectability. A use of the mail which is of such a general expectable occurrence is entitled to be found to be reasonably foreseeable. Thus, we observed generally . . . as to the ordinary course of such an insurance business as is here involved:

Certainly in dealing with insurance agents it will be contemplated that the mails will have to be employed in carrying on business with the different companies for whom the agent does business.

Id., 504 F.2d at 353-54 (citation omitted). *See also United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979) (conduct is within the mail fraud statute when use of the mails for the purpose of executing the flow of payoff funds is a reasonably foreseeable possibility in furthering the transaction); *United States v. Rabbitt*, 583 F.2d 1014, 1022-23 (8th Cir. 1978).

15. *United States v. Sampson*, 371 U.S. 75 (1962); *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976); *United States v. Tackett*, 646 F.2d 1240, 1243 (8th Cir. 1981).

In *Schmuck v. United States*, 489 U.S. 705, 713 (1989), the Court held that all mailings that are in any way part of the execution of the scheme will supply the mailing element of the offense even if the mailing later may turn out to be counterproductive and allow the discovery of the scheme.

16. Each use of the wires is a separate offense notwithstanding the fact that the defendant devised only one scheme to defraud. *See, e.g., United States v. Rice,* 699 F.3d 1043, 1047 (8th Cir. 2012); *United States v. Calvert*, 523 F.2d 895, 903 n. 6, 914 (8th Cir. 1975).

17. *Reistroffer v. United States*, 258 F.2d 379, 395 (8th Cir. 1958); *United States v. Porter*, 441 F.2d 1204, 1211 (8th Cir. 1971).

18. *See United States v. Louper-Morris*, 672 F.3d at 556 (actual loss or harm not required, only intent to defraud and communications reasonably calculated to deceive persons or ordinary

prudence and comprehension).

19. *See United States v. West*, 549 F.2d 545, 552 (8th Cir. 1977); *United States v. Gross*, 416 F.2d 1205, 1210 (8th Cir. 1969); *Atkinson v. United States*, 344 F.2d 97, 98 (8th Cir. 1965); *United States v. Calvert*, 523 F.2d 895, 912 (8th Cir. 1975) (use of mail need not be specifically or exclusively intended).

20. *See United States v. McKanry,* 628 F.3d 1010, 1017 (8th Cir. 2011), citing *Schmuck v. United States,* 489 U.S. at 710-711, and *United States v. Nelson,* 988 F.3d 798, 804(8th Cir. 1993).

21. *United States v. Shyres*, 898 F.2d 647, 658 (8th Cir. 1990); *United States v. Cady*, 567 F.2d 771, 775 (8th Cir. 1977); *United States v. Minkin*, 504 F.2d 350, 352-53 (8th Cir. 1974). *See also* Instruction No. 4.13, *supra*, on specific inferences.

Committee Comments

Since the elements of wire fraud (Instruction No. 6.18.1341) are virtually identical to the elements of mail fraud, see also the discussion regarding mail fraud.

For wire fraud, the defendant must cause interstate wire facilities to be used. *See generally, United States v. Tackett*, 646 F.2d 1240, 1242-43 (8th Cir. 1981); *United States v. Mendenhall*, 597 F.2d 639, 641 (8th Cir. 1979); *United States v. West*, 549 F.2d 545, 549-53 (8th Cir. 1977); *United States v. Gross*, 416 F.2d 1205, 1209-10 (8th Cir. 1969). *But see United States v. Bryant*, 766 F.2d 370 (8th Cir. 1985).

Approved July 11, 2017.

MANUAL OF

MODEL CRIMINAL JURY INSTRUCTIONS

FOR THE
DISTRICT COURTS OF THE
NINTH CIRCUIT

Prepared by the Ninth Circuit
Jury Instructions Committee

2010 Edition

Last updated 1/2019

8.121 MAIL FRAUD—SCHEME TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY FALSE PROMISES (18 U.S.C. § 1341)

The defendant is charged in [Count _____ of] the indictment with mail fraud in violation of Section 1341 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [participated in] [devised] [intended to devise] a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth, the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Comment

Use this instruction with respect to a crime charged under the second clause of 18 U.S.C. § 1341.

Much of the language in this instruction is taken from the instructions approved in *United States v. Woods*, 335 F.3d 993 (9th Cir.2003). Materiality is an essential element of the crime of mail fraud. *Neder v. United States*, 527 U.S. 1 (1999). Materiality of statements or promises must be established, *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir.1981), but the jury need not unanimously agree that a specific material false statement was made. *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir.), *cert. denied*, 550 U.S. 937 (2007). Materiality is a question of fact for the jury. *United States v. Carpenter*, 95 F.3d 773, 776

(9th Cir.1996). The common law test for materiality in the false statement statutes, as reflected in the second element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir.2008).

Success of the scheme is immaterial. *United States v. Rude*, 88 F.3d 1538, 1547 (9th Cir.1996); *United States v. Utz*, 886 F.2d 1148, 1150-51 (9th Cir.1989).

See Schmuck v. United States, 489 U.S. 705, 712 (1989) (mailing that is "incident to an essential part of the scheme" or "a step in the plot" satisfies mailing element of offense); *United States v. Hubbard*, 96 F.3d 1223, 1228–29 (9th Cir.1996) (same).

See United States v. LeVeque, 283 F.3d 1098, 1102 (9th Cir.2002) (government-issued license does not constitute property for purposes of § 1341).

8.124 WIRE FRAUD
(18 U.S.C. § 1343)

Comment

"To convict a person of wire fraud, the government must prove beyond a reasonable doubt that the accused (1) participated in a scheme to defraud; and (2) used the wires to further the scheme." *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir.2000) (citation omitted).

"To sustain a conviction for fraud . . . , the government must prove beyond a reasonable doubt the element of specific intent." *Id.* at 1082 (citation omitted).

Wire fraud does not require the government to prove that the underlying conduct was itself a violation of a particular statute or regulation. *United States v. Green*, 592 F.3d 1057, 1064 (9th Cir.2010).

Honest services fraud criminalizes only schemes to defraud that involve bribery or kickbacks. *Skilling v. United States*, __ U.S. __, 130 S. Ct. 2896, 2931 (2010); *Black v. United States*, __ U.S. __, 130 S. Ct. 2963, 2968 (2010). Undisclosed conflicts of interest, or undisclosed self-dealing, is not sufficient. *Skilling*, 130 S. Ct. at 2932.

The "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Id.* (citing 18 U.S.C. §§ 201(b) (bribery), 666(a)(2); 41 U.S.C. § 52(2) (kickbacks)); *see also McNally v. United States*, 483 U.S. 350 (1987). Although it did not define bribery or kickbacks, the Supreme Court in *Skilling* cited three appellate decisions that reviewed jury instructions on the bribery element of honest services fraud. *Skilling*, 130 S. Ct. at 2934 (citing *United States v. Ganim*, 510 F.3d 134, 147-49 (2d Cir.2007), *cert denied*, 552 U.S. 1313 (2008); *United States v. Whitfield*, 590 F.3d 325, 352-53 (5th Cir.2009); and *United States v. Kemp*, 500 F.3d 257, 281-86 (3d Cir.2007)). In the Ninth Circuit, bribery requires at least an implicit *quid pro quo*. *United States v. Kincaid-Chauncey*, 556 F.3d 923, 941 (9th Cir.2009). "Only individuals who can be shown to have had the specific intent to trade official actions for items of value are subject to criminal punishment on this theory of honest services fraud." *Id.* at 943 n.15. The *quid pro quo* need not be explicit, and an implicit *quid pro quo* need not concern a specific official act. *Id.* at 945-46 (citing *Kemp*, 500 F.3d at 282 ("[T]he government need not prove that each gift was provided with the intent to prompt a specific official act.")). A *quid pro quo* requirement is satisfied if the evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official acts favorable to the donor. *Id.* at 943. Bribery is to be distinguished from legal lobbying activities. *Id.* at 942, 946 (citing *Kemp*, 500 F.3d at 281-82). These principles are consistent with the appellate decisions cited by the Supreme Court.

The Supreme Court in *Skilling* cited a statutory definition of kickbacks. *Skilling*, 130

S. Ct. at 2933-34 ("'The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].'") (quoting 41 U.S.C. 52(2)).

Honest services fraud requires a "specific intent to defraud." *Kincaid-Chauncey*, 556 F.3d at 941.

The only difference between mail fraud and wire fraud is that the former involves the use of the mails and the latter involves the use of wire, radio, or television communication in interstate or foreign commerce. In a wire fraud or attempted wire fraud case, the Committee recommends that Instructions 8.121 (Mail Fraud—Scheme to Defraud or to Obtain Money or Property by False Promises) and 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services)) be modified appropriately.

As with mail fraud, materiality is an essential element of the crime of wire fraud. *Neder v. United States*, 527 U.S. 1 (1999).

CRIMINAL PATTERN JURY INSTRUCTIONS

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

2011 Edition
Updated February 2018

2.56

MAIL FRAUD
18 U.S.C. § 1341

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1341.

This law makes it a crime to use the mails in carrying out a scheme to defraud [A scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises is a specific type of scheme to defraud.]

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 devised or intended to devise a scheme to defraud, as alleged in the indictment [or describe the scheme alleged in the indictment];

Second: the defendant acted with specific intent to defraud;

Third: the defendant mailed something [caused another person to mail something] through the United States Postal Service [a private or commercial interstate carrier] for the purpose of carrying out the scheme;

Fourth: the scheme employed false or fraudulent pretenses, representations, or promises that were material.

[*Fifth*: the scheme was in connection with the conduct of telemarketing.]

or

[*Fifth*: the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Fifth*: the scheme was related to a presidentially declared major disaster or emergency.]

or

[*Fifth*: the scheme affected a financial institution.]

A "scheme to defraud" is conduct intended to or reasonably calculated to deceive persons of ordinary prudence or comprehension.

A "scheme to defraud" includes a scheme to deprive another of money, property, or the intangible right of honest services.

An "intent to defraud" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

What must be proved beyond a reasonable doubt is that the defendant devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mails was closely related to the scheme, in that the defendant either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen even though the defendant did not intend or request the mails to be used.

Comment

On the elements of a § 1341 offense, see *generally United States v. Haber*, 251 F.3d 881, 887 (10th Cir. 2001); *United States v. Deters*, 184 F.3d 1253, 1258 (10th Cir. 1999). Both the United States Supreme Court and the Tenth Circuit have interpreted 18 U.S.C. § 1341 to establish a single offense. *Cleveland v. United States*, 531 U.S. 12, 26 (2000); *United States v. Kalu*, 791 F.3d 1194, 1203 (10th Cir. 2015); *see also United States v. Zar*, 790 F.3d 1036, 1050 (10th Cir. 2015) (applying *Cleveland*'s interpretation of § 1341 to the wire

fraud statute, 18 U.S.C. § 1343). Insofar as *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990), interpreted § 1341 to prohibit two "overlapping" but separate offenses, it was effectively overruled by *Cleveland*. *See Zar*, 790 F.3d at 1050. In *Cleveland*, 531 U.S. at 26, the Supreme Court explained that the disjunctive phrases in the statute—"[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . .", 18 U.S.C. § 1341—"proscribe a single offense and that the second phrase merely describes one type of fraudulent scheme." *Zar*, 790 F.3d at 1050; *see Kalu*, 791 F.3d at 1203.

The same scheme may be charged as a scheme to defraud and a scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises. However, because the former includes the latter, an indictment that alleges both under a single count is no longer considered duplicative under United States Supreme Court and Tenth Circuit precedents. In such cases, the trial court need not instruct the jury that it must unanimously find that the defendant devised one kind of scheme or the other. The *Zar* case clarified that "the first element of wire fraud is a scheme to defraud and that element includes a scheme to obtain [money or] property by means of false or fraudulent pretenses, representations, or promises . . . ." *Zar*, 790 F.3d at 1050.

As to the second element, the Tenth Circuit has "consistently indicated that specific intent to defraud is an element of a § 1341 offense." *Kalu*, 791 F.3d at 1203; *see United States v. Camick*, 796 F.3d 1206, 1214 (10th Cir. 2015) (stating the elements of mail fraud under § 1314); *see also United States v. Schuler*, 458 F.3d 1148, 1152 (10th Cir. 2006) (citing *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003)). Because it is often difficult to prove intent to defraud from direct evidence, the jury may infer such intent "from circumstantial evidence considered in its totality." *Kalu*, 791 F.3d at 1205. "Intent may be inferred from evidence that the defendant attempted to conceal activity. Intent to defraud may be inferred from the defendant's misrepresentations, knowledge of a false statement as well as whether the defendant profited or converted money to his own use." *United States v. Prows*, 118 F.3d 686, 692 (10th Cir. 1997) (quotation omitted). Further, "[e]vidence of the schemer's indifference to the truth of statements can amount to evidence of fraudulent intent." *United States v. Trammell*, 133 F.3d 1343, 1352 (10th Cir. 1998) (brackets and quotation omitted).

The third element is satisfied upon a showing that the use of the mails is a part of the execution or attempted execution of the fraud. *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (citing *Kann v. United States*, 323 U.S. 88, 95 (1944)). The use of the mails, however, need not be essential to the scheme. *Id.* at 710. It is sufficient that the use of the mails is "incident to an essential part of the scheme" or "a step in the plot." *Id.* at 710-11 (internal citations omitted). Further, the defendant need only "reasonably foresee the occurrence of mailings." *United States v. Worley*, 751 F.2d 348, 350 (10th Cir. 1984).

A fourth element, materiality, must be decided by the jury in all mail

fraud cases. *Neder v. United States*, 527 U.S. 1, 25 (1999). A false statement is "material" if it has "'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 16 (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). However, to establish a violation of the statute, the government need not prove that the defendant made direct misrepresentations to the victim, *United States v. Kennedy*, 64 F.3d 1465, 1475-76 (10th Cir. 1995), nor is an affirmative misrepresentation necessary to effect a scheme to defraud. *Id.* at 1476; *Cronic*, 900 F.2d at 1513-14 ("Schemes to defraud . . . may come within the scope of the statute even absent an affirmative misrepresentation."), *overruled on other grounds by United States v. Iverson*, 818 F.3d 1015 (10th Cir. 2016). *See also Neder*, 527 U.S. at 22 (noting that, at common law, fraud required a misrepresentation, concealment, or omission of material fact).

Use Note

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a fifth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1341 (mail fraud committed in connection with presidentially declared major disaster or emergency or mail fraud that affects a financial institution) or 18 U.S.C. § 2326 (mail fraud involving telemarketing). For the definition of "presidentially declared major disaster or emergency," *see* 42 U.S.C. §5122. In some cases, a defendant may be entitled to a good-faith instruction. For a description of such circumstances, *see United States v. Chavis*, 461 F.3d 1201, 1209 (10th Cir. 2006).

2.57

WIRE FRAUD
18 U.S.C. § 1343

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1343.

This law makes it a crime to use interstate wire communication facilities in carrying out a scheme to defraud. [A scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises is a specific type of scheme to defraud.]

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 devised or intended to devise a scheme to defraud, as alleged in the indictment [or describe the scheme as stated in the indictment];

Second: the defendant acted with specific intent to defraud;

Third: the defendant [used interstate or foreign wire communications facilities] [caused another person to use interstate or foreign wire communications facilities] for the purpose of carrying out the scheme;

Fourth: the scheme employed false or fraudulent pretenses, representations, or promises that were material;

[*Fifth*: the scheme was in connection with the conduct of telemarketing.]

or

[*Fifth*: the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Fifth*: the scheme was related to a presidentially declared major disaster or emergency.]

or

[*Fifth*: the scheme affected a financial institution.]

A "scheme to defraud" is conduct intended to or reasonably calculated to deceive persons of ordinary prudence or comprehension.

A "scheme to defraud" includes a scheme to deprive another of money, property or the intangible right of honest services.

An "intent to defraud" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity.

A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Comment

Cases addressing the elements of wire fraud include: *United States v. Zar*, 790 F.3d 1036, 1049-50 (10th Cir. 2015); *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1102 (10th Cir. 1999); *United States v. Smith*, 133 F.3d 737, 742-43 (10th Cir. 1997); *United States v. Galbraith*, 20 F.3d 1054, 1056 (10th Cir. 1994); *United States v. Drake*, 932 F.2d 861, 863 (10th Cir. 1991). The *Zar* case clarified that "the first element of wire fraud is a scheme to defraud and that element includes a scheme to obtain [money or] property by means of false or fraudulent pretenses, representations, or promises." *Zar*, 790 F.3d at 1050 (citing *Cleveland v. United States*, 531 U.S. 12, 26 (2000)).

In *Neder v. United States*, 527 U.S. 1, 25 (1999), the Court held that "materiality of falsehood" is an essential element of wire fraud. Where false

representations are involved in the scheme, they must be material. *Id.* However, a scheme to defraud does not necessarily involve affirmative misrepresentations. *United States v. Cochran*, 109 F.3d 660, 664 (10th Cir. 1997); *United States v. Cronic*, 900 F.2d 1511, 1513-14 (10th Cir. 1990), *overruled on other grounds by United States v. Iverson*, 818 F.3d 1015 (10th Cir. 2016). *See also Neder*, 527 U.S. at 22 (noting that, at common law, fraud required misrepresentation, concealment, or omission of material fact).

The first two elements of mail fraud and wire fraud are identical. *See United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003). Given the similarity in elements, Instruction 2.56 on mail fraud also should be consulted.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

Use Note

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a fifth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1343 (wire fraud committed in connection with presidentially declared major disaster or emergency or wire fraud that affects a financial institution) or 18 U.S.C. § 2326 (wire fraud involving telemarketing). For the definition of "presidentially declared major disaster or emergency," *see* 42 U.S.C. § 5122. A "wire communications facility" includes wire, radio or television communication facilities. The use of this term should be tailored to the case before the court.

CRIMINAL PATTERN JURY INSTRUCTIONS

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

2011 Edition
Updated February 2018

2.56

MAIL FRAUD
18 U.S.C. § 1341

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1341.

This law makes it a crime to use the mails in carrying out a scheme to defraud [A scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises is a specific type of scheme to defraud.]

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 devised or intended to devise a scheme to defraud, as alleged in the indictment [or describe the scheme alleged in the indictment];

Second: the defendant acted with specific intent to defraud;

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or

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A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

What must be proved beyond a reasonable doubt is that the defendant devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mails was closely related to the scheme, in that the defendant either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen even though the defendant did not intend or request the mails to be used.

Comment

On the elements of a § 1341 offense, see *generally United States v. Haber*, 251 F.3d 881, 887 (10th Cir. 2001); *United States v. Deters*, 184 F.3d 1253, 1258 (10th Cir. 1999). Both the United States Supreme Court and the Tenth Circuit have interpreted 18 U.S.C. § 1341 to establish a single offense. *Cleveland v. United States*, 531 U.S. 12, 26 (2000); *United States v. Kalu*, 791 F.3d 1194, 1203 (10th Cir. 2015); *see also United States v. Zar*, 790 F.3d 1036, 1050 (10th Cir. 2015) (applying *Cleveland*'s interpretation of § 1341 to the wire

fraud statute, 18 U.S.C. § 1343). Insofar as *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990), interpreted § 1341 to prohibit two "overlapping" but separate offenses, it was effectively overruled by *Cleveland*. *See Zar*, 790 F.3d at 1050. In *Cleveland*, 531 U.S. at 26, the Supreme Court explained that the disjunctive phrases in the statute—"[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . .", 18 U.S.C. § 1341—"proscribe a single offense and that the second phrase merely describes one type of fraudulent scheme." *Zar*, 790 F.3d at 1050; *see Kalu*, 791 F.3d at 1203.

The same scheme may be charged as a scheme to defraud and a scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises. However, because the former includes the latter, an indictment that alleges both under a single count is no longer considered duplicative under United States Supreme Court and Tenth Circuit precedents. In such cases, the trial court need not instruct the jury that it must unanimously find that the defendant devised one kind of scheme or the other. The *Zar* case clarified that "the first element of wire fraud is a scheme to defraud and that element includes a scheme to obtain [money or] property by means of false or fraudulent pretenses, representations, or promises . . . ." *Zar*, 790 F.3d at 1050.

As to the second element, the Tenth Circuit has "consistently indicated that specific intent to defraud is an element of a § 1341 offense." *Kalu*, 791 F.3d at 1203; *see United States v. Camick*, 796 F.3d 1206, 1214 (10th Cir. 2015) (stating the elements of mail fraud under § 1314); *see also United States v. Schuler*, 458 F.3d 1148, 1152 (10th Cir. 2006) (citing *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003)). Because it is often difficult to prove intent to defraud from direct evidence, the jury may infer such intent "from circumstantial evidence considered in its totality." *Kalu*, 791 F.3d at 1205. "Intent may be inferred from evidence that the defendant attempted to conceal activity. Intent to defraud may be inferred from the defendant's misrepresentations, knowledge of a false statement as well as whether the defendant profited or converted money to his own use." *United States v. Prows*, 118 F.3d 686, 692 (10th Cir. 1997) (quotation omitted). Further, "[e]vidence of the schemer's indifference to the truth of statements can amount to evidence of fraudulent intent." *United States v. Trammell*, 133 F.3d 1343, 1352 (10th Cir. 1998) (brackets and quotation omitted).

The third element is satisfied upon a showing that the use of the mails is a part of the execution or attempted execution of the fraud. *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (citing *Kann v. United States*, 323 U.S. 88, 95 (1944)). The use of the mails, however, need not be essential to the scheme. *Id.* at 710. It is sufficient that the use of the mails is "incident to an essential part of the scheme" or "a step in the plot." *Id.* at 710-11 (internal citations omitted). Further, the defendant need only "reasonably foresee the occurrence of mailings." *United States v. Worley*, 751 F.2d 348, 350 (10th Cir. 1984).

A fourth element, materiality, must be decided by the jury in all mail

fraud cases. *Neder v. United States*, 527 U.S. 1, 25 (1999). A false statement is "material" if it has "'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 16 (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). However, to establish a violation of the statute, the government need not prove that the defendant made direct misrepresentations to the victim, *United States v. Kennedy*, 64 F.3d 1465, 1475-76 (10th Cir. 1995), nor is an affirmative misrepresentation necessary to effect a scheme to defraud. *Id.* at 1476; *Cronic*, 900 F.2d at 1513-14 ("Schemes to defraud . . . may come within the scope of the statute even absent an affirmative misrepresentation."), *overruled on other grounds by United States v. Iverson*, 818 F.3d 1015 (10th Cir. 2016). *See also Neder*, 527 U.S. at 22 (noting that, at common law, fraud required a misrepresentation, concealment, or omission of material fact).

Use Note

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a fifth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1341 (mail fraud committed in connection with presidentially declared major disaster or emergency or mail fraud that affects a financial institution) or 18 U.S.C. § 2326 (mail fraud involving telemarketing). For the definition of "presidentially declared major disaster or emergency," *see* 42 U.S.C. §5122. In some cases, a defendant may be entitled to a good-faith instruction. For a description of such circumstances, *see United States v. Chavis*, 461 F.3d 1201, 1209 (10th Cir. 2006).

2.57

WIRE FRAUD
18 U.S.C. § 1343

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1343.

This law makes it a crime to use interstate wire communication facilities in carrying out a scheme to defraud. [A scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises is a specific type of scheme to defraud.]

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 devised or intended to devise a scheme to defraud, as alleged in the indictment [or describe the scheme as stated in the indictment];

Second: the defendant acted with specific intent to defraud;

Third: the defendant [used interstate or foreign wire communications facilities] [caused another person to use interstate or foreign wire communications facilities] for the purpose of carrying out the scheme;

Fourth: the scheme employed false or fraudulent pretenses, representations, or promises that were material;

[*Fifth*: the scheme was in connection with the conduct of telemarketing.]

or

[*Fifth*: the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Fifth*: the scheme was related to a presidentially declared major disaster or emergency.]

or

[*Fifth*: the scheme affected a financial institution.]

A "scheme to defraud" is conduct intended to or reasonably calculated to deceive persons of ordinary prudence or comprehension.

A "scheme to defraud" includes a scheme to deprive another of money, property or the intangible right of honest services.

An "intent to defraud" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity.

A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Comment

Cases addressing the elements of wire fraud include: *United States v. Zar*, 790 F.3d 1036, 1049-50 (10th Cir. 2015); *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1102 (10th Cir. 1999); *United States v. Smith*, 133 F.3d 737, 742-43 (10th Cir. 1997); *United States v. Galbraith*, 20 F.3d 1054, 1056 (10th Cir. 1994); *United States v. Drake*, 932 F.2d 861, 863 (10th Cir. 1991). The *Zar* case clarified that "the first element of wire fraud is a scheme to defraud and that element includes a scheme to obtain [money or] property by means of false or fraudulent pretenses, representations, or promises." *Zar*, 790 F.3d at 1050 (citing *Cleveland v. United States*, 531 U.S. 12, 26 (2000)).

In *Neder v. United States*, 527 U.S. 1, 25 (1999), the Court held that "materiality of falsehood" is an essential element of wire fraud. Where false

representations are involved in the scheme, they must be material. *Id.* However, a scheme to defraud does not necessarily involve affirmative misrepresentations. *United States v. Cochran*, 109 F.3d 660, 664 (10th Cir. 1997); *United States v. Cronic*, 900 F.2d 1511, 1513-14 (10th Cir. 1990), *overruled on other grounds by United States v. Iverson*, 818 F.3d 1015 (10th Cir. 2016). *See also Neder*, 527 U.S. at 22 (noting that, at common law, fraud required misrepresentation, concealment, or omission of material fact).

The first two elements of mail fraud and wire fraud are identical. *See United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003). Given the similarity in elements, Instruction 2.56 on mail fraud also should be consulted.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

Use Note

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a fifth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1343 (wire fraud committed in connection with presidentially declared major disaster or emergency or wire fraud that affects a financial institution) or 18 U.S.C. § 2326 (wire fraud involving telemarketing). For the definition of "presidentially declared major disaster or emergency," *see* 42 U.S.C. § 5122. A "wire communications facility" includes wire, radio or television communication facilities. The use of this term should be tailored to the case before the court.

JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

JAMES P. GERSTENLAUER
CIRCUIT EXECUTIVE

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ATLANTA, GEORGIA 30303

1 February 2019

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, which are listed at the bottom of this memorandum.

On 24 January 2019, the Council also approved the following revised and new instructions:

OFFENSE INSTRUCTIONS

Revised

50.1	Mail Fraud, 18 U.S.C. § 1341
50.2	Mail Fraud: Depriving Another of Intangible Right of Honest Services, 18 U.S.C. §§ 1341, 1346 (revises revision of 9 December 2016)
50.3	Mail Fraud: Depriving Another of Intangible Right of Honest Services, 18 U.S.C. §§ 1341, 1346, Private Employee
50.4	Mail Fraud: Depriving Another of Intangible Right of Honest Services, 18 U.S.C. §§ 1341, 1346, Independent Contractor or Other Private Sector Contractual Relationship Besides Employer/Employee
51	Wire Fraud, 18 U.S.C. § 1343
52	Bank Fraud, 18 U.S.C. § 1344
53.1	Health Care Fraud, 18 U.S.C. § 1347 (renumbered from O53)

98 Controlled Substances: Possession with Intent to Distribute, 21 U.S.C. § 841(a)(1)

106.1 Possession of Unregistered Firearm, 26 U.S.C. § 5861(d)

New

53.2 Obstruction of Criminal Investigations of Health Care Offenses, 18 U.S.C. § 1518

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 ann., 50.2, 70.2, 40.3, 49, and 82, special instruction 19, as well as new offense instructions 117.1 and 117.2.

- 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.

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

O50.1
Mail Fraud
18 U.S.C. § 1341

It's a Federal crime to [use the United States mail] [transmit something by private or commercial interstate carrier] in carrying out a scheme to defraud someone.

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

(1) the Defendant knowingly devised or participated in a scheme to defraud someone, or obtain money or property, using false or fraudulent pretenses, representations, or promises;

(2) the false or fraudulent pretenses, representations, or promises were about a material fact;

(3) the Defendant intended to defraud someone; and

(4) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier] something meant to help carry out the scheme to defraud.

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

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

A statement or representation is "false" or "fraudulent" if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.

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

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

The Government does not have to prove all the details about the precise nature and purpose of the scheme or that the material [mailed] [deposited with an interstate carrier] was itself false or fraudulent. It also does not have to prove that the use of [the mail] [the interstate carrier] was intended as the specific or

exclusive means carrying out the fraud, or that the Defendant did the actual [mailing] [depositing]. It doesn't even have to prove that anyone was actually defrauded.

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

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

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years imprisonment and $1 million fine).

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - -

(1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and

(2) in the case of an offense under any of those sections that - -

(A) victimized ten or more persons over the age of 55; or

(B) targeted persons over the Age of 55,

shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1341 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the Defendant is guilty of using the mail in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

The 1994 amendment to Section 1341 now also applies it to the use of "any private or commercial interstate carrier." Where such private carriers are involved, the statute requires the government to prove only that the carrier engages in interstate deliveries and not that state lines were crossed. *See United States v. Marek*, 238 F.3d 310, 318 (5th Cir.) *cert. denied* 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001).

Mail fraud requires a showing of "(1) knowing participation in a scheme to defraud and (2) a mailing in furtherance of the scheme." *United States v. Photogrammetric Data Svcs., Inc.,* 259 F.3d 229, 253 (4th Cir. 2001). The mailing, however, need only "be

incident to an essential part of the scheme or a step in the plot," and does not have to be an essential element of the scheme to be part of the execution of the fraud. *Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

Materiality is an essential element of the crimes of mail fraud, wire fraud, and bank fraud, and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-29 (11th Cir. 1999), *cert. denied* 530 U.S. 1261, 120 S. Ct. 2727, 147 L. Ed. 2d 982 (2000).

In mail fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of Title 18, United States Code, Section 1341. *Cleveland v. United States*, 531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000).

In the Eleventh Circuit, there has been considerable activity with respect to whether the measure of the alleged fraudulent conduct should be an objective "intended to deceive a reasonable person" standard, or whether conduct intended to deceive "someone," including the ignorant and gullible, was sufficient.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009), the Eleventh Circuit, in an en banc decision, held that:

> Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent.

556 F.3d 1157, 1165 (11th Cir. 2009).

O51
Wire Fraud
18 U.S.C. § 1343

It's a Federal crime to use interstate wire, radio, or television communications to carry out a scheme to defraud someone else.

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

(1) the Defendant knowingly devised or participated in a scheme to defraud, or to obtain money or property by using false pretenses, representations, or promises;

(2) the false pretenses, representations, or promises were about a material fact;

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

(4) the Defendant transmitted or caused to be transmitted by [wire] [radio] [television] some communication in interstate commerce to help carry out the scheme to defraud.

The term "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises.

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

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

The "intent to defraud" is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the material transmitted by interstate [wire] [radio] [television] was itself false or fraudulent; or that using the [wire] [radio] [television] was intended as the specific or exclusive means of carrying out the alleged fraud; or that the Defendant personally made the transmission over the [wire] [radio] [television]. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "use" interstate [wire] [radio] [television] communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business.

Each separate use of the interstate [wire] [radio] [television] communications as part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years imprisonment and $1 million fine.)

If the offense involved telemarketing, 18 U.S.C.§ 2326 requires enhanced imprisonment penalties:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - -
>
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
>
> (2) in the case of an offense under any of those sections that - -
>
> (A) victimized ten or more persons over the age of 55; or
>
> (B) targeted persons over the Age of 55,
>
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1343 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth

element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the defendant is guilty of using interstate [wire] [radio] [television] communications facilities in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing] [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

Wire fraud requires showing (1) that the Defendant knowingly devised or participated in a scheme to defraud; (2) that the Defendant did so willfully and with an intent to defraud; and (3) that the Defendant used interstate wires for the purpose of executing the scheme. *Langford v. Rite Aid of Ala., Inc.,* 231 F.3d 1308, 1312 (11th Cir. 2000). Materiality is an essential element of the crimes of mail fraud, wire fraud, and bank fraud and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-20 (11th Cir. 1999), *cert. denied* 530 U.S. 1261 (2000).

In wire fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of this statute. *Cleveland v. United States*, 531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000) (addressing "property" for purposes of mail fraud statute).

The mail fraud and wire fraud statutes are "given a similar construction and are subject to the same substantive analysis." *Belt v. United States*, 868 F.3d 1208, 1211 (11th Cir. 1989).

See also *United States v. Svete*, 556 F.3d 1157, (11th Cir. 2009) and discussion *supra* Offense Instruction 50.1.

APPENDIX N

18 U.S.C.A. § 1341

§ 1341. Frauds and swindles

Effective: January 7, 2008
Currentness

<Notes of Decisions for 18 USCA § 1341 are displayed in two separate documents.>

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94; Pub.L. 91-375, § 6(j)(11), Aug. 12, 1970, 84 Stat. 778; Pub.L. 101-73, Title IX, § 961(i), Aug. 9, 1989, 103 Stat. 500; Pub.L. 101-647, Title XXV, § 2504(h), Nov. 29, 1990, 104 Stat. 4861; Pub.L. 103-322, Title XXV, § 250006, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2087, 2147; Pub.L. 107-204, Title IX, § 903(a), July 30, 2002, 116 Stat. 805; Pub.L. 110-179, § 4, Jan. 7, 2008, 121 Stat. 2557.)

Notes of Decisions (2834)

18 U.S.C.A. § 1341, 18 USCA § 1341
Current through P.L. 116-5. Title 26 current through 116-9.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 63. Mail Fraud and Other Fraud Offenses (Refs & Annos)

18 U.S.C.A. § 1343

§ 1343. Fraud by wire, radio, or television

Effective: January 7, 2008
Currentness

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

CREDIT(S)

(Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722; amended July 11, 1956, c. 561, 70 Stat. 523; Pub.L. 101-73, Title IX, § 961(j), Aug. 9, 1989, 103 Stat. 500; Pub.L. 101-647, Title XXV, § 2504(i), Nov. 29, 1990, 104 Stat. 4861; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 107-204, Title IX, § 903(b), July 30, 2002, 116 Stat. 805; Pub.L. 110-179, § 3, Jan. 7, 2008, 121 Stat. 2557.)

Notes of Decisions (1314)

18 U.S.C.A. § 1343, 18 USCA § 1343
Current through P.L. 116-5. Title 26 current through 116-9.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 46. Forfeiture (Refs & Annos)

18 U.S.C.A. § 981

§ 981. Civil forfeiture

Effective: February 18, 2016
Currentness

(a)(1) The following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of--

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the the [1] Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of--

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(G) All assets, foreign or domestic--

(i) of any individual, entity, or organization engaged in planning or perpetrating any any [2] Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as defined in section 2332b(g)(5) [3] against the United States, citizens or residents of the United States, or their property;

(iii) derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property; or

(iv) of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government. [4] Where the property sought for forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States.

(H) Any property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title.

(I) Any property, real or personal, that is involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a prohibition imposed pursuant to section 104(a) of the North Korea Sanctions and Policy Enhancement Act of 2016.

(2) For purposes of paragraph (1), the term "proceeds" is defined as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if--

(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

(B) there is probable cause to believe that the property is subject to forfeiture and--

(i) the seizure is made pursuant to a lawful arrest or search; or

(ii) another exception to the Fourth Amendment warrant requirement would apply; or

(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(4)(A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject only to the orders

and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may--

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property under this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine--

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency--

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; or

(7) In[4] the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g)(1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that--

(A) the claimant is the subject of a related criminal investigation or case;

(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

(C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

(4) In this subsection, the terms "related criminal case" and "related criminal investigation" mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In determining whether a criminal case or investigation is "related" to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

(5) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property while the stay is in effect.

(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.

(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(i)(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

(j) For purposes of this section--

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

(k) Interbank accounts.--

(1) In general.--

(A) In general.--For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign financial institution (as defined in section 984(c)(2)(A) of this title), and that foreign financial institution (as defined in section 984(c)(2)(A) of this title) has an interbank account in the United States with a covered financial institution (as defined in section 5318(j)(1) of title 31), the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title), may be restrained, seized, or arrested.

(B) Authority to suspend.--The Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate a forfeiture under this section if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign financial institution (as defined in section 984(c)(2)(A) of this title) is located and the laws of the United States with respect to liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination would be in the interest of justice and would not harm the national interests of the United States.

(2) No requirement for government to trace funds.--If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title), nor shall it be necessary for the Government to rely on the application of section 984.

(3) Claims brought by owner of the funds.--If a forfeiture action is instituted against funds restrained, seized, or arrested under paragraph (1), the owner of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title) may contest the forfeiture by filing a claim under section 983.

(4) Definitions.--For purposes of this subsection, the following definitions shall apply:

(A) Interbank account.--The term "interbank account" has the same meaning as in section 984(c)(2)(B).

(B) Owner.--

(i) In general.--Except as provided in clause (ii), the term "owner"--

(I) means the person who was the owner, as that term is defined in section 983(d)(6), of the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title) at the time such funds were deposited; and

(II) does not include either the foreign financial institution (as defined in section 984(c)(2)(A) of this title) or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

(ii) Exception.--The foreign financial institution (as defined in section 984(c)(2)(A) of this title) may be considered the "owner" of the funds (and no other person shall qualify as the owner of such funds) only if--

(I) the basis for the forfeiture action is wrongdoing committed by the foreign financial institution (as defined in section 984(c)(2)(A) of this title); or

(II) the foreign financial institution (as defined in section 984(c)(2)(A) of this title) establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign financial institution (as defined in section 984(c)(2)(A) of this title) had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign financial institution (as defined in section 984(c)(2)(A) of this title) shall be deemed the owner of the funds to the extent of such discharged obligation.

CREDIT(S)

(Added Pub.L. 99-570, Title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3207-35; amended Pub.L. 100-690, Title VI, §§ 6463(a), (b), 6469(b), 6470(b), (e), (f), 6471(c), Nov. 18, 1988, 102 Stat. 4374, 4377, 4378; Pub.L. 101-73, Title IX, § 963(a), (b), Aug. 9, 1989, 103 Stat. 504; Pub.L. 101-647, Title I, § 103, Title XXV, §§ 2508, 2524, 2525(a), Title XXXV, § 3531, Nov. 29, 1990, 104 Stat. 4791, 4862, 4873, 4874, 4924; Pub.L. 102-393, Title VI, § 638(d), Oct. 6, 1992, 106 Stat. 1788; Pub.L. 102-519, Title I, § 104(a), Oct. 25, 1992, 106 Stat. 3385; Pub.L. 102-550, Title XV, §§ 1525(c)(1), 1533, Oct. 28, 1992, 106 Stat. 4065, 4066; Pub.L. 103-322, Title XXXIII, § 330011(s)(2), Sept. 13, 1994, 108 Stat. 2146; Pub.L. 103-447, Title I, § 102(b), Nov. 2, 1994, 108 Stat. 4693; Pub.L. 106-185, §§ 2(c)(1), 5(a), 6, 8(a), 20, Apr. 25, 2000, 114 Stat. 210, 213 to 215, 224; Pub.L. 107-56, Title III, §§ 319(a), 320, 372(b)(1), 373(b), Title VIII, § 806, Oct. 26, 2001, 115 Stat. 311, 315, 339, 340, 378; Pub.L. 107-197, Title III, § 301(d), June 25, 2002, 116 Stat. 728; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(2), Nov. 2, 2002, 116 Stat. 1806; Pub.L. 109-177, Title I, §§ 111, 120, Title IV, §§ 404, 406(a)(3), Mar. 9, 2006, 120 Stat. 209, 221, 244; Pub.L. 111-203, Title III, § 377(3), July 21, 2010, 124 Stat. 1569; Pub.L. 112-186, § 3, Oct. 5, 2012, 126 Stat. 1428; Pub.L. 114-122, Title I, § 105(a), Feb. 18, 2016, 130 Stat. 101.)

Notes of Decisions (354)

Footnotes

1 So in original.

2 So in original. The second "any" probably should not appear.

3 So in original. A closing parenthesis probably should appear.

4 So in original. Probably should not be capitalized.

18 U.S.C.A. § 981, 18 USCA § 981

Current through P.L. 116-5. Title 26 current through 116-9.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version's Validity Called into Doubt by U.S. v. Riedl, D.Hawai'i, Oct. 11, 2001

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties

21 U.S.C.A. § 853

§ 853. Criminal forfeitures

Effective: December 1, 2009
Currentness

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term “property”

Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit

(A) In general

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply

Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring

the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant--

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall--

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

CREDIT(S)

(Pub.L. 91-513, Title II, § 413, as added and amended Pub.L. 98-473, Title II, §§ 303, 2301(d)-(f), Oct. 12, 1984, 98 Stat. 2044, 2192, 2193; Pub.L. 99-570, Title I, §§ 1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207-13, 3207-54; Pub.L. 104-237, Title II, § 207, Oct. 3, 1996, 110 Stat. 3104; Pub.L. 106-310, Div. B, Title XXXVI, § 3613(a), Oct. 17, 2000, 114 Stat. 1229; Pub.L. 107-56, Title III, § 319(d), Oct. 26, 2001, 115 Stat. 314; Pub.L. 109-177, Title VII, § 743(a), Mar. 9, 2006, 120 Stat. 272; Pub.L. 111-16, § 5, May 7, 2009, 123 Stat. 1608.)

Notes of Decisions (500)

21 U.S.C.A. § 853, 21 USCA § 853
Current through P.L. 116-5. Title 26 current through 116-9.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 163. Fines, Penalties and Forfeitures (Refs & Annos)

28 U.S.C.A. § 2461

§ 2461. Mode of recovery

Effective: March 9, 2006
Currentness

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

(c) If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 974; Pub.L. 106-185, § 16, Apr. 25, 2000, 114 Stat. 221; Pub.L. 109-177, Title IV, § 410, Mar. 9, 2006, 120 Stat. 246.)

Notes of Decisions (46)

28 U.S.C.A. § 2461, 28 USCA § 2461
Current through P.L. 116-5. Title 26 current through 116-9.

End of Document

United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle IV. Money
Chapter 53. Monetary Transactions
Subchapter II. Records and Reports on Monetary Instruments Transactions (Refs & Annos)

31 U.S.C.A. § 5332

§ 5332. Bulk cash smuggling into or out of the United States

Currentness

(a) Criminal offense.--

(1) In general.--Whoever, with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States, shall be guilty of a currency smuggling offense and subject to punishment pursuant to subsection (b).

(2) Concealment on person.--For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual.

(b) Penalty.--

(1) Term of imprisonment.--A person convicted of a currency smuggling offense under subsection (a), or a conspiracy to commit such offense, shall be imprisoned for not more than 5 years.

(2) Forfeiture.--In addition, the court, in imposing sentence under paragraph (1), shall order that the defendant forfeit to the United States, any property, real or personal, involved in the offense, and any property traceable to such property.

(3) Procedure.--The seizure, restraint, and forfeiture of property under this section shall be governed by section 413 of the Controlled Substances Act.

(4) Personal money judgment.--If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled

Substances Act, the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture.

(c) Civil forfeiture.--

(1) In general.--Any property involved in a violation of subsection (a), or a conspiracy to commit such violation, and any property traceable to such violation or conspiracy, may be seized and forfeited to the United States.

(2) Procedure.--The seizure and forfeiture shall be governed by the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of title 18, United States Code.

(3) Treatment of certain property as involved in the offense.--For purposes of this subsection and subsection (b), any currency or other monetary instrument that is concealed or intended to be concealed in violation of subsection (a) or a conspiracy to commit such violation, any article, container, or conveyance used, or intended to be used, to conceal or transport the currency or other monetary instrument, and any other property used, or intended to be used, to facilitate the offense, shall be considered property involved in the offense.

CREDIT(S)

(Added Pub.L. 107-56, Title III, § 371(c), Oct. 26, 2001, 115 Stat. 337; amended Pub.L. 108-458, Title VI, § 6203(h), Dec. 17, 2004, 118 Stat. 3747.)

Notes of Decisions (11)

31 U.S.C.A. § 5332, 31 USCA § 5332
Current through P.L. 116-5. Title 26 current through 116-9.

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