INDEX TO THE APPENDIX

United States Court of Appeals
For the First Circuit

No. 17-1609

ARTHUR DURHAM,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

JUDGMENT

Entered: April 5, 2019

Petitioner appeals from the district court's denial of a 28 U.S.C. § 2255 motion featuring a challenge to one or more 18 U.S.C. § 924(c) convictions under Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II), and related precedent. The court entered an order to show cause citing recent precedent from this court holding that various federal offenses, including potentially the offense(s) anchoring petitioner's § 924(c) conviction(s), categorically satisfy the force clause at § 924(c)(3)(A), rendering any challenge to the residual clause at § 924(c)(3)(B) irrelevant. Petitioner was directed to show cause why relief should not be denied in this case in light of the precedent cited. Petitioner has responded to that order to show cause, and we have considered carefully any arguments sufficiently developed in that response and any supplemental or amended response. We conclude, after review of those arguments and relevant portions of the record, that the district court's denial of § 2255 relief was not erroneous. See Parsley v. United States, 604 F.3d 667, 671 (1st Cir. 2010) (standard of review). To the extent petitioner requests denial of relief without prejudice in case the Supreme Court eventually deems the § 924(c)(3)(B) residual clause unconstitutionally vague, such a ruling would not be appropriate in light of the force-clause basis of this ruling.

Accordingly, any previously imposed stay is lifted, and any pending motion for appointment of counsel is denied. To the extent petitioner has filed an application for expanded COA to encompass a claim that the Johnson II claim goes to jurisdiction and/or actual innocence,

that request is denied as moot in light of the conclusion that the Johnson II claim fails on the merits. The judgment of the district court is affirmed. Any remaining pending motions are denied as moot.

By the Court:

Maria R. Hamilton, Clerk

cc: Judith H. Mizner
Bjorn R. Lange
Arthur Durham
Seth R. Aframe

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Derek Kucinski

v. Civil No. 16-cv-201-PB

United States of America

Anthony M. Shea

v. Civil No. 16-cv-235-PB

United States of America

Anthony Sawyer

v. Civil No. 16-cv-250-PB

United States of America

James C. Karahalios, Jr.

v. Civil No. 16-cv-254-PB

United States of America

Gerard Boulanger

v. Civil No. 16-cv-266-PB

United States of America

Arthur Durham

v. Civil No. 16-cv-274-PB

United States of America

Matthew Karahalios

v. Civil No. 16-cv-286-PB

United States of America

Opinion No. 2016 DNH 163

MEMORANDUM AND ORDER

Derek Kucinski and six other prisoners have filed 28 U.S.C. § 2255 motions challenging their convictions under 18 U.S.C. § 924(c) for using a firearm during and in relation to a "crime of violence."[1] A "crime of violence," as used in § 924(c), is a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "force clause"), or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (the "residual clause"). 18 U.S.C. §

[1] Two other prisoners, Patrick Chasse, 15-cv-473-PB, and Sean King, 16-cv-283-PB, have also filed § 2255 motions challenging their convictions under § 924(c). I address Chasse's motion in a separate order because it is not barred by the statute of limitations. King has filed a second or successive motion with the First Circuit which has not yet been granted. I therefore do not address King's motion.

924(c)(3). The prisoners challenge their convictions by claiming that § 924(c)'s residual clause is unconstitutionally vague.

In this Memorandum and Order I address the government's contention that the prisoners' § 924(c) claims are barred by the statute of limitations that governs § 2255 motions.

I. BACKGROUND

Section 2255 motions are subject to a one-year statute of limitations. 28 U.S.C. § 2255(f). In most cases, the limitations period begins to run for § 2255 motions when a prisoner's conviction becomes final. § 2255(f)(1). If, however, a prisoner bases his motion on a new right that was announced by the Supreme Court after his conviction became final, the limitations period begins when "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2255(f)(3).

The prisoners argue that their § 924(c) claims are timely under § 2255(f)(3) because their claims are based on a new right that the Supreme Court initially recognized in Johnson v. United States, 135 S.Ct. 2551, 2563 (2015), less than a year before

they filed their § 2255 motions. Johnson held that a similar residual clause used in defining a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B)(ii), is unconstitutionally vague. Id. The Court later determined in Welch v. United States, 136 S.Ct. 1257, 1268 (2016), that Johnson announced a new rule that applies retroactively to cases on collateral review. The prisoners argue that the reasoning that led the Court to invalidate the ACCA's residual clause in Johnson requires the same result when applied to their § 924(c) claims. See Doc. No. 14 at 10-14.[2] Thus, they contend that their § 2255 motions are timely under § 2255(f)(3) because they filed their motions within a year of the date that the Court announced the right initially recognized in Johnson.

In response, the government asserts that the new right announced in Johnson does not extend to § 924(c)'s residual clause. See Doc. No. 9 at 5 (arguing that "the Supreme Court's holding in Johnson does not address whether the residual clause of § 924(c) is void for vagueness"). Instead, the government argues that the right asserted by the prisoners falls outside

[2] Unless otherwise specified, docket citations refer to Case No. 16-cv-201-PB, that of petitioner Derek Kucinski. The parties have filed identical briefs in all the cases listed in the caption.

the scope of the new right announced in Johnson and, therefore, applying that right to a § 924(c) claim would itself require the recognition of a new right.

II. ANALYSIS

Neither the Supreme Court nor the First Circuit has explained how a court should determine when the Supreme Court has recognized a new right for purposes of § 2255(f)(3). I fill that gap by applying the analytical framework the Supreme Court uses to determine whether a judicial decision announces a new rule that can be applied retroactively to cases on collateral review.

The Supreme Court announced its current scheme for resolving retroactivity questions in a plurality opinion in Teague v. Lane, 489 U.S. 288 (1989). Teague's reasoning was later adopted by a majority of the Court and the Court refined its reasoning in several subsequent decisions. See, e.g., Sawyer v. Smith, 497 U.S. 227, 234 (1990); Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997); Chaidez v. United States, 133 S.Ct. 1103, 1107 (2013). Under Teague, a case announces a new rule for retroactivity purposes if "the result was not dictated by precedent existing at the time the defendant's conviction became final." Chaidez, 133 S.Ct. at

1107 (emphasis in original). And, as later cases explain, a "holding is not so dictated . . . unless it would have been apparent to all reasonable jurists." Id. (quoting Lambrix, 520 U.S. at 527-28) (internal quotations omitted).

Other courts have concluded, and I agree, that Teague's analytic framework also applies in determining whether a new right has been recognized for purposes of § 2255(f)(3). See Headbird v. United States, 813 F.3d 1092, 1095 (8th Cir. Feb. 19, 2016); United States v. Taylor, No. 1:06-CR-430, 2016 WL 4718948, at *2-*9 (E.D. Va. Sept. 8, 2016); Smith v. United States, 13-cv-924-J-34PDB, 2016 WL 3194980, at *4 (M.D. Fl. June 9, 2016). Congress enacted § 2255(f)(3) in 1996, several years after Teague, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See Taylor, 2016 WL 4718948, at *4. Thus, "[t]here can be no doubt that Congress was aware of the Teague framework when it enacted the AEDPA." Id. Indeed, several of AEDPA's provisions include language that directly tracks Teague. Id. at *4, n.10 (citing 28 U.S.C. § 2255(h)(2) and 28 U.S.C. § 2254(e)(2)(A)(i)). In particular, § 2255(f)(3) itself references the Teague framework by specifying that the recognition of a new right by the Supreme Court will not restart the statute of limitations unless the right has also been made "retroactively applicable to cases on collateral review." See

id. Thus, the text of both AEDPA as a whole, and § 2255(f)(3) in particular, strongly suggest that Congress intended courts to use Teague to determine whether the Supreme Court has recognized a new right for statute of limitations purposes.[3]

One might nevertheless argue that the Teague framework should not apply to the statute of limitations inquiry because Teague is used to determine whether a new "rule" has been recognized for retroactivity purposes, whereas § 2255(f)(3) and other sections of AEDPA refer to the announcement of a new "right" for statute of limitations purposes.[4] Compare 28 U.S.C. § 2255(f)(3), with Teague, 489 U.S. at 301, and 28 U.S.C. §§ 2254(e)(2)(A)(i), 2255(h)(2). I decline to follow this path.

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[3] Although the parties do not offer any detailed analysis of this issue, the government agrees that Teague should be used to determine when a new right has been recognized pursuant to § 2255(f)(3). See Doc. No. 9 at 9. Indeed, Teague and its progeny provide the only existing analytic framework for deciding such issues. Cf. Headbird, 813 F.3d at 1095 (explaining that "it seems unlikely that Congress meant to trigger the development of a new body of law that distinguishes rights that are 'newly recognized' from rights that are recognized in [a] 'new rule' under established retroactivity jurisprudence").

[4] Neither side argues that the terms "right" and "rule" should be construed differently in this context. In fact, the parties used the terms interchangeably both in their briefs and at oral argument. See, e.g., Doc. Nos. 9 at 9 and 14 at 10. I nevertheless address the subject because it has been considered by other courts. See, e.g., Taylor, 2016 WL 4718948, at *3-*9.

If Congress had intended something other than the Teague framework to be used to determine when a new right has been recognized for statute of limitations purposes, a § 2255 claimant would be unable to benefit from § 2255(f)(3) when the Supreme Court announces a retroactive new rule unless the Court also determines that the new rule is based on a new right. Absent this additional determination, § 2255(f)(3) would be unavailable to collateral review claimants, and only claimants whose petitions are timely under § 2255(f)(1) could benefit from the new rule.

Welch can be used to illustrate the problem that results if a "right" is treated differently from "rule" in this context. See Taylor, 2016 WL 4718948 at *6-*7 (using their example). If we were to assume that Johnson announced a new rule for collateral review purposes but not a new right for statute of limitations purposes, the petitioner in Welch could not benefit from the Court's determination in his case that the new right announced in Johnson also applies on collateral review. This is because the petitioner could not rely on § 2255(f)(3), as the Supreme Court did not base its new rule on a new right, and the petitioner could not rely on § 2255(f)(1) because he waited more than a year after his conviction became final to file his petition. Id. (noting that the petitioner in Welch waited more

than a year after his conviction became final to file his § 2255 motion).

I cannot explain why Congress might have intended that a "rule" for retroactivity purposes should be treated differently from a "right" for statute of limitations purposes. New rules apply retroactively on collateral review only if they are either "substantive" rules or "watershed rules of civil procedure." Welch, 136 S.Ct. at 1264. Substantive rules include rules that "narrow the scope of a criminal statute by interpreting its terms" or that "place particular conduct or persons covered by the statute beyond the State's power to punish." Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004). Watershed rules of criminal procedure "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." Welch, 136 S.Ct. at 1264 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990). When such rules are made retroactive to cases on collateral review, no good reason justifies the use of a statute of limitations to bar a collateral review claimant from obtaining relief on the basis of the new rule if the claimant has asserted his claim promptly after the new rule is announced. Accordingly, stronger textual support than the use of the term "right" rather than "rule" in § 2255(f)(3) is required to justify an interpretation of

§ 2255(f)(3) that would require such a result.[5]

Because both sides agree that Johnson announced a new retroactive rule, the question here is whether that new rule also encompasses the prisoners' contention that § 924(c)'s residual clause is unconstitutionally vague. Applying the Teague framework, I answer that question by asking whether all reasonable jurists would agree that the Court's reasoning in Johnson also dictates the conclusion that § 924(c)'s residual clause is unconstitutionally vague. Absent such agreement, the prisoners' claimed right must itself be treated as a new right that must await recognition by the Supreme Court before the statute of limitations can be restarted by § 2255(f)(3).

I am not persuaded that Johnson necessarily encompasses the prisoners' § 924(c) claims. Although strong arguments can be

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[5] Sound policy reasons also support the use of the Teague framework to determine when a new right has been recognized for purposes of § 2255(f)(3). Although the prisoners here would benefit from a ruling that Johnson's new rule also encompasses their § 924(c) claims, other prisoners with similar claims would be barred from obtaining § 2255 relief unless they filed their claims within a year of either the date that their convictions became final or the date that Johnson was decided. Limiting the scope of newly announced rules to applications that reasonable jurists can agree on protects defendants who fail to act immediately to assert a novel application of a new rule because the statute of limitations with respect to such claims will not begin to run until they are clearly recognized by the Supreme Court.

made that the reasoning the Court used in Johnson to invalidate ACCA's residual clause requires the same result when applied to § 924(c), several courts, including at least three circuit courts and one district court, have concluded otherwise. See, e.g., United States v. Hill, No. 14-3872-CR, 2016 WL 4120667, at *8-*11 (2d Cir. Aug. 3, 2016); United States v. Prickett, No. 15-3486, 2016 WL 4010515, at *1 (8th Cir. July 27, 2016) (per curium); United States v. Taylor, 814 F.3d 340, 378 (6th Cir. 2016); United States v. Moreno-Aguilar, 2016 WL 4089563, at *9 (D. Md. Aug. 2, 2016); see also United States v. Gonzalez-Longoria, No. 15-40041, 2016 WL 4169127, at *1 (5th Cir. Aug. 5, 2016) (en banc)(concluding that identical language in 18 U.S.C. § 16(b) is not unconstitutionally vague in light of Johnson). Now is not the time to determine whether these courts are correct. Instead, it is sufficient to resolve the statute of limitations issue to conclude, as I do, that a substantial number of capable jurists have reasonably determined after careful analysis that Johnson does not require the invalidation of § 924(c)'s residual clause. Because reasonable jurists can and do disagree on this issue, the prisoners must await a determination by the Supreme Court before they may proceed with their § 2255 motions.

III. CONCLUSION

For the reasons set forth in this Memorandum and Order, the prisoners listed in the case caption are not currently entitled to invoke § 2255(f)(3) in support of their challenges to § 924(c)'s residual clause. Because all of the prisoners filed their § 2255 motions more than a year after their convictions became final, their motions are currently barred by § 2255(f).

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

September 15, 2016

cc: Counsel of record in all cases

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Arthur Durham

v. Civil No. 16-cv-274-PB

United States of America

O R D E R

Arthur Durham raised two issues in his 28 U.S.C. § 2255 petition. In an order dated September 15, 2017, I rejected Durham's claim that his conviction under 18 U.S.C. § 924(c) was invalid because § 924(c)'s residual clause was unconstitutionally vague. See United States v. Durham, No. 16-cv-274-PB, 2016 DNH 163 (Sept. 15, 2016). On June 8, 2016, Durham abandoned his remaining claim in light of the Supreme Court's recent decision in Beckles v. United States, 137 S. Ct. 886 (2017). See Doc. No. 15. Accordingly, all claims brought by the petitioner have been resolved and the clerk is instructed to close the case.

I previously granted at least one other petitioner a certificate of appealability on the issue I addressed in the September 15, 2016 Memorandum and Order. See Karahalios v. United States, 16-cv-286-PB, Doc. No. 11 (Sept. 15, 2016). I

now grant Durham a certificate of appealability on the same issue for the same reasons.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

June 13, 2017

cc: Bjorn Lange, Esq.
Seth Aframe, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Arthur Durham

v.

Civil No. 16-cv-274-PB

United States of America

JUDGMENT

In accordance with the following, judgment is hereby entered:

1. Memorandum and Order by Judge Paul Barbadoro dated September 15, 2016; and

2. Order by Judge Paul Barbadoro dated June 13, 2017.

By the Court,

Daniel J. Lynch
Clerk of Court

Date: June 14, 2017

cc: Counsel of Record

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

2.70

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

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

Use Note

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

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

PATTERN JURY INSTRUCTIONS (Criminal Cases)

Prepared by the

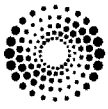
Committee on Pattern

Jury Instructions

District Judges Association

Fifth Circuit

2015 Edition



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2.73A

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

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

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

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

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

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

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

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

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

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

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

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

Note

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

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

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

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

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

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

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

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

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

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

ELEVENTH CIRCUIT

PATTERN JURY INSTRUCTIONS

(CRIMINAL CASES)

2016

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

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

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

(1) the Defendant caused [person's name] to part with property;

(2) the Defendant did so knowingly by using extortion; and

(3) the extortionate transaction delayed, interrupted, or affected interstate commerce.

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

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

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

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

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

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

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

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

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

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

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

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

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

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

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

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

(1) the Defendant knowingly acquired someone else's personal property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and

(3) the Defendant's actions obstructed, delayed, or affected interstate commerce.

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

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

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

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

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

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

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

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

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

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

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

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

EIGHTH CIRCUIT

MODEL JURY INSTRUCTIONS

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

MANUAL OF
MODEL CRIMINAL
JURY INSTRUCTIONS

for the

DISTRICT COURTS OF THE
EIGHTH CIRCUIT

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

2017 Edition

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

The crime of interference with commerce by means of [committing physical violence][threatening physical violence][1] as charged in [Count_____] of the Indictment, has three elements, which are:

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

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

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

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

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

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

minimal effect on commerce, so long as the business dealt in goods that moved through "commerce," as defined above.] [3]

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

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

Notes of Use

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

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

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

Committee Comments

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

Original

08-CR-758 TC

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

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

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

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

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

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

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

INSTRUCTION NO. 36

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

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

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

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

INSTRUCTION NO. 38

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

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

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

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

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

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

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

JURY INSTRUCTIONS AND VERDICT FORM

Members of the Jury:

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

COUNT ONE: CONSPIRACY TO INTERFERE WITH COMMERCE BY ROBBERY

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

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

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

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

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

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

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

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

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

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

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

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

Second: That defendant did so by means of robbery;

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

Fourth: That the robbery affected commerce.

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

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

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

Defendant.
_____/

No. 14-20154

Hon. Bernard A. Friedman

JURY INSTRUCTIONS

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

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

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

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

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

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

(2) Definitions

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

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

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

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

It is not necessary to prove that the defendant intended to obstruct, delay or interfere with interstate commerce or that the purpose of the alleged crime was to affect interstate commerce. Further, you do not have to decide whether the effect on interstate commerce was to be harmful or beneficial to a particular business or to commerce in general. You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the offense potentially caused an effect on interstate commerce to any degree, however minimal or slight.

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

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

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

DARRYL EARL MOODY
_____/

COURT'S INSTRUCTIONS TO THE JURY

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

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

First: That the Defendant knowingly obtained or took the personal property of another, or from the presence of another, as charged;

Second: That the Defendant took the property against the victim's will, by means of actual or threatened force or violence or fear of injury, whether immediately or in the future; and

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

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

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

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

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