APPENDIX K

CHAPTER 61
Sexual Abuse

¶ 61.01 Aggravated Sexual Abuse By Force or Threat (18 U.S.C. § 2241(a))

Instruction 61-1 The Indictment and the Statute

The indictment charges the defendant with aggravated sexual abuse. The indictment reads as follows:

[Read Indictment]

The indictment charges the defendant with violating section 2241(a) of Title 18 of the United States Code. That section provides in relevant part:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General of the United States, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be [guilty of a crime].

Comment

The rape and sexual abuse provisions of the United States Code were completely revised in 1986. 1 As the legislative history indicates, the law of rape as it had developed through common law and the prior statutes had several serious shortcomings. First, it required proof of both the use of force and the lack of the victim's consent, thus necessitating evidence that the victim resisted the attack. Second, the statute was gender-biased in that it protected only females attacked by males; males were not protected, nor were same-sex offenses covered. Third, the spousal immunity doctrine provided that it was a complete defense that the victim and defendant were married at the time of the alleged attack. Fourth, traditionally, a rape had to be corroborated

by evidence other than the victim's testimony, although that was not required in federal prosecutions at the time. 2

The revision of the rape statutes was intended to alleviate these problems. As the House Report accompanying the Act states:

[The new statute] modernizes and reforms Federal rape provisions by (1) defining the offenses in gender-neutral terms; (2) defining the offenses so that the focus of a trial is upon the conduct of the defendant, instead of upon the conduct or state of mind of the victim; (3) expanding the offenses to reach all forms of sexual abuse of another; (4) abandoning the doctrines of resistance and spousal immunity; and (5) expanding Federal jurisdiction to include all Federal prisons. In addition, the [new act] carries forward the current Federal rule that corroboration of a victim's testimony is not required. 3

The new provisions provide a series of offenses depending for the most part on whether the defendant engaged in a "sexual act" or the lesser "sexual contact" as those terms are defined in the statute, the degree of coercive behavior used by the defendant, and the age of the victim. The greatest offense is aggravated sexual abuse under section 2241, requiring a sexual act and some aggravating circumstance. Less serious offenses of sexual abuse are defined in sections 2242 and 2243, which also require a sexual act, but less serious aggravating factors. Finally, abusive sexual contact is addressed in section 2244, which requires "sexual contact" not amounting to a sexual act under the same circumstances as are punished in the more serious offenses.

If the victim was less than twelve at the time of the offense, then any sexual act is punished as an aggravated offense under section 2241(c) without any coercive behavior, and sexual contact is punished under section 2244(a) and (c) with double penalties. If the victim was between twelve and sixteen at the time of the offense, then aggravated sexual abuse requires a sexual act by the use of force as with an adult victim; if force was not used, then the traditional statutory rape offense is defined in section 2243(a), and parallel offenses involving sexual contact are addressed in section 2244. For adult victims, aggravated sexual abuse requires the use of force or a threat of force, or the use of drugs or intoxicants to incapacitate the victim, or an attack on an unconscious victim; sexual abuse involves lesser threats, situations where the victim was incapacitated, and when the victim was in official custody under the authority of defendant; if only sexual contact occurred, parallel offenses are incorporated into section 2244.

The graded offenses of aggravated sexual abuse, sexual abuse and abusive sexual contact appear on their face to establish a series of lesser included offenses. Indeed, the offenses defined in section 2244 can hardly be read otherwise as it defines the offense as "[w]hoever ... knowingly engages in or causes sexual contact with or by another person if so to do would violate ... section 2241 of this title had the sexual contact been a sexual act." In practice, however, the courts have had a difficult time with the issue of lesser included offenses and have concluded that many of the lesser grades do not qualify as lesser included offenses. These issues are discussed throughout this chapter in the "Elements of the Offense" instruction for each offense.

In addition to the section 2241(a) offense addressed in the Instruction above, section 2241(b) defines a separate offense of aggravated sexual abuse when the victim was either unconscious or the defendant forcefully or without the victim's knowledge administered some drug or intoxicant to incapacitate the victim prior to the sexual act. No instruction is provided for this offense as it appears to be charged only rarely.

Footnotes
1
Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 87, 100 Stat. 3620 (1986).
2
H.R. Rep. No. 99-594, at 11–13, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6191–93.
3
Id. at 10–11.

Instruction 61-2 Elements of the Offense

In order to prove the defendant guilty of aggravated sexual abuse, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused [name of victim] to engage in a sexual act as I will define that term for you;

Second, that the defendant acted knowingly in causing [name of victim] to engage in that sexual act;

Third, that the defendant did so by using force against [name of victim] or by threatening or placing [name of victim] in fear that any person, including herself (*or* himself), will be subjected to death, serious bodily injury, or kidnapping; and

Fourth, that the offense was committed in the special maritime and territorial jurisdiction of the United States (*or* in a federal prison) (*for conduct occurring after January 5, 2006, or* in a prison, institution, or facility that holds federal prisoners in custody).

Authority

Tenth Circuit: United States v. Martin, 528 F.3d 746 (10th Cir.), *cert. denied*, 555 U.S. 960, 129 S. Ct. 433, 172 L. Ed. 2d 314 (2008).

Eleventh Circuit: Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 74.

Comment

The required elements of this offense are well-accepted. 1 The Eighth Circuit formulation is similar, but treats the knowledge requirement as part of the first element. 2 That approach is equally acceptable to the recommended formulation. The knowledge requirement is included as a separate element here out of a general preference for treating scienter as a separate element whenever possible.

The Ninth Circuit pattern instruction combines the first three elements of the recommended formulation as follows:

First, the defendant knowingly [used force] [threatened or placed [victim] in fear that some person would be subject to death, serious bodily injury or kidnapping] to cause [victim] to engage in a sexual act; and

Second, the offense was committed at [location stated in indictment]. 3

As this formulation requires too many factual findings in one element, it is not recommended.

Because one of the elements of this offense is that it occur in some federal enclave, many prosecutions involve assaults that occur on Indian reservations. If the defendant is a Native American, so that the charge is filed under 18 U.S.C. § 1153, then an additional element should be added to the effect that the defendant is a Native American. 4 If the offense resulted in the death of the victim, it may be charged as a capital offense under section 2245. 5 In that situation, an additional element to that effect should be incorporated into the recommended formulation.

There has been considerable discussion in the courts as to which other offenses in sections 2242-2244 are lesser included offenses of those in section 2241(a). Section 2242(1) seems to create a lesser offense by requiring proof of a threat "other than by threatening or placing [the victim] in fear that any person will be subjected to death, serious bodily injury, or kidnapping." 6 However, every court to consider this issue has concluded that section 2242(1) does not describe a lesser included offense of violating section 2241(a), because the threats encompassed by those two provisions are different, not greater and lesser; thus, each requires proof of an element that the other does not. 7

Section 2243(a) defines the traditional crime of statutory rape, a sexual act with a victim less than sixteen years old and more than four years younger than defendant. This is clearly not a lesser included offense of section 2241 because it includes elements relating to the age of the victim that section 2241 does not. 8

Section 2244(a) specifically incorporates all of 2241(a) except that it requires proof of "sexual contact" rather than the more serious "sexual act," providing:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate-

(1) section 2241 of this title had the sexual contact been a sexual act 9

Despite what appears to be an obvious intention by Congress to create a lesser included offense, the courts are divided on this issue. The problem is in the respective definitions of "sexual act" and "sexual contact" in section 2246(2). The definition of "sexual act" includes four separate acts: two (penetration of the vulva or anus by the penis and several forms of oral sex) that include no separate intent requirement, and two (digital penetration and touching of certain parts of the body not through the clothing) that include a requirement that the act be performed with "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 10 The definition of "sexual contact" describes lesser conduct with the same intent requirement as the latter two sexual acts. 11 Thus, if the defendant is charged with committing one of the first two acts, then there is a strong argument that the specific intent requirement is not an element of the section 2241 offense. That is the majority position, as at least three courts of appeals have held that violating section 2244(a) is not a lesser included offense of violating section 2241(a) because the former requires proof of an element—specific intent—that the latter does not. 12 The Eighth Circuit has taken the contrary position, reasoning that the specific intent to gratify sexual desire is inherent in the first two acts, so it is in fact an element, even if unstated, of every sexual act. 13 The Ninth Circuit has pointed out that if the defendant is charged with either of the latter two forms of sexual acts, which both include the specific intent requirement, then violating section 2244 is a lesser offense of violating section 2241. 14 That conclusion is also subject to question, as it can be argued that the touching required to prove a sexual act is different, not lesser, than the touching required to prove sexual contact. That argument has not been addressed in a reported decision.

Footnotes

1
See United States v. Martin, 528 F.3d 746, 752 (10th Cir.), *cert. denied*, 555 U.S. 960, 129 S. Ct. 433, 172 L. Ed. 2d 314 (2008); Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 74.

2
United States v. Cobenais, 868 F.3d 731, 739 (8th Cir. 2017); United States v. Tarnow, 705 F.3d 809, 813–14 (8th Cir. 2013); United States v. Espinosa, 585 F.3d 418, 424 (8th Cir. 2009); United States v. Youngman, 481 F.3d 1015, 1020 (8th Cir. 2007); *see also* Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 2242(1).

3
Ninth Circuit Model Criminal Jury Instruction 8.133.

4
See, e.g., United States v. Youngman, 481 F.3d 1015, 1020 (8th Cir. 2007); United States v. Peters, 277 F.3d 963, 966–67 (7th Cir. 2002); United States v. Tsinhnahijinnie, 112 F.3d 988, 991 (9th Cir. 1997).
5
See, e.g., United States v. Nelson, 347 F.3d 701 (8th Cir. 2003).
6
18 U.S.C. § 2242(a).
7
United States v. Boyles, 57 F.3d 535, 544–45 (7th Cir. 1995); United States v. Sneezer, 983 F.2d 920, 923–24 (9th Cir. 1992).
8
United States v. Rivera, 43 F.3d 1291, 1297 (9th Cir. 1995); United States v. Amos, 952 F.2d 992, 994 (8th Cir. 1991).
9
18 U.S.C. § 2244(a).
10
18 U.S.C. § 2246(2).
11
18 U.S.C. § 2246(3).
12
United States v. Castillo, 140 F.3d 874, 886–87 (10th Cir. 1998); United States v. Hourihan, 66 F.3d 458, 464–65 (2d Cir. 1995); United States v. Garcia, 7 F.3d 885, 890–91 (9th Cir. 1993).
13
United States v. Robertson, 606 F.3d 943, 951 (11th Cir. 2010); United States v. Demarrias, 876 F.2d 674, 676–77 (8th Cir. 1989); *see* United States v. Waters, 194 F.3d 926, 931 (8th Cir. 1999) (reaffirming *Demarrias*).
14
United States v. Torres, 937 F.2d 1469, 1476-77 (9th Cir. 1991).

Instruction 61-3 First Element—Sexual Act 1

The first element that the government must prove beyond a reasonable doubt is that the defendant caused [name of victim] to engage in a sexual act.

The term "sexual act" means (1) penetration, however slight, of the vulva or anus by the penis; (2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (3) penetration, however slight, of the anal or genital opening of another by a hand, a finger, or by any other object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of sixteen years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Authority

First Circuit: United States v. Jahagirdar, 466 F.3d 149 (1st Cir. 2006).

Seventh Circuit: Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 2246(2).

Eleventh Circuit: Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 74.

Comment

The definition of a "sexual act" is adapted directly from the statute. 2 Only those parts of the definition that are relevant should be included in the charge. The Eighth Circuit has held that multiple sexual acts during one episode may be charged separately. 3

The first and third parts of the definition require "penetration." There is some authority that penetration through the victim's clothing will satisfy this element. In *United States v. Norman T.*, 4 the evidence tended to establish that the defendant digitally penetrated the five-year-old victim's genitalia through her jeans and underwear. The defendant argued on appeal that this may have been "sexual contact"—touching through the clothing—but was not a "sexual act" as those terms are defined in section 2246. The court of appeals disagreed, stating that "the existence of clothing may make it more difficult, or impossible, to perform [the acts described in section 2246(2)(A), (B) and (C)], but that is a factual question, not a legal one." 5 As the court pointed out, section 2246(2)(D) contains a specific limitation that the touching not be through clothing, so if Congress had intended that limitation to apply to the other parts of the definition, it could easily have incorporated it into the statutory language. 6

The recommended instruction does not address the issues of the victim's lack of consent or resistance to the sexual act. 7 It is clear that Congress intended to eliminate any requirement that the government establish that the victim did not consent or actively resisted. As the legislative history explains, under prior law,

[t]he resistance doctrine was applied to determine whether the requisite force, and therefore lack of consent, was present. The resistance doctrine reflected a policy in direct conflict with the safety and welfare of sexual abuse victims. Resistance under certain conditions is dangerous. Requiring a victim to become a martyr by testing the sincerity of an offender's threat is unfair and should not be imposed upon victims of sexual abuse offenses. The law does not impose a similar requirement upon victims of other crimes of violence. 8

If the defendant suggests that the victim did not sufficiently resist, the following instruction making clear the government's burden in this regard is recommended: "The government is not required to show that the victim did not consent to the sexual act, nor is the government required to show that the victim resisted." 9

Footnotes

2
18 U.S.C. § 2246(2).
3
United States v. Two Elk, 536 F.3d 890, 898–99 (8th Cir. 2008) (separate counts charging vaginal penetration and anal penetration of victim during same episode were not multiplicitous); *see also* United States v. Plenty Chief, 561 F.3d 846, 851–53 (8th Cir. 2009) (multiple acts of "sexual contact" may be charged separately, in this case touching breasts and attempted digital penetration).
4
129 F.3d 1099 (10th Cir. 1997).
5
Id. at 1103.
6
Id.
7
See United States v. Martin, 528 F.3d 746, 753–54 (10th Cir.), *cert. denied*, 555 U.S. 960, 129 S. Ct. 433, 172 L. Ed. 2d 314 (2008) (trial court properly refused requested consent charge).
8
H.R. Rep. No. 99-594, at 14, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6194.
9
See United States v. Rivera, 43 F.3d 1291, 1297 (9th Cir. 1995).

Instruction 61-4 Second Element—Defendant Acted Knowingly

The second element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly in causing [name of victim] to engage in a sexual act.

To act knowingly means to act intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all the facts and circumstances surrounding the case.

Authority

Seventh Circuit: United States v. Peters, 277 F.3d 963 (7th Cir. 2002).

Eighth Circuit: United States v. Holy Bull, 613 F.3d 871 (8th Cir. 2010); United States v. Hollow Horn, 523 F.3d 882 (8th Cir. 2008).

Ninth Circuit: Ninth Circuit Model Criminal Jury Instruction 8.133.

Comment

The definition of knowingly is the standard one used throughout this **Treatise** 1 and is widely accepted.

2 As with other instances when the government is required to prove that the defendant acted knowingly, a deliberate ignorance instruction would be appropriate if the evidence supports that inference. 3

Footnotes
1
See Instruction 3A-1, *above*.
2
See United States v. Holy Bull, 613 F.3d 871, 874 (8th Cir. 2010); United States v. Peters, 277 F.3d 963, 968 (7th Cir. 2002); Comment to Ninth Circuit Model Criminal Jury Instruction 8.133.
3
See United States v. Jennings, 496 F.3d 344, 355 (4th Cir. 2007), *cert. denied*, 552 U.S. 1214, 128 S. Ct. 1300, 170 L. Ed. 2d 121 (2008); United States v. Peters, 277 F.3d 963, 968 (7th Cir. 2002). For discussion of deliberate ignorance instructions, see Instruction 3A-2, *above*.

Instruction 61-5 Third Element—Force or Threat

The third element that the government must prove beyond a reasonable doubt is that the defendant used force against [name of victim] or threatened or placed [name of victim] in fear that any person would be subjected to death, serious bodily injury, or kidnapping.

For the purposes of this element, the use of force means the use or threatened use of a weapon, the use of such physical force as is sufficient to overcome, restrain, or injure a person, or a threat of harm sufficient to coerce or compel submission by the victim.

If applicable: **This element is satisfied if [name of victim] was placed in fear that another person would be subjected to death, serious bodily injury, or kidnapping.**

If applicable: **A threat of serious bodily injury means a threat of injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.**

Authority

Second Circuit: United States v. Lauck, 905 F.2d 15 (2d Cir. 1990).

Fourth Circuit: United States v. Johnson, 492 F.3d 254 (4th Cir. 2007).

Sixth Circuit: United States v. Weekley, 130 F.3d 747 (6th Cir. 1997).

Eighth Circuit: United States v. Robertson, 606 F.3d 943 (11th Cir. 2010); United States v. Bercier, 506 F.3d 625 (8th Cir. 2007).

Ninth Circuit: United States v. Archdale, 229 F.3d 861 (9th Cir. 2000); United States v. Fulton, 987 F.2d

631 (9th Cir. 1993).

Comment

The definition of force in the recommended instruction originated in the legislative history accompanying the enactment of section 2241, 1 and has been widely adopted by the courts. 2 The statute does not require proof of significant violence, 3 or that the victim offered resistance, 4 or that the victim did not consent. 5 Although consent is not an element of the crime, it is relevant because its presence would negate the causal element under § 2241(a)(1), and the need to employ force will necessarily indicate a lack of consent. 6

It is often stated that the force requirement is met "when the sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact." 7 While that is undoubtedly true, it is not recommended that this language be incorporated into the jury charge. The inability to escape is evidence of the use of force sufficient to satisfy this element, but it is not required. 8 The fact that the victim was able to escape at some point is not a defense, 9 and including the language quoted above is likely to confuse the jurors by focusing their attention on whether the victim was able to escape, rather than on whether the defendant used force.

Optional language in the instruction addresses the situation when the threat of harm was directed at a third person. For example, the legislative history states that it would be an offense under section 2241(a) "for A to cause B to engage in a sexual act (with A or someone else) by threatening to kill B's child." 10

Finally, the instruction includes optional language defining "serious bodily injury." This definition is derived directly from section 2246(4).

Footnotes

1
H.R. Rep. No. 99-594, at 14 n.54a, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6194 n.54a.

2
See, e.g., United States v. Robertson, 606 F.3d 943, 956 (11th Cir. 2010); United States v. Johnson, 492 F.3d 254, 257 (4th Cir. 2007); United States v. Archdale, 229 F.3d 861, 868 (9th Cir. 2000); United States v. Weekley, 130 F.3d 747, 754 (6th Cir. 1997); United States v. Lauck, 905 F.2d 15, 18 (2d Cir. 1990).

3
United States v. Lauck, 905 F.2d 15, 18 (2d Cir. 1990).

4
H.R. Rep. No. 99-594, at 14, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6194 n.54.

5
Id.; *see* United States v. Martin, 528 F.3d 746, 753–54 (10th Cir.), *cert. denied*, 555 U.S. 960, 129 S. Ct. 433, 172 L. Ed. 2d 314 (2008).

6

United States v. Cobenais, 868 F.3d 731, 740 (8th Cir. 2017) (rejecting argument that district court's instruction improperly led jury to find that no consent exists if defendant committed otherwise consensual act by force, here, if both parties wanted to engage in inherently forceful act of "fisting").

7

United States v. Lauck, 905 F.2d 15, 18 (2d Cir. 1990); *see* United States v. H.B., 695 F.3d 931, 936 (9th Cir. 2012); United States v. Holly, 488 F.3d 1298, 1302–03 (10th Cir. 2007), *cert. denied*, 552 U.S. 1310, 128 S. Ct. 1870, 170 L. Ed. 2d 744 (2008); United States v. Simmons, 470 F.3d 1115, 1121 (5th Cir. 2006), *cert. denied*, 551 U.S. 1147, 127 S. Ct. 3002, 168 L. Ed. 2d 731 (2007); United States v. Weekley, 130 F.3d 747, 754 (6th Cir. 1997).

8

United States v. Allery, 139 F.3d 609, 611–12 (8th Cir. 1998).

9

Id.

10

H.R. Rep. No. 99-594,. at 14, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6194.

Instruction 61-6 Fourth Element—Offense Occurred in Federal Jurisdiction

The fourth element that the government must prove beyond a reasonable doubt is that the offense was committed in the special maritime and territorial jurisdiction of the United States (*or* in a federal prison) *(for conduct occurring after January 5, 2006, or* in a prison, institution, or facility that holds federal prisoners in custody).

The indictment alleges that the offense occurred at [location stated in indictment]. You are instructed that [said location] is within the special maritime and territorial jurisdiction of the United States.

Thus, if you find that the offense occurred at that location, this element is satisfied. If, however, you find that the offense did not occur at [said location] or if you have a reasonable doubt as to this element, then you must find the defendant not guilty.

Authority

First Circuit: United States v. Levesque, 681 F.2d 75 (1st Cir. 1982).

Second Circuit: United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995).

Eighth Circuit: United States v. Stands, 105 F.3d 1565 (8th Cir. 1997).

Ninth Circuit: United States v. Warren, 984 F.2d 325 (9th Cir. 1993); Ninth Circuit Model Criminal Jury Instruction 8.133.

Tenth Circuit: United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999).

Eleventh Circuit: Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 74.

Comment

That the offense occurred in the "special maritime and territorial jurisdiction" is necessary to establish federal jurisdiction. The term "special maritime and territorial jurisdiction" is defined in 18 U.S.C. § 7, and is incorporated into a number of criminal statutes in addition to the sexual abuse offenses. 1

Section 7 establishes federal jurisdiction in a variety of locations both inside and outside the United States, including military posts, 2 aircraft, 3 vessels carrying the United States flag or sailing in United States waters, 4 foreign vessels traveling to or from United States ports, 5 and other locations. Indian reservations are not included in section 7, but are incorporated into the sexual abuse offenses by 18 U.S.C. § 1153. 6

Although there is authority that federal prisons fall within section 7, 7 such facilities are specifically incorporated into every provision in the sexual abuse statutes. Section 2246(1) defines the term "prison" as a "correctional, detention or penal facility." One of the few courts to address this provision defined a detention facility as "a place designed or intended to hold persons in custody," and so held that the cell block in the federal courthouse fell within this definition. 8 A 2006 amendment added the language referring to state and local facilities with contractual arrangements to house federal prisoners. 9 Note that the language of the new provision does not limit jurisdiction to instances when a federal prisoner housed in the facility was sexually assaulted, so it is arguably applicable to a sexual assault on one state prisoner by another state prisoner in an institution that also houses federal prisoners, thereby raising constitutional concerns.

The courts are agreed that the question whether a particular location falls within federal jurisdiction under section 7 or 1153 is a pure question of law that should not be submitted to the jury. 10 Thus, the published pattern instructions uniformly instruct the jury that a particular place is within federal jurisdiction and that the jury's role is to determine whether the offense took place at that location as charged. 11 Indeed, on a couple of occasions, appellate courts have held that the trial court erred in submitting the legal question to the jury, although both held that the error was harmless. 12

The Fifth Circuit has held on several occasions that this element should be treated similarly to venue and that it need only be proven by a preponderance of the evidence. 13 The court of appeals has recently questioned that result, pointing out that the Supreme Court has consistently emphasized that every element included in the definition of the offense must be proven beyond a reasonable doubt. 14 As the district court charged the jury that the element must be proven beyond a reasonable doubt, the court had no occasion to overrule that prior authority, but the court's comments are undoubtedly correct, and the jury is charged by the higher standard in the recommended instruction.

Footnotes
1

See, e.g., 18 U.S.C. § 81 (arson); 18 U.S.C. § 113 (assault); 18 U.S.C. §§ 1111-1113 (murder, manslaughter and attempted murder); 18 U.S.C. § 1201(a)(2) (kidnapping).

2
18 U.S.C. § 7(3) (domestic military bases); 18 U.S.C. § 7(9) (foreign military bases and consulates).

Note that there was at one time a split in the circuits as to whether foreign military bases and off-base housing facilities in other countries were included in section 7. *Compare* United States v. Corey, 232 F.3d 1166, 1169–83 (9th Cir. 2000) (foreign bases are included) *with* United States v. Gatlin, 216 F.3d 207, 211–23 (2d Cir. 2000) (foreign bases are not included). This division was resolved by the USA PATRIOT Act of 2001, Pub. L. No. 107-56, Title VIII, § 804, 115 Stat. 377 (2001), which added section 7(9).

3
18 U.S.C. § 7(5); *see, e.g.*, United States v. Jahagirdar, 466 F.3d 149 (1st Cir. 2006); United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004).

4
18 U.S.C. §§ 7(1), (2).

5
18 U.S.C. § 7(8); *see* United States v. Curtis, 380 F.3d 1311, 1312 n.1 (11th Cir. 2004); United States v. Neil, 312 F.3d 419, 422 (9th Cir. 2002).

6
Section 1153 provides:

Any Indian who commits against the person of another Indian or other person any of the following offenses, namely ... a felony under chapter 109A [the sexual abuse chapter] ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

See United States v. Cobenais, 868 F.3d 731, 739 (8th Cir. 2017) (Instruction included as elements: "(1) the defendant did knowingly cause and attempt to cause another to engage in a sexual act, (2) by the use of force or threat of force, (3) *the defendant is an Indian, and (4) the offense occurred in Indian Country*." (Emphasis added, internal quotation marks and citations omitted).

7
See United States v. Hernandez-Fundora, 58 F.3d 802, 809–10 (2d Cir. 1995).

8
United States v. Urrabazo, 234 F.3d 904, 906–07 (5th Cir. 2000).

9
Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1177(a), 119 Stat. 2960 (2006).

10
United States v. Roberts, 185 F.3d 1125, 1137 (10th Cir. 1999); United States v. Stands, 105 F.3d 1565, 1575–76 (8th Cir. 1997); United States v. Hernandez-Fundora, 58 F.3d 802, 812 (2d Cir. 1995); United States v. Warren, 984 F.2d 325, 327 (9th Cir. 1993); United States v. Levesque, 681 F.2d 75, 78 (1st Cir. 1982).

11
See Ninth Circuit Model Criminal Jury Instruction 8.133; Eleventh Circuit Pattern Criminal Jury

Instructions, Offense Instruction 74.
12
United States v. Stands, 105 F.3d 1565, 1575–76 (8th Cir. 1997); United States v. Levesque, 681 F.2d 75, 78 (1st Cir. 1982).
13
See United States v. Bell, 993 F.2d 427, 429 (5th Cir. 1993); United States v. Bowers, 660 F.2d 527, 531 (5th Cir. 1981).
14
United States v. Perrien, 274 F.3d 936, 939 n.1 (5th Cir. 2001) (citing Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), and In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

Footnotes for 61.01[61-3]

1 Adapted from Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 2246(2).

¶ 61.02 Aggravated Sexual Abuse of Minor Under Twelve (18 U.S.C. § 2241(c))

Instruction 61-7 The Indictment and the Statute

The indictment charges the defendant with aggravated sexual abuse of a minor under twelve. The indictment reads as follows:

[Read Indictment]

The indictment charges the defendant with violating section 2241(c) of Title 18 of the United States Code. That section provides in relevant part:

Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General of the United States, knowingly engages in a sexual act with another person who has not attained the age of 12 years [shall be guilty of a crime].

Comment

For a general discussion of the organization and grading of the sexual abuse offenses, see Comment to Instruction 61-1, *above*.

The legislative history makes clear that sexual conduct with children less than twelve years old is prohibited without any other coercive conduct by the defendant: "This offense does not require the use of force or threats, or the administering of a drug, intoxicant or other similar substance. It proscribes noncoercive conduct in which older, more mature persons take advantage of others whose capability to make judgments about sexual activity has not matured." 1

This offense includes a second jurisdictional peg in addition to offenses that occur in the special maritime and territorial jurisdiction for those instances when the defendant crossed a state line for the purpose of engaging in a sexual act with a child under twelve. This issue is discussed in depth in Instruction 61-12, *below*.

Footnotes
1
H.R. Rep. No. 99-594, at 15, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6195.

Instruction 61-8 Elements of the Offense

In order to prove the defendant guilty of aggravated sexual abuse of a minor under twelve, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused [name of victim] to engage in a sexual act as I will define that term for you;

Second, that the defendant acted knowingly in causing [name of victim] to engage in that sexual act;

Third, that [name of victim] was less than twelve years old at the time of the acts alleged in the indictment; and

Choose applicable jurisdictional element:

Fourth, that the offense was committed in the special maritime and territorial jurisdiction of the United States (*or* in a federal prison) (*for conduct occurring after January 5, 2006, or* in a prison, institution, or facility that holds federal prisoners in custody); *or*

Fourth, that the defendant crossed a state line with intent to engage in a sexual act with a child

under twelve.

Comment

The Ninth Circuit pattern instruction is similar, but treats the knowledge requirement as part of the first element. 1 That approach is equally acceptable to the recommended formulation. The knowledge requirement is included as a separate element here out of a general preference for treating scienter as a separate element whenever possible.

The use of force, threats, or any other coercive act by the defendant is not an element of this offense. 2 Thus, any sexual activity between the defendant and a child under twelve is punishable under either section 2241(c) or section 2244(a) as long as federal jurisdiction exists. Note, however, that the jurisdictional peg for crossing a state line is not included in section 2244, so liability under that theory is limited to instances of sexual acts and not sexual contact.

There is a question whether engaging in sexual contact with a child under twelve under section 2244(a) is a lesser included offense of engaging in a sexual act with a child under twelve under section 2241(c). As discussed in the Comment to Instruction 61-2, *above*, the majority position is that since sexual contact requires proof of intent that a sexual act does not, that section 2244(a) is not a lesser included offense because it contains an element that the greater offense does not. 3 This is complicated by the fact that two subsections of section 2246(2) defining "sexual act" do include that same intent element, so the section 2244 offense may be a lesser offense under certain circumstances. 4

The Sixth Circuit has recently held that a violation of section 2423(b) may be a lesser included offense of section 2241(c) in certain circumstances. 5 For a discussion of this issue, see Comment to Instruction 61-13, *below*.

Footnotes

1
Ninth Circuit Model Criminal Jury Instruction 8.137.

2
United States v. Gabe, 237 F.3d 954, 961 (8th Cir. 2001); H.R. Rep. No. 99-594, at 15, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6195.

3
United States v. Castillo, 140 F.3d 874, 886–87 (10th Cir. 1998); United States v. Hourihan, 66 F.3d 458, 464–65 (2d Cir. 1995); United States v. Garcia, 7 F.3d 885, 890–91 (9th Cir. 1993). *But see* United States v. Demarrias, 876 F.2d 674, 676–77 (8th Cir. 1989) (holding that this intent element is implicit in every definition of sexual act, so all section 2244 offenses are lesser included offenses of the corresponding offenses in sections 2241-2243); *see also* United States v. Waters, 194 F.3d 926, 931 (8th Cir. 1999) (reaffirming *Demarrias*).

4
See United States v. Torres, 937 F.2d 1469, 1476-77 (9th Cir. 1991).

5

United States v. DeCarlo, 434 F.3d 447, 456–57 (6th Cir. 2006).

Instruction 61-9 First Element—Sexual Act 1

The first element that the government must prove beyond a reasonable doubt is that the defendant caused [name of victim] to engage in a sexual act.

The term "sexual act" means (1) penetration, however slight, of the vulva or anus by the penis; (2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (3) penetration, however slight, of the anal or genital opening of another by a hand, a finger, or by any other object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of sixteen years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Authority

First Circuit: United States v. Jahagirdar, 466 F.3d 149 (1st Cir. 2006).

Seventh Circuit: Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 2246(2).

Eleventh Circuit: Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 74.

Comment

See Comment to Instruction 61-3, *above*.

Instruction 61-10 Second Element—Defendant Acted Knowingly

The second element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly in causing [name of victim] to engage in a sexual act.

To act knowingly means to act intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all the facts and circumstances surrounding the case.

Authority

Seventh Circuit: United States v. Peters, 277 F.3d 963 (7th Cir. 2002).

Eighth Circuit: United States v. Holy Bull, 613 F.3d 871 (8th Cir. 2010); United States v. Hollow Horn, 523 F.3d 882 (8th Cir. 2008).

Ninth Circuit: Ninth Circuit Model Criminal Jury Instruction 8.133.

Comment

See Comment to Instruction 61-4, *above*.

Instruction 61-11 Third Element—Age of Victim

The third element that the government must prove beyond a reasonable doubt is that [name of victim] was less than twelve years old at the time of the acts alleged in the indictment.

The government does not have to prove that the defendant knew that [name of victim] was less than twelve years old.

Authority

Eighth Circuit: United States v. Brown, 330 F.3d 1073 (8th Cir. 2003).

Comment

Section 2241(d) specifically provides that the government need not prove that the defendant knew that the victim was less than twelve years old. 1 The legislative history makes this abundantly clear as well, stating that "there is strict liability as to the age of a victim" less than twelve, 2 and quoting the Commentary to the Model Penal Code to the effect that "no credible error of perception would be sufficient to recharacterize a child of such tender years as an appropriate object of sexual gratification." 3

Thus, unlike the case of sexual acts with a minor between twelve and sixteen years old, 4 reasonable mistake of age is not a defense. 5 Further, several courts have held that the defense is not constitutionally required, concluding that there is no equal protection problem in treating children under twelve differently from children between twelve and sixteen because Congress had a rational basis for providing greater protection to younger children. 6

Footnotes
1
18 U.S.C. § 2241(d).
2
H.R. Rep. No. 99-594, at 15, *reprinted at* 1986 U.S. Code. Cong. & Admin. News 6186, 6195.

3
Id. at 15–16 (quoting Model Penal Code and Commentaries, § 231.6, comment at 414 (1980)).
4
See Instruction 61-33, *below*.
5
United States v. Juvenile Male, 211 F.3d 1169, 1170–71 (9th Cir. 2000).
6
United States v. Juvenile Male, 211 F.3d 1169, 1170–71 (9th Cir. 2000); United States v. Ransom, 942 F.2d 775, 776–778 (10th Cir. 1991) (also rejecting due process challenge).

Instruction 61-12 Fourth Element—Offense Occurred in Federal Jurisdiction

The fourth element that the government must prove beyond a reasonable doubt is that the offense was committed in the special maritime and territorial jurisdiction of the United States (*or* in a federal prison) (*for conduct occurring after January 5, 2006, or* in a prison, institution, or facility that holds federal prisoners in custody).

The Indictment alleges that the offense occurred at [location stated in indictment]. You are instructed that [said location] is within the special maritime and territorial jurisdiction of the United States.

Thus, if you find that the offense occurred at that location, this element is satisfied. If, however, you find that the offense did not occur at [said location] or if you have a reasonable doubt as to this element, then you must find the defendant not guilty.

Authority

First Circuit: United States v. Levesque, 681 F.2d 75 (1st Cir. 1982).

Second Circuit: United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995).

Eighth Circuit: United States v. Stands, 105 F.3d 1565 (8th Cir. 1997).

Ninth Circuit: United States v. Warren, 984 F.2d 325 (9th Cir. 1993); Ninth Circuit Model Criminal Jury Instruction 8.133.

Tenth Circuit: United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999).

Eleventh Circuit: Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 74.

Comment

If the indictment charges that the offense occurred in the special maritime and territorial jurisdiction, this

instruction should be given. For a discussion of this charge, see Comment to Instruction 61-6, *above*. If the indictment charges that the defendant crossed a state line to engage in the sexual activity, Instruction 61-13, *below*, should be substituted.

Instruction 61-13 Fourth Element—Defendant Crossed State Line 1

The fourth element that the government must prove beyond a reasonable doubt is that the defendant crossed a state line with intent to engage in a sexual act with a child under twelve.

In order to establish this element, it is not necessary for the government to prove that the illegal sexual activity was the sole purpose for crossing the state line. A person may have several different purposes or motives for such travel, and each may prompt in varying degrees the act of making the journey. The government must prove beyond a reasonable doubt, however, that a significant or motivating purpose of the travel across a state line was to engage in a sexual act with a child under twelve years old. In other words, the illegal sexual activity must not have been merely incidental to the trip.

Authority

Ninth Circuit: United States v. Lukashov, 694 F.3d 1107 (9th Cir. 2012).

Tenth Circuit: United States v. Cryar, 232 F.3d 1318 (10th Cir. 2000).

Comment

If the indictment charges that the defendant crossed a state line to engage in the sexual activity, this instruction should be given. If the indictment charges that the offense occurred in the special maritime and territorial jurisdiction, Instruction 61-12, *above*, should be substituted.

Section 2241(c) provides that jurisdiction exists under section 2241(c) when the defendant "crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years." 2 The Mann Act contains a similar jurisdictional provision, 3 and in an early case involving that provision, *Mortenson v. United States*, 4 the Supreme Court stated in dictum that an intention to transport women across state lines for the purpose of prostitution "must be the dominant motive of such interstate movement." 5 However, lower courts interpreting the Mann Act and related statutes after *Mortenson* have read this requirement more broadly, requiring not that the interstate travel be *the* dominant motive, but only that it be *a* dominant motive in that it was a compelling or significant motivation for the travel. 6 The only courts to address this issue specifically in the context of section 2241 have held that the same interpretation should be applied, 7 as does the Seventh Circuit pattern instruction. 8 Thus, the recommended instruction is adapted from one of the recent cases involving the Mann Act language. 9 Note that the distinction between "*a* dominant motive" and "*the* dominant motive" is likely to confuse the jury, 10 so the word "dominant" is avoided completely in favor of the clearer terms "sole purpose" and

"significant or motivating purpose" which are easier to understand. For the same reason, the phrase "efficient and compelling purpose" 11 is avoided as well.

The language of section 2241(c) is ambiguous in that it could be read as creating a separate crime for crossing a state line with the intent to commit a sexual act with a child under twelve without actually committing or attempting to commit that act. Indeed, the Seventh Circuit pattern instructions include a charge under section 2243(a)—which at one time included language similar to that in section 2241(a)—to that effect. 12 This does not appear to be a proper interpretation of the statute. One of the proponents of the amendment adding this provision stated on the Senate floor that the purpose of the amendment was to "establish new Federal jurisdiction over sexual offenses against children when a person commits a crime after crossing state lines with the intent of committing a sex offense." 13 The first court to address this issue in practice, the Tenth Circuit in *United States v. Cryar*, 14 held that this is solely a jurisdictional peg, and that a sexual act or attempted sexual act is required for prosecution. 15 However, in *United States v. DeCarlo*, 16 the Sixth Circuit held that section 2241(c) does prohibit "interstate travel with the intent to have sex with a child younger than twelve," 17 without discussion of *Cryar* or the problem discussed here. The Eleventh Circuit has reached the same conclusion in *United States v. Brenton-Farley*. 18

DeCarlo involved the familiar factual pattern where the defendant communicated through an Internet chat room with a person he believed to be a young girl but who was in fact an undercover law enforcement officer. When defendant traveled across a state line to meet the "girl," he was arrested and charged with violations of both sections 2241(c) and 2243(b) and convicted on both counts. The court of appeals recognized that under the theory of the case as charged, the defendant was convicted in both counts of traveling in interstate commerce with the intent to engage in sexual contact with a minor, and held that in these circumstances violating section 2423(b) is a lesser included offense of violating section 2241(c) because the former applies to children under sixteen while the latter applies to children under twelve. 19 Accordingly, the court held that the two counts were duplicitous and remanded for resentencing on the greater offense alone. 20 It is submitted that, as discussed above, the better view is that section 2241(c) is inapplicable in the absence of actual or attempted sexual contact. Under this view, the result in *DeCarlo* would have been to reverse the section 2241(c) conviction while affirming the section 2423(b) conviction because that is the statute specifically directed at the defendant's conduct.

Footnotes
2
18 U.S.C. § 2241(c).
3
The Mann Act, 18 U.S.C. § 2421 provides:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be [guilty of a crime].
4
322 U.S. 369, 64 S. Ct. 1037, 88 L. Ed. 1331 (1944).
5

Id. at 374.
6
See Comment to Instruction 64-4, *below*. The Seventh Circuit pointed out that, despite the seemingly clear statement in *Mortenson*, the Supreme Court had not accepted review of a case using the less stringent standard in the previous fifty years despite numerous opportunities to do so. United States v. Vang, 128 F.3d 1065, 1072 n.10 (7th Cir. 1997).
7
United States v. Lukashov, 694 F.3d 1107, 1118–19 (9th Cir. 2012) (approving jury instruction substantially similar to Instruction 61-13); United States v. Cryar, 232 F.3d 1318, 1324 (10th Cir. 2000).
8
See Committee Comment to Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 2243(a).
9
See United States v. Hayward, 359 F.3d 631, 637 (3d Cir. 2004).
10
See United States v. Vang, 128 F.3d 1065, 1072 (7th Cir. 1997) (referring to the "cognitive dissonance" resulting from the concept of multiple dominant purposes).
11
See United States v. Cryar, 232 F.3d 1318, 1324 (10th Cir. 2000); United States v. Campbell, 49 F.3d 1079, 1083 (5th Cir. 1995); United States v. Snow, 507 F.2d 22, 24 (7th Cir. 1974) (per then-Judge Stevens).
12
Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 2243(a). The language in section 2243 was deleted as redundant in the Protection of Children from Child Predators Act of 1998, Pub. L. No. 105-314, Title III, § 301(b), 112 Stat. 2979 (1986).
13
142 Cong. Rec. S 8639 (daily ed. July 24, 1996) (statement of Sen. Hutchison).
14
232 F.3d 1318 (10th Cir. 2000).
15
Id. at 1322 ("It is certainly not the crossing alone but the crossing in order to engage in sexual activity with underage persons that is criminal."). In *Cryar*, the defendant crossed from Texas into the Eastern District of Oklahoma and then traveled to the Western District, where the attempted sexual act occurred. He was indicted in the Western District, and argued on appeal that venue was proper only in the Eastern District, where the crossing occurred. The court of appeals disagreed, holding that venue was proper where the attempt occurred because that is where the crime was completed. Id. at 1322–23.
16
434 F.3d 447 (6th Cir. 2006).
17
Id. at 449.
18
607 F.3d 1294, 1325 (11th Cir. 2010) (referring to section 2241(c) count as defendant's "interstate travel conviction").
19
Id. at 456.

20
434 F.3d at 457.

Footnotes for 61.02[61-9]

1 Adapted from Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 2246(2).