
No. _____

In the

Supreme Court of the United States

MATTHEW GATREL, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Appendices to Petition for a Writ of Certiorari

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FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 1 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MATTHEW GATREL, AKA Fluffy,

Defendant-Appellant.

No. 22-50138

D.C. No.
2:19-cr-00036-JAK-1

Central District of California,
Los Angeles

ORDER

Before: BYBEE, D.M. FISHER,* and DESAI, Circuit Judges.

The panel has unanimously voted to deny the Appellant's petition for rehearing. Judge Desai has voted to deny the petition for rehearing en banc, and Judge Bybee and Judge Fisher so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc, Dkt. 46, are **DENIED**.

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 22 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MATTHEW GATREL, AKA Fluffy,

Defendant-Appellant.

No. 22-50138

D.C. No.
2:19-cr-00036-JAK-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding

Argued and Submitted November 16, 2023
Pasadena, California

Before: BYBEE, D.M. FISHER, ** and DESAI, Circuit Judges.

Matthew Gatrell appeals his convictions for conspiracy (in violation of 18 U.S.C. § 371) and damaging and attempting to damage protected computers (in violation of 18 U.S.C. § 1030(a)(5)(A)), as well as his sentence of twenty-four

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

** The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

months' imprisonment. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm his conviction and sentence.

1. Upon de novo review, sufficient evidence supports Gatrell's conviction.

See United States v. Hursh, 217 F.3d 761, 767 (9th Cir. 2000). The Government presented overwhelming evidence that Gatrell conspired to and attempted to damage protected computers through two web services he operated:

DownThem.org and AmpNode.com. For instance, there was documentary evidence of Gatrell bragging about his services, explaining their power, and providing customer support. Whether either service could have caused damage to protected computers is irrelevant to the sufficiency of evidence, because no actual damage was required to return a verdict of guilty. *United States v. Fleming*, 215 F.3d 930, 936 (9th Cir. 2000) (“Factual impossibility is not a defense to an inchoate offense.”). Taken in the light most favorable to the prosecution, a reasonable jury could conclude that Gatrell—at the very least—conspired to and attempted to damage computers. Because the evidence “is adequate to allow ‘any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt,’ we affirm. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (alteration in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

2. The District Court did not abuse its discretion in allowing the introduction of certain evidence. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc). Testimony that DownThem and AmpNode were very similar to other illegal web services was relevant, probative, and not barred by any evidentiary rule. *Cf. United States v. Espinosa*, 827 F.2d 604, 611–13 (9th Cir. 1987). Email exchanges with customers, which Gatrell argues are hearsay, were admitted only to prove their effect on him, not the truth of the matter asserted. Fed. R. Evid. 801(c). Finally, statements about the use of AmpNode by the operator of an illegal client service were properly admitted because they were “made by [Gatrell’s] coconspirator,” Bukoski, “during and in furtherance of the conspiracy.” Fed. R. Evid. 801(d)(2)(E). We uphold evidentiary rulings unless they are “illogical, implausible, or without support in inferences that may be drawn from the facts in the record.” *Hinkson*, 585 F.3d at 1263. The evidentiary rulings here clear this threshold.

3. The same abuse-of-discretion standard applies to the District Court’s decision not to issue a specific unanimity instruction with respect to the precise protected computers Gatrell was alleged to have damaged. *See United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999). The jury unanimously agreed that Gatrell damaged or attempted to damage ten or more computers within a one-year period, in violation of 18 U.S.C. § 1030(c)(4)(A)(i)(VI). “[I]n the ordinary case, a

general instruction that the verdict must be unanimous will be sufficient to protect the defendant's rights." *United States v. Anguiano*, 873 F.2d 1314, 1319 (9th Cir. 1989). A specific unanimity instruction is required only where a case is "factually complex," *id.* at 1320, or "it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed . . . acts consisting of different legal elements," *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 985 (9th Cir. 2020) (alteration in original) (internal quotation marks and citations omitted). In this case, no specific unanimity instruction was necessary. The statutory element in question is straightforward: 18 U.S.C. § 1030(c)(4)(A)(i)(VI) penalizes damaging or attempting to damage "10 or more protected computers during any 1-year period." This element is satisfied if the jury agrees that at least ten computers were damaged but does not require the jury to agree on which ten computers were damaged. It follows that the District Court did not abuse its discretion in declining to issue a specific unanimity instruction.

4. Gatrell believes he should have been tried in the Northern District of Illinois, where he resided. Upon de novo review, venue was proper in the Central District of California. *See United States v. Childs*, 5 F.3d 1328, 1331 (9th Cir. 1993). A federal offense may be "prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). To analyze the

propriety of venue in a given state or district, we consider each count individually.

See United States v. Corona, 34 F.3d 876, 879 (9th Cir. 1994).

Turning first to the conspiracy charge, it is unnecessary that Gatrell either entered or committed an overt act in furtherance of the conspiracy “within the district, as long as one of his co-conspirators did.” *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988). His co-conspirator, Juan Martinez, lived and administered DownThem in the Central District of California, so venue was proper there.

Turning second to the charge of causing and attempting to cause computer impairment, “direct proof of venue is not necessary where circumstantial evidence . . . supports the inference that the crime was committed in the district where venue was laid.” *Childs*, 5 F.3d at 1332 (internal quotation marks and citation omitted).

Given Martinez’s role in administering the site and launching attacks, the jury could have concluded that—wherever Gatrell lived—his attempts to cause impairment to protected computers involved criminal activity committed in the Central District of California.

5. Nor did the District Court clearly err in continuing Gatrell’s trial during the COVID-19 pandemic. *See United States v. Henry*, 984 F.3d 1343, 1349–50 (9th Cir. 2021). The Speedy Trial Act requires that a criminal trial begin within seventy days from the day an indictment is filed or the defendant makes his initial

appearance. 18 U.S.C. § 3161(c)(1). But Congress provided for an exception where a district court finds “that the ends of justice served by [the delay] outweigh the best interest of the public and the defendant in a speedy trial.” *Id.* § 3161(h)(7)(A). Gatrell now acknowledges that we have held that the COVID-19 pandemic presented the sort of public emergency during which the ends of justice could justify delay. *United States v. Olsen*, 21 F.4th 1036, 1047 (9th Cir. 2022). Because there is no argument or evidence suggesting that this case is materially different from *Olsen*, the District Court did not violate Gatrell’s speedy trial rights.

6. The District Court did not abuse its discretion in applying the United States Sentencing Guidelines. *See United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). It applied a two-level enhancement for an offense committed through the intentional use of “sophisticated means,” U.S.S.G. § 2B1.1(b)(10), and a four-level enhancement that applies to any defendant convicted of damaging protected computers, *id.* at § 2B1.1(b)(19)(A)(ii). Gatrell claims that applying both enhancements is impermissible double-counting, but he is wrong.

A sentencing court should “consider all applicable Guidelines provisions in calculating the guidelines range for an offense.” *United States v. Smith*, 719 F.3d 1120, 1123 (9th Cir. 2013) (“In particular, the Sentencing Guidelines contemplate that courts will apply all applicable specific offense characteristics to enhance the

base offense level.”). The Sentencing Commission expressly indicates when Guidelines provisions are *not* to be applied cumulatively. *Id.* at 1124. It has made no such indication here, and for good reason. The Sentencing Commission enacted the protected-computers enhancement because of a “heightened showing of intent to cause damage,” not to deter sophisticated criminal activity. U.S.S.G. amend. 654 (effective Nov. 1, 2003). It follows that the sophisticated-means enhancement does not increase Gatrell’s punishment based on “a kind of harm that has already been fully accounted for” in the protected-computers enhancement. *United States v. Gallegos*, 613 F.3d 1211, 1216 (9th Cir. 2010) (quoting *United States v. Stoterau*, 524 F.3d 988, 1001 (9th Cir. 2008)).

7. Finally, as we conclude that no individual error occurred, no cumulative error occurred either. *United States v. Jeremiah*, 493 F.3d 1042, 1047 (9th Cir. 2007).

Gatrell’s convictions and sentence are **AFFIRMED**.

United States District Court
Central District of California

UNITED STATES OF AMERICA vs.

Defendant Matthew Gatrellakas: Fluffy; Gatrell, Matthew Duane; Andrews, MikeDocket No. LA CR19-00036 JAK-1 JS3Social Security No. 7 3 5 3
(Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH 06 DAY 13 YEAR 2022

In the presence of the attorney for the government, the defendant appeared in person on this date.

COUNSEL

Adam Olin, DFPD

(Name of Counsel)

PLEA

 GUILTY, and the court being satisfied that there is a factual basis for the plea.**NOLO
CONTENDERE****NOT
GUILTY**

FINDING

There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of:

Count 1: Conspiracy in violation of 18 U.S.C. § 371

Count 3: Unauthorized Impairment of Protected Computers, Damage affecting 10 or More Protected Computers during any 1-year period; Aiding and Abetting in violation of 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(VI); 18 U.S.C. §§ 2(a), (b)

JUDGMENT
AND PROB/
COMM
ORDER

The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Matthew Gatrell, is hereby committed on Counts 1 and 3 of the Indictment to the custody of the Bureau of Prisons for a term of 24 months. This term consists of 24 months on Count 1, and 24 months on Count 3, both to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of 3 years each on Counts 1 and 3, to run concurrently, under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office and Second Amended General Order 20-04.
2. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.
3. The defendant shall cooperate in the collection of a DNA sample from the defendant.
4. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), cell phones, other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.
5. The defendant shall possess and use only those computers and computer-related devices, screen usernames, passwords, email accounts, and internet service providers (ISPs), social media accounts, messaging applications and cloud storage accounts, that have been approved by the Probation Officer. Computers and computer-related devices include personal computers, internet appliances, electronic games, cellular telephones, digital storage media, and their peripheral equipment, that can access, or can be modified to access, the internet, electronic bulletin boards, and other computers.
6. All computers, computer-related devices, and their peripheral equipment, used by the defendant shall be subject to search, seizure and computer monitoring. This shall not apply to items used at the employment site that are maintained and monitored by the employer.

7. The defendant shall comply with the rules and regulations of the Computer Monitoring Program. The defendant shall pay the cost of the Computer Monitoring Program.
8. The defendant shall not view, possess and/or compose any material that describes or promotes the unauthorized access to computer systems, nor shall the defendant write, possess, download or utilize any software designed to detect vulnerabilities in computer networks, cause damage to other computer systems and/or covertly install remote connection/back door applications not authorized by users of other computer systems. This includes, but is not limited to, spoofing/defacing web sites, denial of service attacks, gaining unauthorized access to information, or other "hacking" activities against corporate, government, education, private, etc. computer systems.
9. The defendant shall not establish any website or electronic host, either internal at his residence or at another location, nor shall the defendant purchase, secure, or control any domain name.
10. The defendant shall maintain, at most, one virtual currency wallet, and that one wallet shall be used for all personal transactions. The defendant shall not obtain or open any virtual currency wallets/accounts without prior approval of the Probation Officer. All virtual currency transactions, along with any virtual currency wallet Extended Public Keys (XPUB), shall be disclosed to the Probation Officer upon request. The defendant shall be limited to only using and possessing open public blockchain virtual currencies and restricted from using privacy-based blockchain virtual currencies, unless prior approval is obtained from the Probation Officer.

The defendant shall comply with the Internal Revenue Service's reporting requirements as they pertain to virtual currencies and shall provide proof of having done so to the Probation Officer.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

It is further ordered that the defendant surrender himself to the institution designated by the Bureau of Prisons at or before 12 noon, July 19, 2022. In the absence of such designation, the defendant shall report on or before the same date and time, to the United States Marshal located at 219 S. Dearborn Street, Room 2444, Chicago, Illinois 60604. Should another issue as to compliance with the terms of bond arise prior to July 19, 2022, the Government may renew its request for an immediate remand to custody. An assessment of such a request will be made based on the evidence presented as to an alleged violation.

It is ordered that the defendant shall pay to the United States a special assessment of \$200, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline §5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

The Court has found that the property identified in the preliminary order of forfeiture is subject to forfeiture. The preliminary order is incorporated by reference into this judgment and is final.

The statement of reasons shall be included in the commitment order and judgment and provided to the pretrial services and probation office in the Sentencing Commission and the Bureau of Prisons a complete copy of the revised presentence report as well as the addendum shall be provided to the Bureau of Prisons and the Sentencing Commission. Any other copies of the report and related materials shall remain confidential.

The Court recommends that the defendant be incarcerated at Mens Camp Thomson in Thomson, Illinois or FCI Oxford located in Oxford, Wisconsin.

Bond is exonerated upon self-surrender.

Defendant is advised of his right of appeal.

IT IS SO ORDERED.

USA vs. Matthew Gatrell

Docket No.: LA CR19-00036 JAK-1

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

June 13, 2022

Date



John A. Kronstadt, United States District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

June 13, 2022

Filed Date

By /s/ Dolores Ramos

Dolores Ramos, Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

USA vs. Matthew Gatrell

Docket No.: LA CR19-00036 JAK-1

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(1)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid):
 - Non-federal victims (individual and corporate),
 - Providers of compensation to non-federal victims,
 - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

USA vs. Matthew Gatrell

Docket No.: LA CR19-00036 JAK-1

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____ the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date _____

Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date _____

Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____

Defendant _____

Date _____

U. S. Probation Officer/Designated Witness _____

Date _____

United States Code Annotated
Constitution of the United States
Annotated
Article III. The Judiciary

U.S.C.A. Const. Art. III § 2, cl. 3

Section 2, Clause 3. Criminal Trial by Jury

Currentness

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Notes of Decisions (165)

U.S.C.A. Const. Art. III § 2, cl. 3, USCA CONST Art. III § 2, cl. 3

Current through P.L. 118-62. Some statute sections may be more current, see credits for details.

End of Document

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CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Sixth Amendment

Sixth Amendment Explained

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 47. Fraud and False Statements (Refs & Annos)

18 U.S.C.A. § 1030

§ 1030. Fraud and related activity in connection with computers

Effective: October 20, 2020

Currentness

(a) Whoever--

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in [section 1602\(n\) of title 15](#), or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act ([15 U.S.C. 1681 et seq.](#));

(B) information from any department or agency of the United States; or

(C) information from any protected computer;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period;

(5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.¹

(6) knowingly and with intent to defraud traffics (as defined in [section 1029](#)) in any password or similar information through which a computer may be accessed without authorization, if--

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;²

(7) with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any--

(A) threat to cause damage to a protected computer;

(B) threat to obtain information from a protected computer without authorization or in excess of authorization or to impair the confidentiality of information obtained from a protected computer without authorization or by exceeding authorized access; or

(C) demand or request for money or other thing of value in relation to damage to a protected computer, where such damage was caused to facilitate the extortion;

shall be punished as provided in subsection (c) of this section.

(b) Whoever conspires to commit or attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is--

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(2)(A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if--

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds \$5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(7) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4),³ or (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(4)(A) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 5 years, or both, in the case of--

(i) an offense under subsection (a)(5)(B), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused)--

(I) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least \$5,000 in value;

(II) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(III) physical injury to any person;

(IV) a threat to public health or safety;

(V) damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; or

(VI) damage affecting 10 or more protected computers during any 1-year period; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(B) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 10 years, or both, in the case of--

(i) an offense under subsection (a)(5)(A), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused) a harm provided in subclauses (I) through (VI) of subparagraph (A)(i); or

(ii) an attempt to commit an offense punishable under this subparagraph;

(C) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 20 years, or both, in the case of--

(i) an offense or an attempt to commit an offense under subparagraphs (A) or (B) of subsection (a)(5) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(D) a fine under this title, imprisonment for not more than 10 years, or both, in the case of--

(i) an offense or an attempt to commit an offense under subsection (a)(5)(C) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(E) if the offender attempts to cause or knowingly or recklessly causes serious bodily injury from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for not more than 20 years, or both;

(F) if the offender attempts to cause or knowingly or recklessly causes death from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for any term of years or for life, or both; or

(G) a fine under this title, imprisonment for not more than 1 year, or both, for--

(i) any other offense under subsection (a)(5); or

(ii) an attempt to commit an offense punishable under this subparagraph.

[**(5)** Repealed. [Pub.L. 110-326, Title II, § 204\(a\)\(2\)\(D\)](#), Sept. 26, 2008, 122 Stat. 3562]

(d)(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 ([42 U.S.C. 2014\(y\)](#))), except for offenses affecting the duties of the United States Secret Service pursuant to [section 3056\(a\)](#) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section--

(1) the term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term “protected computer” means a computer--

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government;

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States; or

(C) that--

(i) is part of a voting system; and

(ii)(I) is used for the management, support, or administration of a Federal election; or

(II) has moved in or otherwise affects interstate or foreign commerce;

(3) the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) the term “financial institution” means--

(A) an institution, with deposits insured by the Federal Deposit Insurance Corporation;

(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(C) a credit union with accounts insured by the National Credit Union Administration;

(D) a member of the Federal home loan bank system and any home loan bank;

(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;

(G) the Securities Investor Protection Corporation;

(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and

(I) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(5) the term “financial record” means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term “exceeds authorized access” means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) the term “department of the United States” means the legislative or judicial branch of the Government or one of the executive departments enumerated in [section 101 of title 5](#);

(8) the term “damage” means any impairment to the integrity or availability of data, a program, a system, or information;

(9) the term “government entity” includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) the term “conviction” shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) the term “loss” means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service;

(12) the term “person” means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity;

(13) the term “Federal election” means any election (as defined in section 301(1) of the Federal Election Campaign Act of 1971 ([52 U.S.C. 30101\(1\)](#))) for Federal office (as defined in section 301(3) of the Federal Election Campaign Act of 1971 ([52 U.S.C. 30101\(3\)](#))); and

(14) the term “voting system” has the meaning given the term in section 301(b) of the Help America Vote Act of 2002 ([52 U.S.C. 21081\(b\)](#)).

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses ⁴ (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or

the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

(h) The Attorney General and the Secretary of the Treasury shall report to the Congress annually, during the first 3 years following the date of the enactment of this subsection, concerning investigations and prosecutions under subsection (a)(5).

(i)(1) The court, in imposing sentence on any person convicted of a violation of this section, or convicted of conspiracy to violate this section, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person forfeit to the United States--

(A) such person's interest in any personal property that was used or intended to be used to commit or to facilitate the commission of such violation; and

(B) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(2) The criminal forfeiture of property under this subsection, any seizure and disposition thereof, and any judicial proceeding in relation thereto, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ([21 U.S.C. 853](#)), except subsection (d) of that section.

(j) For purposes of subsection (i), the following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) Any personal property used or intended to be used to commit or to facilitate the commission of any violation of this section, or a conspiracy to violate this section.

(2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this section, or a conspiracy to violate this section⁵

CREDIT(S)

(Added [Pub.L. 98-473](#), Title II, § 2102(a), Oct. 12, 1984, 98 Stat. 2190; amended [Pub.L. 99-474](#), § 2, Oct. 16, 1986, 100 Stat. 1213; [Pub.L. 100-690](#), Title VII, § 7065, Nov. 18, 1988, 102 Stat. 4404; [Pub.L. 101-73](#), Title IX, § 962(a)(5), Aug. 9, 1989, 103 Stat. 502; [Pub.L. 101-647](#), Title XII, § 1205(e), [Title XXV](#), § 2597(j), [Title XXXV](#), § 3533, Nov. 29, 1990, 104 Stat. 4831, 4910, 4925; [Pub.L. 103-322](#), Title XXIX, § 290001(b) to (f), Sept. 13, 1994, 108 Stat. 2097-2099; [Pub.L. 104-294](#), Title II, § 201, Title VI, § 604(b)(36), Oct. 11, 1996, 110 Stat. 3491, 3508; [Pub.L. 107-56](#), Title V, § 506(a), Title VIII, § 814(a) to (e), Oct. 26, 2001, 115 Stat. 366, 382-384; [Pub.L. 107-273](#), Div. B, Title IV, §§ 4002(b)(1), (12), 4005(a)(3), (d)(3), Nov. 2, 2002, 116 Stat. 1807, 1808, 1812, 1813; [Pub.L. 107-296](#), Title XXII, § 2207(g), formerly Title II, § 225(g), Nov. 25, 2002, 116 Stat. 2158; renumbered § 2207(g), [Pub.L. 115-278](#), § 2(g)(2)(I), Nov. 16, 2018, 132 Stat. 4178; amended [Pub.L. 110-326](#), Title II, §§ 203, 204(a), 205 to 208, Sept. 26, 2008, 122 Stat. 3561, 3563; [Pub.L. 116-179](#), § 2, Oct. 20, 2020, 134 Stat. 855.)

Notes of Decisions (343)

Footnotes

- 1 So in original. The period probably should be a semicolon.
- 2 So in original. Probably should be followed by “or”.
- 3 So in original. The comma probably should not appear.
- 4 So in original. Probably should be “subclause”.
- 5 So in original. Probably should be followed by a period.

18 U.S.C.A. § 1030, 18 USCA § 1030

Current through P.L. 118-62. Some statute sections may be more current, see credits for details.

End of Document

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 KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limited on Constitutional Grounds by [United States v. Rodriguez](#), 5th Cir.(Tex.), Feb. 28, 2020

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Two. Offense Conduct (Refs & Annos)

Part B. Basic Economic Offenses

1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit (Refs & Annos)

USSG, § 2B1.1, 18 U.S.C.A.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property;

Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Currentness

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded \$6,500, increase the offense level as follows:

Loss (apply the greatest)	Increase in Level
(A)\$6,500 or less.....	no increase
(B)More than \$6,500.....	add 2
(C)More than \$15,000.....	add 4
(D)More than \$40,000.....	add 6
(E)More than \$95,000.....	add 8
(F)More than \$150,000.....	add 10
(G)More than \$250,000.....	add 12
(H)More than \$550,000.....	add 14

(I) More than \$1,500,000.....	add 16
(J) More than \$3,500,000.....	add 18
(K) More than \$9,500,000.....	add 20
(L) More than \$25,000,000.....	add 22
(M) More than \$65,000,000.....	add 24
(N) More than \$150,000,000.....	add 26
(O) More than \$250,000,000.....	add 28
(P) More than \$550,000,000.....	add 30.

(2) (Apply the greatest) If the offense--

(A)(i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.

(6) If (A) the defendant was convicted of an offense under [18 U.S.C. § 1037](#); and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by 2 levels; (ii) more than \$7,000,000, increase by 3 levels; or (iii) more than \$20,000,000, increase by 4 levels.

(8) (Apply the greater) If--

(A) the offense involved conduct described in [18 U.S.C. § 670](#), increase by 2 levels; or

(B) the offense involved conduct described in [18 U.S.C. § 670](#), and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(12) If the offense involved conduct described in [18 U.S.C. § 1040](#), increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(13) If the defendant was convicted under [42 U.S.C. 408\(a\), 1011\(a\)](#), or [1383a\(a\)](#) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended--

(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.

If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(17) (Apply the greater) If--

(A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(18) If (A) the defendant was convicted of an offense under [18 U.S.C. § 1030](#), and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.

(19)(A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) [18 U.S.C. § 1030](#), and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.

(ii) [18 U.S.C. § 1030\(a\)\(5\)\(A\)](#), increase by 4 levels.

(iii) [18 U.S.C. § 1030](#), and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.

(20) If the offense involved--

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

CREDIT(S)

(Effective November 1, 1987; amended effective June 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1993; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2001; November 1, 2002; January 25, 2003; November 1, 2003; November 1, 2004; November 1, 2005; November 1, 2006; November 1, 2007; February 6, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2015; November 1, 2018; November 1, 2023.)

COMMENTARY

<Statutory Provisions: 5 U.S.C. §§ 8345a, 8466a; 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 220, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1040, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction

of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; [19 U.S.C. § 2401f](#); [20 U.S.C. § 1097\(a\), \(b\), \(d\), \(e\)](#); [29 U.S.C. § 501\(c\)](#); [42 U.S.C. § 1011](#); [49 U.S.C. §§ 14915, 30170, 46317\(a\), 60123\(b\)](#). For additional statutory provision(s) see Appendix A (Statutory Index).>

<Application Notes>

<**1. Definitions.**--For purposes of this guideline:>

<“Cultural heritage resource” has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<“Equity securities” has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 ([15 U.S.C. § 78c\(a\)\(11\)](#)).>

<“Federal health care offense” has the meaning given that term in [18 U.S.C. § 24](#).>

<“Financial institution” includes any institution described in [18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007](#), or [§ 1014](#); any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. “Union or employee pension fund” and “any health, medical, or hospital insurance association,” primarily include large pension funds that serve many persons (e.g., pension funds or large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.>

<“Firearm” and “destructive device” have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).>

<“Foreign instrumentality” and “foreign agent” have the meaning given those terms in [18 U.S.C. § 1839\(1\)](#) and [\(2\)](#), respectively.>

<“Government health care program” means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.>

<“Means of identification” has the meaning given that term in [18 U.S.C. § 1028\(d\)\(7\)](#), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct).>

<“National cemetery” means a cemetery (A) established under [section 2400 of title 38, United States Code](#); or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.>

<“Paleontological resource” has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<“Personal information” means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.>

<“Pre-retail medical product” has the meaning given that term in 18 U.S.C. § 670(e).>

<“Publicly traded company” means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). “Issuer” has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).>

<“Supply chain” has the meaning given that term in 18 U.S.C. § 670(e).>

<“Theft from the person of another” means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.>

<“Trade secret” has the meaning given that term in 18 U.S.C. § 1839(3).>

<“Veterans' memorial” means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).>

<“Victim” means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. “Person” includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.>

<2. Application of Subsection (a)(1).-->

<(A) “Referenced to this Guideline”.--For purposes of subsection (a)(1), an offense is “referenced to this guideline” if (i) this guideline is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of § 1B1.2 (Applicable Guidelines); or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.>

<(B) **Definition of “Statutory Maximum Term of Imprisonment.”**--For purposes of this guideline, “statutory maximum term of imprisonment” means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.>

<(C) **Base Offense Level Determination for Cases Involving Multiple Counts.**--In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.>

<3. Loss Under Subsection (b)(1).--This application note applies to the determination of loss under subsection (b)(1).>

<(A) **General Rule.**--Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.>

<(i) **Actual Loss.**--“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.>

<(ii) **Intended Loss.**--“Intended loss” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).>

<(iii) **Pecuniary Harm.**--“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.>

<(iv) **Reasonably Foreseeable Pecuniary Harm.**--For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.>

<(v) **Rules of Construction in Certain Cases.**--In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:>

<(I) **Product Substitution Cases.**--In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.>

<(II) **Procurement Fraud Cases.**--In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correct the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.>

<(III) **Offenses Under 18 U.S.C. § 1030.**--In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: Any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.>

<(B) **Gain.**--The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.>

<(C) **Estimation of Loss.**--The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).>

<The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:>

<(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.>

<(ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.>

<(iii) The cost of repairs to damaged property.>

<(iv) The approximate number of victims multiplied by the average loss to each victim.>

<(v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.>

<(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.>

<(D) Exclusions from Loss.--Loss shall not include the following:>

<(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.>

<(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.>

<(E) Credits Against Loss.--Loss shall be reduced by the following:>

<(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.>

<(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.>

<(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.>

<In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.>

<(F) Special Rules.--Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:>

<(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.--In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the

commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, “counterfeit access device” and “unauthorized access device” have the meaning given those terms in Application Note 10(A).>

<(ii) **Government Benefits.**--In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.>

<(iii) **Davis-Bacon Act Violations.**--In a case involving a Davis-Bacon Act violation (i.e., a violation of [40 U.S.C. § 3142](#), criminally prosecuted under [18 U.S.C. § 1001](#)), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.>

<(iv) **Ponzi and Other Fraudulent Investment Schemes.**--In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in access of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).>

<(v) **Certain Other Unlawful Misrepresentation Schemes.**--In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.>

<(vi) **Value of Controlled Substances.**--In a case involving controlled substances, loss is the estimated street value of the controlled substances.>

<(vii) **Value of Cultural Heritage Resources or Paleontological Resources.**--In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the “value of the resource” set forth in Application Note 2 of the Commentary to § 2B1.5.>

<(viii) **Federal Health Care Offenses Involving Government Health Care Programs.**--In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute *prima facie* evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.>

<(ix) **Fraudulent Inflation or Deflation in Value of Securities or Commodities.**--In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by-->

<(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and>

<(II) multiplying the difference in average price by the number of shares outstanding.>

<In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).>

<4. Application of Subsection (b)(2).-->

<**(A) Definition.**--For purposes of subsection (b)(2), “mass-marketing” means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. “Mass-marketing” includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.>

<**(B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.**--For purposes of subsection (b)(2), an offense under [18 U.S.C. § 1037](#), or any other offense involving conduct described in [18 U.S.C. § 1037](#), shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, [18 U.S.C. § 1037](#).>

<**(C) Undelivered United States Mail.**-->

<**(i) In General.**--In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, “victim” means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.>

<**(ii) Special Rule.**--A case described in subdivision (C)(i) of this note that involved-->

<**(I)** a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.>

<**(II)** a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.>

<**(iii) Definition.**--“Undelivered United States mail” means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).>

<**(D) Vulnerable Victims.**--If subsection (b)(2)(B) or (C) applies, an enhancement under § 3A1.1(b)(2) shall not apply.>

<(E) Cases Involving Means of Identification.--For purposes of subsection (b)(2), in a case involving means of identification “victim” means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.>

<(F) Substantial Financial Hardship.--In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim-->

<(i) becoming insolvent;>

<(ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);>

<(iii) suffering substantial loss of a retirement, education, or other savings or investment fund;>

<(iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;>

<(v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and>

<(vi) suffering substantial harm to his or her ability to obtain credit.>

<5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).--For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:>

<(A) The regularity and sophistication of the defendant's activities.>

<(B) The value and size of the inventory of stolen property maintained by the defendant.>

<(C) The extent to which the defendant's activities encouraged or facilitated other crimes.>

<(D) The defendant's past activities involving stolen property.>

<6. Application of Subsection (b)(6).--For purposes of subsection (b)(6), “improper means” includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.>

<7. Application of Subsection (b)(8)(B).--If subsection (b)(8)(B) applies, do not apply an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<8. Application of Subsection (b)(9).-->

<(A) In General.--The adjustments in subsection (b)(9) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.>

<(B) Misrepresentations Regarding Charitable and Other Institutions.--Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert

all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(9)(A) applies, for example, to the following:>

<(i) A defendant who solicited contributions for a non-existent famine relief organization.>

<(ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.>

<(iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.>

<(C) **Fraud in Contravention of Prior Judicial Order.**--Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).>

<(D) **College Scholarship Fraud.**--For purposes of subsection (b)(9)(D):>

<“Financial assistance” means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.>

<“Institution of higher education” has the meaning given that term in section 101 of the Higher Education Act of 1954 ([20 U.S.C. § 1001](#)).>

<(E) **Non-Applicability of Chapter Three Adjustments.**-->

<(i) **Subsection (b)(9)(A).**--If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under § 3B1.3.>

<(ii) **Subsection (b)(9)(B) and (C).**--If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under § 3C1.1.>

<9. **Application of Subsection (b)(10).**-->

<(A) **Definition of United States.**--For purposes of subsection (b)(10)(B), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.>

<(B) Sophisticated Means Enhancement under Subsection (b)(10)(C).--For purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.>

<(C) Non-Applicability of Chapter Three Adjustment.--If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under § 3C1.1, do not apply that adjustment under § 3C1.1.>

<10. Application of Subsection (b)(11).-->

<(A) Definitions.--For purposes of subsection (b)(11):>

<“Authentication feature” has the meaning given that term in [18 U.S.C. § 1028\(d\)\(1\)](#).>

<“Counterfeit access device” (i) has the meaning given that term in [18 U.S.C. § 1029\(e\)\(2\)](#); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.>

<“Device-making equipment” (i) has the meaning given that term in [18 U.S.C. § 1029\(e\)\(6\)](#); and (ii) includes (I) any hardware or software that has been configured as described in [18 U.S.C. § 1029\(a\)\(9\)](#); and (II) a scanning receiver referred to in [18 U.S.C. § 1029\(a\)\(8\)](#). “Scanning receiver” has the meaning given that term in [18 U.S.C. § 1029\(e\)\(8\)](#).>

<“Produce” includes manufacture, design, alter, authenticate, duplicate, or assemble. “Production” includes manufacture, design, alteration, authentication, duplication, or assembly.>

<“Telecommunications service” has the meaning given that term in [18 U.S.C. § 1029\(e\)\(9\)](#).>

<“Unauthorized access device” has the meaning given that term in [18 U.S.C. § 1029\(e\)\(3\)](#).>

<(B) Authentication Features and Identification Documents.--Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of [18 U.S.C. § 1028](#), also are covered by this guideline. If the primary purpose of the offense, under [18 U.S.C. § 1028](#), was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.>

<(C) Application of Subsection (b)(11)(C)(i).-->

<(i) In General.--Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.>

<(ii) Examples.--Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:>

<(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.>

<(II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.>

<(iii) **Non-applicability of Subsection (b)(11)(C)(i).**--Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:>

<(I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.>

<(II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.>

<(D) **Application of Subsection (b)(11)(C)(ii).**--Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.>

<11. **Interaction of Subsection (b)(13) and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).**--If subsection (b)(13) applies, do not apply § 3B1.3.>

<12. **Application of Subsection (b)(15).**--Subsection (b)(15) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.>

<13. **Gross Receipts Enhancement under Subsection (b)(17)(A).**-->

<(A) **In General.**--For purposes of subsection (b)(17)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.>

<(B) **Definition.**--"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).>

<14. **Application of Subsection (b)(17)(B).**-->

<(A) **Application of Subsection (b)(17)(B)(i).**--The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:>

<(i) The financial institution became insolvent.>

<(ii) The financial institution substantially reduced benefits to pensioners or insureds.>

<(iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.>

<(iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.>

<(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a “bailout”.>

<(B) Application of Subsection (b)(17)(B)(ii).-->

<(i) **Definition.**--For purposes of this subsection, “organization” has the meaning given that term in Application Note 1 of § 8A1.1 (Applicability of Chapter Eight).>

<(ii) **In General.**--The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:>

<(I) The organization became insolvent or suffered a substantial reduction in the value of its assets.>

<(II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).>

<(III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.>

<(IV) The organization substantially reduced its workforce.>

<(V) The organization substantially reduced its employee pension benefits.>

<(VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.>

<(VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a “bailout”.>

<15. Application of Subsection (b)(19).-->

<(A) **Definitions.**--For purposes of subsection (b)(19):>

<“Critical infrastructure” means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services

(including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.>

<“Government entity” has the meaning given that term in [18 U.S.C. § 1030\(e\)\(9\)](#).>

<**(B) Subsection (b)(19)(A)(iii).**--If the same conduct that forms the basis for an enhancement under subsection (b)(19)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(17)(B), do not apply the enhancement under subsection (b)(17)(B).>

<**16. Application of Subsection (b)(20).**-->

<**(A) Definitions.**--For purposes of subsection (b)(20):>

<“Commodities law” means (i) the Commodity Exchange Act ([7 U.S.C. § 1 et seq.](#)) and [18 U.S.C. § 1348](#); and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.>

<“Commodity pool operator” has the meaning given that term in section 1a(11) of the Commodity Exchange Act ([7 U.S.C. § 1a\(11\)](#)).>

<“Commodity trading advisor” has the meaning given that term in section 1a(12) of the Commodity Exchange Act ([7 U.S.C. § 1a\(12\)](#)).>

<“Futures commission merchant” has the meaning given that term in section 1a(28) of the Commodity Exchange Act ([7 U.S.C. § 1a\(28\)](#)).>

<“Introducing broker” has the meaning given that term in section 1a(31) of the Commodity Exchange Act ([7 U.S.C. § 1a\(31\)](#)).>

<“Investment adviser” has the meaning given that term in section 202(a)(11) of the Investment Advisers Act of 1940 ([15 U.S.C. § 80b-2\(a\)\(11\)](#)).>

<“Person associated with a broker or dealer” has the meaning given that term in section 3(a)(18) of the Securities Exchange Act of 1934 ([15 U.S.C. § 78c\(a\)\(18\)](#)).>

<“Person associated with an investment adviser” has the meaning given that term in section 202(a)(17) of the Investment Advisers Act of 1940 ([15 U.S.C. § 80b-2\(a\)\(17\)](#)).>

<“Registered broker or dealer” has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 ([15 U.S.C. § 78c\(a\)\(48\)](#)).>

<“Securities law” (i) means [18 U.S.C. §§ 1348, 1350](#), and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 ([15 U.S.C. § 78c\(a\)\(47\)](#)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.>

<**(B) In General.**--A conviction under a securities law or commodities law is not required in order for subsection (b)(20) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by

fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.>

<(C) Nonapplicability of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).--If subsection (b)(20) applies, do not apply § 3B1.3.>

<17. Cross Reference in Subsection (c)(3).--Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).>

<18. Continuing Financial Crimes Enterprise.--If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".>

<19. Partially Completed Offenses.--In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to § 2X1.1.>

<20. Multiple-Count Indictments.--Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).>

<21. Departure Considerations.-->

<(A) Upward Departure Considerations.--There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:>

<(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.>

<(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).>

<An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.>

<An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.>

<Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.>

<(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).>

<(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.>

<(v) In a case involving stolen information from a “protected computer”, as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.>

<(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:>

<(I) The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.>

<(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.>

<(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.>

<**(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.**--An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.>

<**(C) Downward Departure Consideration.**--There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.>

<For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b) (2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.>

<**(D) Downward Departure for Major Disaster or Emergency Victims.**--If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.>

<**Background:** This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).>

<Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.>

<The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.>

<Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).>

<A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.>

<Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.>

<Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.>

<Subsection (b)(5) implements the instruction to the Commission in section 2 of Public Law 105-101 and the directive to the Commission in section 3 of Public Law 110-384.>

<Subsection (b)(7) implements the directive to the Commission in section 10606 of Public Law 111-148.>

<Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112-186.>

<Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106-420.>

<Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.>

<Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105-172.>

<Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105-318. This subsection focuses principally on an aggravated form of identity theft known as “affirmative identity theft” or “breeding”, in which a defendant uses another individual's name, social security number, or some other form of identification (the “means of identification”) to “breed” (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines “means of identification”, the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were “bred” (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been “stolen.” Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.>

<Subsection (b)(12) implements the directive in section 5 of Public Law 110-179.>

<Subsection (b)(14) implements the directive in section 3 of Public Law 112-269.>

<Subsection (b)(16)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.>

<Subsection (b)(17)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.>

<Subsection (b)(17)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.>

<Subsection (b)(18) implements the directive in section 209 of Public Law 110-326.>

<Subsection (b)(19) implements the directive in section 225(b) of Public Law 107-296. The minimum offense level of level 24 provided in subsection (b)(19)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.>

Notes of Decisions (1265)

Federal Sentencing Guidelines, § 2B1.1, 18 U.S.C.A., FSG § 2B1.1
As amended to 3-15-22.

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