The following redline/strikeouts show substantive changes to the Seventh Circuit criminal instructions that were posted in March 2020. An article regarding these changes can be found in the Blog at https://www.trialdex.com/blog.htm.

6.09(B) DIMINISHED CAPACITY

You have heard evidence that the defendant may have had [insert mental disorder] at the time of the commission of the offense[s] charged in [Count[s] of] the indictment. You may consider this evidence in determining whether the defendant was capable of [insert intent element of crime at issue, e.g., acting with intent to commit murder, acting with intent to defraud, corruptly influencing the due administration of justice]. Committee Comment Diminished capacity is not a defense to a general intent crime, that is, one that must be committed "knowingly," but it may negate the intent required to prove a crime with a specific intent element. See United States v. Navarrete, 125 F.3d 559, 563 n.1 (7th Cir. 1997) (noting that conspiracy to distribute narcotics is a specific intent crime); United States v. Reed, 991 F.2d 399, 400-01 (7th Cir. 1993) (noting that firearm-possession offenses are general intent crimes). See also, e.g., United States v. Moore, 425 F.3d 1061, 1065 n.3 (7th Cir. 2005) (diminished capacity defense was not available for crime of distribution of narcotics because it is a general intent crime); United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1989) (diminished capacity is not a defense to bank robbery because it is a general intent crime). Where the defense only applies to certain counts in a multi-count indictment, the court should specifically reference those counts to which it does apply. United States v. Kenyon, 481 F.3d 1054, 1070–71 (8th Cir. 2007).

18 U.S.C. § 201 OFFICIAL ACT

An "official act" is a decision or action on[, or an agreement to make a decision or take action on,] a specific [question], [matter], [cause], [suit], [proceeding] or [controversy], which [is pending] [or] [at any time may be pending] [or] [may by law be brought] before a public official in his official capacity[, or in his place of trust or profit]. [A "question" or "matter" must involve a formal exercise of governmental power and must be something specific and focused.] In this case, the [question(s)], [matter(s)], [cause(s)], [suit(s)], [proceeding(s)] or [controversy(ies)] at issue [is] [are] [describe in specific and focused terms]. [A public official makes a decision or takes action on a [question], [matter], [cause], [suit], [proceeding] or [controversy] when he uses his official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that the advice will form the basis for an official act by another official.] [A public official does not make a decision or take action on a [question], [matter], [cause], [suit], [proceeding] or [controversy] if he does no more than set up a meeting, host an event, or call another public official.] Committee Comment In McDonnell v. United States, 136 S. Ct. 2355 (2016), the Supreme Court interpreted the term "official act" in the context of federal bribery laws. Specifically, McDonnell was charged with honest services fraud, 18 U.S.C. § 1346, and Hobbs act extortion, 18 U.S.C. § 1951. To define what qualifies as an "official act" for purposes of bribery under those statutes, the Supreme Court used and interpreted the definition of that term found in 18 U.S.C. § 201(a)(3). The Committee thus adopts McDonnell's definition here, even though the McDonnell prosecution was brought under different bribery laws. The Supreme Court held that a "question" or "matter" must involve, like a "cause, suit, proceeding, or controversy," "a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." 136 S. Ct. at 2372. Like a lawsuit, agency determination, or committee hearing, the question or matter must be "specific and focused." Id. at 2372. That could include questions or matters such as whether researchers at a state university would initiate a study of a particular drug's efficacy, or whether a state agency would allocate grant money to the study of the drug. Id. at 2374. 150 In addition to the requirement that the question or matter be specific and focused, the "public official must make a decision or take an action on that question or matter, or agree to do so." Id. at 2370 (emphasis in original). Certain commonplace acts, such as setting up a meeting, contacting another official, or organizing an event—without more—do not qualify as making a "decision" or taking "action" on a question or matter. Id. at 2371. The Committee notes, however, that the Supreme Court has acknowledged that these types of acts may be relevant to whether there was an agreement to take an official act. Id. ~~149 18 U.S.C. § 241 ELEMENTS"~~That is not to say that the government must prove that the official directly made the ultimate decision or directly took the ultimate action. Making a decision or taking an action on a question or matter can include using the official's position "to exert pressure on another official to perform an 'official act.'" Id. (emphasis in original). And it does include using the official's position "to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official." Id. The first paragraph of the instruction is a quote of the entirety of Section 201(a)(3), so the parties should tailor it to the specific type of official act at issue in their case and omit what could otherwise be unnecessary and confusing terms. For example, most bribery cases likely will involve a defendant's "official capacity," rather than the defendant's "place of trust or profit," which is not a well-defined term. In cases where something less concrete than a cause, suit, proceeding, or controversy is at issue—in other words, a "question" or "matter" is at issue—the second paragraph may be necessary to ensure that the jury does not interpret "question" or "matter" at too high of a level of generality. The third paragraph (the

description of the question or matter) must be tailored to the particular case. McDonnell requires that the question or matter involve a formal exercise of governmental power and must be something specific and focused. The fourth and fifth paragraphs, if given, should be tailored to the particular case, depending on the government's and defense's respective theories.

18 U.S.C. § 666(a)(1)(B) BRIBERY CONCERNING FEDERALLY FUNDED PROGRAM – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bribery. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt: 1. That the defendant was an agent of [an organization; a [state; local; Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]]; and 2. The defendant [solicited; demanded; accepted; agreed to accept] ~~anything~~something of value from another person; and 3. The defendant did so corruptly with the intent to be influenced or rewarded in connection with some [business; transaction; series of transactions] of the [organization; government; government agency]; and 4. This business [transaction; series of transactions] involved ~~any thing~~something of a value of $5,000 or more; and 5. The [organization; government; government agency], in a one~~-~~ year period, received benefits of more than $10,000 under any Federal program involving a [grant; contract; subsidy; loan; guarantee; insurance] or other assistance. (The one~~-~~ year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.) [A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him in connection with his [organizational; official] duties.] If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment The government is not required to prove that the theft affected the federal funds received by the organization or agency. Salinas v. United States, 522 U.S. 52, 56–61 (1997). The jury should be so instructed in the event a contrary argument is raised. ~~208~~210 The bracketed definition of "corruptly" set forth above is derived from United States v. Bonito, 57 F.3d 167, 171 (2d Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, e.g., Roma Construction Co. v. aRusso, 96 F.3d 566, 573–74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See United States v. Medley, 913 F.2d 1248 (7th Cir. 1990). A defendant need only be partially motivated by the expectation of or desire for reward. United States v. Coyne, 4 F.3d 100 (2d Cir. 1993). ~~209~~211 18 U.S.C. § 666(a)(1)(B) ACCEPTING A BRIBE [The indictment charges the defendant[s] with; Count[s] ~~__~~of the indictment charge[s] the defendant[s] with] bribery. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [five] following elements beyond a reasonable doubt: 1. That the defendant was an agent of [an organization; a [state; local; Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]]; and 2. That the defendant solicited, demanded, accepted or agreed to accept ~~something~~a thing of value from another person; and 3. That the defendant acted corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the [organization; government; government agency]; and 4. That this business, transaction or series of transactions involved ~~something~~a thing of a value of $5,000 or more; and 5. That the [organization; government; government agency], in a ~~one-year~~oneyear period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.] [A person acts corruptly when that person acts with the understanding that something of

value is to be offered or given to reward or influence him/her in connection with his [organizational; official] duties.] If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge].~~count]. 212 Committee Comment The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. Salinas v. United States, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised. ~~210~~ The definition of "corruptly" set forth above is derived from United States v. Bonito, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, e.g., Roma Construction Co. v. ~~Arusso~~aRusso, 96 F.3d 566, 573–74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See United States v. Medley, 913 F.2d 1248 (7th Cir. 1990). A defendant need only be partially motivated by the expectation of or desire for reward. United States v. Coyne, 4 F.3d 100 (2nd Cir. 1993). The agent need not have unilateral control over the business or transaction; influence is sufficient. United States v. Gee, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control ~~executive branch~~executivebranch grants: "This confuses influence with power to act unilaterally.... One does not need to live in Chicago to know that a job description is not a complete measure of clout.") The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." United States v. Robinson, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in McDonnell v. United States, 136 S. Ct. 2355, 2371- 72 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federalemployee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and judges should consider the potential impact of McDonnell on § 666 cases. The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). ~~In United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. Blagojevich held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll"~~213~~." Id. at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by Blagojevich, then an instruction might be warranted to exclude that possibility.~~

18 U.S.C. § 666(a)(2) PAYING A BRIBE

[The indictment charges the defendant[s] with; Count[s]___ of the indictment charge[s] the defendant[s] with] [paying or offering to pay] a bribe. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. That the defendant gave, offered, or agreed to give ~~something~~a thing of value to another person; and 2. That the defendant did so corruptly with the intent to influence or reward an agent of [an organization; a [State; local; Indian tribal] government, or any agency thereof] in connection with some business, transaction, or series of transactions of the [organization; government; government agency]; and 3. That this business, transaction, or series of transactions involved ~~something~~a thing with a value of $5,000 or more; and 4. That the [organization; government; government or agency], in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.] [A person acts corruptly when that person acts with the intent that something of value is given or offered to reward or influence an agent of an [organization; government; government agency] in connection with the agent's [organizational; official] duties.] If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. Sabri v. United States, 541 U.S. 600, 606 (2004); Salinas v. United States, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised. ~~212~~214 The definition of "corruptly" set forth above is derived from United States v. Bonito, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, e.g., Roma Construction Co. v. aRusso, 96 F.3d 566, 573–74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See United States v. Medley, 913 F.2d 1248 (7th Cir. 1990). The agent need not have unilateral control over the business or transaction; influence is sufficient. United States v. Gee, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control ~~executive-branch~~executivebranch grants: "This confuses influence with power to act unilaterally.... One does not need to live in Chicago to know that a job description is not a complete measure of clout.") ~~The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).~~ The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." United States v. Robinson, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in McDonnell v. United States, 136 S. Ct. 2355, 2371- 72 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federalemployee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and judges should consider the potential impact of McDonnell on § 666 cases. The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). ~~In United States v. Blagojevich, 794 F.3d~~

729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. Blagojevich held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll."215 Id. at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by Blagojevich, then an instruction might be warranted to exclude that possibility.

18 U.S.C. § 922(g) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY A PROHIBITED PERSON – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___of the indictment charge[s] the defendant[s] with] unlawful [possession; receipt] of [a firearm; ammunition] by a [Prohibited Person]. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the ~~[three]~~ following elements beyond a reasonable doubt: 1. The defendant knowingly [possessed; received] [a firearm; ammunition]; ~~and~~ 2. At the time of the ~~charged act,~~[possession; receipt], the defendant [was a ~~[~~Prohibited Person]; ~~and~~ 3. ~~[Such possession was in or affecting commerce] or [the~~At the time of the [possession; receipt], the defendant [knowledge requirement for the defendant's alleged prohibited status]; and 4. [The [firearm; ammunition] had been shipped or transported in interstate or foreign commerce~~].~~ before the defendant received it.] [The defendant's possession of the [firearm; ammunition] was in or affected commerce.] If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment The term "Prohibited Person" is used in this instruction in the same way that it is used in the elements instruction for 18 U.S.C. § 922(d~~) (i.e. as a placeholder) and the~~). The Committee Comment associated with that instruction also applies to the use of that term in this instruction. ~~For a definition of "knowingly" see the Pattern Instruction 4.10. Section 922(d)(1) requires only that the defendant know that the firearm recipient is a felon; it does not require knowledge of what crime he previously had been convicted.~~The bracketed phrase "was a Prohibited Person" found in element 2 should be replaced with a phrase describing the nature of the prohibition. Suggested language for that description may be found below. For a definition of "knowingly" see the Pattern Instruction 4.10. In Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019), the Supreme Court held that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from 236 possessing a firearm." Although Rehaif specifically concerned § 922(g)(5), which prohibits an "alien" from possessing a firearm or ammunition, the Court expressed its holding as applying to § 922(g) – without specifying a subparagraph – and as applying to "the relevant category of persons" – not just an alien under § 922(g)(5). In light of Rehaif, it is the Committee's view, that in any prosecution under § 922(g), the trial judge must include the knowledge requirement as to the defendant's status in the "relevant category" of persons. Having said that, questions may well arise as to whether the knowledge element applies to every aspect of the definitions and clauses in § 922(g)'s subparagraphs. In responding to the dissent's questions on that point, the Supreme Court stated, "We express no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here. See post, at 2207-2208 (ALITO, J., dissenting)(discussing other statuses listed in § 922(g) not at issue here)." 139 S. Ct. at 2200. Though the full meaning of knowledge requirements following Rehaif is unclear, the Committee believes that Rehaif applies in a straightforward manner to some frequently charged subsections of the statute and makes the following suggestions for knowledge requirements: 1. Subsection (g)(1): • had previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year; and • knew that [he/she] had been convicted of a crime punishable by imprisonment for more than one year.

2. Subsection (g)(5)(A): • was an alien; • knew [he/she] was an alien illegally or unlawfully in the United States. 237~~ United States v. Haskins, 511 F.3d 688, 692 (7th Cir. 2007).~~234

18 U.S.C. § 1028(d)(7) DEFINITION OF "MEANS OF IDENTIFICATION"

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual. A means of identification includes any [name; social security number; date of birth; official State or government issued driver's license or identification number; alien registration number; government passport number; employer or taxpayer identification number.] [unique biometric data, such as fingerprint, voice print, retina or iris image; or other unique physical representation.] [unique electronic [identification number; address; routing code~~].~~.] [electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account; a specific communication transmitted from a telecommunications instrument.] ~~[~~[card; plate; code; account number; electronic serial number; mobile identification number; personal identification number; or other telecommunications service, equipment, or instrument identifier; or other means of account access] that can be [used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value; used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).] Committee Comment This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(7)–(8) and § 1028A(a)(1)–(2) and the definitions of "authentication feature," "issuing authority" and "false authentication feature." The statutory definition of "means of identification" provides an uncommonly long list of examples, all of which are reproduced here as alternative sets of examples. In crafting a jury instruction from this pattern definition, the court should incorporate only those examples that are most relevant to the facts of the particular case on trial. The final set of examples of a "means of identification" provided by § 1028(d)(7)(D) contains a cross-reference to § 1029(e)'s definitions of "telecommunication identifying information" and "access device." Accordingly, the final two sets of examples in this pattern definition reproduce the definitions of those terms provided by § 1029(e)(1), (11). ~~Finally, for § 1028A purposes, a person's name, by itself, might not constitute a "means of identification of another." The Fourth Circuit has held that such a 327 means of identification must contain other, valid information, in addition to a person's name, which identifies a specific individual. United States v. Mitchell, 518 F.3d 230, 235 (4th Cir. 2008). In Mitchell, the defendant was charged under § 1028A because he used a Georgia driver's license to commit bank fraud. The license bore the name "Marcus Jackson" (not the defendant's name). There were two Marcus Jacksons with driver's licenses in Georgia but neither had the same license number as the one on the defendant's license. Moreover, the defendant's license did not accurately state the birthday or address of either of the real Marcus Jacksons. The court reversed the defendant's § 1028A conviction because nothing established that the means of identification at issue was in fact the "means of identification of another person." The ID was fake. To sustain a conviction under § 1028A, according to the Fourth Circuit, the means of identification must contain some "valid unique identifier" to establish that the identification did in fact belong to someone else.~~330 In United States v. Thomas, 763 F.3d 689, 692-93 (7th Cir. 2014), the court found that a name is a "means of identification" within the meaning of the statute. 331 ~~Id. at 235–36.~~

18 U.S.C. § 1028A(A)(1) AGGRAVATED IDENTITY THEFT – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] — of the indictment charge[s] the defendant[s] with] aggravated identity theft. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [~~three; five~~four] following elements beyond a reasonable doubt: ~~[~~1. The defendant committed the felony offense of [title of offense] as charged in Count ~~[__]~~; ~~or [1~~[ ]. 2. The defendant ~~committed [the terrorism offense of [title of offense] as charged in Count [__]; 2. During and in relation to that offense, the defendant~~ knowingly ~~[~~transferred~~;~~, possessed~~;~~, or used~~]~~ a ~~[~~means of identification; ~~false identification document]; [and]~~ 3. The defendant ~~did so without lawful authority[.] [; and] [4. The~~knew the means of identification belonged to another person; ~~and~~4. The defendant knew that such transfer, possession or use was without lawful authority; 5. The defendant ~~knew that the means of identification belonged~~did so during and in relation to ~~another person.]~~[name charged felony]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment ~~This instruction may be used alternatively for both general and terrorismrelated aggravated identity theft offenses. 18 U.S.C. § 1028A(a)(1) (2). Use the alternate first element for the terrorism offense under § 1028A(a)(2). The term "false identification document" in the second element should also be used only in connection with the terrorism offense. The fourth and fifth elements are applicable only if the offense charged is § 1028A(a)(1), involving a means of identification rather than a false identification document.~~ In Flores-Figueroa v. United States, 556 U.S. 646 (2009), the Supreme Court held that 18 U.S.C. § 1028A(a)(1) required the government to prove that the ~~336~~defendant knew that the means of identification at issue belonged to another person. In United States v. LaFaive, 618 F.3d 613, 615–18 (7th Cir. 2010), the Seventh Circuit decided that the phrase "another person" in subsection (a)(1) of § 1028A includes both living and deceased persons. The court stated that its conclusion was supported by the plain language of § 1028A(a)(1), the structure of § 1028A, and decisions of other courts. In United States v. Aslan, 644 F.3d 526, 550 (7th Cir. 2011), the court held that a defendant must know that the "means of identification" belonged to a real person, not a purely fictitious creation not tied to any person. In United States v. ~~337~~Spears, 729 F.3d 753, 757 (7th Cir. 2013), the court ruled that "another person" means a "person who did not consent to the 339 information's use, rather than a person other than the defendant." Further, in United States v. Thomas, 763 F.3d 689, 692-93 (7th Cir. 2014), the court found that forging someone's name on a document is a "knowing use" of that name "without lawful authority" and that a name is a "means of identification" within the meaning of the statute. The court also outlined the elements of the offense that must be proven to sustain a violation of the statute. Id. at 692. The term "knowingly" is defined in Pattern Instruction 4.10, which should also be given to define the term "knew" in the third element of this instruction. If the predicate offense is not separately charged, the jury must be instructed as to the elements of that count and has to find the elements beyond a reasonable doubt.

18 U.S.C. § 1030(a)(1) OBTAINING INFORMATION FROM COMPUTER INJURIOUS TO THE UNITED STATES – ELEMENTS

[The indictment charges the defendant[s] with; Count[s~~]~~] of the indictment charge[s] the defendant[s] with] obtaining government protected information from a computer. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [accessed a computer without authorization; exceeded his authorized access to a computer]; and 2. In doing so, the defendant obtained [information that had been determined by the United States Government to require protection against disclosure for reasons of national defense or foreign relations; data regarding the design, manufacture or use of atomic weapons]; and 3. The defendant obtained the [information; data] with reason to believe that the information could be used to injure the United States or to the advantage of any foreign nation; and 4. The defendant willfully ~~[~~[communicated; delivered; transmitted] the [information; data] to any person not entitled to receive it] [retained the [information; data] and failed to deliver it to the officer or employee of the United States entitled to receive it]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment The statute includes "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted." The "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted" language should be used where relevant to the particular case on trial. When the indictment alleges an attempt, the Pattern Instruction 4.09 for attempt should also be employed. ~~366 18 U.S.C. § 1030(a~~The term "knowingly" is defined in Pattern Instruction 4.10, which should be given to define the term "knowingly" in the first element of this instruction.

18 U.S.C. § 1111 FIRST DEGREE MURDER – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] murder in the first degree. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. Within the [special maritime; territorial jurisdiction] of the United States; 2. Defendant unlawfully killed [X]; 3. With malice aforethought; and 4. With premeditation. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty [of that count]. If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty [of that count]. [You would then need to consider the charge of second-degree murder, which I will explain to you shortly.] Committee Comment Generally, "premeditation" is the element that distinguishes first degree murder from second degree murder. See United States v. Delaney, 717 F.3d 553, 555-56 (7th Cir. 2013) (premeditation distinguishes first and second-degree murder). However, 18 U.S.C. § 1111 provides that murder committed under any of the following circumstances also constitutes murder in the first degree (examples of premeditation or a premeditation substitute): [by poison] [by lying in wait] [during the perpetration of, or attempt to perpetrate [arson] [escape] [murder] [kidnapping] [treason] [espionage] [sabotage] [aggravated sexual abuse or sexual abuse] [child abuse] [burglary] [robbery]] [as part of a pattern or practice of assault or torture against a child or children] [as the result of a premeditated design to affect the death of any human being other than him who is killed]. 405 The United States Supreme Court has held that the burden is upon the government to prove the absence of heat of passion when the defendant properly raises a heat of passion defense. Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975). In that circumstance, the Committee recommends adding a fifth element: 5. Not in the heat of passion. In Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975), Maine's murder statute defined murder as a killing with "malice aforethought," and malice aforethought was defined as a state of mind consisting of, among other things, an intent to kill "without considerable provocation." A killing with provocation was classified as manslaughter and subject to a lower punishment. In Mullaney, the Supreme Court held that the defendant's due process rights were violated by Maine's decision to place upon the defendant the burden of proving legal provocation. Because provocation negated the "malice aforethought" required to convict him of murder, the approach used in Maine violated In re Winship, 397 U.S. 358 (1970), which required the government to prove "beyond a reasonable doubt every fact necessary to constitute the crime charged." Instructions containing the elements and definitions applicable to voluntary manslaughter should then also be given. The Seventh Circuit discussion in United States v. Delaney, 717 F. 3d 553 (7th Cir. 2013), provides guidance on proper jury instruction in murder cases. For many years, precedent also dictated that in cases where self-defense is properly invoked, a fifth element "not in self-defense" should also be added, thereby requiring the United States to disprove the defense. Following the Supreme Court's decision in Dixon v. United States, 548 U.S. 1 (2006), the issue of which party bears the burden of proof is unsettled. The Court in Dixon held that burden of proving the defense of duress is on the defendant. In United States v. White Feather, 768 F.3d 735 (7th Cir. 2014), the court affirmed the trial court's refusal of a jury instruction on the issue of self-defense but did not address the burden of proof. See also Michael D. Monico & Barry A. Spevack, Federal Criminal Practice: Seventh Circuit Criminal Handbook § 411 (2015) (discussing White Feather, "affirmative" as opposed to "substantive" defenses, and the burden of proof). Cf. Patterson v. New York, 432 U.S. 197, 207-09 (1977), in which the

Supreme Court held that the government is not required to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree or culpability or the severity of the punishment." 410

18 U.S.C. § 1111 DEFINITION OF MALICE AFORETHOUGHT

A person acts with “malice aforethought” if the person takes someone else’s life deliberately and intentionally, or willfully acts with callous disregard for human life, knowing that a serious risk of death or serious bodily harm would result. 411

18 U.S.C. § 1111 DEFINITION OF PREMEDITATION

Premeditation requires planning and deliberation beyond the simple conscious intent to kill. Enough time must pass between the formation of the plan and fatal act for the defendant to have deliberated, and the defendant must have, in fact, deliberated during that time. Committee Comment Premeditation is the difference between first and second-degree murder. United States v. Delaney, 717 F.3d 553, 555-56 (7th Cir. 2013). In United States v. Bell, the Seventh Circuit noted, "Premeditation requires planning and deliberation beyond the simple conscious intent to kill. There must be an appreciable elapse of time between the formation of a design and the fatal act, [citations omitted] although no specific period of time is required. [Citations omitted.] But more is required than the simple passage of time: the defendant must, in fact, have deliberated during that time period." United States v. Bell, No. 14-3470, 2016 WL 629524, at *7 (7th Cir. Feb. 17, 2016) That the death resulted from another predetermined criminal act does not make the death premeditated. United States v. Prevatte, 16 F.3d 767, 780 (7th Cir. 1994). Premeditation may be proved by circumstantial evidence. Bell, at *7. 412

18 U.S.C. § 1111 SECOND DEGREE MURDER – ELEMENTS

If you have found the defendant not guilty of the charge of murder in the first degree, or if you cannot unanimously agree that the defendant is guilty or not guilty of murder in the first degree, you must consider whether the government has proven the charge of murder in the second degree. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. Within the [special maritime; territorial jurisdiction] of the United States; 2. Defendant unlawfully killed [X]; 3. With malice aforethought. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. [You would then need to consider the charge of [voluntary manslaughter] [involuntary manslaughter] which I will explain to you shortly.] Committee Comment The United States Supreme Court has held that the burden is upon the government to prove the absence of heat of passion when the issue is properly raised. Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975). In that circumstance, the Committee recommends adding a fourth element: 4. Not in the heat of passion. The elements and definitions applicable to voluntary manslaughter should also be given. The Seventh Circuit discussion in United States v. Delaney, 717 F. 3d 553 (7th Cir. 2013), provides guidance on proper jury instruction in murder cases. When involuntary manslaughter is raised as a lesser included offense, elements and definitions applicable to involuntary manslaughter should also be given. 413 If instructions on lesser included offenses are given, the jury should also be advised that the definitions provided as to the relevant elements of proof apply equally to the charge of second-degree murder, as they did to the charge of firstdegree murder. The only difference between the two charges is that first-degree murder requires proof of premeditation whereas second-degree murder does not. For many years, precedent also dictated that in cases where self-defense is properly invoked, a fifth element "not in self-defense" should also be added, thereby requiring the United States to disprove the defense. Following the Supreme Court's decision in Dixon v. United States, 548 U.S. 1 (2006), the issue of which party bears the burden of proof is unsettled. The Court in Dixon held that burden of proving the defense of duress is on the defendant. The most recent Seventh Circuit opinion addressing self-defense, United States v. White Feather, 768 F.3d 735 (7th Cir. 2014) affirmed the trial court's refusal of a jury instruction on the issue of self-defense but did not address the burden of proof. See also Michael D. Monico & Barry A. Spevack, Federal Criminal Practice: Seventh Circuit Criminal Handbook § 411 (2015) (discussing White Feather, "affirmative" as opposed to "substantive" defenses, and the burden of proof). Cf. Patterson v. New York, 432 U.S. 197, 207-09 (1977), in which the Supreme Court held that the government is not required to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree or culpability or the severity of the punishment." 414

18 U.S.C. §§ 1111, 1112 JURISDICTION

[The parties have agreed; The Court takes judicial notice] that the [charged location] is within the [special maritime; territorial jurisdiction] of the United States]. Committee Comment The Committee suggests that this element will rarely be at issue and will be amenable to either a stipulation or a finding by judicial notice. 18 U.S.C. § 7 describes the locations included in the special maritime and territorial jurisdiction of the United States, and also includes Indian Territory when murder is the charged crime. See, 18 U.S.C. § 1152. 415

18 U.S.C. §§ 1111, 1112 CONDUCT CAUSED DEATH

That "defendant unlawfully killed [X]"—requires the government to prove that the defendant's conduct caused [X]'s death. This means that the government must prove that the defendant injured [X], or caused [his; her] injury, from which [X] died. Committee Comment If a defendant commits an unintended killing while committing another felony, the defendant can be convicted of murder for causing the death. Dean v. United States, 556 U.S. 568, 575 (2009) (citing 18 U.S.C. § 1111). 416

18 U.S.C. § 1112 VOLUNTARY MANSLAUGHTER – ELEMENTS

If you have found the defendant not guilty of the charge of murder in the first degree and not guilty on the charge of murder in the second degree (or if you cannot reach a unanimous verdict on either of those charges), you should consider whether he is guilty of the lesser offense of voluntary manslaughter. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. [Within the [special maritime] [territorial jurisdiction] of the United States;] 2. Defendant unlawfully killed [X]; 3. Intentionally; and 4. In the heat of passion but without malice. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. 417

18 U.S.C. § 1112 DEFINITION OF HEAT OF PASSION

"The heat of passion" means a passion of fear, rage or anger that caused the defendant to lose self-control and act upon impulse without self-reflection as a result of circumstances that would provoke such passion in a reasonable person, but which did not justify the use of deadly force. [As noted, the government must prove beyond a reasonable doubt that the defendant was not acting in the heat of passion before you may find that the defendant acted with malice.] Committee Comment The bracketed paragraph should be read when the government has the burden of disproving heat of passion. If voluntary manslaughter is the charged crime, the bracketed paragraph would not be read. The United States Supreme Court has held that the burden is upon the government to prove the absence of heat of passion when the issue is properly raised. Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975). See also United States v. Delaney, 717 F.3d 553, 559-60 (7th 2013), for discussion of heat of passion. 418

18 U.S.C. § 1112 DEFINITION OF VOLUNTARY MANSLAUGHTER

Unlike first- and second-degree murder, voluntary manslaughter involves an intentional killing in the heat of passion but without malice. Malice marks the boundary that separates the crimes of murder and manslaughter. 419

18 U.S.C. § 1112 INVOLUNTARY MANSLAUGHTER - ELEMENTS

The crime of murder also includes the lesser offense of involuntary manslaughter. If you have found the defendant not guilty of the charge of murder in the first degree and not guilty on the charge of murder in the second degree (or if you cannot reach a unanimous verdict on either of those charges), you should proceed to determine whether he is guilty or not guilty of the lesser offense of involuntary manslaughter. Involuntary manslaughter is the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. ~~402 18 U.S.C. §§ 1341 & 1343 MAIL/WIRE/CARRIER FRAUD -~~ Within the [special maritime; territorial jurisdiction] of the United States; 2. [X] was unlawfully killed; 3. As a result of an act done by the defendant during the commission of [an unlawful act not amounting to a felony; a lawful act, done either in an unlawful manner or without due caution, which might produce death]; and 4. The defendant [knew that such conduct was a threat to the life of [X]; knew of circumstances that might would reasonably cause the defendant to foresee that such conduct might be a threat to the life of [X]]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment In cases not involving an unlawful act, the mens rea requirement for involuntary manslaughter is equivalent to gross or criminal negligence. United States v. Ganadonegro, 854 F. Supp. 2d 1068 (D. N.M. 2012). Wanton or reckless disregard for human life is required, but not of the nature that constitutes a finding of malice. United States v. Paul, 37 F.3d 496 (9th Cir. 1994). To be convicted of involuntary manslaughter, a defendant must have acted with gross negligence—meaning a wanton or reckless disregard for human life—and had knowledge that his conduct was a threat to the life of another or knowledge of 420 such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject another. United States v. Hicks, 389 F.3d 514 (5th Cir. 2004). 421

18 U.S.C. § 1112 DEFINITION OF ASSAULT

In considering the lesser-included offense of involuntary manslaughter, you would need to determine whether or not the defendant committed an assault on [X], and if so, whether or not the assault was an act amounting to a felony. An assault is any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm. An assault by striking, beating, or wounding (that is, a simple assault) is an unlawful act not amounting to a felony. Committee Comment If there is an issue as to whether an assault is simple or aggravated, the following instructions may be given: [An assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse is an unlawful act amounting to a felony, and an assault resulting in serious bodily injury is an unlawful act amounting to a felony. (These are referred to as aggravated assaults.) If an assault not amounting to a felony was proven beyond a reasonable doubt, such an act would satisfy the first essential element of involuntary manslaughter. On the other hand, if an assault amounting to a felony was proven beyond a reasonable doubt, such an act would not satisfy the first essential element of involuntary manslaughter.] 422

18 U.S.C. § 1112 DEFINITION OF DANGEROUS WEAPON

A “dangerous weapon or device” means any object that can be used to inflict severe bodily harm or injury. The object need not actually be capable of inflicting harm or injury. Rather, an object is a dangerous weapon or device if it, or the manner in which it is used, would cause fear in the average person. Committee Comment See McLaughlin v. United States, 476 U.S. 16, 17–18 (1986) (holding that an unloaded handgun is a “dangerous weapon” within the meaning of § 2113(d) because “a gun is typically and characteristically dangerous;” “the display of a gun instills fear in the average citizen,” consequently “it creates an immediate danger that a violent response will ensue”; and “a gun can cause harm when used as a bludgeon”); United States v. Beckett, 208 F.3d 140, 152 (3d Cir. 2000) (holding hoax bombs qualified as dangerous weapons under § 2113(d)); see also United States v. Woods, 556 F.3d 616, 623 (7th Cir. 2009) (relying on McLaughlin and concluding that BB guns qualify as dangerous weapons under U.S.S.G. § 2B3.1(b)(2)(E)). 423

18 U.S.C. § 1112 DEFINITION OF SERIOUS BODILY INJURY

"Serious bodily injury" means bodily injury which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or mental faculty. Committee Comment This definition is found at 18 U.S.C. § 1365(h)(3).

18 U.S.C. §§ 1341, 1343 & 1346 RECEIVING A BRIBE OR KICKBACK

[A [public official] [employee] [corporate officer] [union official] [defendant] commits bribery when he [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act.]. [A kickback occurs when a [public official] [employee] [corporate officer] [union official] [defendant] [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act], and the act itself provides the source of the funds to be "kicked back."] "Something of value" includes money or property [and prospective employment]. Committee Comment ~~The~~In the first paragraph, the bracketed list of fiduciaries is not necessarily an exhaustive list. Also, in the first paragraph, the official act will vary in each case and the court may need to vary the instruction based on it. ~~The bracketed list of fiduciaries is not necessarily an exhaustive list.~~ For the definition of an "official act~~",~~," see the Pattern Instruction for the same term in 18 U.S.C. § 201~~(a)(3~~, which discusses McDonnell v. United States, 136 S. Ct. 2355, 2371-72 (2016). A kickback is a form of bribery where the official action, typically the granting of a government contract or license, is the source of the funds to be paid to the fiduciary. As Skilling v. United States, 130 S. Ct. 2896 (2010), explains, that is what happened in McNally v. United States, 483 U.S. 350, 359 (1987). See Skilling, 130 S. Ct. at 2932 ("a public official, in exchange for routing… insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest"); see also, e.g., United States v. Blanton, 719 F.2d 815, 816–818 (6th Cir. 1983) (governor arranged for friends to receive state liquor licenses in exchange for a share of the profits). In cases in which the defendant asserts that the payment was a mere gratuity or that the defendant falsely promised to take official action but never intended to do so, the parties and the court should examine United States v. Hawkins, 777 F.3d 880, 883-84 (7th Cir. 2015), and McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016). Hawkins held that Section 1346 only covers bribery and kickback schemes and does not cover mere gratuities. Hawkins, 777 F.3d at 883. The Seventh Circuit also held that Section 1346 does not apply if a public official makes a false promise to take official action. Id. at 883-84. In other words, if a public official is "scamming" the would-be bribe payers, then there is no bribery or kickback scheme under Section 1346. Id. at 884. In McDonnell, however, the Supreme Court arguably contradicted Hawkins by stating that honest-services bribery does not require that the public official 436 actually intend to perform the official act. 136 S. Ct. at 2371 ("Nor must the public official in fact intend to perform the 'official act,' so long as he agrees to do so. A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return.") But this part of McDonnell is arguably dicta; does not discuss Skilling v. United States, 561 U.S. 358, 413 (2010), which described honest-services bribery as official action "in exchange for" value; and relies on Evans v. United States, 504 U.S. 255, 268 (1992), which arguably does not hold that a false promise to take official action qualifies as bribery. The Committee does not adopt a position because the case law is currently unclear. Skilling cites 18 U.S.C. § 201 as an example of a bribery statute that gives content to 1346's bribery scope, and § 201 refers to bribes comprising "anything of value." Accordingly, "anything of value" may include various forms of money and property, United States v. Williams, 705 F.2d 603, 622–23 (2d Cir. 1983~~) ("~~)("anything of value" under § 201 includes shares in corporation), and may also include prospective employment, United States v. Gorman, 807 F.2d 1299, 1302, 1305 (6th Cir. 1986) ("anything of value" under § 201 includes a side job for federal employee as reward for official action). The definition of "something of value" provides

common examples but is not intended to be an exhaustive list. When the alleged bribe is in the form of a campaign contribution, an additional instruction may be required. In McCormick v. United States, 500 U.S. 257, 273 (1991), the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. ~~414~~ § 1951, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." In Evans v. United States, 504 U.S. 255 (1992), another Hobbs Act case involving campaign contributions, the Court elaborated on the quid pro quo requirement from McCormick, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268. The Court in Evans held that the following jury instruction satisfied McCormick: [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution. Id. at 258, 268 (second brackets in original). Furthermore, in United States v. Allen, 10 F.3d 405, (7th Cir. 1993), the court discussed the district court's giving 437 of a McCormick instruction in a case in which RICO predicate acts included bribery in violation of Indiana law. The instruction defining "color of official right" for § 1951 purposes also addresses the role of campaign contributions. See Instruction 18 U.S.C. § 1951 Color of Official Right – Definition. ~~Gratuities are not a form of bribery under § 1346 honest-services fraud~~438~~. United States v. Hawkins, 777 F.3d 880, 882-83 (7th Cir. 2015). Honest-services bribery requires that the public official demand or accept money in exchange for the bribe, whereas a gratuity is merely a reward for the performance for official acts, without the bargained-for exchange. Id. In view of Hawkins, it might be appropriate in certain bribery prosecutions to give a limiting instruction explaining the difference between gratuities and bribes, especially if the defense theory relies on this distinction. In United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. Blagojevich held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." Id. at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by Blagojevich, then an instruction might be warranted to exclude that possibility. 415~~

18 U.S.C. §§ 1341, 1343 & 1346 OFFERING A BRIBE OR KICKBACK

[A defendant offers a bribe when he, directly or indirectly, [promises, gives, offers] a [public official] [employee] [corporate officer] [union official] anything of value in exchange for a promise for, or performance of, an [official act.] [Describe act at issue.] [A defendant offers a kickback when he, directly or indirectly, [promises, gives, offers] a [public official] [employee] [corporate officer] [union official] something of value in exchange for a promise for, or performance of, an [official act.], and the act itself provides the source of the funds to be "kicked back."] [Describe act at issue.] "Something of value" includes money or property [and prospective employment]. Committee Comment See Committee Comment for the pattern instruction on Receiving a Bribe or Kickback. ~~416~~439 18 U.S.C. §§ 1341, 1343 & 1346 INTENT TO INFLUENCE It is not necessary that the [public official] [defendant] had the power to or did perform the act for which he was promised or which he agreed to receive something of value; it is sufficient if the matter was before him in his official capacity. [Nor is it necessary that the [public official] [defendant] in fact intended to perform the specific official act. It is sufficient if the [public official] [defendant] knew that the thing of value was offered with the intent to exchange the thing of value for the performance of the official act.] ~~417~~Committee Comment This instruction was adapted from the Intent to Influence instruction for 18 U.S.C. § 201. But the parties and the court should review the Committee Comment for 18 U.S.C. §§ 1341, 1343 & 1346 (Receiving a Bribe or Kickback), for a discussion of the case law's uncertainty on whether an official must actually intend to perform the official act. It remains accurate to say, as this Intent to Influence instruction does, that the official need not actually carry out the official action in order to be convicted of bribery. McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016) (citing Evans v. United States, 504 U.S. 255, 268 (1992)). 440

18 U.S.C. § 1344(1) SCHEME TO DEFRAUD A FINANCIAL INSTITUTION – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [bank] [financial institution] fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four; five] following elements beyond a reasonable doubt: 1. There was a scheme to defraud a [bank; specified financial institution under 18 U.S.C. § 20] as charged in the indictment; and 2. The defendant knowingly [carried out; attempted to carry out] the scheme; and 3. The defendant acted with the intent to defraud the [bank; specified financial institution under 18 U.S.C. § 20] [4. The scheme involved a materially false or fraudulent pretense, representation, or promise[; and [[4.; 5.] At the time of the charged offense the deposits of the [bank;] [financial institution] were insured by the Federal Deposit Insurance Corporation]].] If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment In Loughrin v. United States, 134 S. Ct. 2384 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. Accordingly, the Committee has divided the previously unified instruction for § 1344 into two separate instructions. In Neder v. United States, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following Neder, "district courts should include materiality in the jury instructions for section 1344." United States v. Reynolds, 189 F.3d 521, 525 n.2 (7th Cir. 1999)[; see]. See also United States v. 425 Fernandez, 282 F.3d 500, 509 (7th Cir. 2002). that a materially false or 448 fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information. Although the Seventh Circuit has not yet addressed the application of Neder to § 1344(1) specifically, the Ninth Circuit, in United States v. Omer, 395 F.3d 1087 (9th Cir. 2005), held that materiality is an element of a § 1344(1) violation under Neder. In light of the general admonitions in Neder and in Reynolds, this instruction has been modified to reflect this requirement. Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporate the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information. The final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated into § 1344, as well as into other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution. This instruction should be appropriately modified in the event that the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.

18 U.S.C. § 1344 SCHEME – DEFINITION

A scheme is a plan or course of action formed with the intent to accomplish some purpose. [In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property from a [bank] [financial institution] by means of false pretenses, representations or promises, the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme. However, the government is not required to prove all of them.] [A scheme to defraud a [bank] [financial institution] means a plan or course of action intended to deceive or cheat that [bank] [financial institution] or [to obtain money or property or to cause the [potential] loss of money or property by the [bank] [financial institution]. [A scheme to defraud need not involve any false statement or misrepresentation of fact.]] Committee Comment This instruction is based on the mail/wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. For a discussion of whether the unanimity instruction should be given see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud. The Seventh Circuit has held that § 1344(1) covers check kiting schemes, even though it believes that they may not involve specific false statements or misrepresentations of fact. United States v. Doherty, 969 F.2d 425, 429 (7th Cir. 1992) ("As its ordinary meaning suggests, the term 'scheme to defraud' describes a broad range of conduct, some which involve false statements or misrepresentations of fact... and others which do not.... [[O]ne need not make a false representation to execute a scheme to defraud."); see also United States v. Norton, 108 F.3d 133, 135 (7th Cir.1997); United States v. LeDonne, 21 F.3d 1418, 1427–28 (7th Cir. 1994). The final bracketed sentence in this instruction reflects the holdings in the check kiting cases, and should be given in a case (like one charging check kiting) where no specific false statement or misrepresentation is charged. However, the Committee recognizes that there is tension between that language, which says that a scheme need not involve a specific false statement or misrepresentation, and the language in the fourth element of the elements instruction for § 1344(1), which requires the government to prove that "[t]he scheme involved a materially false or fraudulent pretense, representation, or promise." The Committee believes that this language in the fourth element under § 1344(1) is, despite the holdings in the check kiting cases, made necessary by the holdings in Neder v. 450 United States, 527 U.S. 1 (1999), and United States v. Reynolds, 189 F.3d 521, 525 n. 2 (7th Cir. 1999), that juries must be instructed on the requirement of materiality in bank fraud cases, as they are in mail and wire fraud cases. Moreover, consistent with the additional observation in Neder that the mail, wire and bank fraud statutes should be considered similarly, the Committee believes that the materiality requirement must be addressed this way in the elements instruction, as is done in the mail and wire fraud instructions. But reconciling the requirement of a "materially false or fraudulent pretense, representation, or promise" in the fourth element under § 1344(1) with the holding in the Doherty line of cases that no specific false statement or misrepresentation is required, and determining just what it is that must be material in a check-kiting case, is beyond the Committee's authority to resolve. In the Committee Comment to the "Definition of Scheme to Defraud" instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wire fraud conviction can be based on an omission and/or concealment. As that Comment points out, omissions plus an affirmative act of concealment can comprise a scheme to defraud in mail/wire fraud cases. But it is not clear, even from cases construing those statutes, whether an omission itself, without more, is enough. As unresolved as the issue is with respect to the mail and wire fraud statutes, it is even more so with respect to bank fraud. In bank fraud cases in which the issue arises, the Court may wish to consider

adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

18 U.S.C. § 1344 MULTIPLE FALSE STATEMENTS CHARGED

[In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property from a [bank] [financial institution] by means of false pretenses, representations or promises, the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme. However, the government is not required to prove all of them.]

18 U.S.C. § 1344(1) SCHEME TO DEFRAUD A FINANCIAL INSTITUTION – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] [bank] [financial institution] fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four; five] following elements beyond a reasonable doubt: 1. There was a scheme to defraud a [bank; specified financial institution under 18 U.S.C. § 20] as charged in the indictment; and 2. The defendant knowingly [carried out; attempted to carry out] the scheme; and 3. The defendant acted with the intent to defraud the [bank; specified financial institution under 18 U.S.C. § 20] 4. The scheme involved a materially false or fraudulent pretense, representation, or promise [; and 5. At the time of the charged offense the deposits of the [bank; [financial institution] were insured by the Federal Deposit Insurance Corporation]]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment In Loughrin v. United States, 134 S. Ct. 2384 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. Accordingly, the Committee has divided the previously unified instruction for § 1344 into two separate instructions. In Neder v. United States, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following Neder, "district courts should include materiality in the jury instructions for section 1344." United States v. Reynolds, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); see also United States v. Fernandez, 282 F.3d 500, 509 (7th Cir. 2002). ~~426~~Although the Seventh Circuit has not yet addressed the application of Neder to § 1344(1) specifically, the Ninth 453 Circuit, in United States v. Omer, 395 F.3d 1087 (9th Cir. 2005), held that materiality is an element of a § 1344(1) violation under Neder. In light of the general admonitions in Neder and in Reynolds, this instruction has been modified to reflect this requirement. Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporate the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information. The final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated into § 1344, as well as into other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution. This instruction should be appropriately modified in the event that the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.

18 U.S.C. § 1347(1) SCHEME – DEFINITION

A scheme is a plan or course of action formed with the intent to accomplish some purpose. A scheme to defraud a health care benefit program means a plan or course of action intended to deceive or cheat that health care benefit program or [to obtain money or property or to cause the [potential] loss of money or property [belonging to; [in the [care] [custody] [or] [control] of] the health care benefit program. [A scheme to defraud need not involve any false statement or misrepresentation of fact.] Committee Comment This instruction is based on the instructions applicable to mail/wire/bank fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1344. For a discussion of the use of proof of omission or concealment to show a scheme to defraud, see the Committee Comment to the mail/wire fraud statutes instruction and to the accompanying "Definition of Material" instruction463. For a discussion of whether the unanimity instruction should be given see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud. The issue of whether a specific false statement or misrepresentation of fact is necessary has not been decided in the context of health care fraud. Under the bank fraud statute, the Seventh Circuit has recognized that a check-kiting scheme can be charged under § 1344(1) even though the scheme may not involve a specific false statement or misrepresentation of fact. United States v. Doherty, 969 F.2d 425, 429 (7th Cir. 1992) ("As its ordinary meaning suggests, the term 'scheme to defraud' describes a broad range of conduct, some which involve false statements or misrepresentations of fact... and others which do not.....[[O]ne need not make a false representation to execute a scheme to defraud."); see also United States v. Norton, 108 F.3d 133, 135 (7th Cir. 1997); United States v. LeDonne, 21 F.3d 1418, 1427–28 (7th Cir. 1994). If such a scheme is charged, the Committee recommends that the final bracketed sentence in the first bracketed paragraph reflects these holdings, and should be given in a case where no specific false statement or misrepresentation is charged. For a more detailed discussion of this issue, see the Committee Comment to the Pattern Instruction for 18 U.S.C. § 1344(1) Scheme to Defraud Definition. In the Committee Comment to the "Definition of Scheme to Defraud" instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wire fraud conviction can be based on an omission and/or concealment. As that Comment points out, omissions plus an affirmative act of concealment can436 comprise a scheme to defraud in mail/wire fraud cases. But it is not clear, even from cases construing those statutes, whether an omission itself, without more, is enough. Similarly, this issue has not been resolved with respect to health care fraud. In health fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

18 U.S.C. § 1347(2) OBTAINING PROPERTY FROM A HEALTH CARE BENEFIT PROGRAM BY FALSE OR FRAUDULENT PRETENSES – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] scheming to obtain [money] [property] belonging to a health care benefit program by false or fraudulent pretenses or misrepresentations. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the following five elements beyond a reasonable doubt: 1. There was a scheme to obtain the money or property that [was] [were] [owned by] [or] [in the [care] [custody] [or] [control] of] a health care benefit program by means of false or fraudulent pretenses, representations, or promises, as charged in the indictment; and 2. The defendant knowingly and willfully [carried out; attempted to carry out] the scheme; and 3. The defendant acted with the intent to defraud; and 4. The scheme involved a materially false or fraudulent, pretense, representation, or promise; and 5. The scheme was in connection with the delivery of or payment for [health care benefits] [health care items] [health care services]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment In McNally v. United States, the Supreme Court held that language in the mail fraud statute, 18 U.S.C. § 1341, "sets forth just one offense, using the mail to advance a scheme to defraud." 107 S. Ct. 2875 (1987). In contrast, in Loughrin v. United States, 134 S. Ct. 2384 (2014), the Supreme Court held that language almost identical to § 1347 in the bank fraud statute, § 1344, gives rise to two theories of liability and that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the financial institution that owned or had custody or control over the money or property that was the 438 object of the scheme. The Loughrin Court justified this different interpretation, in part, because of the construction of the statutes. The mail fraud provision contains the two phrases "strung together in a single, unbroken sentence" whereas the bank fraud law's "two clauses have separate numbers, line breaks before, between, and after them, and equivalent indentation – thus placing the clauses on equal footing and indicating that they have separate meanings." 134 S. Ct. at 2391. Although this issue has not been decided by the Supreme Court with regard to the health care fraud statute, § 1347 is constructed almost identically to § 1344. United States v. Hickman, 331 F.3d 439, 445-46 (5th Cir. 2003) (the language and structure of the health care fraud statute indicates that Congress patterned it after the bank fraud statute). See United States v. Awad, 551 F.3d 930 (9th Cir. 2008) (agreeing with Hickman analysis that the health care fraud statute provides two theories of liability). Thus, the committee suggests that similarly to § 1344, the health care fraud statute provides two theories of liability. However, it is important to note, the Loughrin Court further justified the dual theory of liability for the bank fraud statute by noting that at the time the statute was enacted the two clauses of the mail fraud statute had been construed independently by the courts. In the case of the health care fraud statute, it was enacted after McNally was decided, and therefore, after the Court had limited the mail fraud statute to a single theory of liability. Willfulness: For the mens rea element, Section 1347 uses both "knowingly" and "willfully." There is no Seventh Circuit case that has definitively decided the meaning of "knowingly and willfully" in the context of this statute, and the key question is whether "willfully" requires that the defendant know he is violating the law. In United States v. Awad, 551 F.3d 930, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must

prove that the defendant acted with knowledge that his conduct was unlawful. In 2010, after Awad was decided, however, Congress amended § 1347 and added that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." 18 U.S.C. 1347(b). No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether the amendment is strictly limited to "this section," meaning specifically Section 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, Section 1347 prosecutions are sometimes premised on representations that are deemed to be false due to a federal regulation, and it is an open question whether a defendant must know that he is violating the regulation. Litigants and trial courts might find it useful to refer to United States v. Wheeler, 540 F.3d 683 (7th Cir. 2008), which lay out competing considerations on the meaning of "willfully." In Wheeler, the Seventh Circuit considered this issue under a plain error standard in the context of another health care offense, § 669, and concluded that "there is a plausible argument that the use of 439 'knowingly and willfully' in § 669 may require that a defendant know his conduct was in some way unlawful." In discussing the meaning of willfully, the Wheeler court noted that § 669 does not involve the complex statutory scheme at issue in tax or structuring crimes which require a defendant to violate a known legal duty. However, the Wheeler court reasoned that there is also some support for the argument that "willfully" means more than acting intentionally when it is used conjunctively with "knowingly." The Committee advises that if the district court deems the two terms to have the same meaning, then the court should define "knowingly and willfully" in one instruction, using the pattern instruction for "knowingly." If the court deems the two terms to have separate meanings, then the court should define both terms in separate instructions. Litigants and the trial court might wish to refer to the instructions on 18 U.S.C. § 1001, which also uses the term "knowingly and willfully." Intent to Defraud: The third element requires the government to prove that there was a "specific intent to deceive or defraud." See United States v. Natale, 719 F.3d 719, 741-42 (7th Cir. 2013)("intent to defraud requires a specific intent to deceive or mislead"), citing, Awad, 551 F.3d at 940 ("'intent to defraud' [is] defined as 'an intent to deceive or cheat'"); United States v. Choiniere, 517 F.3d 967, 972 (7th Cir. 2008)(in a § 1347 prosecution jury instructions defined intent to defraud to mean that "the acts charged were done knowingly and with the intent to do deceive or cheat the victims"); United States v. White, 492 F.3d 380, 393-94 (6th Cir. 2007) ("the government must prove the defendant's 'specific intent to deceive or defraud'"). As noted above, effective on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148, Title VI, § 10606(b), added § 1347(b), which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." Just as the interpretation of Section 1347(b) remains open on the issue of willfulness (see the discussion above), no Seventh Circuit decision has interpreted this section for purposes of the specific intent element. Materiality: In Neder v. United States, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined in 18 U.S.C. § 1344. Following Neder, "district courts should include materiality in the jury instructions for section 1344." United States v. Reynolds, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); see also United States v. Fernandez, 282 F.3d 500, 509 (7th Cir. 2002). In keeping with the similarity between section 1344 and section 1347, the fourth element of this instruction includes materiality. The jury instruction defining Health Care Benefit Program and Interstate Commerce should be given in conjunction with this instruction.

18 U.S.C. § 1347 HEALTH CARE BENEFIT PROGRAM/ INTERSTATE COMMERCE – DEFINITION

A health care benefit program is ~~a~~any [public or private~~] [~~][plan or contract], affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any ~~degree of~~ impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States]. The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree. The government need not prove that [the] [a] defendant engaged in interstate commerce or that the acts of [the] [a] defendant affected interstate commerce. Committee Comment A health care benefit program is defined in 18 U.S.C. § 24 for purposes of the federal health care offenses, including § 1347. The first sentence of this instruction is the definition of health care benefit program in 18 U.S.C. § 24. The remainder of the instruction addresses "affecting commerce" which is an element of proof in cases where 18 U.S.C. § 24 is at issue. Courts have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. United States v. Klein, 543 F.3d 206, 211 (5th Cir. 2008); United States v. Lucien, 2003 WL 22336124 (2d Cir. Oct. 14, 2003); United States v. Whited, 311 F.3d 259 (3d Cir. 2002~~) (interpreting). The court may also find it appropriate to adapt for~~ health care ~~benefit program under § 669). 441~~offenses the RICO pattern instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce. 464 18 U.S.C. § 1461 MAILING OBSCENE MATERIAL – ELEMENTS [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] mailing obscene material. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant knowingly [used the mails] [caused the mails to be used] for the delivery of certain materials, as charged; and 2. The defendant knew the content, character, and nature of the materials; and 3. The materials were obscene. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment: To fulfill the "knowingly" requirement of 18 U.S.C. § 1461, the Supreme Court held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials. Hamling v. United States, 418 U.S. 87, 123 (1974); see also United States v. Knox, 32 F.3d 733, 753–54 (3d Cir. 1994) (general nature and character required under 18 U.S.C. § 2252). Because the statute's references to materials that are indecent, filthy and vile raise constitutional issues, the proposed pattern instruction does not include them. ~~442~~465 18 U.S.C. § 1462 BRINGING OBSCENE MATERIAL INTO THE UNITED STATES – ELEMENTS [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bringing obscene material into the United States. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant knowingly brought [the material charged in the indictment] into the United States; and 2. The defendant knew the character or nature of [the material charged in the indictment] at the time it was brought into the United States; and 3. [The material charged in the indictment] was obscene. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are

considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. ~~443~~466 18 U.S.C. § 1462 TAKING OR RECEIVING OBSCENE MATERIAL – ELEMENTS [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] taking or receiving obscene material. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant knowingly took or received [the material charged in the indictment] from [any express company~~]~~ [][other common carrier~~]~~ [][interactive computer service]; and 2. The defendant knew the character or nature of [the material charged in the indictment] at the time it was [taken~~]~~ [][received]; and 3. [The material charged in the indictment] was obscene. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment "Computer" is defined in the Pattern Instruction for 18 U.S.C. § 1030(e)(1). ~~444~~467

18 U.S.C. § 1591 SEX TRAFFICKING OF A MINOR – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] sex trafficking of a minor. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant knowingly [recruited] [enticed] [harbored] [transported] [provided][obtained][maintained] [the person identified in the indictment]; and 2. the defendant [knew][recklessly disregarded the fact]: (a) [force][threats of force][fraud][coercion] would be used to cause [the person identified in the indictment] to engage in a commercial sex act; or (b) [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act; and 3. the offense was in or affecting interstate commerce. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. ~~489 18 U.S.C. § 1591 SEX TRAFFICKING OF A MINOR – ELEMENTS THIS INSTRUCTION IS UNDER REVIEW BY THE COMMITTEE IN LIGHT OF CHANGES IN THE LAW. 490 18 U.S.C. § 1591 BENEFITTING FROM SEX TRAFFICKING OF A MINOR – ELEMENTS THIS INSTRUCTION IS UNDER REVIEW BY THE COMMITTEE IN LIGHT OF CHANGES IN THE LAW. 491~~Committee Comment Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. §1591(e)(3). A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that [force][threats of force][fraud][coercion] would be used to cause, or the minor status of the person identified in the indictment being caused to engage in a commercial sex act. See United States v. Pina-Suarez, 2008 WL 2212047, at **3 (11th Cir. May 29, 2008); United States v. Wilson, 2010 WL 2991561 (S.D. Fl. 2010). The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. §10 and are modified in the Pattern Instruction on Interstate/Foreign Commerce-Definition, above, which consolidates and harmonizes various definitions of those terms. 513

18 U.S.C. § 1591 BENEFITTING FROM SEX TRAFFICKING OF A MINOR – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] benefiting from the sex trafficking of a minor. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant knowingly benefitted, financially or by receiving a thing of value, from participation in a venture which has engaged in an act of [recruiting] [enticing] harboring] [transporting] [providing] [obtaining] [maintaining] [the person identified in the indictment]; 2. The defendant [knew][recklessly disregarded the fact]: (a) force, fraud, or coercion would be used to cause [the person identified in the indictment] to engage in a commercial sex act; or (b) [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act; and 3. The offense was in or affecting interstate commerce. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. §1591(e)(3). A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that [force][threats of force][fraud][coercion] would be used to cause, or the minor status of the person identified in the indictment being caused to engage in a commercial sex act. See United States v. Pina-Suarez, 2008 WL 2212047, at **3 (11th Cir. May 29, 2008); United States v. Wilson, 2010 WL 2991561 (S.D.Fl. 2010). The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. §10 and are modified in the Pattern Instruction on Interstate/Foreign 514 Commerce above, which consolidates and harmonizes various definitions of those terms. 515

18 U.S.C. § 1591(A)(1) SEX TRAFFICKING OF A MINOR OR BY FORCE, FRAUD, OR COERCION

[The indictment charges the defendant[s] with] [Count[s] __ of the indictment charge[s] the defendant[s] with] sex trafficking [of a minor] [by force, fraud, and coercion]. In order for you to find [a; the] defendant guilty of this count, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant knowingly [recruited] [enticed] [harbored] [transported] [provided] [obtained] [advertised] [maintained] [patronized] [solicited] by any means [the person identified in the indictment]; and 2. The defendant: a. [knew] [recklessly disregarded] the fact that [force] [threats of force] [fraud] [coercion] would be used to cause [the person identified in the indictment] to engage in a commercial sex act; or a. [knew] [recklessly disregarded] the fact that [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act; or b. had a reasonable opportunity to observe [the person identified in the indictment] who had not yet attained the age of 18, and knew or recklessly disregarded the fact that [the person identified in the indictment] would be caused to engage in a commercial sex act; and 3. the offense was in or affecting interstate commerce. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty of [that count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty of [that count]. Committee Comment 516 The Committee provides the following guidance regarding the inclusion of applicable subsections under section (2) of the instruction. For cases in which the defendant has been charged with sex trafficking of a non-minor using force, fraud, or coercion, the court should use only subsection (2)(a). For cases in which the defendant has been charged with sex trafficking of a minor that does not use force, fraud, or coercion, the court should not use subsection (2)(a) and only use subsections (2)(b) and (2)(c) as applicable. For cases in which the defendant has been charged with sex trafficking of a minor in which the government is pursuing multiple theories, the court should use those subsections of (2)(a)(b) and (c) that are applicable. On or about May 29, 2015, Congress amended § 1591(a) to include the terms “advertises,” “patronizes” and “solicits” in the list of conduct that was criminalized under the statute, thereby making clear that, at least as of May 29, 2015, the statute applied to conduct committed by consumers and advertisers of commercial sex acts, as well as suppliers. See United States v. Jungers, 702 F.3d 1066 (8th Cir. 2013) (prior to the May 29, 2015 amendment, holding that 18 U.S.C. § 1591 applies to both suppliers and purchasers of commercial sex acts); See Justice for Victims of Trafficking Act of 2015, Pub.L. No. 114–22, 129 Stat. 227 (May 29, 2015). As amended on May 29, 2015, § 1591(c) states: “In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed harbored, transported, provided, obtained, maintained, patronized, or solicited, the government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.” Thus, § 1591(c) provides that, in cases other than those alleged under the “advertised” prong of § 1591(a), in lieu of proving knowledge of the minor’s age or reckless disregard, the government can satisfy its burden by showing that the defendant had the reasonable opportunity to observe the minor-aged victim. See United States v. Robinson, 702 F.3d 22, 26 (2d Cir. 2012) (government “need not prove any mens rea with regard to the defendant’s awareness of the victim’s age if the defendant had a reasonable opportunity to observe the victim.”); United States v. Copeland, 820 F.3d 809, 813 (5th Cir. 2016) (adopting Robinson and holding that 1591(c) “supplies an alternative to proving any mens rea with regard to the victim’s age”). In a case that involves advertising,

neither the "reckless disregard" nor the reasonable opportunity to observe aspect of the jury instruction should be included. Under § 1591(a) and § 1591(c), if the government charges "advertising", the mens rea element is knowingly. Certain courts have held that providing a jury instruction as to "reasonable opportunity to observe" is a constructive amendment of the indictment if not specifically alleged as a theory of liability in the indictment. See United States v. 517 Bolds, 620 F. App'x 592 (9th Cir. 2015); United States v. Lockhart, 844 F.3d 501 (5th Cir. 2016). To date, the Seventh Circuit has not addressed this issue. Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. §1591(e)(3). A completed "commercial sex act" is not an essential element of the offense. United States v. Wearing, 865 F.3d 553, 555-57 (7th Cir. 2017). Although the Seventh Circuit has not explicitly approved a particular jury instruction for "recklessly disregards" in the context of § 1591, the Committee recommends defining it. In United States v. Carson, 870 F.3d 584, 601 (7th Cir. 2017), however, the Seventh Circuit found the following instruction erroneous: A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that either: (1) force, threats of force, or coercion would be used to cause the person identified in the indictment to engage in a commercial sex act, or (2) the person identified in the indictment was under eighteen years of age and would be caused to engage in a commercial sex act. The "or carelessly ignores" language lowered the requisite standard. See also United States v. Groce, 891 F.3d 260, 269 (7th Cir. 2018) (wrong to instruct the jury that recklessly disregards can be satisfied by where the person "consciously or carelessly ignores facts and circumstances") (emphasis added). Other Circuits have associated "recklessly disregards" with consciously ignoring facts and circumstances. See United States v. O'Neal, 742 F. App'x 836, 842–43 (5th Cir. 2018) ("We have not had many cases that discuss a defendant's reckless disregard of a victim's age under § 1591. But the common definition of reckless disregard is "[c]onscious indifference to the consequences of an act"); United States v. Roy, 630 F. App'x 169 (4th Cir. 2015) (jury instruction provided "A person 'recklessly disregards' a fact within the meaning of this offense when he is aware of, but consciously ignores, facts and circumstances that would reveal that force, threats of force, fraud, or coercion, or any combination of such means, could be used to cause a victim to engage in a commercial sex act."). The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are modified in the Pattern Instruction on Interstate/Foreign Commerce-Definition, above, which consolidates and harmonizes various definitions of those terms. The defendant need not have known or intended that his conduct would have any effect on interstate or foreign commerce. United States v. Sawyer, 733 F.3d 228, 230 (7th Cir. 2013). Moreover, while the offense conduct must have affected interstate or foreign commerce, the statute does not require that the specific acts listed in 18 U.S.C. § 1591(a)(1) affect interstate or foreign commerce. Wearing, 865 F.3d at 557–58. 518

18 U.S.C. § 1951 COLOR OF OFFICIAL RIGHT – DEFINITION

[Attempted] Extortion under color of official right occurs when a public official receives [or attempts to obtain] money or property to which ~~[~~he~~] [she]~~ is not entitled, knowing [believing] that the money or property is being [would be] given to [him] [her] in return for taking, withholding or influencing official action. [Although the official must receive [or attempt to obtain] the money or property, the government does not have to prove that the public official first suggested giving money or property, or that the official asked for or solicited it.] [While the official must receive [or attempt to obtain] the money or property in return for the official action, the government does not have to prove [that the official actually took or intended to take that action] [or] [that the official could have actually taken the action in return for which payment was made] [or] [that the official would not have taken the same action even without payment].] [Acceptance by an elected official of a campaign contribution, by itself, does not constitute extortion under color of official right, even if the person making the contribution has business pending before the official. However, if a public official receives [or attempts to obtain] money or property, knowing [believing] that it is [would be] given in exchange for a specific requested exercise of [his~~] [~~][her] official power, [he~~] [~~][she] has committed extortion under color of official right, even if the money or property is [to be] given to the official in the form of a campaign contribution.] Committee Comment See Evans v. United States, 504 U.S. 255 (1992); McCormick v. United States, 500 U.S. 257 (1991); United States v. Giles, 246 F.3d 966 (7th Cir. 2001); United States v. Abbas, 560 F.3d 660 (7th Cir. 2009). An extortion conviction "under color of official right" requires the government to prove a quid pro quo. In McCormick, 500 U.S. at 273, the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. § 1951, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." In Evans, 504 U.S. 255, another Hobbs Act case involving campaign contributions, the Court elaborated on the quid pro quo requirement from McCormick, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268. The Court in Evans held that the following jury instruction satisfied McCormick: [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance ~~517~~ does constitute a violation of the Hobbs Act regardless of whether the payment is 544 made in the form of a campaign contribution. Id. at 258, 268 (second brackets in original). In United States v. Giles, the Court extended the quid pro quo requirement beyond campaign contributions and held that any extortion "under color of official right" conviction under the Hobbs Act requires the government to prove that a payment was made in exchange for a specific promise to perform an official act. 246 F.2d at 971–73 (approving the language of this instruction as sufficient to instruct jury on quid pro quo requirement). The quid pro quo can be implied. Id. at 972 ("The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his works and actions, so long as he intends it to be so and the payor so interprets it.") For the definition of an "official action," see the Pattern Instruction for the term "official act" in 18 U.S.C. § 201, which discusses McDonnell v. United States, 136 S. Ct. 2355, 2371-72 (2016).~~In United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. Blagojevich held that the proposed exchange did not fit within the~~

~~definition of bribery because the deal was a proposed "political logroll." Id. at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by Blagojevich, then an instruction might be warranted to exclude that possibility.~~ In Abbas, the Seventh Circuit held that "under color of official right" liability applies only to public officials who misuse their official office. 560 F.3d at 664. Thus, a defendant who impersonated an FBI agent could not commit a crime against the public trust and was not subject to this "special brand of criminal liability." Id. ~~518~~545

18 U.S.C. § 1959(A) VIOLENT CRIMES IN AID OF RACKETEERING ACTIVITY

Count ___ of the indictment charges the defendant[s] with [committing] [conspiring to commit] [attempting to commit] _____ [specify the crime of violence] in aid of racketeering. In order for you to find [a; the] defendant guilty of this count, the government must prove the following five elements beyond a reasonable doubt: 1. The [name of charged enterprise] was an enterprise; 2. The enterprise was engaged in racketeering activity; 3. The activities of the enterprise affected interstate or foreign commerce; 4. The defendant committed the _____ [as charged in Count _____ of the indictment]; and 5. The defendant committed the _____ to gain entrance to or maintain or increase his position in the enterprise. [The government does not have to prove this was the defendant's sole or principal purpose in committing the [crime of violence].] If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty [of that count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty [of that count]. Committee Comment For the terms in elements one through three, the pattern instructions provided in § 1961 should be used or referenced. See 18 U.S.C. § 1959(b)(1) and (2); see also United States v. Rogers, 89 F.3d 1326, 1332 (7th Cir. 1996) (the definition of "enterprise" as used in § 1959 is the same as that in § 1961(4); § 1959 was enacted to complement the RICO); United States v. Carson, 455 F.3d 336, 371 (D.C. Cir. 2006) (the term "racketeering activity" as used in § 1959 is defined in § 1961). 571 With regard to element four, the court should instruct the jury on the substantive law applicable to the charged predicate offense. The bracketed language in element four should be used if the predicate offense is specifically charged in a count in the indictment. In addition to a crime of violence committed for the purpose of gaining entrance to or maintaining or increasing a position in the enterprise, Section 1959 also applies to a crime of violence committed as "consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activities." If that is the basis of the charged crime, the language of element five should be modified accordingly. See United States v. Concepcion, 983 F.2d 369, 384 (2d Cir. 1992) ("[W]e note that Section 1959 as a whole is sufficiently inclusive to encompass the actions of a so-called independent contractor, for it reaches not only those who seek to maintain or increase their positions within a RICO enterprise, but also those who perform violent crimes 'as consideration for the receipt of . . . anything of pecuniary value' from such an enterprise.") (citation omitted). The jury need not find that a defendant's "sole or principal motive" in committing the crime of violence was to gain entrance to, increase, or maintain the defendant's position in the enterprise. See United States v. Garcia, 754 F.3d 460, 472-73 (7th Cir. 2014) (the jury instruction "correctly states that the jury did not need to find that Zambrano's sole or principal motive was to maintain his position in the gang.") (citing United States v. DeSilva, 505 F.3d 711, 715-16 (7th Cir. 2007) ("The motive requirement … is met if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership."); United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992); United States v. Carson, 455 F.3d 336, 371 (D.C. Cir. 2006); United States v. Tse, 135 F.3d 200, 206 (1st Cir. 1998)). 572

18 U.S.C. § 2250(~~a~~A) FAILURE TO REGISTER/ UPDATE AS SEX OFFENDER – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~__~~ of the indictment charge[s] the defendant[s] with] failing to register or update registration as a sex offender. In order for you to find [a~~;~~] [the] defendant guilty of this ~~charge~~count, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant was required to register under the Sex Offender Registration and Notification Act; and 2. The defendant traveled in interstate or foreign commerce; and 3. The defendant then knowingly failed to [register] [update his registration] as required by the Sex Offender Registration and Notification Act~~; and 3. The defendant traveled in interstate or foreign commerce after failing to [register] [update his registration].~~. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment 18 U.S.C. § 2250(~~b~~a) provides an affirmative defense where uncontrollable circumstances prevented the individual from complying, the individual did not contribute to the creation of those circumstances, and the individual complied as soon as the circumstances ceased to exist. The Supreme Court addressed Section 2250(a) in Nichols v. United States, 136 S. Ct. 1113 (2016), where it found that the failure to register as a sex offender under the Sex Offender Registration and Notification Act after traveling was the focus of the offense. See also United States v. Haslage, 853 F.3d 331, 332 (7th Cir. 2017) ("the failure to register after traveling" is the focus of the crime). In Haslage, the court also addressed the question of the proper venue for charges under this statute. Id. at 335 (venue is proper "in the place of the new residence"). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. The interstate or foreign commerce travel element is satisfied by proof that the defendant has traveled from one state to another state or to a foreign 630 country after having been convicted of a qualifying "sex offense." See 42 U.S.C. §16911(5). The interstate or foreign travel may not precede the registration requirement. See Carr v. United States, 130 S. Ct. 2229 (2010). The court should instruct regarding requirements of the Sex Offender Registration and Notification Act. See 42 U.S.C. §16901, et seq. ~~601~~631

18 U.S.C. § 2251A(b) PURCHASING OR OBTAINING CHILDREN [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] purchasing or obtaining [a child] [children].635 636 In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant: (a) purchased [the person identified in the indictment]; or (b) obtained custody or control of [the person identified in the indictment]; or (c) offered to purchase [the person identified in the indictment]; or (d) offered to obtain custody or control of [the person identified in the indictment]; 2. (a) the defendant knew that [the person identified in the indictment] would be portrayed in a visual depiction [engaging in] [assisting another person to engage in] sexually explicit conduct; or (b) the defendant [purchased] [obtained custody or control] [offered to purchase] [offered to obtain custody or control] [the person identified in the indictment] (i) intending to promote having [the person identified in the indictment] engage in sexually explicit conduct; and (ii) the defendant did so for the purpose of producing a visual depiction of that conduct; and 3. In the course of such conduct [[the person identified in the indictment] [the defendant] traveled in interstate commerce] [the offer to sell or transfer custody or control of the minor was communicated or transported in interstate commerce or by mail]; and 4. [The person identified in the indictment] at the time of the [purchase] [obtaining of custody or control] [offer to purchase] [offer to obtain custody or control] was under the age of eighteen years. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. 606 If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. §2256(2)(B). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(A). "Producing" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(3). "Visual depiction" is defined in the Pattern Instruction for 18 U.S.C.§ 1466A(F)(1). "Custody or control" is defined in the Pattern Instruction for 18 U.S.C. § 2256(7). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. §2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See United States v. Kemmish, 120 F.3d 937, 942 (9th Cir. 1997). 607

18 U.S.C. § 2252A(a)(1) MAILING, TRANSPORTING OR SHIPPING MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s] ___ of the indictment charge[s] the defendant[s] with] [mailing] [transporting] [shipping] of material containing child pornography. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [three] following elements beyond a reasonable doubt: 1. The defendant knowingly [mailed] [transported ~~in~~ or shipped using any means or facility of interstate or foreign commerce] [transported or shipped in or affecting interstate or foreign commerce~~]~~ [by any means, including by computer] the material identified in the indictment~~]; and~~; 2. ~~[~~The material identified in the indictment~~]~~ is child pornography; and 3. The defendant knew both that ~~one or more persons depicted in [~~the material ~~identified in the indictment] was under the age of eighteen years.~~depicted one or more minor[s] and that the minor[s] were engaged in sexually explicit conduct. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment 18 U.S.C~~. §~~ § 2252A encompasses the primary theories of prosecution under 18 U.S.C. § 2252. Accordingly, the committee has not prepared pattern instructions for Section 2252. "Child pornography" is defined in the Pattern Instruction for 18 U.S.C~~. §~~. § 2256(8). "Interstate/foreign commerce" is defined in ~~a~~the pattern instruction that follows the instructions related to 18 U.S.C. § 1465. ~~613~~"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). 642 In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252 extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004) (§§ 2252A~~(a~~ and 2252 are "materially identical" and therefore the Supreme Court's holding in X-Citement Video applies to § 2252A); United States v. Rogers, 474 F. App'x. 463, 476-77 (7th Cir. 2012). 643

18 U.S.C. § 2252A(A)(2)(A) RECEIPT OR DISTRIBUTION OF CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~—~~ of the indictment charge[s] the defendant[s] with] [receipt] [distribution] of child pornography. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: ~~1~~3. The defendant knowingly [received] [distributed] [the material identified in the indictment]; and ~~2~~4. [The material identified in the indictment] is child pornography; and ~~3~~5. The defendant knew both that ~~one or more persons depicted in [~~the material ~~identified in the indictment] was under the age of eighteen years;~~depicted one or more minors and ~~4.~~that the minors were engaged in sexually explicit conduct. 6. [The material identified in the indictment] was [mailed] [shipped ~~in interstate or foreign commerce] [~~or transported ~~in~~using a means or facility of interstate or foreign commerce] [shipped or transported in ~~a manner~~or affecting interstate or foreign commerce~~].~~ by any means, including by computer]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C~~.~~ ~~§~~. § 2256(8). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. ~~614~~"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact 644 that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). 645

18 U.S.C. § 2252A(a)(2)(B) RECEIPT OR DISTRIBUTION OF MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~—~~ of the indictment charge[s] the defendant[s] with] [receipt] [distribution] of material containing child pornography. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [received] [distributed] [the material identified in the indictment]; 2. [The material identified in the indictment] contained child pornography; 3. The defendant knew both that the material depicted one or more ~~persons depicted~~ minors and that the minor[s] were engaged in ~~[the material identified in the indictment] was under the age of eighteen years~~sexually explicit conduct; and 4. [The material identified in the indictment] was [mailed] [shipped ~~in interstate or foreign commerce] [~~or transported ~~in~~using a means or facility of interstate or foreign commerce] [shipped or transported in ~~a manner~~or affecting interstate or foreign commerce~~].~~ by any means, including by computer]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C~~.~~ ~~§~~. § 2256(8). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. ~~615~~"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A 646 extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). 647

18 U.S.C. § 2252A(a)(3)(A) REPRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~—~~ of the indictment charge[s] the defendant[s] with] reproduction of child pornography for distribution. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly reproduced [the material identified in the indictment]; 2. [The material identified in the indictment] is child pornography; 3. The defendant knew both that the material depicted one or more ~~persons depicted~~ minors and that the minor[s] were engaged in ~~[the material identified in the indictment] was under the age of eighteen years~~sexually explicit conduct; and 4. The defendant intended to distribute [the material identified in the indictment] ~~by [mailing it] [shipping it~~ [through the mail] [using a means or facility of interstate or foreign commerce] [in or affecting interstate or foreign commerce~~] [transporting it in or affecting interstate or foreign commerce].~~ by any means, including by computer]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C~~.~~ § 2256(8). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. ~~616~~"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A 648 extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). 649

18 U.S.C. § 2252A(a)(4)(A) SALE OR POSSESSION WITH INTENT TO SELL OF CHILD PORNOGRAPHY IN U.S. TERRITORY – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~—~~ of the indictment charge[s] the defendant[s] with] [sale of] [possession with intent to sell] child pornography. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [sold] [possessed with intent to sell] [the material identified in the indictment]; 2. [The material identified in the indictment] is child pornography; 3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and 4. The [sale] [possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government] [in Indian country]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty [of that count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty [of that count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C. § 2256(8). "Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. 650 Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). 651

18 U.S.C. § 2252A(a)(4)(B) SALE OR POSSESSION WITH INTENT TO SELL OF CHILD PORNOGRAPHY IN INTERSTATE OR FOREIGN COMMERCE – ELEMENTS

[The indictment charges the defendant[s] with] [Count[s] of the indictment charge[s] the defendant[s] with] [sale of] [possession with intent to sell] child pornography. In order for you to find [a; the] defendant guilty of this count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [sold] [possessed with intent to sell] [the material identified in the indictment]; and 2. [The material identified in the indictment] is child pornography; and 3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and 4. The [material identified in the indictment] has been [mailed] [shipped or transported using a means or facility of interstate or foreign commerce] [shipped or transported in or affecting interstate or foreign commerce by any means, including by computer] [produced using materials that have been mailed, or using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty [of that count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty [of that count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C. § 2256(8). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. "Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). 652 In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). 653 18 U.S.C. § 2252A(a)(5)(A) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY IN U.S. TERRITORY – ELEMENTS [The indictment charges the defendant[s] with] [Count[s] of the indictment charge[s] the defendant[s] with] [possession of] [accessing with intent to view] child pornography. In order for you to find [a; the] defendant guilty of this count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [possessed] [accessed with intent to view] [the material identified in the indictment]; and 2. [The material identified in the indictment] ~~[the material identified in the indictment] is child pornography; 3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and 4.~~contained child pornography; and 3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and 4. The [sale] [possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government] [in Indian country]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment "Child pornography" is~~

~~defined in the Pattern Instruction for 18 U.S.C.§ 2256(8). 617 18 U.S.C. § 2252A(a)(4)(B) SALE OR POSSESSION WITH INTENT TO SELL OF CHILD PORNOGRAPHY IN INTERSTATE OR FOREIGN COMMERCE – ELEMENTS [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [sale of] [possession with intent to sell] child pornography.~~ count you are considering], then you should find the defendant guilty [of that count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty [of that count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C. § 2256(8). "Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 654 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). Pursuant to 18 U.S.C. § 2252A(b)(2), if the offense involved any image of child pornography involving a prepubescent minor or a minor who had not attained 12 years of age, the defendant faces a maximum sentence of 20 years' imprisonment, rather than 10 years' imprisonment. If this is alleged in a count charged under 18 U.S.C. § 2252A(a)(5)(A), the parties should modify the elements instruction accordingly or provide the jury with a special verdict form. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). 655~~In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [sold] [possessed with intent to sell] [the material identified in the indictment]; and 2. [the material identified in the indictment] is child pornography; and 3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and 4. The material identified in the indictment] has been [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [produced using materials that have been mailed, shipped or transported in a manner affecting interstate or foreign commerce].~~ If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. ~~Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.~~ ~~618 18 U.S.C. § 2252A(a)(5)(A) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY IN U.S. TERRITORY – ELEMENTS [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [possession of] [accessing with intent to view] child pornography.~~ ~~In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [possessed] [accessed with intent to view] [the material identified in the indictment]; and 2. [The material identified in the indictment]~~ ~~is child pornography; and 3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and 4.~~ ~~The [sale] [possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of~~

~~the United States government] [in Indian country]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8). 619~~

18 U.S.C. § 2252A(a)(5)(B) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY IN INTERSTATE COMMERCE – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~—~~ of the indictment charge[s] the defendant[s] with] [possession of] [accessing with intent to view] child pornography. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [possessed] [accessed with intent to view] [the material identified in the indictment]; and 2. [The material identified in the indictment] ~~is~~contained child pornography; and 3. The defendant knew both that ~~one or more persons depicted in [~~the material ~~identified in~~ depicted one or more minors and that the ~~indictment] was under the age of eighteen years~~minor[s] were engaged in sexually explicit conduct; and 4. [The material identified in the indictment] has been [mailed] [shipped ~~in~~ or transported using a means or facility of interstate or foreign commerce] [~~transported in interstate or foreign commerce] [produced using materials that have been mailed,~~ shipped or transported in ~~a manner~~or affecting interstate or foreign commerce~~]].~~ by any means, including by computer] [produced using materials that have been mailed, or using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C~~.~~ ~~§~~. § 2256(8). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. ~~620~~"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). 656 "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). Pursuant to 18 U.S.C. § 2252A(b)(2), if the offense involved any image of child pornography involving a prepubescent minor or a minor who had not attained 12 years of age, the defendant faces a maximum sentence of 20 years' imprisonment, rather than 10 years' imprisonment. If this is alleged in a count charged under 18 U.S.C. § 2252A(a)(5)(B), the parties should modify the elements instruction accordingly or provide the jury with a special verdict form. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). 657

18 U.S.C. §§ 2252A(a)(6)(A), (B) AND (C) PROVIDING CHILD PORNOGRAPHY TO A MINOR – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~—~~ of the indictment charge[s] the defendant[s] with] [distributing] [offering] [sending] [providing] child pornography to a minor. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [five] following elements beyond a reasonable doubt: 1. The defendant knowingly [distributed] [offered] [sent] [provided] [the material identified in the indictment] to [the person identified in the indictment~~];~~] for purposes of inducing or persuading a minor to participate in any activity that is illegal; and 2. [The material identified in the indictment] is child pornography; and 3. The defendant knew both that ~~one or more persons depicted in [~~the material ~~identified in the indictment] was under the age of eighteen years;~~depicted one or more minors and ~~4.~~that the minor[s] were engaged in sexually explicit conduct; and 4. [The person identified in the indictment] had not attained the age of eighteen years; and 5. [The material identified in the indictment] has been: ~~(~~a~~).~~ [mailed] [shipped ~~in interstate or foreign commerce~~] [transported ~~in~~] using any means or facility of interstate or foreign commerce~~] [shipped~~ or ~~transported~~ in ~~a manner~~or affecting interstate or foreign commerce by any means, including computer]; or ~~(~~b~~).~~ produced using materials that have been [mailed] [shipped ~~in interstate or foreign commerce~~] [transported ~~in interstate or foreign commerce] [shipped or transported in a manner~~] in or affecting interstate or foreign commerce by any means, including by computer]; or ~~(~~c~~) which [distribution] [offer] [sending] [provision] was accomplished [using~~ . [distributed] [offered] [sent] [provided] using [the mails] [~~by~~ any means or facility of interstate or foreign commerce]. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge]. 621~~count]. 658 Committee Comment In giving this instruction the court should choose which of the alternatives presented under element 5 are applicable to the case. “Child pornography” is defined in the Pattern Instruction for 18 U.S.C.~~§~~. § 2256(8). “Interstate/foreign commerce” is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. ~~622~~“Minor” is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). “Sexually explicit conduct” is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the “knowingly” requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App’x 463, 476-77 (7th Cir. 2012). 659

18 U.S.C. § 2252A(a)(7) PRODUCTION WITH INTENT TO DISTRIBUTE AND DISTRIBUTION OF ADAPTED CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with~~;~~] [Count[s]~~__~~ of the indictment charge[s] the defendant[s] with] [production with the intent to distribute] [distribution] of adapted child pornography. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant knowingly [produced with the intent to distribute] [distributed] [the material identified in the indictment]; and 2. [The material identified in the indictment] is child pornography [consisting of] [including] an adapted or modified depiction of an identifiable minor; and 3. The defendant knew both that ~~one or more persons depicted in [~~the material ~~identified in the indictment] was under the age of eighteen years;~~depicted one or more minors and ~~4.~~that the minor[s] were engaged in sexually explicit conduct; and 4. [The material identified in the indictment] has been [produced] [distributed] by any means ~~[in] [~~, including a computer, in or affecting~~]~~ interstate or foreign commerce. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment "Child pornography" is defined in the Pattern Instruction for 18 U.S.C. ~~§~~. § 2256(8). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. "Identifiable minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(9). "Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B). 660 In United States v. X-Citement Video, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. See also United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); United States v. Rogers, 474 F. App'x 463, 476-77 (7th Cir. 2012). 661 18 U.S.C. § 2251A(b) PURCHASING OR OBTAINING CHILDREN [The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] purchasing or obtaining [a child][children]. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant: (a) purchased [the person identified in the indictment]; or (b) obtained custody or control of [the person identified in the indictment]; or (c) offered to purchase [the person identified in the indictment]; or (d) offered to obtain custody or control of [the person identified in the indictment]; 2. (a) the defendant knew that [the person identified in the indictment] would be portrayed in a visual depiction [engaging in][assisting another person to engage in] sexually explicit conduct; or (b) the defendant [purchased][obtained custody or control][offered to purchase][offered to obtain custody or control][the person identified in the indictment] (i) intending to promote having [the person identified in the indictment] engage in sexually explicit conduct; and (ii) the defendant did so for the purpose of producing a visual depiction of that conduct; and 3. In the course of such conduct [[the person identified in the indictment][the defendant] traveled in interstate commerce][the offer to sell or transfer custody or control of the minor was communicated or transported in interstate commerce or by mail]; and 4. [The person identified in the indictment] at the time of the [purchase][obtaining of custody or control][offer to purchase][offer to obtain custody or control] was under the age of eighteen years. If you find from your consideration of all the evidence that the government has proved each of these

elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge]. 662 If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].
Committee Comment Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. §2256(2)(B). "Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(A). "Producing" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(3). "Visual depiction" is defined in the Pattern Instruction for 18 U.S.C.§ 1466A(F)(1). "Custody or control" is defined in the Pattern Instruction for 18 U.S.C. § 2256(7). "Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465. A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. §2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See United States v. Kemmish, 120 F.3d 937, 942 (9th Cir. 1997). ~~623 18 U.S.C.§ 2256(9) – 18 U.S.C. § 2252A(C)~~663

18 U.S.C. § 2256(9) – 18 U.S.C. § 2252A(C) – AFFIRMATIVE DEFENSE TO CHARGES UNDER 18 U.S.C. §§ 2252A(A)(1), (A)(2), (A)(3)(A), (A)(4) OR (A)(5)

If the defendant proves that it is more likely than not that the alleged child pornography was produced using actual adults at the time the material was produced, then you should find him not guilty of possessing child pornography. Committee Comment: "Child pornography" is defined broadly in 18 U.S.C. §2256(8) to include visual depictions that are indistinguishable from that of a minor engaging in sexually explicit conduct and visual depictions adapted or modified to appear to be that of an identifiable minor engaging in sexually explicit conduct. Therefore, it is an affirmative defense that the visual depictions were produced using actual adults. "Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1). ~~624~~664 18 U.S.C. § 2252A(d) – AFFIRMATIVE DEFENSE TO CHARGE UNDER 18 U.S.C. § 2252A(a)(5) If the defendant proves that it is more likely than not that (a) he possessed fewer than three images of child pornography; (b) he promptly and in good faith [took reasonable steps to destroy each image~~]~~ ~~[~~][reported the matter to a law enforcement agency and afforded the agency access to the image(s)]; (c) he did not retain any image; and (d) he did not allow any person other than law enforcement to access or copy any image, then you should find him not guilty of possessing child pornography. Committee Comment: The defendant has the burden of proof with respect to this affirmative defense because it does not negate an element of the offense; instead it requires proof of additional facts that mitigate the circumstances of the offense. United States v. Davenport, 519 F.3d 940, 945 (9th Cir. 2008). The language in this instruction should be added to the elements instruction for 18 U.S.C. §2252A(a)(5) in appropriate cases. "Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8). ~~625~~665 18 U.S.C. §2256(1) MINOR – DEFINED "Minor" means any person under the age of eighteen (18) years. ~~626~~666 18 U.S.C. §2256(2)(A) SEXUALLY EXPLICIT CONDUCT – DEFINED "Sexually explicit conduct" includes actual or simulated – ~~(~~1~~)~~. sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral~~-~~ anal, whether between persons of the same or opposite sex; ~~(~~2~~)~~. bestiality; ~~(~~3~~)~~. masturbation; ~~(~~4~~)~~. sadistic or masochistic abuse; or ~~(~~5~~)~~. lascivious ~~exhibition~~exhibit of the anus, genitals, or pubic area of any person. Committee Comment Only the applicable terms within this definition should be used. In some cases charging violations of 18 U.S.C. § 2252A involving allegations of the use of computer-generated images that are, or are indistinguishable from, that of a minor engaging in sexually explicit conduct, this definition should be modified as set forth in 18 U.S.C. §~~2256(2)(B). 627~~ 2256(2)(B). In 2018, Congress passed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, which added the term "anus," to 18 U.S.C. § 2256(2)(A)(v). 667 18 U.S.C. § 2256(3) PRODUCING – DEFINED The term "producing" includes producing, directing, manufacturing, issuing, publishing, or advertising. ~~628~~668 18 U.S.C. § 2256(6) COMPUTER – DEFINED "Computer" as used in this instruction 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. Committee Comment "Computer" in connection with this range of offenses has the same meaning as provided in 18 U.S.C. § 1030. This instruction should only be given in cases where there is an issue regarding whether a particular device is a computer. ~~629~~669

18 U.S.C. § 2422(b) ENTICEMENT OF A MINOR – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] enticement of a minor. In order for you to find [a; the] defendant guilty of this ~~charge~~count, the government must prove each of the [four] following elements beyond a reasonable doubt: 1. The defendant used a facility or means of interstate commerce to knowingly [persuade~~]~~ ~~[~~][induce~~]~~ ~~[~~][entice~~]~~ ~~[~~][coerce] [the person identified in the indictment] to engage in [prostitution~~]~~ ~~[~~][sexual activity]; and 2. [The person identified in the indictment] was less than 18 years of age; and 3. The defendant believed [the person identified in the indictment was less than 18 years of age~~;~~]; and 4. If the sexual activity had occurred, [the defendant] [any other person identified in the indictment] would have committed the criminal offense of _____. If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant guilty [of that ~~charge~~count]. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the ~~charge~~count you are considering], then you should find the defendant not guilty [of that ~~charge~~count]. Committee Comment United States v. Berg, No. 09-2498 (7th Cir. 2011), held that the intent required under Section 2422(b) is the intent to persuade, induce or entice someone believed to be a minor to engage in sexual activity. It is not required for the government to prove that the defendant intended to engage in sexual activity with the minor. The term "sexual activity" is not defined in the state. However, in United States v. Taylor, No. 10-2715 (7th Cir. 2011), the Court held that the rule on lenity requires sexual activity to be interpreted as synonymous with "sexual act" insofar as it requires physical contact between two people. Acts that are sexual in nature, but that do not involve that physical contact between two people (e.g., flashing, masturbation) are not covered by the statute. ~~653~~In United States v. McMillan, 744 F.3d 1033 (7th Cir. 2014), the Court held that a state statute making it a crime to knowingly persuade, induce, entice, or coerce person under 693 age of 18 to engage in criminal sexual activity extended to adult-to-adult communications that were designed to persuade minor to commit forbidden acts. In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration. If the charged offense is an attempt, the court should also give the instruction defining attempt. See the Pattern Instruction 4.09. In U.S. v. Cote, 504 F.3d 682 (7th Cir. 2007), the Court held that a Defendant could be found guilty of using a facility or means of interstate commerce knowingly to attempt to persuade, induce or entice a minor to engage in a sexual act if he believed, albeit mistakenly, that the victim was a minor. "Minor" is defined in the Pattern Instruction for 18 U.S.C. ~~§~~. § 2256(1). For a definition of "interstate or foreign commerce" see the Pattern Instruction related to 18 U.S.C. § 2315. It is well-established that a jury in a federal criminal case may not convict unless it unanimously finds that the government has proved each element of the offense beyond a reasonable doubt. Richardson v. United States, 526 U.S. 813, 817 (1999). A federal jury need not always decide unanimously the means the defendant used to commit an element of the crime. Id. The Seventh Circuit has not yet decided whether, in the context of 18 U.S.C. § 2422(b), unanimity regarding the manner of persuasion, inducement, enticement, or coercion is required, and the Committee takes no position. 694~~See United States v. Hofus, 598 F.3d 1171, 1177 (9th Cir. 2010) (unanimity not required). If it is required, see Pattern Instruction 4.04. 654~~

DRUG QUANTITY/SPECIAL VERDICT INSTRUCTIONS

If you find the defendant guilty of the offense charged in [Count _____ of] the indictment, you must then determine the amount of [controlled substance] the government has proven was involved in the offense. In making this determination, you are to consider any type and amount of controlled substances for which the government has proven beyond a reasonable doubt that [: (1)] the defendant [possessed with intent to distribute; distributed; conspired to possess with intent to distribute; conspired to distribute; etc.] [while the defendant was a member of the conspiracy charged in Count __] [; plus (2) the defendant's co-conspirators [distributed; possessed with intent to distribute; conspired to possess with intent to distribute; conspired to possess with intent to distribute; etc.] in furtherance of and as a reasonably foreseeable consequence of that conspiracy.] You will see on the verdict form a question concerning the amount of ~~controlled substances~~narcotics involved in the offense charged in [Count __ of] the indictment. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged in [Count _____ of] the indictment. If you find that the government has proven beyond a reasonable doubt that the offense involved [insert quantity; e.g., 5 kilograms or more of cocaine], then you should answer the [first] question "Yes." [If you answer "Yes," then you need not answer the remaining question[s] regarding drug quantity for that count.] If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert quantity; e.g., 5 kilograms or more of cocaine], then you should answer the [first] question "No." [If you answer the first question "No," then you must answer the next question. That question asks you to determine whether the government has proven beyond a reasonable doubt that the offense involved [insert lesser quantity; e.g., 500 grams or more of cocaine]. If you find that the government has proven beyond a reasonable doubt that the offense involved [insert lesser quantity; e.g., 500 grams or more of cocaine], then you should answer the second question "Yes."] If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert lesser quantity; e.g., 500 grams or more of cocaine], then you should answer the second question "No."

Committee Comment Based on the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), ~~and Alleyne v. United States, 133 S. Ct. 2151 (2013),~~ this instruction ~~671~~ should be given whenever the drug quantity may affect the statutory maximum sentence. The jury need only find the threshold 711 quantity that triggers the increased statutory maximum penalty; it need not find the exact quantity involved. See United States v. Kelly, 519 F.3d 355, 363 (7th Cir. 2005); United States v. Washington, 558 F.3d 716, 719–20 (7th Cir. 2009). ~~The second paragraph of this instruction, which includes reference to narcotics involved in a conspiracy of which the defendant was a member, is derived from the Pinkerton instruction, Instruction 5.11. If the jury is asked to consider amounts involved in acts by the defendant's co-conspirators, it must be instructed that the defendant's liability "only extends to those criminal acts that (1) were reasonably foreseeable to the defendant[ ]; and (2) occurred during the time that [he was a] member[ ] of the conspiracy." United States v. Cruse, 805 F.3d 795, 817 (7th Cir. 2015).~~ In drafting this instruction, the Committee took account of Washington, in which the court considered a case in which the jury was given a quantity verdict form with three choices – less than 5 grams of crack; 5 grams or more but less than 50 grams; and 50 grams or more – and left the form blank because it was unable to reach a unanimous verdict on the quantity. The court noted that it was possible that the jury's failure to agree on a quantity was attributable in part to how the verdict form was worded, and it stated that "[i]t would be preferable … to give the jury an open-ended form, saying something like 'we find unanimously that the defendant distributed at least __ grams of crack and __ grams of powder cocaine." 558 F.3d at 718 n.1. Having considered this suggestion, the

Committee is of the view that an “open-ended” quantity verdict form might actually be counterproductive, as a jury might find it more difficult to agree on a particular quantity than upon a range, which is what the proposed instruction directs. Though the court in Washington proposed an “at least [x]” form of verdict, the Committee believes that the instructions necessary to explain that the trial judge is, in effect, asking the jury to make a finding about the highest (or lowest) amount on which the jury can reach unanimous agreement would be quite complicated and would risk tilting the balance in favor of one side or the other. ~~If evidence of narcotics transactions or dealing not involved in the charged offense is admitted at trial under Federal Rule of Evidence 404(b) or otherwise, the court should consider a limiting instruction that those narcotics cannot be counted in the jury's quantity determination. 672~~712