UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-80103-CR-CANNON

UNITED STATES OF AMERICA

v.

DUSTIN SEAN McCABE,

Defendant.
_______________________________/

JOINT PROPOSED JURY INSTRUCTIONS AND VERDICT FORM

Pursuant to Federal Rule of Criminal Procedure 30 and the Court's trial order, the United States and Defendant Dustin Sean McCabe, through counsel, submit these joint proposed jury instructions and verdict form.[1] It is further requested that the parties be allowed to propose such additional instructions as become appropriate based on the trial testimony and that they be informed prior to closings as to which instructions the Court will accept and which it will decline.

Dated: February 18, 2025

Respectfully submitted,

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[1] The parties have included instructions to which there are objections. Per the Court's trial order, instructions proposed by the Government to which the Defendant objects are **bolded and underlined**, and instructions proposed by the Defendant to which the Government objects are ***bolded and italicized***.

B1
Face Page - Introduction

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-80103-CR-CANNON

UNITED STATES OF AMERICA

v.

DUSTIN SEAN McCABE,

Defendant.
______________________________________/

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case. After I've completed these instructions, you will go to the jury room and begin your discussions – what we call your deliberations.

You must decide whether the Government has proved the specific facts necessary to find the Defendant guilty beyond a reasonable doubt.

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

B2.1
The Duty to Follow Instructions and the Presumption of Innocence

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against the Defendant or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against a defendant isn't evidence of guilt. The law presumes every defendant is innocent. The Defendant does not have to prove his innocence or produce any evidence at all. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

ANNOTATIONS AND COMMENTS

In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970) (The due process clause protects all criminal defendants "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see also *Harvell v. Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995), *reh'g denied*, 70 F.3d 1287 (11th Cir. 1995).

B2.2
The Duty to Follow Instructions and the Presumption of Innocence When a Defendant Does Not Testify

Your decision must be based only on the evidence presented during the trial. You must not be influenced in any way by either sympathy for or prejudice against the Defendant or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against a Defendant isn't evidence of guilt. The law presumes every Defendant is innocent. The Defendant does not have to prove his innocence or produce any evidence at all. A Defendant does not have to testify, and if the Defendant chose not to testify, you cannot consider that in any way while making your decision. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

ANNOTATIONS AND COMMENTS

United States v. Teague, 953 F.2d 1525, 1539 (11th Cir. 1992), *cert. denied*, 506 U.S. 842, 113 S. Ct. 127, 121 L. Ed. 2d 82 (1992), Defendant who does not testify is entitled to instruction that no inference may be drawn from that election; *see also United States v. Veltman*, 6 F.3d 1483, 1493 (11th Cir. 1993) (Court was "troubled" by "absence of instruction on the presumption of innocence at the beginning of the trial… Although the court charged the jury on the presumption before they retired to deliberate, we believe it extraordinary for a trial to progress to that stage with nary a mention of this jurisprudential bedrock.")

B3
Definition of "Reasonable Doubt"

The Government's burden of proof is heavy, but it doesn't have to prove a Defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

ANNOTATIONS AND COMMENTS

United States v. Daniels, 986 F.2d 451 (11th Cir. 1993), opinion readopted on rehearing, 5 F.3d 495 (11th Cir. 1993), *cert. denied*, 511 U.S. 1054, 114 S. Ct. 1615, 128 L. Ed. 2d 342 (1994) approves this definition and instruction concerning reasonable doubt; *see also United States v. Morris*, 647 F.2d 568 (5th Cir. 1981); *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (discussing "reasonable doubt" definition and instruction).

B4
Consideration of Direct and Circumstantial Evidence;
Argument of Counsel; Comments by the Court

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

ANNOTATIONS AND COMMENTS

United States v. Clark, 506 F.2d 416 (5th Cir. 1975), *cert. denied*, 421 U.S. 967, 95 S. Ct. 1957, 44 L. Ed. 2d 454 (1975) approves the substance of this instruction concerning the lack of distinction between direct and circumstantial evidence; *see also United States v. Barnette*, 800 F.2d 1558, 1566 (11th Cir. 1986), *reh'g denied*, 807 F.2d 999 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S. Ct. 1578, 94 L. Ed. 2d 769 (1987) (noting that the "test for evaluating circumstantial evidence is the same as in evaluating direct evidence") (citing *United States v. Henderson*, 693 F.2d 1028, 1030 (11th Cir. 1982)).

United States v. Hope, 714 F.2d 1084, 1087 (11th Cir. 1983) ("A trial judge may comment upon the evidence as long as he instructs the jury that it is the sole judge of the facts and that it is not bound by his comments and as long as the comments are not so highly prejudicial that an instruction to that effect cannot cure the error.") (citing *United States v. Buchanan*, 585 F.2d 100, 102 (5th Cir. 1978)). *See also United States v. Jenkins*, 901 F.2d 1075 (11th Cir. 1990).

United States v. Granville, 716 F.2d 819, 822 (11th Cir. 1983) notes that the jury was correctly instructed that the arguments of counsel should not be considered as evidence (citing *United States v. Phillips*, 664 F.2d 971, 1031 (5th Cir. 1981)); *see also United States v. Siegel*, 587 F.2d 721, 727 (5th Cir. 1979).

For an alternative description of evidence, see Preliminary Instruction, "what is evidence."

B5
Credibility of Witnesses

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

S3
Identification Testimony

The Government must prove beyond a reasonable doubt that the Defendant was the person who committed the crime.

If a witness identifies a Defendant as the person who committed the crime, you must decide whether the witness is telling the truth. But even if you believe the witness is telling the truth, you must still decide how accurate the identification is. I suggest that you ask yourself questions:

1. Did the witness have an adequate opportunity to observe the person at the time the crime was committed?

2. How much time did the witness have to observe the person?

3. How close was the witness?

4. Did anything affect the witness's ability to see?

5. Did the witness know or see the person at an earlier time?

You may also consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification and the length of time between the crime and the identification of the Defendant.

After examining all the evidence, if you have a reasonable doubt that the Defendant was the person who committed the crime, you must find the Defendant not guilty.

ANNOTATIONS AND COMMENTS

See United States v. Martinez, 763 F.2d 1297, 1304 (11th Cir. 1985).

Equally Available Witness[2]

There are people whose names you heard during the course of the trial but who did not appear to testify. One or more of the attorneys has referred to their absence from the trial. I instruct you that each party had an equal opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified had they been called. Their absences should not affect your judgment in any way. You should remember my instruction, however, that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

ANNOTATIONS AND COMMENTS

The Government's authority is as follows:

"The long-standing rule in this circuit is that any inference from a party's failure to call a certain witness equally available to both parties is impermissible." *United States v. Chapman*, 435 F.2d 1245, 1247 (5th Cir. 1970); *see also United States v. Bos*, 194 F. App'x 890, 892 (11th Cir. 2006) ("An inference from a party's failure to call a witness equally available to both parties is impermissible."); *United States v. Esformes*, 16-20549-CR-SCOLA (Court's Instructions to the Jury DE 1216:5).

[2] This is not a pattern instruction. The United States requests that the Court only give this instruction if the Defendant makes an argument at trial to which the instruction applies.

Persons Not on Trial[3]

In addition, some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy or all co-defendants be charged and prosecuted in one proceeding.

You may not draw any inference, favorable or unfavorable, towards the Government or the Defendant on trial from the fact that any person in addition to the Defendant is not on trial here. You may also not speculate as to the reasons why other persons are not on trial.

ANNOTATIONS AND COMMENTS

The Government's authority is as follows:

See United States v. Marie Lucie Tondreau, Case No. 14-20349-CR-SCOLA, Court's Instruction to the Jury (D.E. 106 at p.5); *United States v. Nivis Martin*, Case No. 13-20457-CR-COHN, Court's Instructions to the Jury [D.E. 144 at 7](utilizing this instruction in a mortgage fraud case); *United States v. Math Benjamin*, 12-20707-CR-COOKE, Court's Instructions to the Jury [D.E. 106]; *United States v. Herrera et al.*, 12-20173-CR-LENARD, Court's Instructions to the Jury [D.E. 66]; *United States v. Esformes*, 16-20549-CR-SCOLA (Court's Instructions to the Jury DE 1216:5).

[3] This is not a pattern instruction.

B6.1
Impeachment of Witnesses Because of Inconsistent Statements

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

ANNOTATIONS AND COMMENTS

See United States v. D'Antignac, 628 F.2d 428, 435-36 n.10 (5th Cir. 1980), *cert. denied*, 450 U.S. 967, 101 S. Ct. 1485, 67 L. Ed. 2d 617 (1981) (approving a previous version of this instruction used in conjunction with Basic Instruction 5 and Special Instruction 2.1 as befitted the facts of that case). See also *United States v. McDonald*, 620 F.2d 559, 565 (5th Cir. 1980), and *United States v. Soloman*, 856 F.2d 1572, 1578 (11th Cir. 1988), *reh'g denied*, 863 F.2d 890 (1988), *cert. denied*, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989).

B6.3
Impeachment of Witnesses Because of Inconsistent Statements
(Defendant with No Felony Conviction Testifies)

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of the misstatement may depend on whether the misstatement was about an important fact or about an unimportant detail. A defendant has a right not to testify.

But since the Defendant did testify, you should decide whether you believe the Defendant's testimony in the same way as that of any other witness.

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

T2
Witness's Prior Statement or Testimony Explanatory Instruction

Members of the Jury: If a witness is questioned about earlier statements or testimony the witness made, the questioning is permitted to aid you in evaluating the truth or accuracy of the witness's testimony at this trial.

A witness's earlier testimony or statements are not ordinarily offered or received as evidence of their truth or accuracy. They are pointed out to give you a comparison and to help you decide whether you believe the witness's testimony.

Whether those prior statements are consistent or inconsistent with the witness's trial testimony is entirely up to you.

I'll give you additional instructions at the end of the trial about a number of things you may consider to determine the credibility or believability of the witnesses and the weight to give their testimony.

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

T3
Explanatory Instruction
Transcript of Tape Recorded Conversation

Members of the Jury: Exhibit _____ has been identified as a typewritten transcript of the oral conversation heard on the tape recording received in evidence as Exhibit _____. The transcript also purports to identify the speakers engaged in the conversation.

I've admitted the transcript for the limited and secondary purpose of helping you follow the content of the conversation as you listen to the tape recording and also to help you identify the speakers.

But you are specifically instructed that whether the transcript correctly reflects the content of the conversation or the identity of the speakers is entirely for you to decide based on your own examination of the transcript in relation to hearing the tape recording itself as the primary evidence of its own contents.

If you determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

ANNOTATIONS AND COMMENTS

United States v. Nixon, 918 F.2d 895 (11th Cir. 1990), held that transcripts are admissible in evidence, including transcripts that purport to identify the speakers, and specifically approved the text of this instruction as given at the time the transcripts were offered and received.

B7
Expert Witness

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

ANNOTATIONS AND COMMENTS

United States v. Johnson, 575 F.2d 1347, 1361 (5th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S. Ct. 1214, 59 L. Ed. 2d 454 (1979).

B8
Introduction to Offense Instructions

The indictment charges five separate crimes, called "counts," against the Defendant. Each count has a number. You'll be given a copy of the indictment to refer to during your deliberations.

Count One charges the Defendant with seaman's manslaughter.

Count Two charges the Defendant with making a false statement within the jurisdiction of an agency of the United States.

Counts Three, Four, and Five charge the Defendant with wire fraud.

These five counts charge the Defendant with committing what are called "substantive offenses." I will explain the law governing those substantive offenses in a moment.

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

B9.1A
On or About; Knowingly; Willfully – Generally

You'll see that the indictment charges that a crime was committed "on or about" a certain date. The Government doesn't have to prove that the crime occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that the person acted "willfully," the person need not be aware of the specific law or rule that his conduct may be violating.

ANNOTATIONS AND COMMENTS

The Definition of willfulness in this instruction can be used in most cases where willfulness is an element. For crimes requiring a particularized knowledge of the law being violated, such as tax and currency-structuring cases, use 9.1B's definition of willfulness.

The committee in its most recent revisions to the pattern instructions has changed the approach to how "willfully" should be charged in the substantive offenses which include it as an essential element of the offense. The previous editions of the pattern instructions included the following definition that historically has been used in most cases:

> The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Although this definition has been useful as a general definition that encompasses many different aspects of the legal concept of "willfulness" in a concise and straightforward manner, the Committee has concluded, along with every other Circuit Pattern Instruction Committee that has considered the issue, that the definition is not accurate in every situation. A review of the case law reveals how the courts have struggled with the meaning of "willfulness" as a *mens rea* requirement for substantive criminal offenses. *See Bryan v. United States*, 524. U.S. 184, 189-92, 114 S. Ct. 1939, 1944-45 (1998) ("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." (citing *Spies v. United States*, 317 U.S. 492, 497, 63 S. Ct. 364, 367 (1943))); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41, 114 S. Ct. 655, 659 (1994); *United States v. Phillips*, 19 F.3d 1565, 1576-84 (11th Cir. 1994) (noting the difficulty in defining "willfully" and discussing the term in various contexts), amended to correct clerical errors, 59 F.3d 1095 (11th Cir. 1995); *United States v. Granda*, 565 F.2d 922, 924 (5th Cir. 1978) (noting, *inter alia*, that "willfully" has defied any consistent interpretation by the courts"); *see generally United States v. Bailey*, 444 U.S. 394, 403, 100 S. Ct. 624, 631 (1980) ("Few areas of criminal law pose more difficulty that the proper definition of the *mens rea* requirement for any particular crime.").

Based on the case law, the Committee has concluded that the criminal offenses that expressly include "willfulness" as an essential element can be divided into two broad categories. For the first category (Instruction 9.1A, which encompasses most offenses) "willfully" is defined to require that the offense be committed voluntarily and purposely with the intent to do something unlawful. However, the person need not be aware of the specific law or rule that his or her conduct may be violating. This definition is narrower than the traditional definition that has been used in our pattern charges in the past, but the Committee believes that this narrower definition is required under the law. *See, e.g. Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939 (1998) (holding that the term "willfully" in 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D) requires proof that the defendant knew that his conduct was generally unlawful, but does not require that the defendant knew of the specific licensing requirement that he was violating).

The second category of criminal offenses that have "willfulness" as an essential element have a heightened *mens rea* requirement. For this limited class of offenses, the Government must prove more than the defendant knew that his conduct was done with a bad purpose to disobey the law in general. The Government must prove that the defendant had an intent to violate a known legal duty, that is with the *specific* intent to do something the law forbids. For these offenses, the Committee recommends that the definition of "willfully" in Instruction 9.1B be given to the jury. These offenses include currency structuring statutes and certain tax laws, which tend to involve "highly technical statutes that present the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 118 S. Ct. at 1946 – 47. For example, *see Ratzlaf v. United States*, 114 S. Ct. 655 (1994) (holding that with respect to 31 U.S.C. § 5322(a) and the monetary transaction provisions that it controls, the Government must prove that the defendant acted willfully, *i.e.*, with specific knowledge that the structuring of currency transactions in which he was engaged was unlawful); *see also Cheek v. United States*, 111 S. Ct. 604, 609-10 (1991) (explaining that due to the complexity of tax laws, there is an exception to the general rule that "ignorance of the law or a mistake of law is no defense to criminal prosecution," and "[t]he term 'willfully' [as used in certain federal criminal tax offenses] connot[es] a 'voluntary, intentional violation of a known legal duty'" (citing *United States v. Pomponio*, 429 U.S. 10, 12, 97 S. Ct. 22, 23 (1976) and *United States v. Bishop*, 412, U.S. 346, 360-61, 93 S. Ct. 2008, 2017 (1973))). In *Cheek*, the Supreme Court found error in the trial court's instruction to the jury that in order for the defendant's belief that he was not violating the law to be a defense, his good-faith belief must have been objectively reasonable. The Court further explained, however, that "a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper." *Cheek*, 498 U.S. at 206, 111 S. Ct. at 613.

The Committee observes that the required mental state may be different even for different elements of the same crime. This possibility should be considered when determining what definition of *mens rea* should be charged. *See Liparota v. United States*, 471 U.S. 419, 423, 105 S. Ct. 2084, 2087 n.5 (1985).

Note: If the Defendant raises a good faith defense, it may be appropriate to give Special Instruction 9 [Good Faith Defense to Willfulness (as under the Internal Revenue Code)], Special Instruction 18 [Good Faith Reliance Upon Advice of Counsel].

B10.2
Caution: Punishment
(Single Defendant, Multiple Counts)

Each count of the indictment charges a separate crime. You must consider each crime and the evidence relating to it separately. If you find the Defendant guilty or not guilty of one crime, that must not affect your verdict for any other crime.

I caution you that the Defendant is on trial only for the specific crimes charged in the indictment. You're here to determine from the evidence in this case whether the Defendant is guilty or not guilty of those specific crimes.

You must never consider punishment in any way to decide whether the Defendant is guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.

ANNOTATIONS AND COMMENTS

There may be cases in which the last sentence of the first paragraph of this instruction is inappropriate and should be deleted. This may occur, for example, in prosecutions under 18 U.S.C. § 1962 (RICO offenses) or 21 U.S.C. § 848 (Continuing Criminal Enterprise offenses) where the indictment is structured so that a conviction of one count or counts (sometimes called "predicate offenses") is necessary to a conviction of another count or counts.

Seaman's Manslaughter (Government Proposal)[4]
18 U.S.C. § 1115

Count One charges the Defendant with seaman's manslaughter. It's a Federal crime for a captain, engineer, pilot, or other person employed on a vessel to engage in misconduct, negligence, or inattention to his duties, or for a captain or charterer of a vessel to engage in fraud, neglect, connivance, misconduct, or violation of law that proximately causes the loss of a life.

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

(1) The Defendant was an owner, charterer, captain, engineer, pilot, or other person employed on the M/V SOUTHERN COMFORT;

(2) A person lost his or her life; and

(3) If a person lost his or her life and the Defendant was a captain, engineer, pilot, or other person employed on the vessel, the loss of life was proximately caused by the misconduct, negligence, or inattention of the Defendant to his duties upon the vessel, upon which he was employed;

or

If a person lost his or her life and the Defendant was an owner or charterer of the vessel, the loss of life was proximately caused by the fraud, neglect, connivance, misconduct, or violation of law of the Defendant as the owner or charterer of the vessel.

"Negligence" is a breach of duty, which means an omission to perform some duty, or a violation of some rule or standard of care, which is made to govern and control one in the discharge of some duty.

Negligent conduct "proximately causes" a loss of life if the loss of life resulted from

[4] This Government proposal is not a pattern instruction.

the negligence and it was reasonably foreseeable that the negligent conduct was or could be a threat to the lives of others.

ANNOTATIONS AND COMMENTS

From the Government, in support:

See Government's Trial Brief at Docket Entry 29.

From the defense, in objection:

While the government's proposal correctly instructs the jury that it must find that the defendant's conduct was the proximate cause of the loss of life, it fails to include a second, essential feature of the causation element: "but for," or "actual," causation. In its omission of an actual causation element, the model instruction has again failed to keep up with recent caselaw.

In *Burrage v. United States*, 571 U.S. 204 (2014), the Supreme Court explained that there is a bedrock principle in American law that where a person is charged with conduct that resulted in the loss of life, the government must prove that the conduct was the but for cause of the loss. *Id.* at 210-216. There, the Court concluded that the federal statute criminalizing distribution of a controlled substance that "results" in the loss of life requires a jury to find that the substance was the but for cause of the loss, not only a contributing or substantial cause. *Id.* The Court recognized that some state courts will impose liability where the defendant's conduct was only the "substantial" or "contributing" cause, but the Court concluded that those rare outliers could not control the definition of a federal statute absent a clear directive from the statutory text. *Id.*at 215-16. Instead, absent a statutory directive to the contrary, where a statute contains causal language, such as "results from" or "based on," it must be read to require but for causation. *See id.* at 213-14.

Statutes that charge conduct causing a death thus generally require both actual and proximate causation. The Ninth Circuit reached the same conclusion in *United States v. Pineda-Doval*, 614 F.3d 1019 (9th Cir. 2010). There the Court explained that for "a defendant to be found guilty of transportation of illegal aliens resulting in death, the Government must prove that the defendant's criminal conduct was the but-for cause and the proximate cause of the charged deaths." *Id*. at 1032. Here, the statute imposes liability on a captain "by whose" negligence life is lost. 18 U.S.C. § 1115. "By whose" is the same type of causal language requiring actual causation that the Supreme Court referenced in *Burrage*. Indeed, other courts have read a but for causation requirement into the seaman's manslaughter statute. *See United States v. Knowles*, 4 Sawy. 517 (1864) (N.D. Cal.) ("It is not sufficient for you to believe that possibly he might have been saved. To find the defendant guilty, you must come to the conclusion that he would, beyond a reasonable doubt, have been saved if proper efforts to save him had been seasonably made."); *United States v. Meckling*, 141 F.Supp. 608 (D. Md. 1956) (entering acquittal because captain's negligent acts "are only possibilities, or at the most probabilities, so far as the loss of life is concerned").

All references to "misconduct" and "inattention to one's duties" should be removed from the jury instructions. The government's alternatives—"misconduct" or "inattention to his duties"—are akin to simple negligence, rather than the required gross negligence. The text of the seaman's manslaughter statute presents the following standard: "misconduct, negligence, or inattention to his duties." 18 U.S.C. § 1115. All three of these clauses essentially articulate a negligence standard, but because they appear in a manslaughter statute, the whole phrase must be interpreted to require gross negligence.

All references to "misconduct" and "inattention to one's duties" should be removed from the jury instructions since they are highly likely to confuse the jury into believing that it may reach a guilty verdict based on a lesser standard than gross negligence. Omitting this statutory language is consistent with the way in which juries who have addressed this issue are instructed on the general manslaughter statute, § 1112. That statute states that involuntary manslaughter may be committed "In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112. Despite the fact that the statute contains multiple clauses, it has held that it contains only one standard of care: gross negligence. Moreover, in Garcia, the Ninth Circuit reversed a conviction where the district court instructed the jury with the disjunctive language contained in the statute, specifically instructing that the element required a finding "the Defendant committed an act, done either in an unlawful manner or with wanton or reckless disregard for human life, which might produce death." Garcia, 729 F.3d at 1176. Although the instruction's disjunctive phrasing tracked the statute, it did not require gross negligence and was therefore erroneous. See id. So too, here: an instruction tracking the language of the statute, but failing to require gross negligence, would misstate the elements of the offense. The second element of the instruction here should track the Ninth Circuit model instruction: "Second, the defendant acted with gross negligence, defined as wanton or reckless disregard for human life."

Seaman's Manslaughter (Defense Proposal)[5]
18 U.S.C. § 1115

The defendant is charged in the indictment with seaman's manslaughter, in violation of 18 U.S.C. § 1115. In order for the defendant to be found guilty of the charge, the government must prove each of the following elements beyond a reasonable doubt:

(1) First, the defendant was a captain or other person employed on a marine vessel;

(2) Second, the defendant committed an act that might produce death;

(3) Third, the defendant acted with gross negligence, defined as wanton or reckless disregard for human life;

(4) Fourth, the defendant's grossly negligent act was the proximate cause of the death of 1 person. A proximate cause is one that played a substantial part in bringing about the deaths, so that the deaths were the direct result or a reasonably probable consequence of the defendant's act;

(5) Fifth, the defendant's grossly negligence act was the actual cause of the death of 1 person. An actual cause is one without which the deaths could not have occurred;

(6) Sixth, the defendant knew that such an act was a threat to the lives of others; and

(7) Seventh, the deaths occurred within federal admiralty jurisdiction. Federal admiralty jurisdiction exists if the deaths occurred on a vessel engaged in commercial activity and on a waterway that is used or susceptible of being used for the business of shipping.

ANNOTATIONS AND COMMENTS

From the defense, in support:

18 U.S.C. § 1115; Ninth Circuit Model Criminal Jury Instructions, No. 16.4; *United States v. Garcia*, 729 F.3d 1171, 1175 (9th Cir. 2013); *United States v. Keith*, 605 F.2d 462, 463 (9th Cir. 1979); *United States v. Rodriguez*, 880 F.3d 1151, 1159-60 (9th Cir. 2018); *Burrage v. United States*, 571 U.S. 204, 210-16 (2014); CAUSE, Black's Law Dictionary (11th ed. 2019); *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975) (admiralty jurisdiction).

From the Government, in objection:

The Government specifically objects to Proposed Element 2 (an act that might cause

[5] This defense proposal is not a pattern instruction.

death), Proposed Element 3 (gross negligence), Proposed Element 4 (gross negligence and proximate cause), Proposed Element 5 (actual cause), Proposed Element 6 (knowledge), and Proposed Element 7 (admiralty jurisdiction).

As to Proposed Element 2 (an act that might cause death), the Government objects because the proposed element is unduly vague and misstates the law, eschewing the "reasonable foreseeability" standard that governs in these cases. It is also internally inconsistent with the defense's Proposed Element 4 in that respect, because it speaks to "reasonably probable result" as the governing standard. The sum of all this is that the Court should reject this proposal as unduly confusing and legally incorrect.

As to Proposed Element 3 (gross negligence), the Government objects because, as set forth in its trial brief, gross negligence is not a required showing for Section 1115 prosecutions. *See* DE 29 at 3-5; *see also, e.g., United States v. Alvarez*, 809 F. App'x 562, 569 (11th Cir. 2020).

As to Proposed Element 4 (proximate cause), the Government objects because the proposed element misstates the proximate cause standard and is internally inconsistent, stating on the one hand the lesser standard of the negligence only "play[ing] a substantial part in bringing about the deaths" but then providing a higher standard in writing, "so that the deaths were the direct result or a reasonably probable consequence of the defendant's act." In this way, the instruction is likely to cause needless juror confusion while also misstating the law.

As to Proposed Element 5 (actual cause), the Government objects because the proposed element is duplicative and confusing. Proximate cause is the causation standard for Section 1115 applied in *O'Keefe*, *see* DE 29 at 5-6, and adding an additional element of actual cause serves only to confuse the jury when the negligence causing the harm can be baked into the definition of proximate cause, which is what the Government proposes. The defense's proposal, in contrast, pits its prior proximate cause instruction against this actual cause instruction, with proximate cause being expressly broader than actual cause. And while the defense cites *Burrage*, that case found the Supreme Court reversing a circuit court that had rejected the use of proximate cause by instead using precisely the language that the defense now uses for "proximate cause," which it defines as conduct playing a "substantial part" in the result.[6]

As to Proposed Element 6 (knowledge), the Government objects because it misstates the law. As explained in the Government's trial brief, *see* DE 29 at 3-5, there is no knowledge requirement for this crime. Rather, the crime requires only simple negligence. Indeed, even the Eleventh Circuit's involuntary manslaughter instruction, Pattern Instruction O46.2, has an element that "the Defendant knew *or could have reasonably foreseen* that the Defendant's conduct was or could be a threat to the lives of others," which is what the Government proposes

[6] The Government notes that the objection here is more semantic than legal: the Government's definition of "proximate cause" encompasses the negligence causing the death, as the concept of actual cause here contemplates. The problem with the defense's proposal is that it blends actual causation with a lesser standard immediately before it, which serves no purpose but to confuse the jury. The Government's proposal, in contrast, is a streamlined definition that gives the jury the one set of findings it needs to make.

and indeed what the defense includes in its Proposed Element 4 as the proper standard.

As to Proposed Element 7 (admiralty), the Government again objects because it misstates the law, with three considerations favoring this Court refusing to instruct the jury as provided:

First, Section 1115 does not contain an admiralty and maritime jurisdictional clause, and this Court should not insert additional elements into the offense without clear on-point case law. None of the examples of Section 1115 jury instructions of which the Government is aware contain such an element, and when seaman's manslaughter was codified in its current form as Section 1115, Congress expressly removed the special maritime and territorial jurisdiction limitation. *See United States v. McKee*, 68 F.4th 1100, 1105 (8th Cir. 2023).

Second, even assuming there to be an admiralty aspect to the case, the way to resolve it is not through an added element at trial but instead a motion to dismiss for lack of jurisdiction. The only case to rule that there is a jurisdictional element of admiralty, *McKee*, was resolved by a motion to dismiss, not a stipulated bench trial or a jury verdict. *See United States v. Ruiz-Murillo*, 736 F. App'x 812, 816-17 (11th Cir. 2018); Docket Entry 104 of *United States v. McKee, et al.*, No. 18-CR-5043 (W.D. Mo.) (motion to dismiss). That said, it also bears noting that unlike *McKee*, there is not even a good-faith argument here that there is a jurisdictional issue with this prosecution. The defense has never argued, in a motion to dismiss or otherwise, that the location where this incident occurred outside the permissible jurisdiction. This fact shows that the defense is inserting this element only to create confusion at the eleventh hour, and this Court should decline to follow it down that path.

Title 46 Code of Federal Regulations
Regulations Concerning Vessel Operation[7]

Persons employed on a vessel are required to comply the law, including the provisions of the law set forth in the Code of Federal Regulations. This Code of Federal Regulations is to be considered by the jury as one of the circumstances in evidence in the case surrounding the conduct of the defendant.

§ 4.05-1 Notice of Marine Casualty

The following is a federal regulation governing operating a vessel in navigable waters:

Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—

1. **An unintended grounding, or an unintended strike of (allision with) a bridge;**
2. **An intended grounding, or an intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of paragraphs (a) (3) through (8);**
3. **A loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel;**
4. **An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems;**

[7] This is not a pattern instruction.

5. **A loss of life;**
6. **An injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties;**
7. **An occurrence causing property-damage in excess of $75,000, this damage including the cost of labor and material to restore the property to its condition before the occurrence, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage; or**
8. **An occurrence involving significant harm to the environment as defined in § 4.03-65.**

§ 4.06-5 Drug Testing Requirements

The following is a federal regulation governing operating a vessel in navigable waters:

1. **Any individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incidents must provide a blood, breath, saliva, or urine specimen for chemical testing when directed to do so by the marine employer or a law enforcement officer.**
2. **If the individual refuses to provide a blood, breath, saliva, or urine specimen, this refusal must be noted on Forms CG-2692 and CG-2692B and in the vessel's official log book, if a log book is required. The marine employer must remove the individual as soon as practical from duties that directly affect the safe operation of the vessel.**
3. **Individuals subject to alcohol testing after a serious marine incidents are prohibited from consuming alcohol beverages for 8 hours following the occurrence of the serious marine incidents or until after the alcohol testing required by this part is completed.**

4. **No individual may be compelled to provide specimens for alcohol and drug testing required by this part. However, refusal to provide specimens is a violation of this subpart and may subject the individual to suspension and revocation proceedings under part 5 of this chapter, a civil penalty, or both.**

§ 16.115 and § 16.230(b) Chemical Testing

Violation of this part is subject to the civil penalties set forth in 46 U.S.C. 2115. Any person who fails to implement or conduct, or who otherwise fails to comply with the requirements for chemical testing for dangerous drugs as prescribed under this part, is liable to the United States Government for a civil penalty of not more than $5,000 for each violation. Each day of a continuing violation will constitute a separate violation.

…

(b) Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on uninspected vessels who:

1. **Are required by law or regulation to hold a license issued by the Coast Guard in order to perform their duties on the vessel;**
2. **Perform duties and functions directly related to the safe operation of the vessel;**
3. **Perform the duties and functions of patrolmen or watchmen required by this chapter; or,**

Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.

ANNOTATIONS AND COMMENTS

From the Government, in support:

See Government's Trial Brief at Docket Entry 29.

From the defense, in objection:

The Court should not read Coast Guard regulations to the jury as part of its final jury instructions. Mr. McCabe's is not charged with violating those regulations. The regulations will be introduced as evidence in the case; there is no reason for the Court to repeat this particular evidence to the jury. Doing so would be unduly prejudicial and undermine the limiting instruction the Court will provide regarding the proper role the regulations may play in the jury's deliberations.

Moreover, there is only a fine distinction between the improper inference a jury might draw from the regulations—of negligence per se—and the proper one—that the regulations may be considered, along with the totality of the evidence, in evaluating the standard of care and other issues at trial. See United States v. Pardee, 368 F.2d 368, 375 (4th Cir. 1966) (decision of what conduct rises to the level of criminal negligence must be "left to the jury" so that it can "measure the conduct of the defendant against all of the existing circumstances and determine therefrom whether" it rises to criminally liable conduct).

The regulations must be treated like any other evidence for the jury to evaluate. They should not be presented to the jury as part of the Court's instruction on the law of the case, just after it hears the elements of the charge. Such an instruction would elevate the regulations above the remainder of the evidence introduced at trial and give the misleading impression that the regulations are part of the crime charged. Additionally, the government should not be able to cherry-pick which regulations will be read to the jury by the Court. The defense will introduce additional regulations to the jury, as well as other documents produced by the Coast Guard in its regulatory capacity. There is no reason why some of this evidence—the government's chosen regulations—should be read to the jury by the Court, and not others.

The Defense requests that if the Court does allow the Government to read Coast Guard regulations to the jury as part of its final jury instructions, its proposed limiting instruction is used, both when a Coast Guard regulation is first introduced at trial and again at the end of trial. For starters, it is crucially important to clarify for the jury that while Mr. McCabe is being charged with a crime, these regulations are not criminal laws. Without that limitation, the jury may draw the highly prejudicial and erroneous inference that he has committed other, uncharged crimes captured by the regulations. Additionally, the Defense's proposal accurately states the law. A violation of the regulations does not in itself establish negligence—any claim to the contrary would erroneously create a per se negligence standard. The instruction instead correctly states that the regulations should be considered, along with all the evidence, in the jury's deliberation.

O36
False Statement to a Federal Agency
18 U.S.C. § 1001

It's a Federal crime to willfully make a false or fraudulent statement to a department or agency of the United States.

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

(1) the Defendant made the statement as charged;

(2) the statement was false;

(3) the falsity concerned a material matter;

(4) the Defendant acted willfully, knowing that the statement was false; and

(5) the false statement was made or used for a matter within the jurisdiction of a department or agency of the United States.

A statement is "false" when made or used if it is untrue when made and the person making or using it knows it is untrue. The Government doesn't have to show that the Governmental agency or department was, in fact, deceived or misled.

The United States Coast Guard is an agency of the United States. Filing documents with that agency relating to a vessel's use or status is a matter within that agency's jurisdiction.

The making of a false statement is not a crime unless the falsity relates to a "material" fact.

A "material fact" is an important fact – not some unimportant or trivial detail – that has a natural tendency to influence or is capable of influencing a decision of a department or agency in reaching a required decision.

<u>ANNOTATIONS AND COMMENTS</u>

18 U.S.C. § 1001(a) provides:

> … [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully - - (1) falsifies… a material fact; (2) makes any materially false, fictitious or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The enumeration of the elements of the offense is taken from *United States v. Calhoon*, 97 F.3d 518, 523 (11th Cir. 1996).

In *Arthur Pew Const. Co. v. Lipscomb*, 965 F.2d 1559, 1576 (11th Cir. 1992), the court held that misrepresentation for purposes of § 1001 must be deliberate, knowing, and willful, or at least have been made with a reckless disregard of the truth and a conscious purpose to avoid telling the truth.

In *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), the Supreme Court held that the materiality of a false statement under this section is a jury question, and that failure to submit the question of materiality to the jury constitutes reversible error. *See United States v. Klais*, 68 F.3d 1282, 1283 (11th Cir. 1995) (recognizing holding). The Eleventh Circuit has held that for a conviction to be sustained under § 1001, "it is imperative that the writing or document be 'false.'" *United States v. Blankenship*, 382 F.3d 1110, 1132 (11th Cir. 2004). Where the writing or document at issue is a contract, the Court of Appeals further held that there are only two ways in which a contract can possibly be considered false: (1) where a person forges or alters it, or (2) where it contains "factual misrepresentations." *Id*.

The materiality definition is adopted from *Gaudin*, 115 S. Ct. at 2313, and *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir. 1980). *See United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991); *United States v. Herring*, 916 F.2d 1543, 1547 (11th Cir. 1990); *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988).

The "exculpatory no" doctrine as an exception to the scope of the offense (*see United States v. Payne*, 750 F.2d 844, 861 (11th Cir. 1985)) was repudiated by the Supreme Court in *Brogan v. United States*, 522 U.S. 398, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

O51
Wire Fraud
18 U.S.C. § 1343

It's a Federal crime to use interstate wire, radio, or television communications to carry out a scheme to defraud someone else.

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

(1) the Defendant knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;

(2) the false pretenses, representations, or promises were about a material fact;

(3) the Defendant acted with the intent to defraud; and

(4) the Defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud.

A "scheme to defraud" means any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises. ***[A "scheme to defraud" is not a scheme that is intended to deceive someone only of information needed to make discretionary decisions about the use of money or property. Rather, a scheme to defraud is a scheme that is intended to cause an economic injury or loss on the alleged victim.]***[8]

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference to the truth, and makes with the intent to defraud. A statement or representation may be "false" or "fraudulent" when it is a half-truth, or effectively conceals a material fact, and is made with the intent to defraud.

[8] The [bracketed] sentences are not from the Pattern but are instead proposed additions by the defense.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the material transmitted by interstate wire was itself false or fraudulent; or that using the wire was intended as the specific or exclusive means of carrying out the alleged fraud; or that the Defendant personally made the transmission over the wire. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "use" interstate wire communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business.

Each separate use of the interstate wire communications as part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years' imprisonment and $1 million fine.)

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

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

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1343 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the defendant is guilty of using interstate [wire] [radio] [television] communications facilities in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing] [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

Wire fraud requires showing (1) that the Defendant knowingly devised or participated in a scheme to defraud; (2) that the Defendant did so willfully and with an intent to defraud; and (3) that the Defendant used interstate wires for the purpose of executing the scheme. *Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1312 (11th Cir. 2000). Materiality is an essential element of the crimes of mail fraud, wire fraud, and bank fraud and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-20 (11th Cir. 1999), *cert. denied* 530 U.S. 1261 (2000).

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

In wire fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of this statute. *Cleveland v. United States*, 531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000) (addressing "property" for purposes of mail fraud statute).

The mail fraud and wire fraud statutes are "given a similar construction and are subject to the same substantive analysis." *Belt v. United States*, 868 F.3d 1208, 1211 (11th Cir. 1989).

See also United States v. Svete, 556 F.3d 1157, (11th Cir. 2009) and discussion *supra*. Offense Instruction 50.1.

From the defense, in support:

Federal law makes it a crime to use interstate wire communications to carry out a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. To establish a violation of this statute, the Government must prove: "(1) a scheme to defraud exists, (2) the defendant used wire communications in interstate or foreign commerce to further that scheme, and (3) the defendant had specific intent to defraud." *United States v. del Carpio Frescas*, 932 F.3d 324, 329 (5th Cir. 2019). *See also, United States v. Davis*, No. 21-10996, 2022 WL 16944171, at *3 (5th Cir. Nov. 15, 2022). The Fifth Circuit's reading of the wire fraud statute can be found in decisions involving the mail fraud statute, 18 U.S.C. § 1341. Because the requisite elements of "scheme to defraud" under the wire fraud statute, 18 U.S.C. § 1343 and the mail fraud statute are identical, cases construing mail fraud apply to the wire fraud statute as well. *United States v. Lemire,* 720 F.2d 1327, 1334–35 n. 6 (D.C.Cir.1983); *United States v. Feldman,* 711 F.2d 758, 763 n. 1 (7th Cir.1983). *United States v. Bruno*, 809 F.2d 1097, 1104–05 (5th Cir. 1987). The wire transfers cannot "further the scheme" if the wires are immaterial, the scheme has come to fruition, or the success of the scheme was not dependent on the wire transfer. *See Schmuck v. United States*, 489 U.S. 705, 713, 109 S. Ct. 1443, 1449, 103 L. Ed. 2d 734 (1989). Based on this definition, the jury instruction should establish that the wire transfers that the Government is relying on for the above counts did in fact further the alleged scheme to defraud. The indictment and the Government's Trial Brief allege that the wire transfers were simply transfers of money between Mr. McCabe's accounts. These transfers were done after Mr. McCabe received the PPP funds. The transfers were immaterial to the scheme to defraud since his obtaining of the money had already.

Ciminelli v. United States, 598 U.S. 306, 308 (2023) (Because "potentially valuable economic information" "necessary to make discretionary economic decisions" is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under

§ 1343."). Id. at 316 ("In sum, the wire fraud statute reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.").

United States v. Takhalov, 827 F.3d 1307, 1312 (11th Cir. 2016), as revised (Oct. 3, 2016), opinion modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016) ("to defraud, one must intend to use deception to cause some injury"); *United States v. Kachkar*, 19-12685, 2022 WL 2704358, at *4 (11th Cir. July 12, 2022) (In *Takhalov*, "[w]e also stated that one can 'scheme to defraud' under Section 1343 only if he 'intend[s] to harm the victim.' And we reasoned that a defendant displays such intent if he 'lies about the nature of the bargain itself,' usually by misrepresenting 'the price' or 'characteristics of the good,' so that the victim does not receive 'what he bargained for.'").

From the Government, in objection:

The Government respectfully submits that the Citations and Authority for the original O51 support this Court using the model instruction without the modification the defense proposes. The Government further objects to the proposed defense instruction language because it is not a valid defense here and is an incorrect statement of the law in any event.

No Defense Blaming Victim[9]

It is not a defense to the crime of wire fraud that the victims could have done something more than they did to prevent the offense. In other words, if you find that the Government has proved all the elements of wire fraud beyond a reasonable doubt, it is no defense that such fraud might not have occurred if the victims had acted with greater care.

Therefore, any evidence that the victims could have done something to prevent any fraud which you find occurred, or evidence that their procedures were somehow deficient, should not be considered by you as an excuse or defense to any wire fraud which you find has been proven beyond a reasonable doubt.

ANNOTATIONS AND COMMENTS

The Government's authority is as follows:

Quoted from instructions upheld in *United States v. Callipari*, 368 F. 3d 22, 37-39 & n.3 (1st Cir. 2004), *vacated on other grounds*, 125 S. Ct. 985 (2005); *United States v. McConley*, No. 19-CR-20447-SINGHAL (S.D. Fla.) (Court's Wire Fraud Instruction to the Jury, DE 294:17); *see also United States v. Jonathan Young*, No. 24-CR-20055-MARTINEZ, Docket Entry 63, at 14 (giving instruction as written here); *United States v. Nicholas Craig Woozencroft*, No. 23-CR-60094-MARTINEZ (S.D. Fla.) (Court's Instructions to the Jury, DE 57:13); *United States v. D'Amico*, No. 18-80179-CR-COHN, (S.D. Fla.) (Court's Instruction to the Jury, DE 102:13);

[9] This is not a pattern instruction.

B11
Duty to Deliberate

Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

ANNOTATIONS AND COMMENTS

See United States v. Brokemond, 959 F.2d 206, 209 (11th Cir. 1992). *See also United States v. Cook*, 586 F.2d 572 (5th Cir. 1978), *reh'g denied*, 589 F.2d 1114 (1979), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2821, 61 L. Ed. 2d 274 (1979); *United States v. Dunbar*, 590 F.2d 1340 (5th Cir. 1979).

B12
Verdict

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and will speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it, date it, and carry it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the marshal. The marshal will bring it to me and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted one way or the other at that time.

ANNOTATIONS AND COMMENTS

United States v. Norton, 867 F.2d 1354, 1365-66 (11th Cir. 1989), *cert. denied*, 491 U.S. 907, 109 S. Ct. 3192, 105 L. Ed. 2d 701 (1989) and 493 U.S. 871, 110 S. Ct. 200, 107 L. Ed. 2d 154 (1989) notes that the Court should not inquire about, or disclose, numerical division of the jury during deliberations but states that "[r]eversal may not be necessary even where the trial judge undertakes the inquiry and thereafter follows it with an *Allen* charge, absent a showing that either incident or a combination of the two was inherently coercive." See *United States v. Brokemond*, 959 F.2d 206, 209 (11th Cir. 1992). *See also United States v. Cook*, 586 F.2d 572 (5th Cir. 1978), *reh'g denied*, 589 F.2d 1114 (1979), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2821, 61 L. Ed. 2d 274 (1979).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-80103-CR-CANNON

UNITED STATES OF AMERICA

v.

DUSTIN SEAN McCABE,

Defendant.
________________________________/

VERDICT FORM

1. We, the Jury, unanimously find Defendant **DUSTIN SEAN McCABE**, as to **Count 1** of the Indictment:

GUILTY _____ NOT GUILTY _____

2. We, the Jury, unanimously find Defendant **DUSTIN SEAN McCABE**, as to **Count 2** of the Indictment:

GUILTY _____ NOT GUILTY _____

3. We, the Jury, unanimously find Defendant **DUSTIN SEAN McCABE**, as to **Count 3** of the Indictment:

GUILTY _____ NOT GUILTY _____

4. We, the Jury, unanimously find Defendant **DUSTIN SEAN McCABE**, as to **Count 4** of the Indictment:

GUILTY _____ NOT GUILTY _____

5. We, the Jury, unanimously find Defendant **DUSTIN SEAN McCABE**, as to **Count 5** of the Indictment:

GUILTY _____ NOT GUILTY _____

SO SAY WE ALL

____
FOREPERSON OF THE JURY

Dated: ________________________