1 Modern Federal Jury Instructions-Criminal P 23A.01

Modern Federal Jury Instructions-Criminal > II SUBSTANTIVE INSTRUCTIONS > CHAPTER 23A Theft of Government Property

¶ 23A.01Theft of Government Property (18 U.S.C. § 641)

Instruction 23A-1 The Indictment and the Statute

The indictment charges the defendant with stealing (*or* embezzling *or* knowingly converting) money or property belonging to the United States government. The indictment reads as follows:

[Read Indictment]

The indictment charges the defendant with violating *section 641 of Title 18 of the United States Code*. That section provides in relevant part:

> **Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof [shall be guilty of a crime].**

Comment

[1] *United States v. Fairley, 880 F.3d 198, 204, 206 (5th Cir. 2018)* (indictment, jury instructions, and verdict form all combined first and second paragraphs of § 641 into single offense; erroneous jury charge was plain error).

[2] *Milanovich v. United States, 365 U.S. 551, 554–55, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961)*.

[3] *United States v. Bauer, 713 F.2d 71, 75 (4th Cir. 1983)*.

The first two paragraphs of section 641 create different crimes with different elements: the first paragraph

applies to the unlawful taking of government property, while the second concerns the unlawful possession of that property after it has been stolen.[1] The Supreme Court has specifically held that a defendant may not be convicted under section 641 for both stealing and receiving the same property,[2] although the indictment may charge the defendant with both.[3]

[4] Economic Espionage Act of 1996, ***Pub. L. No. 104-294***, Title VI, § 606(a), ***110 Stat. 3511*** (1996).

The offense paragraphs of section 641 each provide for both a felony and a misdemeanor offense depending on the value of the property stolen. In its original version, the dividing line between the felony and misdemeanor offenses was set at $100. That was increased to $1,000 in 1996.[4]

Instruction 23A-2 Elements of the Offense

In order to prove the defendant guilty of stealing (*or* embezzling *or* knowingly converting) money or property belonging to the United States government, the government must prove each of the following elements beyond a reasonable doubt:

First, that the money or property described in the Indictment belonged to the United States government;

Second, that the defendant stole (*or* embezzled *or* knowingly converted) that property;

Third, that the defendant acted knowingly and willfully with the intent to deprive the government of the use and benefit of its property; and

Fourth, that the value of the property was greater than $1,000.

Authority

Fifth Circuit: *United States v. Jones, 664 F.3d 966, 976 (5th Cir. 2011)*; *United States v. Dien Duc Huynh, 246 F.3d 734 (5th Cir. 2001)*; *United States v. Aguilar, 967 F.2d 111 (5th Cir. 1992)*; Fifth Circuit Pattern Criminal Jury Instruction 2.27.

Sixth Circuit: *United States v. McGahee, 257 F.3d 520 (6th Cir. 2001)*.

Seventh Circuit: *United States v. Howard, 30 F.3d 871 (7th Cir. 1994)*; Seventh Circuit Pattern Criminal Jury Instruction to *18 U.S.C. § 641*.

Eighth Circuit: *United States v. Rehak, 589 F.3d 965 (8th Cir. 2009)*, *cert. denied*, *559 U.S.1070 (2010)*; Eighth Circuit Model Criminal Jury Instruction 6.18.641.

Ninth Circuit: *United States v. Seaman, 18 F.3d 649 (9th Cir. 1994)*.

Eleventh Circuit: *United States v. McRee, 7 F.3d 976 (11th Cir. 1993)*; *United States v. Lanier, 920 F.2d 887 (11th Cir. 1991)*; Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 21.

Comment

[1] *United States v. McGahee, 257 F.3d 520, 528–29 (6th Cir. 2001)*; *United States v. Seaman, 18 F.3d 649, 650 (9th Cir. 1994)*; *United States v. McRee, 7 F.3d 976, 980 (11th Cir. 1993)*; *United States v. Medrano, 836 F.2d 861, 864 (5th Cir. 1988)*; *see* Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 21; *see also United States v. Ayesh, 702 F.3d 162, 169 (4th Cir. 2012)* (omitting value from formulation); *United States v. Hamilton, 699 F.3d 356, 361 (4th Cir. 2012)* (same).

[2] *United States v. Howard, 30 F.3d 871, 875 (7th Cir. 1994)*; *United States v. Burton, 871 F.2d 1566, 1570 (11th Cir. 1989)*; *United States v. Hill, 835 F.2d 759, 762 n.2 (10th Cir. 1987)*; *see* Fifth Circuit Pattern Criminal Jury Instruction 2.27; Seventh Circuit Pattern Criminal Jury Instruction to *18 U.S.C. § 641*; Eighth Circuit Model Criminal Jury Instruction 6.18.641.

There is wide agreement on the elements of a violation of section 641, with some courts and circuit pattern instructions treating the value of the property as a separate element,[1] and others treating it as part of the first element.[2] Both formulations are equally acceptable; the former is recited here only because it simplifies instruction on the lesser included misdemeanor offense of stealing property with a value of $1,000 or less.

The Fifth Circuit has approved a different formulation, adding as an element that defendants knew the funds were not theirs, and omitting the value element. The court recited the formulation as follows:

[3] *United States v. Jones, 664 F.3d 966, 976 (5th Cir. 2011)*; *see* *United States v. Fairley, 880 F.3d 198, 204, 206 (5th Cir. 2018)* (quoting Fifth Circuit Pattern Jury Instructions and finding erroneous combining of theft and receipt of stolen property provisions of § 641).

> To convict the Appellants of theft of government funds, the jury would have needed to find that the Appellants (1) converted (2) funds that belonged to Medicare, which (3) they knew were not theirs, and (4) did so with the intent to permanently deprive the United States of said funds.[3]

The Ninth Circuit pattern instruction joins the second and third elements as follows:

> First, the defendant knowingly stole [money] [property of value] with the intention of depriving the owner of the use or benefit of the [money] [property];
>
> Second, the [money] [property] belonged to the United States; and

[4] Ninth Circuit Model Criminal Jury Instruction 8.39.

> Third, the value of the [money] [property] was more than $1,000.[4]

[5] *United States v. Campbell, 42 F.3d 1199, 1204 (9th Cir. 1994)*.

[6] *United States v. Seaman, 18 F.3d 649, 650 (9th Cir. 1994)*.

In practice, the Ninth Circuit has approved both the version in the pattern instructions[5] and the recommended formulation.[6]

The Tenth Circuit pattern instruction is similar to the Ninth Circuit's instruction. It provides:

> *First*, the [name property] belonged to the United States government [if lack of knowledge is asserted, add: It does not matter whether the defendant knew that the [name property] belonged to the United States government, only that he knew it did not belong to him];

Second, the defendant [stole] [embezzled] [converted] the [name property] intending to put it [to his own use or gain] [to the use or gain of another] or the defendant took the [name property] knowing it was not his and intending to deprive the owner of the use or benefit of the [name property]; and

[7] Tenth Circuit Criminal Pattern Jury Instruction 2.31.

Third, the value of the [name property] was more than $1000.[7]

Instruction 23A-3 First Element—Money or Property Belonged to United States

The first element the government must prove beyond a reasonable doubt is that the money or property described in the Indictment belonged to the United States government.

To satisfy this element, the government must prove that [describe property] was a "thing of value of the United States." That means that at the time the property was allegedly stolen (*or* embezzled *or* knowingly converted) the United States government or an agency of the United States government had either title to, possession of, or control over the property (*or* the property was made under contract for the United States).

(*If appropriate, except in the Ninth Circuit:* Property includes other things of value beside money and tangible objects. It also includes intangible things like the value of an employee's time and services.)

***Except when knowing conversion of the property is charged:* The government is not required to prove that the defendant knew that the property was a "thing of value of the United States."**

Comment

[1] *United States v. Caseslorente, 220 F.3d 727, 732 (6th Cir. 2000)*.

The requirement that the property allegedly stolen was a "thing of value of the United States" provides the link that establishes federal jurisdiction.[1] Instruction 23A-3 sets forth a basic charge for the usual case when it is alleged that the government owned the property. As discussed below, the phrase "thing of value of the

United States" has been interpreted to apply to interests beyond ownership and possession, so the instruction will need to be revised to address those other interests when appropriate.

[2] *United States v. Lawson, 925 F.2d 1207, 1209 (9th Cir. 1991)*; *United States v. Eden, 659 F.2d 1376, 1378 (9th Cir. 1981)*.

[3] *See* Fifth Circuit Pattern Criminal Jury Instruction 2.27; Seventh Circuit Pattern Criminal Jury Instruction to *18 U.S.C. § 641*; Eighth Circuit Model Criminal Jury Instruction 6.18.641; Ninth Circuit Model Criminal Jury Instruction 8.39; Tenth Circuit Criminal Pattern Jury Instruction 2.31; Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 21.

[4] *See* ***United States v. Lanier, 920 F.2d 887, 896 (11th Cir. 1991)***.

Despite some statements by the Ninth Circuit that the determination whether the property involved is a "thing of value of the United States" is a question of law,[2] it is strongly recommended that this issue be submitted to the jury. All of the circuit pattern instructions include a charge on this element,[3] and there has been no discussion of this issue outside the Ninth Circuit, suggesting that it is routinely charged to the jury. The better view is that this is a factual question for the jury subject to review on appeal whether the interest alleged and found by the jury is sufficient as a matter of law.[4]

[5] *United States v. Kranovich, 401 F.3d 1107, 1113 (9th Cir. 2005)*; *United States v. Tailan, 161 F.3d 591, 592 (9th Cir. 1998)*.

[6] *See United States v. Hall, 549 F.3d 1033, 1038 (6th Cir. 2008)*.

As noted above, the phrase "thing of value of the United States" has been interpreted to extend beyond actual ownership to include any situation in which the government has "title to, possession of or control over" the property.[5] The courts have tended to group these property interests into four categories: (1) when the government has clear ownership of the property; (2) when the government is the custodian or bailee of the property; (3) when a government employee or agent has possession of the property; and (4) when possession of the property has passed to an intermediary but the government retains supervision and control over the property.[6]

[7] *See, e.g.*, *United States v. Caseslorente, 220 F.3d 727, 732–33 (6th Cir. 2000)* (government owned recyclables at time of

conversion by defendant); *United States v. Faust, 850 F.2d 575, 579 (9th Cir. 1988)* (government had clear ownership interest in insurance check made out jointly to defendant and government); *see also United States v. Sussman, 709 F.3d 155, 163–70 (3d Cir. 2013)* (government had ownership in contents of safe deposit box after final order in related FTC proceeding authorized government to use contents to satisfy claims of persons defrauded by defendant).

[8] *See United States v. Newsome, 322 F.3d 328, 333 (4th Cir. 2003)* (trees); *United States v. McPhilomy, 270 F.3d 1302, 1307–08 (10th Cir. 2001)* (commercial grade stone); *United States v. Larson, 110 F.3d 620, 624 (8th Cir. 1997)* (fossils); *United States v. Campbell, 42 F.3d 1199, 1203 (9th Cir. 1994)* (trees). For instructions and a discussion of the Archaeological Resources Protection Act, see Instructions 23A-14 through 23A-19, *below*.

[9] *United States v. Tailan, 161 F.3d 591, 592 (9th Cir. 1998)*; *United States v. Towns, 842 F.2d 740, 741 (4th Cir. 1988)*; *United States v. Sanders, 793 F.2d 107, 108–09 (5th Cir. 1986)*; *United States v. McMurphy, 2009 U.S. Dist. LEXIS 110336 (M.D. Ala. Nov. 19, 2009)*.

The first situation, when the government is alleged to have clear ownership of the property, is the simplest. Ownership of the property in question obviously satisfies the requirement that it be a "thing of value of the United States."[7] In addition to the garden variety items that would undoubtedly fall within this category without discussion, several types of property have been the subject of repeated discussion in the courts. Thus, it is now clear that natural resources on public lands are things of value,[8] as is merchandise for sale on military post exchanges.[9]

[10] *United States v. Collins, 56 F.3d 1416, 1419–21 (D.C. Cir. 1995)* (computer time and services); *United States v. Matzkin, 14 F.3d 1014, 1020 (4th Cir. 1994)* (confidential bid information); ***United States v. Barger, 931 F.2d 359, 368 (6th Cir. 1991)*** (confidential law enforcement information); *United States v. Croft, 750 F.2d 1354, 1359–62 (7th Cir. 1984)* (employee time); *United States v. Wilson, 636 F.2d 225, 227–28 (8th Cir. 1980)* (employee time); *United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979)* (confidential law enforcement information); *see also* Seventh Circuit Pattern Criminal Jury Instruction to *18 U.S.C. § 641* (Definition of Value); Eighth Circuit Model Criminal Jury Instruction 6.18.641. *But see Chappell v. United States, 270 F.2d 274, 276 (9th Cir. 1959)*.

[11] *Chappell v. United States, 270 F.2d 274, 276 (9th Cir. 1959)*; *see also United States v. Tobias, 836 F.2d 449, 451 (9th Cir. 1988)* (dictum reaffirming Ninth Circuit's view on this subject).

[12] *United States v. Collins, 56 F.3d 1416, 1419 (D.C. Cir. 1995)*.

[13] *United States v. Collins, 56 F.3d at 1420–21*. Note that the court affirmed defendant's conviction because he had also taken substantial quantities of office supplies in addition to the use of the computer.

At least six courts of appeals have held that section 641 applies to intangible property such as government employee time and confidential information.[10] Only the Ninth Circuit disagrees, having held in an early case that section 641 does not apply to the theft of employee time.[11] As the District of Columbia Circuit explained, "Congress intended to enact a broad prohibition against the misappropriation of anything belonging to the government unrestrained by the fine and technical distinctions of the common law."[12] However, the defendant's actions must seriously interfere with the government's ownership rights. Thus, in the case just quoted, the court held that keeping personal documents on a government computer did not interfere with the government's use of the computer.[13]

[14] *United States v. Gill, 193 F.3d 802, 804 (4th Cir. 1999)* (mother deposited son's SSI disability check into unauthorized joint account over which son had no control, so title to funds never passed to intended beneficiary); *United States v. O'Kelley, 701 F.2d 758, 760 (8th Cir. 1983)* (unendorsed check remains property of the United States even after receipt by beneficiary); *United States v. Forcellati, 610 F.2d 25, 31 (1st Cir. 1979)*; *United States v. Tackett, 2011 U.S. Dist. LEXIS 101244 (E.D. Ky. Sept. 8, 2011)* (nursing home operator allegedly deposited "economic stimulus" checks into corporate account instead of crediting towards residents' accounts).

[15] *United States v. Howard, 787 F. Supp. 769, 771 (S.D. Ohio 1992)*. *But see United States v. Shirley, 720 F.3d 659, 664 (8th Cir. 2013)* (Social Security disability income to which defendant was no longer entitled was property of the United States even though defendant was intended payee of the check).

A government check remains the property of the government until the check is received and deposited by the intended beneficiary.[14] Once the funds are deposited by the intended payee, however, title to the funds passes and is no longer property "of the United States."[15]

[16] *United States v. Gwin, 839 F.2d 427, 429–30 (8th Cir. 1988)*.

[17] *See* 31 C.F.R. §§ 315.25, 315.28(b).

[18] United States v. Stuart, 22 F.3d 76, 80 (3d Cir. 1994); United States v. Bauer, 713 F.2d 71, 73 (4th Cir. 1983); United States v. Carr, 706 F.2d 1108, 1109–11 (11th Cir. 1983).

[19] United States v. Stuart, 22 F.3d 76, 80 (3d Cir. 1994).

The government must be the owner of the property at the time of the alleged unlawful act. Once the government sells the property, the government becomes a creditor with respect to payment for that property and it is no longer property of the United States.[16] This rule is particularly important with respect to stolen government bonds. When bonds are purchased by a third party, they become the property of that purchaser, and are no longer property of the United States. However, if the bonds are subsequently stolen from the owner, under the applicable Treasury regulations the government will provide relief to the owner by replacing the bonds, and upon the granting of that relief, the stolen bonds become property of the United States.[17] As a result, the original theft of the bonds does not violate section 641, but retaining the bonds after relief has been granted to the owner is covered.[18] In that situation, the government must introduce evidence of when relief was granted, as the bonds became property "of the United States" at that time.[19]

[20] *See* United States v. Milton, 8 F.3d 39, 42–43 (D.C. Cir. 1993) (money in account to be monitored and controlled by EEOC pending disbursement to aggrieved employees of the company involved was a bailment).

[21] United States v. Perez, 707 F.2d 359, 361–62 (8th Cir. 1983) (money introduced as exhibit at criminal trial); United States v. Gordon, 638 F.2d 886, 888–89 (5th Cir. 1981) (seized evidence in a drug case).

The second form of interest that satisfies the "thing of value of the United States" standard is that at the time of the alleged taking, the government was the custodian or bailee of the property such that the government had possession of and control over the property.[20] For example, the government is the custodian of property seized or otherwise held as evidence in a criminal proceeding, so the government's possession of that evidence satisfies this element.[21]

[22] *United States v. Caseslorente, 220 F.3d 727, 732–33 (6th Cir. 2000)* (proceeds of sale of recyclables was property of the United States); *United States v. Benefield, 721 F.2d 128, 130 (4th Cir. 1983)* (collective tip money at NCO club was government property until disbursement to staff).

[23] *United States v. Benefield, 721 F.2d 128, 130 (4th Cir. 1983)*.

The third category that constitutes a "thing of value of the United States" is property in the possession of a government employee or agent prior to conveyance to the government itself. Property that is in the possession of a government employee in his or her capacity as such is property of the United States.[22] Thus, a cashier at a military NCO club who stole the collective tip jar was found guilty of a violation of section 641 because at the time of the theft, she had possession of the funds in her role as an employee of the club.[23]

[24] *United States v. Lawson, 925 F.2d 1207, 1209–10 (9th Cir. 1991)*.

[25] *United States v. Lawson, 925 F.2d at 1209–10*.

Non-employee agents of the government present a more complex problem. In that situation, the question to be determined is whether at the time of the theft the agent was a bailee of the property or a debtor of the government.[24] For example, in one case the defendant was an auctioneer contracted by the government to sell property repossessed from companies that had defaulted on government loans. Defendant sold the property as agreed, but then failed to turn the proceeds over to the government. The court of appeals noted that with respect to the property prior to the sale, the defendant was a consignee and the government retained ownership of the property. After the sale, however, under state law the sale of consigned property creates a debtor-creditor relationship between consignor and consignee with respect to the proceeds of the sale. As a result, the proceeds of the sale was not property of the United States at the time of the taking.[25]

[26] *United States v. Klingler, 61 F.3d 1234, 1238–41 (6th Cir. 1995)* (customs broker converted checks intended to be paid as customs fees and duties); *United States v. Howard, 30 F.3d 871, 875–76 (7th Cir. 1994)* (government had only security interest in insurance proceeds paid directly to defendant); *United States v. Morris, 541 F.2d 153, 154 (6th Cir. 1976)* (funds of daycare center intended to pay for federal school lunch program); *United States v. Reed, 851 F. Supp. 1296, 1311–12 (W.D. Ark. 1994)*, *aff'd*, *47 F.3d 288 (8th*

Cir. 1995) (attorney converted funds intended by client to pay income taxes).

The situation of an agent of the government must be distinguished from an agent of a third party who is holding money intended to be paid to the government. In that circumstance, the agent who converts the principal's funds to his or her own use does not violate section 641 because the government has no legal interest in the funds prior to delivery by the agent.[26]

[27] *United States v. McKay, 274 F.3d 755, 758–59 (2d Cir. 2001)* (HUD section 8 funds); *see United States v. Hall, 549 F.3d 1033, 1038 (6th Cir. 2008)* (subcontractor to government nuclear facility); *United States v. Kranovich, 401 F.3d 1107, 1113–14 (9th Cir. 2005)* (asset forfeiture funds distributed pursuant to Justice Department equitable sharing program); ***United States v. Lanier, 920 F.2d 887, 896–97 (11th Cir. 1991)*** (SBA small vendor program); *United States v. Reynolds, 919 F.2d 435, 437–38 (7th Cir. 1990)* (HUD community block grant funds); *United States v. Littriello, 866 F.2d 713, 714–15 (4th Cir. 1989)* (federal employee health benefit plan funds); *United States v. Wheadon, 794 F.2d 1277, 1284–85 (8th Cir. 1986)* (HUD grants to construct low-income housing); *United States v. Largo, 775 F.2d 1099, 1101–02 (10th Cir. 1985)* (Bureau of Indian Affairs grants); *United States v. McIntosh, 655 F.2d 80, 84 (5th Cir. 1981)* (FmHA loan funds prior to closing).

[28] *United States v. Hall, 549 F.3d 1033, 1039 (6th Cir. 2008)*; *United States v. Kranovich, 401 F.3d 1107, 1113–14 (9th Cir. 2005)*; *United States v. McKay, 274 F.3d 755, 758–59 (2d Cir. 2001)*.

[29] *United States v. Wheadon, 794 F.2d 1277, 1285 (8th Cir. 1986)* (lack of reversionary interest is evidence that government had no property interest, but it is not decisive of the question).

[30] *United States v. Kristofic, 847 F.2d 1295, 1297–99 (7th Cir. 1988)* (even though SBA loan was made for specific purpose, once funds passed to small business, government had only a creditor relationship); *see also United States v. Crouse, 2009 U.S. Dist. LEXIS 61228 (E.D. Wis. July 17, 2009)* (whether Social Security Administration retained supervision and control of benefits paid to representative payee is question for jury).

The fourth category of property interests, and certainly the most contentious, is when possession of the property has passed to an intermediary but the government retains supervision and control over the property. This arises in the common situation when the federal government sends block grant funds to a state agency or private entity for eventual disbursement to the intended third-party beneficiaries. In that circumstance, the courts are unanimously agreed that the property remains a thing of value of the United States after the

transfer to the intermediary "so long as the government exercises supervision and control over the funds and their ultimate use."[27] Supervision and control requires a comprehensive set of regulations and contractual agreements governing the use and expenditure of the funds by the intermediary,[28] although it is not required that the government have a reversionary interest in the funds.[29] However, once the funds pass to an intended third-party beneficiary who has authority to expend it without federal supervision, it ceases to be property of the United States.[30]

[31] *United States v. Robie, 166 F.3d 444, 452–53 (2d Cir. 1999)* (misprinted stamps stolen from government printing contractor).

[32] *United States v. Hartec Enterprises, Inc., 967 F.2d 130, 133–34 (5th Cir. 1992)* (nonconforming wire mesh screens sold by manufacturer for scrap).

Section 641 also applies to property "made under contract for the United States." Prosecutions involving this provision are rare, and tend to center on the connection between the property and the federal government at the time of the theft. Thus, if the government had substantial supervisory control over the manufacture and handling of the items stolen, then this element has been held to be satisfied.[31] On the other hand, if the government did not have such supervision, then it is likely that this element will not be satisfied even if the government had nominal title under the contract.[32]

[33] *United States v. Hicks, 15 F.4th 814, 816–818 (7th Cir. 2021)*; *United States v. Jeffery, 631 F.3d 669, 675–76 (4th Cir.)*, *cert. denied*, ***565 U.S. 855, 132 S. Ct. 187, 181 L. Ed. 2d 95 (2011)***; *United States v. Rehak, 589 F.3d 965, 974–75 (8th Cir. 2009)*, *cert. denied*, ***559 U.S. 1070 (2010)***; *United States v. Stuart, 22 F.3d 76, 81 (3d Cir. 1994)*; *United States v. Sivils, 960 F.2d 587, 595–96 (6th Cir. 1992)*; *United States v. Baker, 693 F.2d 183, 186 (D.C. Cir. 1982)*; *United States v. Jermendy, 544 F.2d 640, 641 (2d Cir. 1976)*; *United States v. Smith, 489 F.2d 1330, 1332 (7th Cir. 1973)*; *Baker v. United States, 429 F.2d 1278, 1279 (9th Cir. 1970)*.

In *Flores-Figueroa v. United States, 556 U.S. 646, 129 S. Ct. 1886, 1890, 173 L. Ed. 2d 853 (2009)*, the Supreme Court held in an identity fraud case that in the aggravated identity fraud statute, *18 U.S.C. § 1028A*, the term "knowingly" applies to "all the subsequently listed elements of the crime." Every court to consider this issue after the Supreme Court's decision held that it has no application to section 641 based on precedent that the mens rea element of an offense generally does not apply to a jurisdictional

element. *United States v. Jeffery, 631 F.3d 669, 676–78 (4th Cir.)*, *cert. denied*, ***565 U.S. 855, 132 S. Ct. 187, 181 L. Ed. 2d 95 (2011)***; *United States v. Rehak, 589 F.3d 965, 974–75 (8th Cir. 2009)*, *cert. denied*, ***559 U.S. 1070 (2010)***.

The last paragraph of the Instruction correctly states that there is no mens rea requirement to this element so that the government need not prove that the defendant knew that the property belonged to the United States, at least when the defendant is charged with stealing or embezzling.[33] When the defendant is charged with knowing conversion, knowledge that the property belonged to the United States is an element of the offense, so the last paragraph should be omitted in those cases.

[34] *United States v. Collins, 464 F.2d 1163, 1165 (9th Cir. 1972)*.

[35] *United States v. Herrera-Martinez, 525 F.3d 60, 64 (1st Cir. 2008)*; *United States v. Milton, 8 F.3d 39, 44 (D.C. Cir. 1993)*; *United States v. Medrano, 836 F.2d 861, 864 (5th Cir. 1988)*; *United States v. Largo, 775 F.2d 1099, 1101–02 (10th Cir. 1985)*; *United States v. Bailey, 734 F.2d 296, 301–05 (7th Cir. 1984)*; *United States v. Benefield, 721 F.2d 128, 130 (4th Cir. 1983)*.

[36] *United States v. Faust, 850 F.2d 575, 580 (9th Cir. 1988)*.

[37] *See* Ninth Circuit Model Criminal Jury Instruction 8.39.

The instruction does not include language requiring proof that the federal government suffered a loss as a result of the theft. In an early case, the Ninth Circuit stated that proof of loss is an "essential element" of an offense under section 641.[34] At least six other courts of appeals have since rejected that position.[35] Even the Ninth Circuit has retreated, stating more recently that the earlier case stands for the proposition that lack of proof of a loss is evidence that the property was not a "thing of value of the United States."[36] The Ninth Circuit pattern instruction makes no reference to this issue.[37]

Instruction 23A-4 Second Element—Defendant Stole or Embezzled Property[1]

[1] The definition of knowing conversion is adapted from the charge of Judge Legg in *United States v. Maisel*, 12 F.3d 423 (4th Cir. 1993).

The second element the government must prove beyond a reasonable doubt is that the defendant stole (*or* embezzled *or* knowingly converted) that property.

If stealing is charged: **To steal money or property means to take someone else's money or property without the owner's consent with the intent to deprive the owner of the value of that money or property.**

If embezzlement is charged: **To embezzle money or property means to voluntarily and intentionally take or convert to one's own use money or property of another after that money or property lawfully came into the possession of the person taking it by virtue of some office, employment or position of trust.**

If conversion is charged: **To knowingly convert money or property means to use the property in an unauthorized manner in a way that seriously interfered with the government's right to use and control its own property, knowing that the property belonged to the United States, and knowing that such use was unauthorized.**

Authority

United States Supreme Court: *Morrissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 2d 288 (1952)*.

Third Circuit: *United States v. Oliver, 238 F.3d 471 (3d Cir. 2001)*.

Fourth Circuit: *United States v. Maisel, 12 F.3d 423 (4th Cir. 1993)*; *United States v. Fogel, 901 F.2d 23 (4th Cir. 1990)*.

Fifth Circuit: *United States v. Dowl, 619 F.3d 494 (5th Cir. 2010)*; *United States v. Dien Duc Huynh, 246 F.3d 734 (5th Cir. 2001)*.

Eighth Circuit: *United States v. Rehak, 589 F.3d 965 (8th Cir. 2009)*, *cert. denied*, *559 U.S. 1070 (2010)*.

Tenth Circuit: *United States v. Hill, 835 F.2d 759 (10th Cir. 1987)*.

Eleventh Circuit: *United States v. Rainwaters, 2010 U.S. Dist. LEXIS 56811 (S.D. Ala. June 9, 2010)*, *aff'd*, *2011 U.S. App. LEXIS 16990 (11th Cir. Aug. 16, 2011)*.

Comment

[2] *Morrissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 2d 288 (1952)*.

[3] *Morrissette v. United States, 342 U.S. at 271*.

[4] *See United States v. Dowl, 619 F.3d 494, 501 (5th Cir. 2010)*; *United States v. Rehak, 589 F.3d 965, 973–74 (8th Cir. 2009)*, *cert. denied*, ***559 U.S. 1070 (2010)***; *United States v. Aguilar, 967 F.2d 106, 112 (5th Cir. 1992)*; *United States v. Hill, 835 F.2d 759, 763 (10th Cir. 1987)*.

[5] *United States v. Dowl, 619 F.3d 494, 500–02 (5th Cir. 2010)*; *United States v. Rehak, 589 F.3d 965, 973–74 (8th Cir. 2009)*, *cert. denied*, ***559 U.S. 1070 (2010)***; *United States v. Howard, 30 F.3d 871, 875 (7th Cir. 1994)*; *United States v. McRee, 7 F.3d 976, 980 (11th Cir. 1993)*.

[6] *United States v. Oliver, 238 F.3d 471 (3d Cir. 2001)* (defendant was working full time at another job while receiving full disability benefits from his government job); *United States v. Rainwaters, 2010 U.S. Dist. LEXIS 56811 (S.D. Ala. June 9, 2010)*, *aff'd*, *2011 U.S. App. LEXIS 16990 (11th Cir. Aug. 16, 2011)* (defendant failed to disclose her common-law marriage to Social Security Administration because she knew it would terminate her benefits).

[7] *United States v. Aguilar, 967 F.2d 106, 114–15 (5th Cir. 1992)*; *see United States v. Lagrone, 743 F.3d 122, 123 (5th Cir. 2014)* (defendant pleaded guilty to paying for postage stamps with bad checks).

[8] *See* Instructions 24A-6 and 27A-5, *below*.

More than a half century ago, in *Morrissette v. United States*,[2] the Supreme Court stated that "[t]o steal means to take away from one in lawful possession without right with the intention to keep wrongfully."[3] Instruction 23A-4 adopts a standard definition of stealing that is widely accepted.[4] It does not require proof that the defendant intended to permanently deprive the government of the property.[5] Stealing includes obtaining property by misrepresentation.[6] It also includes writing bad checks with no intention to pay.[7] The definition of embezzling is also a standard definition used throughout this Treatise.[8]

In discussing the meaning of stealing and the distinctions between the statutory terms embezzle, steal, purloin and knowingly convert, the *Morrissette* Court

Commented that "[p]robably every stealing is a conversion, but certainly not every knowing conversion is a stealing." The court continued:

> Conversion … may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.[9]

Thus, in modern practice, the courts have tended to apply the knowing conversion provision in cases where defendant lawfully came into possession of the property but afterwards exercised dominion and control over the property knowing that he or she had no right to do so.[10] A common example is a government check mistakenly issued to defendant. In that situation, there is no question that defendant, the named payee, lawfully obtained possession of the check, but cashing the check knowing that he or she had no right to the underlying funds is a conversion.[11] The same is true for cashing social security checks sent to a recipient who has recently died.[12]

Instruction 23A-5 Third Element—Intent

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[9] *Morrissette v. United States, 342 U.S. at 271–72*.

[10] *See United States v. Maisel, 12 F.3d 423, 425 (4th Cir. 1993)*; *United States v. Hill, 835 F.2d 759, 764 (10th Cir. 1987)*; *see also United States v. Scott, 789 F.2d 795, 798 (9th Cir. 1986)* (dictum).

[11] *United States v. Irvin, 67 F.3d 670, 672 (8th Cir. 1995)* (clerical error in paycheck); *United States v. McRee, 7 F.3d 976, 982 (11th Cir. 1993)* (erroneous IRS refund); *see also United States v. Hurt, 527 F.3d 1347, 1350–51 (D.C. Cir. 2008)* (discussing whether requesting replacement check after receiving and depositing original check is conversion or theft).

[12] *United States v. Smith, 373 F.3d 561, 565–68 (4th Cir. 2004)*; *United States v. Spear, 734 F.2d 1, 2 (8th Cir. 1984)*.

The third element the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully with the intent to deprive the government of the use and benefit of its property.

To act knowingly means to act intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness.

To act willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or disregard the law.

Whether the defendant acted knowingly and willfully may be proven by the defendant's conduct and by all of the circumstances surrounding the case.

Authority

United States Supreme Court: *Morrissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 2d 288 (1952)*.

Fourth Circuit: *United States v. Fowler, 932 F.2d 306 (4th Cir. 1991)*.

Fifth Circuit: *United States v. Shackleford, 677 F.2d 422 (5th Cir. 1982)*.

Sixth Circuit: *United States v. McGahee, 257 F.3d 520 (6th Cir. 2001)*.

Seventh Circuit: *United States v. Croft, 750 F.2d 1354 (7th Cir. 1984)*.

Eighth Circuit: *United States v. Ross, 769 F.3d 558 (8th Cir. 2014)*; *United States v. Wilson, 636 F.2d 225 (8th Cir. 1980)*.

Ninth Circuit: *United States v. Scott, 789 F.2d 795 (9th Cir. 1986)*; *United States v. Eden, 659 F.2d 1376 (9th Cir. 1981)*.

Eleventh Circuit: *United States v. Moore, 504 F.3d 1345 (11th Cir. 2007)*; *United States v. McRee, 7 F.3d 976 (11th Cir. 1993)*.

Comment

[1] *342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952)*.

[2] *Morrissette, 342 U.S. at 260–61*.

In *Morrissette v. United States*,[1] the Supreme Court specifically held that despite the lack of mens rea language in the statute, section 641 requires proof of intent.[2] Decided shortly after the end of World War II, *Morrissette* involved a defendant who was charged with a violation of section 641 after he removed spent bomb casings from a former bombing range with the intention of melting the casings down for scrap. At trial, defendant argued that he believed the casings were abandoned, and that he had no intent to deprive the government of its property. The trial court rejected that argument, holding that abandonment of the property is not a defense because the statute does not require an intent to steal. In a decision with wide-ranging implications beyond section 641, the Supreme Court decided otherwise, and reversed defendant's conviction.

[3] *Morrissette, 342 U.S. at 250*.

[4] *Morrissette, 342 U.S. at 260–61*.

Even though the statute contains no stated intent element, the Court rejected the suggestion that the "mere omission from a criminal enactment of any mention of criminal intent [should be interpreted] as dispensing with it."[3] While certain regulatory offenses may dispense with an intent element, "stealing, larceny and its variants and equivalents, were among the earliest offenses known," and courts have always "consistently retained the requirement of intent in larceny-type offenses."[4]

[5] *United States v. Ross, 769 F.3d 558, 562–63 (8th Cir. 2014)*; *United States v. Moore, 504 F.3d 1345 (11th Cir. 2007)* (reversing convictions for lack of evidence on this element); *United States v. Donato-Morales, 382 F.3d 42, 47 (1st Cir. 2004)*; *United States v. McGahee, 257 F.3d 520, 531 (6th Cir. 2001)*; *United States v. Fowler, 932 F.2d 306, 316–17 (4th Cir. 1991)*; *United States v. Scott, 789 F.2d 795, 798 (9th Cir. 1986)*; *United States v. Croft, 750 F.2d 1354, 1362–63 (7th Cir. 1984)*; *United States v. Shackelford, 677 F.2d 422, 425 (5th Cir. 1982)*; *United States v. Wilson, 636 F.2d 225, 228 (8th Cir. 1980)*. *But cf. United States v. Ransom, 642 F.3d 1285, 1289 (10th Cir. 2011)*, *cert. denied*, ***565 U.S. 1115, 132 S. Ct. 1046, 181 L. Ed. 2d 740 (2012)*** (describing scienter element as requiring proof that defendant acted "intentionally").

[6] *Morrissette, 342 U.S. at 271*; *see* *United States v. Shackelford, 677 F.2d 422, 425 (5th Cir. 1982)*; *United States v. Bess, 593 F.2d 749, 752 (6th Cir. 1979)*.

[7] *United States v. Fowler, 932 F.2d 306, 317–18 (4th Cir. 1991)* (approving good faith instruction).

[8] *United States v. Heathershaw, 81 F.3d 765, 768–69 (8th Cir. 1996)*; *United States v. Hill, 835 F.2d 759 (8th Cir. 1996)*.

Following *Morrissette*, it is now universally agreed that the defendant must act knowingly and willfully and with the specific intent to deprive the government of the use and benefit of its property.[5] Because of this requirement, several defenses may arise that tend to negate the necessary specific intent. In addition to abandonment of the property, which the *Morrissette* Court recognized as a potential defense,[6] a defendant would be entitled to an instruction on good faith,[7] or to the related defense that he or she had a claim of right to the property,[8] when the evidence supports such a defense.

Instruction 23A-6 Fourth Element—Value of Property

The fourth and final element the government must prove beyond a reasonable doubt is that the value of the property stolen (*or* embezzled *or* knowingly converted) was greater than $1,000.

The word "value" means face, par or market value, or cost price, either wholesale or retail, whichever is greater. "Market value" means the price a willing buyer would pay a willing seller at the time the property was stolen.

(*If appropriate:* In determining the value of the property stolen, you may consider the aggregate or total value of the property referred to in the Indictment. If you find that the aggregate value is $1,000 or less, then you must find the defendant not guilty. On the other hand, if you find the aggregate value to be greater than $1,000, then this element is satisfied.)

Authority

Second Circuit: *United States v. Robie, 166 F.3d 444 (2d Cir. 1999)*.

Fifth Circuit: *United States v. Medrano, 836 F.2d 861, 864–65 (5th Cir. 1988)*; *United States v. Jeter, 775 F.2d 670, 680 (6th Cir. 1985)*; Fifth Circuit Pattern Criminal Jury Instruction 2.27.

Seventh Circuit: *United States v. Oberhardt, 887 F.2d 790 (7th Cir. 1989)*; *United States v. Watkins, 709 F.2d 475 (7th Cir. 1983)*; Seventh Circuit Pattern Criminal Jury Instruction to *18 U.S.C. § 641* (Definition of Value).

Eighth Circuit: Eighth Circuit Model Criminal Jury Instruction 6.18.641.

Ninth Circuit: *United States v. Ligon, 440 F.3d 1182 (9th Cir. 2006)*; *United States v. Bigelow, 728 F.2d 412, 414 (9th Cir. 1984)*.

Tenth Circuit: *United States v. McPhilomy, 270 F.3d 1302 (10th Cir. 2001)*; *United States v. Alberico, 604 F.2d 1315 (10th Cir. 1979)*; Tenth Circuit Criminal Pattern Jury Instruction 2.31.

Eleventh Circuit: *United States v. Langston, 903 F.2d 1510 (11th Cir. 1990)*; Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 21.

Comment

[1] *18 U.S.C. § 641*.

[2] *See, e.g.*, *United States v. McPhilomy, 270 F.3d 1302, 1311 (10th Cir. 2001)*; *United States v. Robie, 166 F.3d 444, 449 (2d Cir. 1999)*; *United States v. Watkins, 709 F.2d 475, 480 (7th Cir. 1983)*; *see* Fifth Circuit Pattern Criminal Jury Instruction 2.27; Eighth Circuit Model Criminal Jury Instruction 6.18.641; Tenth Circuit Criminal Pattern Jury Instruction 2.31; Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 21.

[3] *See* Seventh Circuit Pattern Criminal Jury Instruction to *18 U.S.C. § 641* (Definition of Value); *see also* *United States v. Brookins, 52 F.3d 615, 619 (7th Cir. 1995)* (approving this language in a case involving *18 U.S.C. § 659*).

The term "value" is specifically defined in section 641 to mean "face, par or market value, or cost price, either wholesale or retail, whichever is greater."[1] Numerous courts have upheld instructions quoting that

definition verbatim.[2] The recommended instruction goes slightly further, including a standard definition of market value as well.[3]

[4] United States v. Alberico, 604 F.2d 1315, 1321–22 (10th Cir. 1979) (face value of checks made out to military post was legitimate measure of value even though defendant could not have obtained that value); *cf.* United States v. Sargent, 504 F.3d 767, 769–71 (9th Cir. 2007) (postal service documents evidencing amount of bulk mail receipts were not "evidence of debt" or negotiable in any way, so they had only negligible value).

[5] United States v. Robie, 166 F.3d 444, 451 (2d Cir. 1999); United States v. Langston, 903 F.2d 1510, 1514 (11th Cir. 1990); United States v. Oberhardt, 887 F.2d 790, 792–93 (7th Cir. 1989); United States v. Jeter, 775 F.2d 670, 680 (6th Cir. 1985); United States v. Bigelow, 728 F.2d 412, 414 (9th Cir. 1984); United States v. Gordon, 638 F.2d 886, 889 (5th Cir. 1981); United States v. Gathright, 2007 U.S. Dist. LEXIS 5229 (E.D. Ark. Jan. 24, 2007).

[6] United States v. McPhilomy, 270 F.3d 1302, 1311 (10th Cir. 2001); United States v. Medrano, 836 F.2d 861, 864–65 (5th Cir. 1988); United States v. Jeter, 775 F.2d 670, 680 (6th Cir. 1985); United States v. Bigelow, 728 F.2d 412, 413–14 (9th Cir. 1984).

[7] United States v. McPhilomy, 270 F.3d 1302, 1311 (10th Cir. 2001); United States v. Oberhardt, 887 F.2d 790, 792–93 (7th Cir. 1989).

[8] United States v. Robie, 166 F.3d 444, 449 (2d Cir. 1999).

[9] *See* United States v. Ligon, 440 F.3d 1182, 1184–86 (9th Cir. 2006). *Ligon* involved the theft of Native American petroglyphs, or rock carvings, from federal land. Even though the government had an expert report placing a value on the carvings, it chose to rely on their "archaeological value," a term borrowed from the Archaeological Resources Protection Act. *See* 16 U.S.C. § 470ee(d). The court held that archeological value, which includes the costs of engaging in an archaeological dig and other scientific expenses, had no place in a section 641 case, particularly when evidence of market value was available, and reversed the theft count. For a jury charge concerning "archaeological value," see Instruction 23A-19, *below*.

The broad definition of value allows the jury to choose among several different methods of valuation, choosing the greatest value among those possibilities. Thus, the face value of the property is always relevant, even when the defendant could not have obtained that amount by selling it.[4] The courts are agreed that the value of the property in a "thieves' market" is an acceptable measure of value.[5] This means that the amount

that defendant received for the property is evidence of its value.[6] This is so even when the commercial value of the property or the price at which the government would have sold the property is lower than the amount received by defendant.[7] Evidence of what the defendant believed he or she could get for the property, usually evidenced by an offering price, is also a legitimate measure of value for the purposes of this element.[8] However, the use of non-economic measures of value seems to be precluded by the language of the statute.[9]

[10] *United States v. Robie, 166 F.3d 444, 451 (2d Cir. 1999)*.

[11] *United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961)*.

Valuation is measured as of the time of the unlawful act committed by defendant. Thus, if defendant is charged with stealing the property, then value is measured at the time of the theft.[10] On the other hand, if defendant is charged with concealing or retaining the property, then value can be measured at any time during defendant's possession.[11]

[12] Identity Theft Penalty Enhancement Act of 2004, ***Pub. L. No. 108-275***, § 4118 Stat. 831 (2004) (effective July 15, 2004); *see United States v. Lagrone, 743 F.3d 122, 124–26 (5th Cir. 2014)* (defendant charged with two counts of stealing less than $1,000 each could be convicted of only one felony count). Even before this amendment of section 641 specifically allowing aggregation, several courts had reached the same result. *See United States v. Smith, 373 F.3d 561, 565–68 (4th Cir. 2004)*; *United States v. Robie, 166 F.3d 444, 449 (2d Cir. 1999)*.

[13] *United States v. Reagan, 596 F.3d 251, 253–54 (5th Cir. 2010)* (indictment charging a separate count for each year in which defendant received monthly checks was not multiplicitous).

Finally, the instruction contains optional language allowing the jury to aggregate the value of stolen items charged in the indictment to reach the $1,000 level.[12] The Fifth Circuit has held that the government may

also divide a series of transactions into chronological groups, aggregating the transactions within the relevant time period to reach the $1,000 amount.[13]

[14] *See* Committee Comment to Seventh Circuit Pattern Criminal Jury Instruction *18 U.S.C. § 641*; Notes on Use to Eighth Circuit Model Criminal Jury Instruction 6.18.641 n.4; Comment to Tenth Circuit Criminal Pattern Jury Instruction 2.31; Eleventh Circuit Pattern Criminal Jury Instructions, Annotations and Comment to Offense Instruction 21; *see also United States v. Jordan, 582 F.3d 1239, 1245 n.15 (11th Cir. 2009)* (as indictment did not charge that value of stolen government records exceeded $1,000, defendants could only be convicted of misdemeanor).

If there is a legitimate question as to whether the value of the stolen property exceeded $1,000, the court should give a lesser included offense instruction allowing the jury to consider whether defendant is guilty of the misdemeanor offense of theft of government property less than $1,000.[14]

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