¶ 46.13Destruction or Alteration of Evidence in Federal Investigation (18 U.S.C. § 1519)

Instruction 46-78 The Indictment and the Statute

The defendant is charged in the indictment with tampering with evidence in a federal investigation. The indictment reads:

[Read Indictment]

The relevant statute on this subject is *18 U.S.C. § 1519*. It provides:

> **Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be [guilty of a crime].**

Comment

[1] ***Pub. L. No. 107-204***, Title XI, § 1102, ***116 Stat. 807*** (2002).

Section 1519 was originally enacted as part of the Sarbanes-Oxley Act[1] passed in the aftermath of the Enron scandal and other similar events. For a complete discussion of the impetus for its passage and its relationship to the other evidence tampering provision, section 1512(c)(1), see Comment to Instruction 46-63, *above*.

[2] *See* United States v. McRae, 702 F.3d 806, 836–38 (5th Cir. 2012); United States v. Moyer, 674 F.3d 192, 211–12 (3d Cir. 2012); United States v. Kernell, 667 F.3d 746, 752–56 (6th Cir. 2012); United States v. Yielding, 657 F.3d 688, 715 (8th Cir. 2011); United States v. Stevens, 771 F. Supp. 2d 556, 562 (D. Md. 2011).

Section 1519 has been the subject of numerous vagueness challenges, although none of these have been successful.[2]

[3] *See* United States v. Moyer, 674 F.3d 192, 205 (3d Cir. 2012); United States v. Sanford, Ltd., 859 F. Supp. 2d 102, 119–20 (D.D.C. 2012); *see also* United States v. Gray, 692 F.3d 514, 520–21 (6th Cir. 2012) (unanimity as to how defendant falsified document is not required).

[4] *See* United States v. Schmeltz, 667 F.3d 685, 688 (6th Cir. 2011) (multiple false statements in one document should be charged as one count); *see also* United States v. Diana Shipping Servs., S.A., 2013 U.S. Dist. LEXIS 170416 (E.D. Va. Dec. 12, 2013) (multiple false entries in one log book made over extended period could be charged separately).

Finally, it is not entirely clear what the unit of prosecution is under this statute. Several courts have held that the government may charge the falsification of multiple documents as a course of conduct in one count,[3] although it would also appear possible to charge each false document separately.[4]

Instruction 46-79 Elements of the Offense

In order to prove the defendant guilty of tampering with evidence in a federal investigation, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant altered (*or* falsified *or* destroyed *or* mutilated *or* concealed *or* covered up *or* made a false entry in) any record, document, or object that can be used to record or preserve information as alleged in the Indictment;

Second, that the defendant acted knowingly; and

Third, that the defendant acted with the intent to impede, obstruct or influence an investigation (*or* a matter) within the jurisdiction of (*or* in relation to *or* in contemplation of) a department or agency of the United States Government.

Authority

United States Supreme Court: *Yates v. United States, 574 U.S. 528, 135 S.Ct. 1074, 191 L. Ed. 2d 64 (2015)*.

Fourth Circuit: *United States v. Hassler, 992 F.3d 243 (4th Cir. 2021)*; *United States v. Powell, 680 F.3d 350 (4th Cir. 2012)*.

Eleventh Circuit: *United States v. Hunt, 526 F.3d 739 (11th Cir. 2008)*.

Comment

Although the courts are agreed that section 1519 requires the proof of five facts, they have not reached agreement on how to formulate the elements for presentation to the jury, and several variations have been adopted. The five critical facts are:

(1) active conduct by the defendant in altering or destroying or falsifying *etc*., something;

(2) the thing altered or destroyed or falsified was a record, document or tangible object;

(3) the defendant acted knowingly;

(4) the defendant acted with intent to impede, obstruct or influence an investigation; and

(5) the investigation was within the jurisdiction of a federal agency or department.

[1] *See* *United States v. Hassler, 992 F.3d 243, 245–247 (4th Cir. 2021)*; *United States v. Powell, 680 F.3d 350, 355–56 (4th Cir. 2012)*; *United States v. Hunt, 526 F.3d 739, 743 (11th Cir. 2008)*.

[2] *See* *United States v. Schmeltz, 667 F.3d 685, 687–88 (6th Cir. 2011)*; *United States v. Yielding, 657 F.3d 688, 710 (8th Cir. 2011)*; *United States v. Nestor, 2011 U.S. Dist. LEXIS 55890 (M.D. Pa. May 25, 2011)*, *aff'd,* *674 F.3d 192 (3d Cir. 2012)*; *see also* Eighth Circuit Criminal Model Jury Instruction 6.18.1519. This model instruction mentions only falsifying. The accompanying Notes on Use cite *United States v. Yielding, 657 F.3d 688, 711 (8th Cir. 2011)*, stating that

liability may arise in three different situations involving matters within the jurisdiction of a federal department or agency: (1)

> when a defendant acts directly with respect to "the investigation or proper administration of any matter," that is, a pending matter, (2) when a defendant acts "in … contemplation of any such matter," and (3) when a defendant acts "in relation to … any such matter."

When a type of violation other than falsifying a document arises, it will be necessary to modify the instruction.

[3] *See* *United States v. Atlantic States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 539 (D.N.J. 2009)*.

The recommended formulation, which has been approved by the Fourth and Eleventh Circuits, joins the first two facts and the last two.[1] The Sixth and Eighth Circuits and at least one district court in the Third Circuit have approved a formulation joining the first three facts to require as one element the knowing alteration of an object.[2] Another district court in the Third Circuit treated each fact as a separate element.[3] The recommended formulation has been chosen here because the last fact is basically a question of law, so need not be treated as a separate element, and out of a general preference for treating the defendant's state of mind separately from the conduct element, but none of the other formulations in use are objectionable.

A challenge that filling out an incident report containing false information is not covered by section 1519, because the incident report has no relationship to any official proceeding and thus the defendant would not have notice that he could face a section 1519 prosecution, will fail. The Second Circuit explained that

[4] *United States v. Cossette, 593 Fed. Appx 28, 31 (2d Cir. 2014)*, *cert. denied,* ***575 U.S. 985, 135 S. Ct. 1906, 191 L. Ed. 2d 766 (2015)***. *See also* *United States v. Hassler, 992 F.3d 243, 247 (4th Cir. 2021)* (knowledge of a federal investigation under § 1519 is a jurisdictional element and therefore the government was not required to prove that defendant knew or contemplated that the investigation he intended to impede was within the jurisdiction of a federal agency).

> "§ 1519 does not require the existence or likelihood of a federal investigation"; thus, "knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime." A defendant can hardly complain that due process requires him to have notice of something that is not an element of the charged crime.[4]

[5] *574 U.S. 528, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015)*.

[6] 191 L. Ed. 2d at 75.

[7] United States v. McRae, 795 F.3d 471, 477–78 (5th Cir. 2015) (noting that "*Yates* plurality specifically call[ed] out [earlier Fifth Circuit] *McRae* decision," at 191 L. Ed. 2d 64, 83 n.8).

In *Yates v. United States*,[5] the Supreme Court held that, for purposes of § 1519, a "tangible object" is an only an object "one can use to record or preserve information. …" It does not include "all objects in the physical world."[6] Thus, burning a car containing a corpse does not fall within § 1519, given that neither the car nor the corpse would either be "used to record or preserve information" or be "similar to records or documents."[7]

The *Yates* holding is mentioned in the Comment to the Ninth Circuit Model Criminal Jury Instruction 8.131A approved in 2018, even though the language of the instruction itself is not as clear. That two-element instruction states:

> The government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant knowingly altered, destroyed, concealed or falsified a record, document or tangible object; and

[8] Ninth Circuit Model Criminal Jury Instruction 8.131A.

> Second, the defendant acted with the intent to impede, obstruct or influence an actual or contemplated investigation of a matter within the jurisdiction of any department or agency of the United States.[8]

Instruction 46-80 First Element—Altering or Destroying Evidence

The first element the government must prove beyond a reasonable doubt is that the defendant altered (*or* falsified *or* destroyed *or* mutilated *or* concealed *or* covered up *or* made a false entry in) any record, document or tangible object as alleged in the Indictment.

Comment

[1] *United States v. Townsend, 630 F.3d 1003, 1014 (11th Cir. 2011)*.

In a section 1512(c)(1) case, the Eleventh Circuit held that the terms used in that statute—alter, destroy, mutilate and conceal—are sufficiently clear that they require no further definition, and specifically upheld a jury charge using the statutory language.[1]

[2] *United States v. Katakis, 800 F.3d 1017 (9th Cir. 2015)*.

[3] *800 F.3d at 1030*.

[4] *800 F.3d at 1029*.

[5] *800 F.3d at 1028–30* (citing Webster's Third New International Dictionary (1993)).

[6] *800 F.3d at 1029*.

[7] *800 F.3d at 1030*.

To the contrary, in *United States v. Katakis*[2] the Ninth Circuit found it necessary to analyze the definition of "conceal" in a case that involved electronic records. As the court explained, section 1519 was drafted to prevent corporate document shredding, and the digital context could expand its reach beyond what was intended.[3] The defendant had moved ten incriminating emails from an inbox to the deleted items folder. The government had argued that "conceal" would cover this situation where a defendant "remove[d] something from its 'ordinary place of storage[,]' making the thing more difficult for a casual onlooker to find."[4] But the Ninth Circuit used the term's plain meaning, since "conceal" is not a term of art and is not ambiguous. The dictionary meaning of "conceal" was "to prevent disclosure or recognition of; avoid revelation of; refrain from revealing recognition of; draw attention from; treat so as to be unnoticed; to place out of sight; withdraw from being observed; shield from vision or notice."[5] "[A]n email placed in the deleted items folder

remains in that folder unless a user [takes] further action,"[6] even though the email is not displayed to the user. As the Ninth Circuit explained, "[t]he first place that any competent investigator would look for emails that are not in the inbox is in the deleted items folder."[7] Therefore, this degree of concealment did not show actual obstruction.

[8] ***Pub. L. No. 107-204***, tit. XI, § 1102, ***116 Stat. 807*** (2002).

[9] *See* *United States v. Hunt, 526 F.3d 739, 743–44 (11th Cir. 2008)*; *United States v. Russell, 639 F. Supp. 2d 226, 237–38 (D. Conn. 2007)*.

[10] *See, e.g.,* *United States v. Yates, 733 F.3d 1059, 1064 (11th Cir. 2013)* (undersize fish caught in violation of federal regulations), *reversed and remanded,* *Yates v. United States, 574 U.S. 528, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015)*; *United States v. Wortman, 488 F.3d 752 (7th Cir. 2007)* (compact disk containing images of child pornography).

[11] *See, e.g.,* *United States v. McQueen, 727 F.3d 1144 (11th Cir. 2013)*; *United States v. McRae, 702 F.3d 806 (5th Cir. 2012)*; *United States v. Moyer, 674 F.3d 192 (3d Cir. 2012)*; *United States v. Schmeltz, 667 F.3d 685 (6th Cir. 2011)*; *United States v. Stallworth, 656 F.3d 721 (7th Cir. 2011)*; *United States v. Gray, 642 F.3d 371 (2d Cir. 2011)*.

[12] *See* *United States v. Stevens, 771 F. Supp. 2d 556, 563–64 (D. Md. 2011)* (district court holds that section 1512(c)(1) applies to defendant, counsel for a large pharmaceutical company who, after being informed that an investigation was underway, wrote several letters to the FDA allegedly containing false information, although the court dismissed the indictment on other grounds).

[13] *United States v. Rowland, 826 F.3d 100 (2d Cir. 2016)* (It was not error to instruct the jury that a defendant can falsify a document by knowingly omitting a material fact.) *cert. denied,* ***580 U.S. —, 137 S. Ct. 1330, 197 L. Ed. 2d 517 (2017)***.

Even though section 1519 was enacted as part of the Sarbanes-Oxley Act[8] to combat white-collar crime, it is not limited to that class of cases.[9] Thus, in addition to cases involving the falsification or destruction of documents in white-collar cases, the statute has been applied to the destruction of evidence in a wide variety of cases.[10] Indeed, many of the early cases under section 1519 involve police or corrections officers falsifying incident reports to conceal excessive force or other misconduct.[11] It should be noted as well that

this provision applies to a document created only for the specific purpose of misleading investigators.[12] "Falsify" does not mean only tampering with a preexisting document; a document can be falsified and thus fall within section 1519 by the knowing omission of a material fact when it is created.[13]

[14] *United States v. Powell, 680 F.3d 350, 356 (4th Cir. 2012)*; *see also* *United States v. Ionia Mgmt., S.A., 555 F.3d 303, 310 (2d Cir. 2009)* (leaving question open because it was not raised at trial and the evidence in question was clearly material in any event).

[15] *United States v. Ortiz, 367 F. Supp. 2d 536, 543 (S.D.N.Y. 2005)*, *aff'd*, *2007 U.S. App. LEXIS 6611 (2d Cir. Mar. 20, 2007)*; *see also* *United States v. Black, 625 F.3d 386, 389 (7th Cir. 2010)* ("[b]eing able to deny the materiality of a document is a common reason for concealment").

The government is not required to prove that the evidence destroyed was material to the proceeding.[14] As one court has stated in a section 1512(c)(1) case, "such a requirement would be contrary to common sense and sound public policy, in that it would reward a defendant for successfully destroying potential evidence."[15]

[16] *United States v. Powell, 680 F.3d 350, 357–58 (4th Cir. 2012)* (trial court properly refused to charge jury that statements were not false as a matter of law).

When the defendant is charged with falsifying a document or making a false entry in a record, literal truth would be a defense as it is with other perjury-like offenses.[16] For a model charge on this defense, see Instruction 48-8, *below*.

Instruction 46-81 Second Element—Knowing Conduct

The second element the government must prove beyond a reasonable doubt is that the defendant acted knowingly.

A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case.

Comment

[1] *See* United States v. Hassler, 992 F.3d 243 (4th Cir. 2021); United States v. McQueen, 727 F.3d 1144, 1151–52 (11th Cir. 2013); United States v. Moyer, 674 F.3d 192, 208–09 (3d Cir. 2012); United States v. Kernell, 667 F.3d 746, 752–56 (6th Cir. 2012); United States v. Gray, 642 F.3d 371, 378 (2d Cir. 2011); *see also* United States v. McCoy, 2014 U.S. Dist. LEXIS 185397 (E.D. Ky. June 30, 2014) (Section 1519 does not require that defendant knew that falsifying record with intent to obstruct federal investigation was unlawful, in keeping with general principle that ignorance of law is no defense.).

As discussed in Instruction 46-82, *below*, this knowledge requirement applies only to the conduct element, that is that defendant knowingly destroyed or altered or falsified the evidence, and does not apply to the fact that the obstructed investigation will turn out to be federal.[1]

[2] *See* Instruction 46-67, *above*.

It should also be noted that the scienter element of section 1519, requiring only knowing conduct, differs substantially from the analogous offense in section 1512(c)(1), which requires that the defendant act "corruptly."[2]

Instruction 46-82 Third Element—Intent To Impede Investigation[1]

The third element the government must prove beyond a reasonable doubt is that the defendant acted with the intent to impede, obstruct or influence an investigation (*or* a matter) within the jurisdiction of (*or* in relation to *or* in contemplation of) a department or agency of the United States Government.

The government is not required to prove that the defendant knew his conduct would obstruct a federal investigation, or that a federal investigation would take place, or that he knew of the limits of federal

[1] Adapted from the charge in *United States v. Fontenot*, 611 F.3d 734 (11th Cir. 2010).

jurisdiction. However, the government is required to prove that the investigation that the defendant intended to impede, obstruct, or influence did, in fact, concern a matter within the jurisdiction of an agency of the United States.

Authority

Second Circuit: *United States v. Gray, 642 F.3d 371 (2d Cir. 2011)*.

Third Circuit: *United States v. Moyer, 674 F.3d 192 (3d Cir. 2012)*.

Fourth Circuit: *United States v. Hassler, 992 F.3d 243 (4th Cir. 2021)*.

Fifth Circuit: *United States v. McRae, 702 F.3d 806 (5th Cir. 2012)*.

Sixth Circuit: *United States v. Kernell, 667 F.3d 746 (6th Cir. 2012)*.

Eleventh Circuit: *United States v. McQueen, 727 F.3d 1144 (11th Cir. 2013)* *United States v. Fontenot, 611 F.3d 734 (11th Cir. 2010)*.

Comment

[2] *See* *United States v. Hassler, 992 F.3d 243, 247 (4th Cir. 2021)*; *United States v. McQueen, 727 F.3d 1144, 1151–52 (11th Cir. 2013)*; *United States v. Moyer, 674 F.3d 192, 208–09 (3d Cir. 2012)*; *United States v. Kernell, 667 F.3d 746, 752–56 (6th Cir. 2012)*; *United States v. Gray, 642 F.3d 371, 378 (2d Cir. 2011)*.

[3] 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (remarks of Sen. Leahy).

One of the more controversial issues arising under section 1519 has been whether the government must prove that the defendant knew that the investigation or matter he or she intended to impede fell within the jurisdiction of federal authorities. The courts now appear to agree that the answer to that question is in the negative; that is, while the "knowingly" requirement applies to the conduct element (alter, destroy, mutilate, etc.), it does not apply to the federal nature of the investigation.[2] This conclusion is supported by the legislative history, as one of the principal drafters of the legislation stated that "[t]he fact that a matter is

within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way limited to the intent of the defendant."[3]

[4] *611 F.3d 734 (11th Cir. 2010)*.

[5] *702 F.3d 806 (5th Cir. 2012)*.

[6] *McRae, 702 F.3d at 834–36*; *Fontenot, 611 F.3d at 736–38*.

The paragraph of the charge addressing this issue was first used by the district court in *United States v. Fontenot,*[4] and later repeated almost verbatim by the district court in *United States v. McRae.*[5] In both cases, the court held that giving this charge was not plain error, as it had not been challenged below, although both courts indicated that the law was not settled on this point as of yet.[6] As the courts now appear to have reached a consensus on this point, the instruction incorporates the language of those charges.

[7] *United States v. Gray, 642 F.3d 371, 379 (2d Cir. 2011)*; *United States v. Lanham, 617 F.3d 873, 887 (6th Cir. 2010)*.

[8] *544 U.S. 696, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005)*.

[9] *See United States v. Moyer, 674 F.3d 192, 209–10 (3d Cir. 2012)*; *United States v. Kernell, 667 F.3d 746, 754–55 (6th Cir. 2012)*; *United States v. Yielding, 657 F.3d 688, 712–13 (8th Cir. 2011)*; *United States v. Gray, 642 F.3d 371, 376–77 (2d Cir. 2011)*.

The investigation need not have been in existence at the time of the defendant's obstructive conduct, as section 1519 specifically refers to acting in "contemplation of any such matter or case."[7] However, the court should be careful not to use the foreseeability language in the charges involving an official proceeding required by the Supreme Court's decision in *Arthur Andersen LLP v. United States,*[8] The courts have agreed that the nexus requirement established in that case—that the particular federal official proceeding was foreseeable—does not apply to section 1519, which omits the term "official proceeding" in favor of broader language.[9]

[10] *568 F.3d 1335 (11th Cir. 2009)*.

[11] *Id. at 1343*.

Although a grand jury would not appear to fall within the statutory term "any department or agency of the United States," there is authority that an obstructive act committed with intent to impede a grand jury investigation can be brought under section 1519. In *United States v. Hoffman-Vaile*,[10] the court held that since the investigation in question originated in the Department of Health and Human Services, which forwarded it to the Justice Department for criminal investigation, it remained a "matter within the jurisdiction" of both those departments even after the grand jury took up the matter, and so met the statutory language.[11]

[12] *United States v. Pedraza, 636 Fed. Appx 229, 233–34 (5th Cir. 2016)* (The defendant, Special Agent-in-Charge in an office of the U.S. Department of Homeland Security's Office of Inspector General, learned that his office would undergo an internal OIG inspection and which files the inspectors would review. He told several of his agents to falsify investigative reports to fill gaps in the records of inactive cases.).

Similarly, *18 U.S.C. § 1519* applies to attempts to impede the internal policies and processes of an agency, such as an internal Department of Homeland Security inspection.[12]

[13] *United States v. Stevens, 771 F. Supp. 2d 556, 563–64 (D. Md. 2011)* (dismissing indictment because prosecutor misled grand jury as to advice-of-counsel defense, and quoting Instruction 8-4, *above*, concerning the elements of the defense).

Finally, since section 1519 requires proof of specific intent to impede an investigation, the defense of advice of counsel would tend to negate that intent so the defendant would be entitled to offer evidence supporting the defense.[13]

The Ninth Circuit's instruction on section 1519 includes an optional paragraph to be used if the evidence shows that the defendant may have had more than one intention when engaging in the conduct at issue. It states:

[14] Ninth Circuit Model Criminal Jury Instruction 8.131A (approved 2018); *see* *United States v. Smith, 831 F.3d 1207, 1218 (9th Cir. 2016)*.

The government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial.[14]

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