January
2012
Volume 60
Number 1

United States
Department of Justice
Executive Office for
United States Attorneys
Washington, DC
20530

H. Marshall Jarrett
Director

The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0.22(b).

The United States Attorneys' Bulletin is published bimonthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201.

Managing Editor
Jim Donovan

Law Clerk
Carmel Matin

Internet Address
www.usdoj.gov/usao/reading_room/foiamanuals.html

Send article submissions and address changes to Managing Editor,
United States Attorneys' Bulletin,
National Advocacy Center,
Office of Legal Education,
1620 Pendleton Street,
Columbia, SC 29201.

Violent Crimes

In This Issue

Making a Federal Case out of a Death Investigation

C.J. Williams
Assistant United States Attorney
Senior Litigation Counsel
Northern District of Iowa

I. Introduction

How do you respond, as an Assistant United States Attorney, when an agent walks into your office and says, "I've got an investigation involving a death. Can that be a federal offense?" What establishes federal jurisdiction over a death case? After all, "[m]urder . . . is a quintessential example of a crime traditionally considered within the States' fundamental police powers." *United States v. Drury*, 344 F.3d 1089, 1101 (11th Cir. 2003). Must the death be a "murder" to constitute a federal offense? What evidentiary issues arise in these cases? What are the sentencing implications? This article is intended to provide answers to some of these questions. It is designed to arm you with some basic information so when that agent enters your office with a case involving a death, you will at least have a working knowledge of the subject matter sufficient to identify the issues and begin to determine whether you can, and should, accept the case for prosecution.

II. Defining murder

Under federal law, "[m]urder is the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a) (2010). A person is guilty of first degree murder if it was "perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing" or while committing or attempting to commit "any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse . . . child abuse, burglary, or robbery" or "as part of a pattern or practice of assault or torture against a child or children . . . ." *Id.* "Any other murder is murder in the second degree." *Id.* In contrast, "[m]anslaughter is the unlawful killing of a human being without malice" and includes both voluntary manslaughter (killing "[u]pon a sudden quarrel or heat of passion") and involuntary manslaughter (killing while committing a non-felonious offense or killing "without due caution and circumspection"). 18 U.S.C. § 1112(a) (2010). Section 1111 "was intended to adopt the felony murder rule, and for a stated felony the 'malice' element is satisfied by the intent to commit the unlawful felony." *United States v. Shea*, 211 F.3d 658, 674 (1st Cir. 2000).

Federal statutes that make it a crime to commit a murder reference the definition of murder in § 1111. Prosecutors should be aware, however, that many statutes provide for enhanced penalties where "death results" from an offense, even if the defendant's conduct would not necessarily meet the definition of murder or manslaughter. For example, Title 21 contains enhanced penalties where a defendant's distribution of a controlled substance results in death, so long as the controlled substance contributed to the death, regardless of the defendant's intent and without a showing the defendant acted with a lack of caution. *See, e.g.*, *United States v. Ragland*, 555 F.3d 706, 715 (8th Cir. 2009) (affirming defendant's 20-year sentence for distributing heroin resulting in death of a user without any showing the defendant intended to kill or even knew that death could result, and without any showing of negligence or lack of caution).

III. Federal criminal statutes referencing murder or death

Congress has enacted at least 60 criminal statutes where "causing the death of another" can be an element of the offense. These statutes range from the obvious, such as making it a crime to murder the president (18 U.S.C. § 1751), to the obscure, such as making it a crime to kill a poultry inspector (21 U.S.C. § 461(c)). Their origins stretch back to the birth of the federal government. Congress was granted the authority to define and punish piracy in Article I, § 8 of the Constitution. It used that authority when it enacted a statute that made the crime of murder on the high seas (18 U.S.C. § 1652) punishable by death.

Federal statutes punishing murder or criminal conduct "resulting in death" are scattered throughout the United States Code, appearing in Titles 7, 8, 18, 21, 42, and 49. This can make it difficult for a prosecutor to determine whether a case involving a death may give rise to federal prosecution.

IV. Federal jurisdiction over murders or "resulting in death" offenses

Although not organized in this manner within the United States Code, federal murder statutes can be separated into three general categories to facilitate a prosecutor's ability to determine whether federal jurisdiction exists over a death. First are statutes where federal jurisdiction turns on the nature of a defendant or victim. A second category includes statutes where federal jurisdiction is premised on the location of the murder or death. Finally, killings that occur while a defendant is engaged in another federal offense make up the last category.

A. Federal jurisdiction based on the identity of the victim or murderer

It is a federal offense to kill certain people because of a person's position. These include

- The President or Vice President of the United States, or members of their staffs (18 U.S.C. § 1751)
- A high government official (member of Congress, cabinet member, major presidential or vice-presidential candidate, etc.) (18 U.S.C. § 351)
- A "foreign official, official guest, or internationally protected person" (18 U.S.C. § 1116)

Other murders become federal offenses only when a victim is killed while engaged in, or because of, his or her official duties. These include

- Federal employees (including members of the armed services) (18 U.S.C. § 1114)
- Federal law enforcement or correctional officers, and state or local law enforcement or correctional officers if they are working with federal agents in furtherance of a federal investigation (18 U.S.C. § 1121)
- A federal court officer or juror (18 U.S.C. § 1503)
- A federal poultry inspector (21 U.S.C. § 461(c))
- A federal meat inspector (21 U.S.C. § 675)
- A federal egg inspector (21 U.S.C. § 1041)
- A federal nuclear inspector (42 U.S.C. § 2283)

- Employees of the Equal Employment Opportunity Commission (42 U.S.C. § 2000e-13)

Killing a federal witness, victim, or informant is also a federal offense, punishable under 18 U.S.C. §§ 1512 and 1513. If a murderer is a federal prisoner (18 U.S.C. § 1118), an escaped federal prisoner (18 U.S.C. § 1120), or an American pirate (18 U.S.C. § 1652), federal jurisdiction over the murder also arises.

B. Location as a basis for federal jurisdiction

Murder in a federal facility is a violation of 18 U.S.C. § 930. If a person dies because of a captain's or employee's misconduct or negligence while the victim was on a ship, it is a federal offense. 18 U.S.C. § 1115 (2010). Killings within Indian Country (18 U.S.C. §§ 1153, 3242) and on federal land (18 U.S.C. § 1111(b)) constitute federal offenses. If an American citizen murders another American citizen outside of the United States, but within the jurisdiction of another country, that murder may be prosecuted as a federal offense. 18 U.S.C. § 1119 (2010). Finally, if a defendant uses interstate commerce facilities or causes another to travel in interstate commerce in order to kill the other person (the murder-for-hire statute), it becomes a federal offense. 18 U.S.C. § 1958 (2010).

C. Killings while a killer/defendant engaged in another federal offense

There are many statutes which provide that if a person is killed while the killer/defendant is committing another federal felony offense, federal jurisdiction exists over the murder itself. The federal government has jurisdiction over killings that occur during

- The transportation of illegal aliens (8 U.S.C. § 1324)
- The destruction of aircraft or motor vehicles (18 U.S.C. §§ 32-34)
- A drive-by shooting (18 U.S.C. § 36)
- A violent act at an international airport (18 U.S.C. § 37)
- An arson or unlawful handling of an explosive (18 U.S.C. § 844)
- A crime of violence or drug offense involving a firearm (18 U.S.C. § 924(j))
- An attack on a federal facility using a firearm (18 U.S.C. § 930)
- A kidnaping (18 U.S.C. § 1201)
- The mailing of injurious articles (18 U.S.C. § 1716)
- A racketeering offense (18 U.S.C. § 1959)
- A terrorist attack (18 U.S.C. §§ 1992, 2332)
- A train robbery (18 U.S.C. § 1991)
- A bank robbery (18 U.S.C. § 2113)
- A robbery of controlled substances (18 U.S.C. § 2118)
- A carjacking (18 U.S.C. § 2119)
- Abusive sexual conduct (18 U.S.C. §§ 2244, 2245)
- Certain child exploitation crimes (18 U.S.C. § 2251(d))

- A crime of torture (18 U.S.C. § 2340A)
- A war crime (18 U.S.C. § 2441)
- A drug trafficking offense (21 U.S.C. § 848(e)), and
- The piracy of an aircraft (49 U.S.C. § 46502)

Several statutes create federal jurisdiction when deaths occur in maritime settings. Thus, federal jurisdiction exists over deaths occurring as a result of violent acts against maritime navigation (18 U.S.C. § 2280) or maritime fixed platforms (18 U.S.C. § 2281); or as a result of placing a destructive device in waters of the United States (18 U.S.C. § 2282A), unlawfully transporting aboard a vessel explosive, biological, chemical, radioactive, or nuclear materials (18 U.S.C. § 2283), or destroying a vessel or maritime facility (18 U.S.C. § 2291).

A number of statutes also provide the federal government with jurisdiction over killings that implicate civil rights. If two or more people conspire to "injure, oppress, threaten, or intimidate any person" to prevent, or because, the person exercised their Constitutional rights and death results, it becomes a federal offense. 18 U.S.C. § 241 (2010). Causing the death of another in the course of (1) depriving the person of his or her civil rights under color of law (18 U.S.C. § 242) or (2) damaging any "religious real property" for racial motives (18 U.S.C. § 247(c)), can also give rise to federal jurisdiction. Similarly, it is a federal offense if a person is killed because he or she is engaged in a federally protected or sponsored activity. 18 U.S.C. § 245 (2010). Section 245 incidently, is one of the statutes charged in connection with the January 2011 killings during the assassination attempt on Congresswoman Gabrielle Giffords.

Finally, killing an unborn child while engaging in any number of specified federal offenses can result in a charge under 18 U.S.C. § 1841.

V. Issues in federal murder cases

Facts giving rise to federal jurisdiction in murder cases are often the focus of litigation in federal murder cases. For example, in the prosecution of murders committed in furtherance of a Continuing Criminal Enterprise or in aid of a racketeering enterprise, defendants often challenge the evidence establishing the existence of the enterprise rather than the facts surrounding the actual murders. Success in defeating the basis for federal jurisdiction is often easier for defendants than challenging the murder evidence itself. This section discusses some of the most commonly used federal murder statutes and some of the issues that have arisen in cases.

A. Murder-for-hire

The murder-for-hire statute makes it illegal: 1) to travel or use facilities in interstate or foreign commerce; 2) with the intent that a murder in violation of federal or state law be committed; 3) "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value . . . ." 18 U.S.C. § 1958 (2010). Federal jurisdiction rests upon the travel or use of facilities in interstate commerce, which includes the use of the United States Mail (even if the mailing is intrastate). When the government uses informants in these investigations, it often gives rise to claims of entrapment. For example, in *United States v. Mandel*, 647 F.3d 710 (7th Cir. 2011), the defendant used facilities in interstate commerce, his cell phone, multiple times to arrange the murder of his business partner. The defendant appealed his conviction, claiming "he was entrapped into discussing the murder on a cell phone [because it was the informant who called him], so as to manufacture federal jurisdiction

over an otherwise local offense, and that his purely intrastate use of an automobile [did] not constitute the use of a facility of interstate commerce." *Id.* at 712. The court rejected the defendant's challenge, finding the government "merely presented [the defendant] with the opportunity to use his own cell phone to plan the murder . . . ." *Id.* at 720. The court further held that the defendant's driving on roads used in interstate commerce, even when the travel occurred intrastate, was sufficient to establish jurisdiction under § 1958. *Id.* at 721.

"The intent element of § 1958 relates to murder; it does not relate to interstate activity. The interstate travel merely triggers federal jurisdiction. A defendant need not intend to travel across state lines to commit murder-for-hire; instead, a defendant need only intend to commit a murder-for-hire and, in doing so, travel across state lines." *Bertoldo v. United States*, 145 F. Supp. 2d 111, 115 (D. Mass. 2001) (internal citation omitted). The defendant must have a murderous intent at the time he caused another person to travel across state lines. In *United States v. Driggers*, 559 F.3d 1021 (9th Cir. 2009), the defendant caused a man to travel from California to Idaho on two occasions to discuss having the man kill the defendant's ex-wife. The Ninth Circuit found the jury instructions were erroneous because they did not require the jury to find that the defendant caused the travel with the intent kill; however, the error was held to be harmless.

Anything of pecuniary value, even the payment of minor expenses, meets the third element. For example, in *United States v. Acierno*, 579 F.3d 694 (6th Cir. 2009), the defendant plotted to have a purported "hitman" murder her estranged husband and paid the "hitman" $100 to cover his expenses. The court found that paying $100 for expenses constituted a "quid pro quo" between the parties for something of pecuniary value.

B. Murder during a kidnapping

Prosecutions involving deaths during a kidnapping have raised some unique issues regarding the timing and location of the murder in relation to the kidnapping. For example, in *United States v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009), the victim was kidnapped from a mall parking lot in South Dakota and her body was later found in a ditch in Minnesota. Where she was killed was never clear, but the defendant was prosecuted in South Dakota for a kidnapping resulting in death. The court affirmed the venue, holding "[w]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *Id.* at 784 (internal citation omitted). Similarly, in *United States v. Montgomery*, 635 F.3d 1074 (8th Cir. 2011), the defendant murdered a pregnant woman, cut the fetus from her stomach, and kidnapped the live baby taking it across state lines. The defendant appealed her conviction, arguing the victim died before she removed the baby from the womb and therefore the death could not have resulted from the kidnapping which chronologically occurred after the murder. The Eighth Circuit Court of Appeals affirmed the conviction, "conclud[ing] that a death may precede the completion of the crime of kidnapping, but nonetheless result from the kidnapping." *Id.* at 1087.

C. Murder on federal land

When a prosecution for a killing occurs "within the special maritime and territorial jurisdiction of the United States," whether the government can exercise that jurisdiction turns on an esoteric statute pertaining to the federal government's acquisition of real property. It is presumed that the United States has subject matter jurisdiction over crimes occurring on land it acquired prior to 1940. *See, e.g.*, *Hankins v. Delo*, 977 F.2d 396, 398 (8th Cir. 1992). In 1940, however, Congress enacted a statute, 40 U.S.C. § 255, that provides that the federal government must give notice to a state that it is asserting law

enforcement jurisdiction over land it has acquired in the state. Thus, in *United States v. Gabrion*, 517 F.3d 839, 856-57 (6th Cir. 2008), when a defendant murdered a woman in the Manistee National Forest in Michigan, the court found that the federal government could prosecute the murder without having provided notice to the state that it was exercising law enforcement jurisdiction because the federal government acquired the land in 1938.

D. Murdering a federal witness

Title 18, United States Code, § 1512(a)(1)(C) makes it a federal offense "to kill another person, with intent to . . . prevent the communication by any person to a [Federal] law enforcement officer" of "information relating to the . . . possible commission of a Federal offense . . . ." In *Fowler v. United States*, 131 S. Ct. 2045 (2011), the defendant shot a police officer who had come upon him and his associates when they were planning a bank robbery. The defendant appealed his conviction, arguing the government failed to prove he killed the officer to prevent him from communicating with a federal officer, arguing that bank robbery also constitutes a state offense. The Eleventh Circuit Court of Appeals affirmed the conviction, finding a showing of a possible or potential communication to federal authorities was sufficient. The Supreme Court reversed the conviction, however, holding that the government must show there was a reasonable likelihood that a relevant communication would have been made to a federal officer. The government need not show this by proof beyond a reasonable doubt or even by a preponderance of the evidence, but it must show that the likelihood of communication to a federal officer was more than remote, outlandish, or hypothetical. *Id.* at 2050.

E. Murder by Native Americans

Title 18, United States Code, Section 1152 provides that the "general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." However, there are exceptions to this jurisdiction. It does not apply to offenses committed by one Indian against another or when the defendant has already been punished for the act by the local or tribal governments. These exceptions do not apply to 18 U.S.C. § 1153, which make it a federal offense when an Indian commits murder (among other offenses) within Indian country. The government must, however, allege in the indictment and prove beyond a reasonable doubt the status of the defendant as an Indian. For example, *United States v. Graham*, 572 F.3d 954 (8th Cir. 2009), involved the prosecution of a 1975 murder by leaders of the American Indian Movement of a woman they suspected was an FBI informant. The government charged Graham with murder under 18 U.S.C. § 1153. The *Graham* court affirmed the district court's dismissal of the indictment because the government did not allege the Indian status of the defendant, which is an essential element of the offense. *Id.* at 956.

F. Murder in furtherance of a drug offense

For the federal government to exercise jurisdiction over a drug-trafficking related murder, it must show the murder was committed while the defendant(s) were "engaging in" a federal drug offense. 21 U.S.C. § 848(e)(1)(A) (2010). Courts require a "substantive connection" between the defendant's drug activities and the murder. This does not necessarily mean the government must prove that the motive for the murder was to further the drug trafficking offense. For example, in *United States v. Aguilar*, 585 F.3d 652 (2d Cir. 2009), the defendant killed his girlfriend's former boyfriend for two reasons: because the victim used to beat the girlfriend and to eliminate the victim as a romantic rival. The defendant talked other drug dealers into helping with the murder, promising them increased drug quantities in future deliveries or the forgiveness of drug debts. The court affirmed the defendant's conviction, holding that

"[w]hile a 'substantive connection' between an intentional killing and a qualifying narcotics conspiracy is sufficiently proved if one motive for the killing was related to the drug enterprise or conspiracy, we see no reason why it is not also proved by evidence that the defendant used qualified drug dealings to procure the murder." *Id.* at 661.

G. Killing during a carjacking

The elements of a carjacking resulting in death, 18 U.S.C. § 2119, are 1) the taking or attempted taking from the person of another; 2) a motor vehicle transported in interstate commerce; 3) through the use of force, violence, or intimidation; 4) with the intent to cause death or serious bodily injury; 5) that results in death. Defendants often challenge federal jurisdiction over these murders by disputing the first and fourth elements. To satisfy the first element, there must be proximity between the victim and the car, and the victim must retain some ability to control or gain access to the car. The government need not, however, prove that the victim was inside the car. *United States v. Savarese*, 385 F.3d 15, 20 (1st Cir. 2004). The fourth element requires intent to cause death or serious bodily injury, and in that sense this is not a felony murder analog. *United States v. Matos-Quinones*, 456 F.3d 14, 17 (1st Cir. 2006). In other words, it is not sufficient that someone is killed in the process of a carjacking when the intent is only to carjack. Rather, the government must prove that, at the moment the defendant demanded or took control of the car, the defendant possessed the intent to kill or cause serious bodily injury. The government need not prove the defendant killed in order to steal the car. *Holloway v. United States*, 526 U.S. 1 (1999) ("The intent requirement of Section 2119 is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car)."). *Id.* at 12.

VI. Punishment issues

When death results from the commission of a federal offense, it increases the statutory maximum sentence, sometimes exposing the defendant to capital punishment. Of course, any fact having the effect of increasing a statutory maximum sentence must be alleged in the indictment and proved to the jury beyond a reasonable doubt. In non-capital cases, what it means for a death to "result from" an offense may differ depending on the statutory language. There is a presumption that the government must prove the underlying illegal conduct was the proximate cause of the death. This presumption can be rebutted. In drug cases resulting in death, for example, it is sufficient for the controlled substance simply to have been a contributing factor in the death even if other legal or illegal drugs or other health problems contributed to the death.

Of the federal statutes covering murder or causing death offenses, 47 of them provide for capital punishment. It is beyond the scope of this article to examine at length the labyrinth of the capital statutes, procedures, and case law. A short discussion of the Department's protocol process, however, is merited. The Department's death penalty protocol process is set forth at the United States Attorneys' Manual, Sections 9-10.010 to 9-10.190. It designates the review and death penalty decision-making process for all potential federal capital cases. The protocol requires each United States Attorney to make a submission to the Criminal Division in every case in which a death penalty-eligible offense has been or could be charged against a defendant. USAM § 9-10.010. The Attorney General of the United States makes the final decision whether the Department will seek the death penalty in every federal death penalty-eligible case. USAM § 9-10.040.

The protocol process is designed to provide a framework for consistent and evenhanded application of the death penalty decision-making process. The decision whether to seek the death penalty in each case is based on the facts and law. Arbitrary or impermissible factors, such as a defendant's race, ethnic origin, or religion, do not inform any stage of the decision-making process. The protocol does not confer substantive or procedural rights on defendants. Therefore, courts lack the authority to grant relief on a claim the defendant was denied a meaningful opportunity to appear before the Review Committee. *See United States v. Lopez-Matias*, 522 F.3d 150, 155-56 (1st Cir. 2008).

In order to ensure the appropriately careful review demanded in potential capital cases, the protocol process can take some time. The United States Attorneys' Manual requires that the United States Attorney's office make its submission at least 90 days before any court-imposed deadline for giving notice of the intent to seek the death penalty and at least 150 days before trial. USAM § 9-10.080. The protocol was changed in July of 2011 such that it now provides that United States Attorneys' offices are strongly encouraged, "absent extenuating circumstances," to make submissions before indictment in cases where the United States Attorney intends to request authorization not to seek the death penalty. USAM § 9-10.050. In those case, if a pre-indictment decision not to seek the death penalty can be made, it has enormous practical benefits for everyone, including speeding up the process, negating the need to investigate potential aggravating and mitigating factors, and avoiding the costs resulting from the appointment of death penalty qualified defense counsel, mitigation specialists, and a whole host of other professionals to aid the defense.

The Criminal Division's Capital Case Unit (CCU) staffs each case and is available to assist federal prosecutors in complying with the protocol process. The mission of the CCU has also recently expanded to provide direct litigation support on death penalty cases, and CCU attorneys are currently serving as lead or associate counsel on a number of capital cases across the country. For guidance on the protocol process or with regard to litigation of potential death penalty cases, prosecutors are encouraged to contact the CCU. The CCU Chief, Kevin Carwile, can be reached at (202) 514-3705, or by email at Kevin.Carwile@usdoj.gov, and the Deputy Chief, Charlie Kinsey, can be reached at (202) 353-9721, or by email at Gwynn-Charlie.Kinsey@usdoj.gov.

VII. Conclusion

Although murder is the quintessential violent crime traditionally prosecuted by local authorities, Congress has expanded federal jurisdiction to cover some murders and other crimes resulting in death. Of course, proving the murder or death is essential in such prosecutions, but the initial question for a federal prosecutor, and the issue most strenuously litigated by defendants, is the jurisdictional nexus giving rise to the exercise of federal power. Hopefully this article gives federal prosecutors a starting point for responding to the agent who presents a case involving a death.❖

ABOUT THE AUTHOR

❑**C.J. Williams** is the Senior Litigation Counsel for the United States Attorney's Office for the Northern District of Iowa. AUSA Williams has successfully prosecuted two federal death penalty cases. AUSA Williams is currently serving a detail with the Department of Justice's Capital Case Unit and serves on the Attorney General's Capital Case Review Committee.✠

Murder-for-Hire

Jeff Breinholt
Counsel for Law and Policy
National Security Division
Department of Justice

I. Introduction

In the last several months, the U.S. Courts of Appeal have affirmed several murder-for-hire convictions under 18 U.S.C. § 1958. For example, in *United States v. Draven*, 2011 WL 933713, at *2 (4th Cir. Mar. 18, 2011), the Fourth Circuit upheld the conviction of Michael Anthony Draven, who hired a hitman to kill his girlfriend's husband. On the night of the murder, Dravin was in telephone contact with the hitman and drove to an area close to where the murder occurred. After the murder, he shared in his girlfriend's financial reward received by virtue of a death benefit. The First Circuit in *United States v. Bunchan*, 626 F.3d 29, 35 (1st Cir. 2010), affirmed the conviction of James Bunchan, a Massachusetts inmate. Bunchan plotted to kill a witness who was scheduled to testify against him in a fraud case. He enlisted the help of a fellow inmate who secretly went to the authorities and disclosed Bunchan's plan. Buchan ultimately sent the would-be hitman a list of twelve people he wanted to see killed, including their location, relative priority, and how much he was willing to pay for their deaths. One of them was the federal prosecutor in the fraud case.

These two cases exemplify the most quintessential factual scenarios in murder-for-hire jurisprudence since 2000. These cases involve love triangles and threats against law enforcement and witnesses. This article describes the § 1958 jurisprudence from the last decade, where it has been treated by every one of the 13 judicial circuits. While the Second and the Eleventh Circuits have been the most active, a complete listing of the modern murder-for-hire appellate case, by circuit, is appended to the end of this article.

II. The statute

The federal murder-for-hire statute proscribes a very limited category of behavior. It proscribes only those instances where one party agrees to commit a murder in exchange for another party's provision (or future promise) of payment. These scenarios are punishable under § 1958. *See United States v. Washington*, 318 F.3d 845, 854 (8th Cir. 2003) ("The consideration requirement of [§ 1958] has been interpreted in the traditional sense of a bargained-for exchange."); *United States v. Hernandez*, 141 F.3d 1042, 1057 (11th Cir. 1998) (noting that the language of § 1958 "undeniably contemplates a quid-pro-quo (or at least the promise of such) between the parties to the transaction, the murderer and the solicitor"). Moreover, the reach of § 1958 is further limited by the requirement that this payment take the form of "anything of pecuniary value," defined as "anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage[.]" 18 U.S.C. § 1958(b)(1) (2010); *United States v. Frampton*, 382 F.3d 213, 218 (2d Cir. 2004).

Section 1958 was originally enacted as part of the Interstate Travel in Aid of Racketeering Statute (Travel Act), codified at 18 U.S.C. § 1952. The Travel Act, in its original form, established federal jurisdiction over organized crime and racketeering offenses that have a nexus with interstate commerce but did not specifically include murder-for-hire within its scope.

The original Travel Act, titled "Interstate and foreign travel or transportation in aid of racketeering offenses," established penalties for anyone who "travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to: (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity." 18 U.S.C. § 1952(a) (1961). The statute provided that "[a]s used in this section 'unlawful activity' means: (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States; or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States." *Id.* § 1952(b).

In 1984, as part of the Comprehensive Crime Control Act, Pub L. No. 98-473, 98 Stat. 1976 (1984), Congress amended the Travel Act to include the offense of murder-for-hire. At that time, Congress added § 1952A to the statute, the language of which was nearly identical to that of the current § 1958.

Several years later, as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), Congress removed § 1952A from the Travel Act, reenacting it in virtually identical terms as a separate statute, 18 U.S.C. § 1958. Since 1988, Congress has made several slight modifications to § 1958, but the statute is substantively the same as the one Congress originally appended to the Travel Act in 1984 and recast in 1988 as § 1958. The foregoing description of the statute's history comes from *United States v. Drury*, 396 F.3d 1303, 1309 (11th Cir. 2005).

Section 1958, titled, "Use of interstate commerce facilities in the commission of murder-for-hire," currently provides:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.
>
> (b) As used in this section and section 1959–
>
> (1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;
>
> (2) "facility of interstate or foreign commerce" includes means of transportation and communication; and
>
> (3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

III. Defenses

A. Lack of federal jurisdiction

The most common defense in modern § 1958 cases involves contesting whether the defendant's conduct affected interstate or foreign commerce, an element necessary for the defendants' conduct to be subject to federal jurisdiction.

United States v. Cisneros, 456 F. Supp. 2d 826 (S.D. Tex. 2006), involved a mother who sought to have her daughter's ex-boyfriend, Joey Fischer, killed. For the task, she hired a hitman from Mexico, with whom her conspirators communicated by telephone. Fischer was ultimately killed at his home in Texas. Cisneros was convicted under § 1958; she argued, however, that her conduct was insufficiently foreign or interstate. In a companion case, Louise Marek pleaded guilty to hiring an undercover FBI agent to murder her boyfriend's lover. She was arrested after using Western Union to wire transfer $500 from Houston to the ostensible hitman in Harlingen, Texas. The court found that Western Union was an interstate facility, though Marek's only wire communication was intrastate. The Fifth Circuit consolidated the cases and, in an en banc ruling, affirmed both convictions, finding that even an intrastate use of a facility of interstate commerce suffices for purpose of 1958 jurisdiction. *United States v. Marek*, 238 F.3d 310 (5th Cir. 2001); *see Cisneros*, 456 F. Supp. 2d at 842.

A slightly different view comes from the case of Dr. Carl M. Drury, Jr., who discussed having his wife killed with an ATF agent. The agent brought the plot to the attention of his supervisors who agreed he should play along. The result was a series of taped cell phone calls—all within Georgia—between Drury and the ATF agent in which Drury told him to go ahead with the murder. Drury appealed his § 1958 conviction on jurisdictional grounds. The Eleventh Circuit affirmed, finding that: (1) evidence that Drury's calls were routed through out-of-state switching center by cell phone service provider was sufficient to satisfy the jurisdictional element of the federal murder-for-hire statute; and (2) any error by the district court in instructing the jury that telephones were per se facilities in interstate commerce was harmless. *United States v. Drury*, 396 F.3d 1303, 1313-14 (11th Cir. 2005).

Thus, it appears that anytime the authorities have taped telephone calls of the defendant discussing the murder—a feature that is in most § 1958 cases that have been the subject of appellate opinions—the interstate nexus will be met. Prosecutors should, however, endeavor to present to the jury actual proof of the particular phone company's interstate nature. *See United States v. Nader*, 542 F.3d 713, 722 (9th Cir. 2008) (telephone is a facility in interstate commerce).

The "lack of federal jurisdiction" claim was made in a recent Seventh Circuit opinion that involved taped calls and that seemed to nearly blow the lid off of the defense. When Robert Mandel decided to have his business partner killed, he turned to Patrick Dwyer, a trusted friend and employee of the business, for help in finding a killer. Dwyer instead went to the authorities, was outfitted with a wire, and proceeded to record a series of conversations in which he and Mandel plotted the details of the murder in person and over the telephone. A jury later convicted Mandel on multiple charges that he used facilities of interstate commerce, namely, a cellular telephone and his car, in furtherance of a murder-for-hire scheme, in violation of 18 U.S.C. § 1958(a). Mandel appealed, contending that he was entrapped into discussing the murder on a cell phone so as to manufacture federal jurisdiction over an otherwise local offense and that his purely intrastate use of an automobile did not constitute the use of a facility of interstate commerce.

The Seventh Circuit affirmed, finding that: (1) Mandel was not entrapped into using his cell phone, a facility of interstate commerce, in furtherance of the scheme; (2) the government did not improperly manufacture jurisdiction over defendant's conduct; and (3) Mandel's intrastate use of his

personal automobile fell within Congress's Commerce Clause power. *United States v. Mandel*, 647 F.3d 710, 719, 720, 723-23 (7th Cir. 2011). Thus, in the Seventh Circuit at least, even discussing the murder while driving locally in one's car satisfies the interstate commerce element.

What about the mail? A jury convicted Charles E. Wilson under § 1958(a). Wilson subsequently moved pursuant to Federal Rule of Criminal Procedure 29 for a judgment of acquittal, arguing that the government presented insufficient evidence at trial. According to the court:

> There was sufficient evidence to establish that Wilson intended to have his mother murdered. Two witnesses testified that defendant implored Ezekiel Scott, a fellow inmate of the defendant, to arrange for the murder of Wilson's mother. Their testimony was corroborated by recorded conversations between Scott and Wilson. Furthermore, there was sufficient evidence to establish Wilson used the mail as required by § 1958. Scott testified that Wilson handed Scott an envelope containing a map and diagram of his mother's house and that Wilson accompanied Scott as Scott placed the letter in the correctional facility's mailbox marked "U.S. Mail." The envelope was addressed to Scott's wife and was intended to be forwarded to the putative "hitmen." The jury could conclude from the distinctiveness of the postmark that the envelope had actually traveled through the United States mails.

United States v. Wilson, 84 F. App'x 152, 153 (2d Cir. 2004).

For other discussions of the jurisdictional element, see *United States v. Driggers*, 559 F.3d 1021, 1024 (9th Cir. 2009); *United States v. Cannon*, 475 F.3d 1013 (8th Cir. 2007); and *Fisher v. United States*, 638 F. Supp. 2d 129, 139, 141 (D. Mass. 2009).

B. Abandonment

Ronald Preacher was angry at his close friend, Ralph Burton, for stealing his girlfriend. Preacher threatened to kill Burton through a series of voice mails and offered money to another friend and coworker, David Moore, to do the job for him. Moore refused the solicitation, so Preacher asked him to find someone else to kill Burton instead.

Moore informed Special Agent Zachary Coates about Preacher's solicitation. Under the FBI's direction, Moore made a recorded call to Preacher and told Preacher that he had found someone to do the job. Special Agent Ricky Gibbs was directed to act as Moore's hitman, going by the name of Rico. For several days, the two exchanged a series of text messages and phone calls regarding the hit. Although Preacher expressed fear of getting caught, he desired to follow through with the plan nonetheless.

Preacher told Moore that he had gotten the money together to pay the hitman. Preacher stated that he had gone to his ex-girlfriend's house the night before and tampered with her car. That afternoon, Preacher left work and returned with $1,250 in cash (the half payment expected up front) and photos of Burton. Gibbs went to Preacher's workplace to meet and accept payment. Preacher then told Gibbs he was afraid to go through with plan. He therefore cancelled the deal. After Gibbs left, Preacher was arrested.

A federal grand jury indicted Preacher for using a facility of interstate commerce with the intent that a murder-for-hire be committed in violation of § 1958(a). Preacher proposed a jury instruction on the defense of abandonment, claiming that he abandoned his effort to commit the crime and that abandonment is a complete defense to § 1958. The government filed a motion in limine to preclude the use of an abandonment defense and requested that a special jury instruction be given to explain when a

§ 1958 offense is complete. The district court made a finding that a § 1958 offense is complete once a defendant uses a facility of interstate commerce with the requisite intent. *United States v. Preacher*, 631 F.3d 1201, 1203 (11th Cir. 2011). The district court then granted the government's motion in limine and denied Preacher's proposed jury instruction, finding that a completed crime cannot be abandoned. The jury returned a guilty verdict and Preacher was sentenced to 36 months in prison. The Eleventh Circuit affirmed, holding that Preacher was not entitled to jury instruction on defense of abandonment:

> Moreover, we conclude that once a crime is completed, it logically can no longer be abandoned. Preacher used and caused Agent Gibbs to use an instrument of interstate commerce, a cellular telephone, with the intent that an individual be murdered for a price to be paid by Preacher. The first time that Preacher used his cell phone to communicate his desire that the victim be killed for money, he violated § 1958. Abandonment only remains a defense to a completed crime if Congress provides for such a defense in the statute.

Id. at 1204.

C. "Pecuniary value" and insufficient agreement

In one unique case involving an inmate who wanted to kill the prosecutor standing in the way of his release from prison, the defendant was skittish about providing money directly to the hitman. Instead, he executed a Uniform Commercial Code financing statement authorizing the hitman to retrieve $22,500 from two CDs the defendant was pledging as collateral. *United States v. McCullough*, 631 F.3d 783 (5th Cir. 2011). Not every murder-for-hire plot involves this level of sophistication. Sometimes the proof of the promise is more illusory.

After Reggie Cooley and Marion Frampton got sideways with Henry, the person allowing them to deal crack cocaine out of his Troy, New York house, they decided to send a message by killing him. They enlisted a hitman named Johnson who agreed to do the deed in exchange for future favors. Their appeal focused on whether this was adequate consideration to constitute a meeting of the minds and showed the extent of the prosecution's efforts to save the verdict. According to the court:

> [T]he Government marshals various pieces of the evidence. First, and perhaps most importantly, Cooley testified that he and Frampton agreed to enlist the services of Johnson as the triggerman, and that Johnson agreed to act as such. Second, Cooley also stated that he did not arrange for a backup in the event that Johnson had second thoughts, because he knew that Johnson was "capable of doing it." Third, the driver of the private car service, Caine Cassidy, stated that during the return journey to the Bronx, Johnson admitted that "he does this for a living, this wasn't his first one." Finally, Emekah Hodge, Johnson's girlfriend, testified that Johnson was unemployed at the time of the shooting.
>
> The Government argues that from all this evidence, the jury could reasonably infer that Johnson was a professional hitman, and that his role in the plot to murder Henry was just another "job" for which he would receive compensation. We disagree. Certainly the evidence to which the Government refers was sufficient to demonstrate that Johnson and Frampton intended that the murder of Henry take place and reached an agreement toward that end. The more troublesome area, however, is whether that agreement was supported by the type of consideration envisioned by § 1958. The only evidence on this point came from Cooley, who testified on direct examination as follows:

Q. And what consideration was [Johnson] going to get out of this?

A. If he needed a favor from me, he'd get a favor.

Q. Well, when you say favor, what do you mean?

A. Anything. Anything he need.

No doubt acknowledging that evidence of consideration in the form an unspecified "favor" appears inconsistent with the statutory text, the Government argues that other portions of Cooley's testimony provided the jury with a basis upon which to infer that the "favor" was synonymous with "anything of pecuniary value." 18 U.S.C. § 1958(a).

In particular, the Government refers to an incident recounted during Cooley's testimony involving a rival crack enterprise. This enterprise, which operated out of a neighboring residence, posed a threat to the continued economic success of the 41 Ingalls enterprise. Cooley testified that this threat immediately ceased once he and Frampton spoke with the leader of the enterprise, because they, unlike Henry, were well-respected in the crack cocaine trade. The Government argues that this incident demonstrated that a "favor" from Cooley not only carried an inherent "street value," but also was capable of conferring significant economic benefit upon its recipient.

United States v. Frampton, 382 F.3d 213, 218-19 (2d Cir. 2004) (internal citations omitted). In the end, the Second Circuit concluded that the evidence was insufficient to establish the requisite consideration.

A similar case with a different result involved Donna Moonda, who enlisted a fellow group therapy member to kill her rich husband in what looked like a robbery gone bad. The Sixth Circuit determined that the evidence that Moonda promised the hitman one half of anything she received as a result of her husband's death was sufficient to show that he was promised "anything of pecuniary value." *United States v. Moonda*, 2009 WL 3109834, at *5-6 (6th Cir. Sept. 29, 2009); *see also United States v. Gibson*, 530 F.3d 606 (7th Cir. 2008) (jury not required to unanimously agree as to which promises defendant made to proposed hitman in order to convict).

D. Entrapment

Robert Johnson, convicted under § 1958, seemed to have a good case for the entrapment defense. A confidential informant offered to complete a drug deal with Johnson, but conditioned the transaction on Johnson's willingness to kill a member of the informant's supposed organization. Thus, the murder idea was created by the government. Still, Johnson repeatedly agreed to commit the murder, stated that he intended to use an ice pick to accomplish it, and declined an opportunity to back out of his agreement to commit the murder. During the search incident to his arrest, police found a newspaper article in his pocket describing a series of drug-related murders using a knife that happened in 2002. After the arrest, police searched the car that Johnson rode in and found a set of barbeque skewers in the floorboard of the front passenger seat. The Eleventh Circuit affirmed the district court's refusal to give an entrapment instruction, writing:

Here, Johnson initiated the conversation about murder by informing the confidential informant that he had recently committed a murder-for-hire in Washington, D.C. At that point, the confidential informant mentioned that he had a problem with a drug carrier, and Johnson stated that he could take care of it. In a later conversation, the confidential informant later mentioned that he still had a problem with the drug carrier and asked if Johnson could fix his problem, to which Johnson replied, "No problem." Johnson and the

> confidential informant spoke several times and discussed the preparations that needed to be made for the murder, including transportation and the weapons that would be used. Each time they spoke, the confidential informant merely suggested that Johnson commit the crime, and asked if he was still willing and ready to carry out the murder. At one point, the confidential informant told him that if Johnson did not want to go through with it, he did not have to murder the target. Johnson did not show reluctance to carry out the murder. Consequently, Johnson did not present sufficient evidence that the government persuaded or mildly coerced him into committing a crime.
>
> The district court did not err in refusing to give an entrapment instruction because the evidence at trial, including Johnson's willingness to commit murder and his decision to decline an opportunity to withdraw from the murder plot, did not show that the government did more than suggest that Johnson commit the crime.

United States v. Johnson, 364 F. App'x 572, 574-75 (11th Cir. 2010) (internal citations omitted).

E. Double jeopardy

Because murder-for-hire often involves the same facts that would be used in a state murder trial, § 1958 prosecutions sometime present double jeopardy implications when the federal proceedings follow unsuccessful state trials.

Houston police investigated the murder of Doris Angleton, who was shot to death in her home. Attention soon focused on her estranged husband, Robert Angleton, and his brother, Roger. After Roger committed suicide in jail, the state went to trial against Robert and he was acquitted. The FBI thereafter initiated a federal RICO investigation and relied heavily on the support of the state detectives and prosecutors, ultimately charging Robert with a § 1958 violation. As the court noted:

> Angleton's claim that the Double Jeopardy Clause and the Commerce Clause are strained beyond constitutional limits if applied to this successive federal murder-for-hire prosecution following the state capital murder acquittal is, at bottom, an argument that the dual sovereignty doctrine should be modified or limited. Angleton emphasizes changes that have occurred since *Bartkus* and *Abbate* were decided—the increasing federalization of federal criminal law and the Supreme Court's narrowing of the permissible use of the Commerce Clause—to support his arguments for reexamining and limiting the dual sovereignty doctrine, at least as applied to the unusual facts presented here. His arguments raise an issue unaddressed in cases involving appeals under *Abney*: is an argument for a modification of the existing law of double jeopardy, at least as applied to the unusual facts of a particular case, by definition and without exception frivolous?

United States v. Angleton, 221 F. Supp. 2d 696 (S.D. Tex. 2002). In the end, the district court found Angleton's argument non-frivolous but denied the motion to dismiss based on double jeopardy. *Id.* at 740-41.

IV. Murder-for-hire (18 U.S.C. § 1958) appeals since 2000, by Circuit

A. First Circuit

- *United States v. Bunchan*, 626 F.3d 29 (1st Cir. 2010)
- *Fisher v. United States*, 638 F. Supp. 2d 129 (D. Mass. 2009)

B. Second Circuit

- *Vu v. United States*, 648 F.3d 111 (2d Cir. 2011)
- *United States v. Barone*, 387 F. App'x 88 (2d Cir. 2010)
- *United States v. Bloom*, 366 F. App'x 285 (2d Cir. 2010)
- *United States v. Lee*, 549 F.3d 84 (2d Cir. 2008)
- *United States v. Hardwick*, 523 F.3d 94 (2d Cir. 2008)
- *United States v. Banks*, 464 F.3d 184 (2d Cir. 2006)
- *United States v. Frampton*, 382 F.3d 213 (2d Cir. 2004)
- *United States v. Wilson*, 84 F. App'x 152 (2d Cir. 2004)
- *United States v. Gomez*, 644 F. Supp. 2d 362 (S.D.N.Y. 2009)

C. Third Circuit

- *Balter v. United States*, 410 F. App'x 428 (3d Cir. 2010)
- *United States v. Moonda*, 347 F. App'x 192 (3d Cir. 2009)

D. Fourth Circuit

- *United States v. Byers*, 649 F.3d 197 (4th Cir. 2011)
- *United States v. Draven*, 417 F. App'x 362 (4th Cir. 2011)

E. Fifth Circuit

- *United States v. Lopez*, 426 F. App'x 260 (5th Cir. 2011)
- *United States v. McCullough*, 631 F.3d 783 (5th Cir. 2011)
- *United States v. Tolliver*, 400 F. App'x 823 (5th Cir. 2010)
- *United States v. Cisneros*, 456 F. Supp. 2d 826 (S.D. Tex. 2006)
- *United States v. Angleton*, 221 F. Supp. 2d 696 (S.D. Tex. 2002)
- *United States v. Marek*, 238 F.3d 310 (5th Cir. 2001)

F. Sixth Circuit

- *United States v. Acierno*, 579 F.3d 694 (6th Cir. 2009)

G. Seventh Circuit

- *United States v. Mandel*, 647 F.3d 710 (7th Cir. 2011)
- *United States v. Gibson*, 530 F.3d 606 (7th Cir. 2008)

H. Eighth Circuit

- *United States v. Dotson*, 570 F.3d 1067 (8th Cir. 2009)
- *United States v. Howard*, 540 F.3d 905 (8th Cir. 2008)
- *United States v. Hyles*, 521 F.3d 946 (8th Cir. 2008)
- *United States v. Cannon*, 475 F.3d 1013 (8th Cir. 2007)

I. Ninth Circuit

- *United States v. Driggers*, 559 F.3d 1021 (9th Cir. 2009)

J. Tenth Circuit

- *United States v. Robertson*, 473 F.3d 1289 (10th Cir. 2007)

K. Eleventh Circuit

- *United States v. Delorme*, 432 F. App'x 886 (11th Cir. 2011)
- *United States v. Hernandez*, 369 F. App'x 72 (11th Cir. 2011)
- *United States v. Preacher*, 631 F.3d 1201 (11th Cir. 2011)
- *United States v. Johnson*, 364 F. App'x 572 (11th Cir. 2010)
- *United States v. Drury*, 396 F.3d 1303 (11th Cir. 2005)

L. D.C. Circuit

- *United States v. Weathers*, 2011 WL 476618 (D.C. Cir. Feb. 11, 2011)❖

ABOUT THE AUTHOR

❑**Jeff Breinholt** currently serves as Counsel for Law & Policy within the National Security Division (NSD). A 21-year DOJ veteran, he has served in the Tax Division Criminal Enforcement Section and the Criminal Division's Terrorism & Violent Crime Section, and as Deputy Chief of the NSD's Counterterrorism Section. He is a frequent author and lecturer on law enforcement and intelligence topics.✠

The Hobbs Act, 18 U.S.C. § 1951

Andrew Creighton
Trial Attorney
Organized Crime and Gang Section
Criminal Division

I. Introduction

The Hobbs Act prohibits robbery and extortion that interferes with interstate and foreign commerce. The statute is an essential tool in attacking gangs and organized crime and in assisting local law enforcement faced with widespread violent crime. Carrying a 20-year maximum, it is the primary charge filed against some 250 defendants per year and a secondary charge against many more. Hobbs Act robbery is often charged where defendants rob armored cars, bars, fast-food restaurants, convenience stores, and even drug dealers. Hobbs Act extortion is charged where defendants engage in all manner of business shakedowns, including the use of violence to obtain restitution from a Ponzi scheme perpetrator. *United States v. Daane*, 475 F.3d 1114, 1115 (9th Cir. 2007). While the Hobbs Act is usually charged where victims are businesses, it may in some circumstances be used to charge the robberies of individuals. *See, e.g.*, *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (en banc) (per curiam) (affirming a Hobbs Act conviction where the defendant lured an individual victim across state lines and then used the victim's debit card).

Although the statute covers a wide variety of criminal activity, it was enacted to remedy a narrow problem, "a perceived loophole in prior law that exempted certain extortionate practices by organized labor . . . ." *United States v. Gray*, 260 F.3d 1267, 1274 (11th Cir. 2001). Prior to World War II, members of the Teamsters union in New York City were using violence and the threat of violence to compel owners of out-of-town trucks entering the city to pay those Teamsters daily wages at the prevailing union rate, whether or not the owners used the Teamsters' services. Some of those Teamsters were convicted under a 1934 anti-racketeering law prohibiting interference with commerce through the use or threat of force. The Supreme Court overturned the convictions, holding that these actions were the "ordinary activity of labor unions" that Congress had not intended to prohibit. *United States v. Local 807 of the Int'l Bhd. of Teamsters*, 315 U.S. 521, 535 (1942).

In response to this decision, Alabama Congressman Sam Hobbs introduced the Hobbs Anti-Racketeering Bill. Urging the bill's passage before the District of Columbia Bar Association, Hobbs cited congressional testimony describing the plight of a New Jersey farmer who had entered New York with a truckload of cauliflower for delivery to a ship docked in Manhattan. Sam Hobbs, The Hobbs Anti-Racketeering Bill, 13 J. BAR ASS'N OF THE DIST. OF COLUMBIA 101 (1946). After the farmer failed to pay union members before proceeding into New York City, other union members dumped the still-laden truck, along with the farmer, into the Hudson River. Although police rescued the farmer, "[n]o arrests were made. No prosecution followed." *Id.* at 101. Citing similar "Farmer Browns" throughout the country who faced like instances of racketeering and stating that such racketeering had also interfered with the delivery of war equipment, Congressman Hobbs described the Supreme Court's decision in Local 807 as permitting "highway robbery . . . by members of labor unions claiming to seek employment . . . ." *Id.* at 108.

The statute that Congress enacted in response to Local 807 is not, however, limited to union activity or racketeering. *United States v. Culbert*, 435 U.S. 371, 380 (1978). It is, instead, a broad

provision authorizing federal prosecution of robbery and extortion that interferes with interstate or foreign commerce "in any way or degree." 18 U.S.C. § 1951(a) and 1951(b) (2011) ("The term 'commerce' means . . . all commerce between any point in a State . . . and any point outside thereof . . . ."). Ironically, and despite this language, the Supreme Court would later constrain the Act in the labor context, holding that it does not to apply to some labor violence committed during strikes. *United States v. Enmons*, 410 U.S. 396, 400 (1973). But with this exception, and with the requirement of an interstate commerce impact, the Hobbs Act makes robbery and extortion federal crimes, allowing the resources of the federal government to be brought to bear on a wide range of acts that threaten businesses and communities.

As a matter of policy, however, the Department of Justice has determined that the robbery offense of the Hobbs Act should generally be used only in instances involving organized crime, gang activity, or wide-ranging schemes. USAM § 9-131.040. Prosecutors who are unsure whether a particular case would be appropriate to charge under the Hobbs Act should consult with the Organized Crime and Gang Section of the Criminal Division.

II. The elements of a Hobbs Act offense

Hobbs Act offenses are proven by showing both a substantive element, consisting of either robbery or extortion, and a jurisdictional element, the interference with interstate or foreign commerce. *See United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997) ("A 'jurisdictional element' . . . is a provision which requires a factual finding justifying the exercise of federal jurisdiction in connection with any individual application of the statute."). The Hobbs Act also punishes conspiracy and attempts to affect interstate or foreign commerce by robbery or extortion. 18 U.S.C. § 1951(a) (2011); *Scheidler v. National Org. for Women, Inc.*, 547 U.S. 9, 23 (2006) (*Scheidler III*). While the Act prohibits "commit[ing] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," 18 U.S.C. § 1951(a) (2011), this phrase does not create a separate violation. *Scheidler III* at 23. The Court held in *Scheidler III* that "physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act," *id*. at 16, and stated that:

> Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies).

Id. at 23.

Proof of the robbery requires a showing that the defendant unlawfully took or obtained tangible personal property from the victim's person or in his presence without the victim's consent and that the defendant used actual or threatened force, violence, or fear of physical injury to the person or property of the victim or others accompanying the victim. 18 U.S.C. § 1951(b)(1) (2011).

One issue related to the robbery offense that has divided the courts is whether sentencing a defendant for the same act on counts of both Hobbs Act robbery and the Federal Bank Robbery Act, 18 U.S.C. § 2113(a), is constitutional. Reasoning that bank robbery necessarily entails interference with interstate commerce by robbery and that Congress intended to create in § 2113 a separate statutory scheme for bank robbery, most circuits hold that multiple punishment for the two offenses is barred by the Double Jeopardy clause. *See United States v. McCarter*, 406 F.3d 460, 463 (7th Cir. 2005) (overruled on other grounds); *United States v. Holloway*, 309 F.3d 649, 651-52 (9th Cir. 2002); *United States v. Golay*, 560 F.2d 866, 870 (8th Cir. 1977); *United States v. Beck*, 511 F.2d 997, 1000 (6th Cir. 1975). The

Second Circuit, on the other hand, has held that a defendant may be punished for violating both acts because each offense has a mutually exclusive element: robbery from a federally-insured bank as contrasted with robbery affecting interstate commerce. *United States v. Maldonado-Rivera*, 922 F.2d 934, 982-83 (2d Cir. 1990).

Proof of the substantive element of extortion requires a showing that the defendant obtained property or rights to property which were capable of being exercised, transferred, or sold; that the property was obtained with the victim's consent; that the consent was induced by the use of "actual or threatened force, violence, or fear," including economic fear; and that the force, violence, or fear was "wrongful." 18 U.S.C. § 1951(b)(2) (2011); *see Rennell v. Rowe*, 635 F.3d 1008, 1012 (7th Cir. 2011) ("[E]xtortion under the Hobbs Act can occur outside of the labor context when a person uses physical violence or the threat of violence to obtain property, whether or not the defendant has a claim to the property."). The property obtained can be either tangible or intangible and the use, possession, transfer, or sale of that property need not be legal. *United States v. Gotti*, 459 F.3d 296, 325-26 (2d Cir. 2006). Whatever the property, it must be "obtained"—mere interference with a property right does not constitute extortion. *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 404-05 (2003) (*Scheidler II*). The property obtained, however, need not be kept. *See United States v. Velasquez-Bosque*, 601 F.3d 955, 961 (9th Cir. 2010) ("Nothing in [*Scheidler II*] suggests that the Court meant to restrict extortion under the Hobbs Act to permanent takings.").

Two defenses, based on the intent of the defendant, are sometimes offered to the extortion element of a Hobbs Act charge. One is based on the *Enmons* decision, which held that the Hobbs Act did not extend to violence used by employees and union members while seeking to attain legitimate labor gains of higher wages and benefits during a strike over a new collective bargaining agreement. This defense of a "claim of right" to the property at issue is narrow and limited to disputes between labor and management. *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991) ("Whatever the contours of the defense may be, they do not reach extortions based on threats of physical violence outside the labor context. . . . [Y]ou cannot beat someone up to collect a debt, even if you believe he owes it to you." (quotation marks and citation omitted)). Even within labor disputes, the *Enmons* defense lacks merit where a defendant seeks to gain an illegitimate labor objective. *United States v. Green*, 350 U.S. 415, 420 (1956); *United States v. Douglas*, 634 F.3d 852, 859-60 (6th Cir. 2011); *see also United States v. Markle*, 628 F.3d 58, 63 (2d Cir. 2010) ("Nothing in the statutory text or legislative history of the Hobbs Act, in *Enmons*, or in our case law suggests that inter-union violence not connected to a labor-management dispute is exempt from Hobbs Act liability.").

The other common defense to Hobbs Act extortion in both commercial and labor-related disputes concerns the use of economic fear to obtain property. The Hobbs Act does not require proof of a specific intent to violate the law or consciousness of wrongdoing. *United States v. Carmichael*, 232 F.3d 510, 522 (6th Cir. 2000); *see also United States v. Greer*, 640 F.3d 1011, 1018-19 (9th Cir. 2011) (holding not plain error for trial judge to fail to give specific intent instruction). It requires only that the defendant acted knowingly. *See United States v. Woodruff,* 296 F.3d 1041, 1047 (11th Cir. 2002). But, because "there is nothing inherently wrongful about the use of economic fear to obtain property," *United States v. Sturm*, 870 F.2d 769, 773 (1st Cir. 1989), the defendant must know that he has no lawful claim to the property he seeks to obtain in the case of extortion based on economic fear. *See Greer*, 640 F.3d at 1018. Intent therefore merits close attention where economic fear is the basis for an extortion charge.

Other than overcoming these defenses, the substantive elements of robbery or extortion in a Hobbs Act charge raise few legal difficulties, in part because the substantive elements of " 'robbery' and 'extortion' do not lend themselves to restrictive interpretation." *United States v. Culbert*, 435 U.S. 371, 373 (1978) (holding that proof of racketeering activity is not required for a Hobbs Act conviction). Other

legal issues with the Act arise elsewhere, primarily involving the task of proving the jurisdictional element of interference with interstate commerce.

III. Interference with interstate commerce

The Hobbs Act, by making it a crime to commit a robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce," 18 U.S.C. § 1951(a) (2011), extends to the full limits of the Commerce Clause. *Stirone v. United States*, 361 U.S. 212, 215 (1960). The jurisdictional element may be satisfied by showing a de minimus effect on interstate commerce. *See, e.g.*, *United States v. Catalan-Roman*, 585 F.3d 453, 462 (1st Cir. 2009); *United States v. Baylor*, 517 F.3d 899, 902 (6th Cir. 2008); *United States v. Vigil*, 523 F.3d 1258, 1266 (10th Cir. 2008); *United States v. Parkes*, 497 F.3d 220, 230 (2d Cir. 2007); *United States v. Boyd*, 480 F.3d 1178, 1179 (9th Cir. 2007); *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006); *United States v. Urban*, 404 F.3d 754, 781 (3d Cir. 2005) ("insignificant payments having only a de minimis effect on commerce are . . . sufficient"); *United States v. McFarland*, 311 F.3d 376 (5th Cir 2002) (en banc) (per curiam) (affirming, by an evenly divided en banc court, a Hobbs Act conviction under a de minimus standard); *United States v. Peterson*, 236 F.3d 848, 851-52 (7th Cir. 2001); *United States v. Billups*, 692 F.2d, 320, 331 n.7 (4th Cir. 1982).

But a de minimus effect is not *no* effect. The jurisdictional element must be proven beyond a reasonable doubt. *Stirone*, 361 U.S. at 218 (observing that the interstate commerce element is not and should not be treated as "surplusage"); *United States v. Leslie*, 103 F.3d 1093, 1103 (2d Cir. 1997) ("There is nothing more crucial, yet so strikingly obvious, as the need to prove the jurisdictional element of a crime.").

This is not always entertaining. Noting that a prosecutor forewarned a jury that a robbery case was "going to include some evidence that may not be too thrilling[,]" the D.C. Circuit dryly observed that the government was being "sensitive to the possibility that the jury might find testimony about the interstate nexus less exciting than the testimony describing a high-speed chase and shootout." *United States v. Harrington*, 108 F.3d 1460, 1468 (D.C. Cir. 1997).

Nor is proof of the jurisdictional element always easy. The quantum of evidence required to prove interference with interstate commerce varies, both systematically and in case-specific ways.

Systematically, courts often require greater proof of the jurisdictional element when the victim of a robbery or extortion does not easily correspond to the image of a legitimate business enterprise engaged in commercial activity. *United States v. McCormack*, 371 F.3d 22, 28 (1st Cir. 2004), *vacated on other grounds*, 543 U.S. 1098 (2005). This in part reflects a "concern that the Commerce Clause not be construed in such a way as to give the federal government a general police power that would extend even to purely local, non-commercial activities which have traditionally been the concern of the states . . . ." *Harrington*, 108 F.3d at 1469.

Two different cases involving robberies of drug dealers illustrate why prosecutors must carefully consider how to prove the interstate commerce element. In one case, *United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001), members of the Latin Kings gang robbed a marijuana dealer of 30 pounds of marijuana packaged in bricks and $18,000 in cash. When gang members returned to rob him again the following month, they were greeted by shots fired by the dealer's daughter. During the gunfight that followed, one gang member's shots went through the wall of a neighboring house, killing an occupant. Prosecutors charged two members of the gang with violating the Hobbs Act for both the completed robbery and the subsequent attempt.

At trial, the government attempted to show an effect on interstate commerce in two ways. A Secret Service agent was called to testify that the currency taken during the robbery had been printed either in Texas or in Washington, D.C. and therefore had traveled in interstate commerce. *Id*. at 853. On appeal, the government conceded that this was insufficient evidence. The court of appeals agreed, observing that "practically speaking, under the government's [abandoned] theory, all robberies committed outside of Texas could be classified as federal crimes . . . ." *Id.*

The government also presented the testimony of a DEA agent that the marijuana, which had been packaged as bricks, was of a quality and quantity that would "normally" indicate that it had been grown out of state. *Id.* at 854. On cross-examination, the defense elicited the statement from the agent that it was possible that the marijuana had been grown in Indiana but that it was "highly unlikely." *Id.* at 855. Because the statute's "very language dictates that the government must show an effect on interstate commerce" and because the government had introduced only the less-than-conclusive testimony of the DEA agent on the interstate commerce nexus, the court held that the government had failed to show "how the robbery affected [the business's] operation in interstate commerce." *Id.* at 856. All the convictions were reversed.

That result contrasts with the decision in *United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007). In that case, three robbers entered the apartment of a drug dealer and bound and beat several people sleeping there. One robber shot and killed the drug dealer and all three robbers fled. Police officers subsequently found $4,000, a large bag of marijuana, and 58 nickel bags of marijuana in a closet containing the victim's jacket.

The government attempted to prove the interstate commerce element by introducing testimony from "an experienced government investigator" that "marijuana 'is almost exclusively trucked into the United States, predominantly through Mexico'; '[v]ery little' marijuana is grown in New York; and approximately five percent of the arrests the investigator made in the Bronx were of out-of-state purchasers of marijuana." *Id.* at 225. In a cross-examination similar to that in *Peterson*, the defense counsel elicited testimony that "the investigator . . . did not know the origin of the marijuana in [the victim's] room, and that marijuana can be grown indoors and outdoors in New York State." *Id.*

On appeal, the court first observed that the drug dealing operation in the apartment constituted "a small but going enterprise . . . ." *Id.* at 231. The court then affirmed the convictions, relying for proof of an effect on interstate commerce on the testimony of the "experienced narcotics investigator." *Id*. The court emphasized the investigator's testimony that the marijuana had likely come from outside of the country and held that "a reasonable juror, hearing this evidence, could have found that the attempted robbery of Medina's marijuana or proceeds would have affected interstate commerce 'in any way or degree.' " *Id.*

Such are the different outcomes that can result from the necessarily fact-specific evaluation of the quantum of proof on the interstate commerce element. In one case, testimony that marijuana likely had come from out of state was sufficient; in the other it was not. The moral is that close attention must be paid to the jurisdictional element.

A. Proving interstate commerce

Satisfying the interstate commerce element requires proof of (1) some interstate commerce and (2) that was affected by the robbery or extortion. *See Peterson*, 236 F.3d at 856 ("The government's proof should . . . focus[] on the nature of the business robbed and how the robbery affected its operation in interstate commerce."); *see also United States v. Rivera-Rivera*, 555 F.3d 277, 286 (1st Cir. 2009)

("[T]he government may demonstrate the robbery affected interstate commerce by demonstrating that (1) the business engaged in interstate commerce, and (2) that the robbery either depleted the assets of the business or resulted in the business's temporary or permanent closure." (citations omitted)).

Usually, proof of interstate commerce consists of evidence that the victim participated in interstate commerce in one of three ways: by engaging in commercial interstate activities directly; by purchasing commodities that travel in interstate commerce; or by "purchas[ing] goods in-state that originated out-of-state . . . . " *United States v. Needham*, 604 F.3d 673, 682 (2d Cir. 2010). As an example of the first category, *Needham* pointed to *United States v. Farrish*, 122 F.3d 146, 149 (2d Cir. 1997). The defendant there twice robbed the Chelsea Parking Garage in lower Manhattan, attacking the parking lot attendant, grabbing keys, and stealing cars. The court had no trouble finding sufficient evidence that the garage was engaged in interstate commerce. The court observed that the garage was conveniently located on "a major east-west thoroughfare [23rd St.] easily accessible from both the Holland and Lincoln Tunnels[,]" and further noted that 20 percent of the vehicles parked at the garage bore license plates from New Jersey or Connecticut. *Id.* at 147; *see also United States v. Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000) (a motel served guests from out-of-state); *United States v. Williams*, 308 F.3d 833, 839 (8th Cir. 2002) (the victim, an independent taxi cab driver, took people and packages traveling in interstate commerce to the airport).

The purchase of a commodity from out-of-state, *Needham's* second category, is a very common way to show the victim's participation in interstate commerce. *United States v. Quigley*, 53 F.3d 909, 910 (8th Cir. 1995) ("When a business that sells goods manufactured outside the state is robbed, interstate commerce is usually sufficiently affected for the purposes of § 1951(a)."). For example, in *United States v. Haywood*, 363 F.3d 200 (3d Cir. 2004), the court was satisfied with testimony from an officer that "he was familiar with America's Bar[,]" that the bar served Heineken and Miller beer, and that the officer "would have known of any Heineken or Miller breweries on the Virgin Islands." *Id.* at 210-11. Such proof may also include the victim's purchase of services from out-of-state. *See, e.g.*, *United States v. McAdory*, 501 F.3d 868, 871 (8th Cir. 2007) (sustaining the interstate commerce element on evidence of out-of-state purchases of casualty insurance). As technologies change, more types of evidence to prove interstate commerce may develop. *See, e.g.*, *United States v. Horne*, 474 F.3d 1004, 1005-06 (7th Cir. 2007) (affirming proof of involvement in interstate commerce where the defendant found his intrastate robbery victims by advertising products for sale on Ebay).

Evidence that the victim purchased out-of-state commodities is especially key in cases involving the robbery of drug dealers, where proof of jurisdiction often depends upon testimony that cocaine is not produced in the United States. *See, e.g.*, *United States v. Thomas*, 159 F.3d 296, 297 (7th Cir. 1998) ("The cocaine would, the evidence showed, have originated in South America, and thus would have traveled in interstate commerce."). Some courts do not make this a difficult showing. *United States v. Celaj*, 649 F.3d 162, 168 (2d Cir. 2011) ("[A] jury may assume that cocaine and heroin travel in interstate commerce because those drugs cannot be grown, processed, and sold entirely within the state of New York."). More commonly, and more cautiously, testimony is offered to support the jury's finding that drugs moved in interstate commerce. *United States v. Bailey*, 227 F.3d 792, 798 (7th Cir. 2000) (relying on expert testimony that the coca plant is not grown in Illinois).

Lastly, direct purchase of commodities from out-of-state is not required. *Needham*, 604 F.3d at 682. Participation in interstate commerce can consist of purchasing goods in-state that originated from out-of-state. In *United States v. Wilkerson*, 361 F.3d 717 (2d Cir. 2004), two brothers who operated a landscaping business in New York were robbed. At trial, a Home Depot employee reviewed photos of the brothers' supplies and testified that a variety of the products had originated outside of New York State. The court of appeals held that from these regular Home Depot purchases a rational juror could "infer that

. . . the landscaping business, although it serviced only in-state customers, purchased supplies from an in-state retailer, which had purchased those same supplies from out of state wholesalers." *Id.* at 730-31.

These methods of proving a victim's participation in interstate commerce apply as well to illegal enterprises. "[I]legal commerce counts as commerce for Hobbs Act purposes." *United States v. Ostrander*, 411 F.3d 684, 692 (6th Cir. 2005); *see, e.g.*, *United States v. DeCologero*, 530 F.3d 36, 68 (1st Cir. 2008) ("The robbing of a drug dealer typically has the required nexus with interstate commerce."). Yet the farther one gets from the taken-for-granted quality of a for-profit business organization, the more care should be taken to thoroughly prove the jurisdictional element. *United States v. Peterson*, 236 F.3d 848, 854-55 (7th Cir. 2001) ("[S]ince [the defendant's] illegal drug business was not a conventional commercial entity, it was especially important that the government prove the interstate nature of the business."); *see also United States v. Parkes*, 497 F.3d 220, 226 (2d Cir. 2007) (affirming a Hobbs Act robbery against an appeal attacking the government's evidence of interstate commerce activities engaged in by a "local, part-time marijuana dealer"). In *Needham*, the government, operating under a rule overturned in *Parkes*, failed to offer any evidence that the victim's marijuana dealing business operated in interstate commerce or that marijuana, which could be "grown, processed and sold entirely within New York" had come from out-of-state. 604 F.3d at 681. In consequence, the court held that the evidence was insufficient to sustain the convictions.

B. Proving an effect on interstate commerce where the victim is a business

The second step in showing interference with interstate commerce is to prove that the defendant's robbery or extortion "in any way or degree obstruct[ed], delay[ed], or affect[ed] commerce or the movement of any article or commodity in commerce . . . ." 18 U.S.C. § 1951(a) (2011). Where the victim is a business, the effect on interstate commerce is frequently shown with evidence that the defendant's criminal act diminished the assets of the business, thereby lessening the business's capacity to participate in interstate commerce. *United States v. Rivera-Rivera*, 555 F.3d 277, 286 (1st Cir. 2009); *see also United States v. Partida*, 385 F.3d 546, 561 (5th Cir. 2004) ("[E]xtortion which depletes funds otherwise available for drug trafficking obstructs commerce within the meaning of the Hobbs Act.") (citation omitted). Neither the absolute amount of the decline nor the relative impact of the decline on the victim's capacity to engage in interstate commerce need be large. *See, e.g.*, *United States v. Brennick*, 405 F.3d 96, 100 (1st Cir. 2005) (affirming the conviction of a defendant who had robbed a Wal-Mart of $522.37); *see also United States v. Catalan-Roman*, 585 F.3d 453, 463 (1st Cir. 2009) (quashing a defendant's subpoena seeking to obtain rebuttal evidence, irrelevant under this principle, to show that a firm's capacity to participate in interstate commerce was unaffected by the robbery.).

A common variation on depletion of assets is to show that a robbery changed a business's operating hours. *United States v. Rivera-Rivera*, 555 F.3d 277, 286 (1st Cir. 2009); *see United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (describing a business's loss of revenue from not only the robbery but also the closing of the business during the police investigation as "a classic 'depletion of assets' scenario."). The change can be a permanent closure, *see, e.g.*, *United States v. Jimenez-Torres*, 435 F.3d 3, 8 (1st Cir. 2006) (a gas station went out of business after the owner's murder in the course of a robbery); *United States v. Ostrander*, 411 F.3d 684, 692 (6th Cir. 2005) (the robbery and murder of a drug-dealer "obviously reduced the amount of drugs [the dealer] could buy and sell in interstate commerce"), or for only a few hours, *see United States v. Harrington*, 108 F.3d 1460, 1468 (D.C. Cir. 1997) (relying on testimony including a Hardee's manager's statement that after a robbery he had to close for three hours "during a time when the restaurant was usually very busy").

Several rules further expand the possibilities for showing an effect on interstate commerce. It need not be the victim's loss that leads to the change in interstate commerce. *See, e.g.*, *United States v. Cruz-Arroyo*, 461 F.3d 69, 76 (1st Cir. 2006) (a management company experienced the loss of assets, but the managed enterprise was the business shown to purchase in interstate commerce). In an attempt or conspiracy case, the effect need not have occurred. *United States v. Jones*, 30 F.3d 276, 285 (2d Cir. 1994) (In such cases "all that need be shown is the possibility or potential of an effect on interstate commerce, not an actual effect."); *United States v. Re*, 401 F.3d 828, 835 (7th Cir. 2005); *see also United States v. Orisnord*, 483 F.3d 1169, 1177 (11th Cir. 2007) ("factual impossibility is no defense to an inchoate offense under the Hobbs Act"). Also, the effect on interstate commerce need not be quantified. *United States v. Gray*, 260 F.3d 1267, 1277 (11th Cir. 2001); *see also United States v. Kaplan*, 171 F.3d 1351, 1357 (11th Cir. 1999) (en banc) ("Congress intended to protect commerce from any and all forms of effects, whether they are direct or indirect, actual or potential, beneficial or adverse.").

C. Proving an effect on interstate commerce where the victim is an individual

The robbery of a business usually presents a straightforward case for a Hobbs Act offense as it is not difficult to show an effect on interstate commerce and courts generally find the government's proof sufficient. *See, e.g.*, *United States v. Cabrera-Rivera*, 583 F.3d 26, 32 (1st Cir. 2009) (there was "no serious question" that the Loomis-Fargo armored car company was engaged in interstate commerce and that robbery of an armored car had an effect on interstate commerce).

By contrast, when the Hobbs Act robbery victim is an individual and not a commercial business enterprise, it can be far more difficult to show the requisite effect on interstate commerce. In *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995), for example, the defendants beat two Native Americans hitchhiking their way to pick up beer that they had already purchased over the telephone. The defendants took a total of "eighty cents and a near-empty pouch of chewing tobacco." *Id.* at 910. The court of appeals reversed the convictions, stating that the robbery "had no effect or realistic potential effect on interstate commerce." *Id.* at 911.

Presented with the use of the Hobbs Act to prosecute the robbery or extortion of individuals, most courts at least hesitate. *See, e.g.*, *United States v. Jimenez-Torres*, 435 F.3d 3, 7-8 (1st Cir. 2006) ("Where . . . the crime concerns the robbery of a home rather than of a business, we approach the task of applying the de minimis standard with some caution, lest every robbery (which by definition has some economic component) become a federal crime." (citation omitted)). *But cf. United States v. Wilkerson*, 361 F.3d 717, 731 (2d Cir.2004) ("[The] fact that a robbery takes place at a residence does not transform the robbery from the robbery of a business into the random robbery of an individual . . . so long as the evidence supports the conclusion that the robbery targeted the assets of a business."). As the *Quigley* court expressed it, "[a]ctions normally have a lesser effect on interstate commerce when directed at individuals rather than businesses." *Quigley*, 53 F.3d at 910; *see also United States v. Rodriguez-Casiano*, 425 F.3d 12, 15 (1st Cir. 2005).

Reflecting that hesitation, courts have rejected some forms of proof out of hand. In *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), a defendant was convicted, inter alia, of Hobbs Act robbery for stealing the victim's cash and car containing his cell phone. The government argued that taking the car with the cell phone affected the victim's ability to participate in his business. The court of appeals held that these effects are "too attenuated to satisfy the interstate commerce requirement." *Id.* at 99. *See also United States v. Perrotta*, 313 F.3d 33, 36 (2d Cir. 2002) (reversing a Hobbs Act conviction because "the government must show something more than the victim's employment at a company engaged in interstate

commerce to support Hobbs Act jurisdiction."); *United States v. Wang*, 222 F.3d 234, 239 (6th Cir. 2000) ("[A] small sum stolen from a private individual does not, through aggregation, affect interstate commerce merely because the individual happens to be an employee of a national company . . . .").

Similarly, even where the substantive act involves taking or threatening to take substantial sums of money, courts consistently refuse to hold that such evidence per se satisfies the jurisdictional element. "[T]he sheer amount of money [taken], standing alone, does not demonstrate an interstate effect." *United States v. Needham*, 604 F.3d 673, 683 (2d Cir. 2010); *see United States v. McCormack,* 371 F.3d 22, 27 (1st Cir. 2004) (reversed and remanded on other grounds) (stating that a "kidnapper's extortionate demand for $100,000" does not per se satisfy the jurisdictional element of the Hobbs Act and emphasizing that the test for a de minimis effect "requires a multifaceted and case-specific inquiry"). In short, courts are often unconvinced, when the victim of a robbery is an individual, that the evidence of an effect on interstate commerce is sufficient. *See e.g.*, *United States v. Parkes*, 497 F.3d 220, 227, 231 n.11 (2d Cir. 2007); *United States v. Tinoco*, 304 F.3d 1088, 1110, n.21 (11th Cir. 2002); *United States v. Chance,* 306 F.3d 356, 377 (6th Cir. 2002).

Some courts have even chosen to apply a different standard for the jurisdictional nexus where the robbery victim is an individual. *See, e.g.*, *United States v. Wang*, 222 F.3d 234, 238 (6th Cir. 2000) ("We hold that the required showing [where the victim is an individual] is of a different order than in cases in which the victim is a business entity."). The Fifth Circuit offered such a different standard in the *Collins* case:

> Criminal acts directed toward individuals may violate section 1951(a) only if: (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce.

United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994). The Ninth Circuit has approved of the *Collins* test for evaluating the sufficiency of proof of the jurisdictional element where the victim is an individual, but has also held that *Collins* is not the only method of proof. *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (en banc) (per curiam) ("[T]he government may establish jurisdiction for prosecution under the Hobbs Act for a crime directed toward an individual by showing *either* that the crime had a direct effect *or* an indirect effect on interstate commerce." (emphasis added)); *see also United States v. Gray*, 260 F.3d 1267, 1276 (11th Cir. 2001) ("[I]t is of no moment . . . whether the effect is characterized as 'direct' or 'indirect' — if the defendant's conduct had a *minimal* effect on commerce, nothing more is required.").

Finally, some of the courts that do not apply different standards to cases with individual victims nevertheless apply a different level of scrutiny. *United States v. Nascimento*, 491 F.3d 25, 43 (1st Cir. 2007) (applying "heightened scrutiny throughout [the] examination" of the evidence on interstate commerce); *see also United States v. Jamison*, 299 F.3d 114, 121 (2d Cir. 2002) (noting but not deciding the question of whether a different interstate commerce standard should apply to Hobbs Act robbery of individuals).

The lesson is that in a prosecution for Hobbs Act robbery or extortion of an individual, the government should consider carefully how it will prove the jurisdictional element. The *de minimis* standard remains unchanged by *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005). *See, e.g.*, *United States v. Baylor*, 517 F.3d 899, 901 (6th Cir. 2008); *United States v. Lynch*, 437 F.3d 902, 908-09 (9th Cir. 2006) (en banc)

(per curiam) (Lopez "did not require a change in the de minimis standard."); *United States v. Williams*, 342 F.3d 350, 354 (4th Cir. 2003) ("Importantly, the Supreme Court's decisions in *Lopez* and . . . *Morrison* . . . do not disturb our continued application of this 'minimal effects' standard."); *United States v. Jamison*, 299 F.3d 114, 118 (2d Cir. 2002); *United States v. Gray*, 260 F.3d 1267, 1275 (11th Cir. 2001). Nevertheless, it is important to introduce sufficient evidence of some impact on interstate commerce and, in the case of an individual as the victim, it can be particularly difficult to prove the required effect.

IV. Conclusion

Some have raised concerns about the scope of the Hobbs Act and its use in "garden-variety" cases. *See, e.g.*, *United States v. Rutherford*, 236 Fed. App'x 835, 844 (3d Cir. 2007) (unreported) ("While there was sufficient evidence here to support conviction under the Hobbs Act based on the de minimis interstate commerce requirement, the federal government might better focus its resources and unique expertise on truly 'federal' matters and, where possible, leave enforcement of general criminal laws to the states."). But Congress had legitimate concerns about threats to the flow of interstate commerce when it passed the Hobbs Act and the statute's requirement that an effect on interstate commerce must be proven in each case limits its use. Prosecutors should bear in mind the policy considerations expressed in the United States Attorneys' Manual and choose carefully those cases that merit the use of federal resources. Against that backdrop, the Hobbs Act is an important tool for disrupting violent organized crime or gang activity and for supplementing local resources in dealing with widespread violent crime. When robbers shoot an armored car guard and make off with bank deposits, *United States v. Reaves*, 649 F.3d 862, 864 (8th Cir. 2011), or take marijuana and cash from a drug-dealer, *United States v. Lettiere*, 640 F.3d 1271, 1273 (9th Cir. 2011), or rob commercial businesses that purchase goods or send profits across state lines, *Harrington*, 108 F.3d at 1464-1470, the Hobbs Act is an appropriate use of federal prosecutorial powers.❖

ABOUT THE AUTHOR

❑**Andrew Creighton** is a trial attorney in the Organized Crime and Gang Section of the Criminal Division. He joined the Criminal Division in 2010 after clerking for the Honorable John Fisher on the District of Columbia Court of Appeals. He has taught sociology and organizational behavior at the University of Washington, Stanford, and Berkeley.✠

The author wishes to thank his supervisors, Tom Ott, Deputy Chief of Litigation; David Jaffe, Chief of Litigation; James Trusty, Section Chief; and the entire Organized Crime and Gang Section. Special thanks are owed to Jerry Toner, Kathleen Felton, Bradley Price, Doug Crow, and Howard Zlotnick.

Prosecuting Robberies, Burglaries, and Larcenies Under the Federal Bank Robbery Act

Jerome M. Maiatico
Trial Attorney
Organized Crime and Gang Section
Criminal Division

I. Introduction

It's the early morning hours on a cool October day. The rays of the sun peek through the front doors of a federally-insured bank just before it opens. All is peaceful as bank employees are going about their morning routines, and the young female manager unlocks the front door to begin the business day. Then, BOOM! A man in a black ski mask storms in, holding a loaded sawed-off shotgun in his hand and shouting, "Nobody moves, nobody gets hurt!" He zip ties the front door. The frightened manager and her employees nervously back up and instinctively drop to their knees as the masked man approaches the counter. He hoists the manager from the floor, grabs the vault key, and leads her to the vault. He asks, "What's the time lock set for?" The clock on the wall reads 8:29. The manager responds, "8:30." Everything slows down as they watch the clock wind around to the next minute. BZZZZ! The timer goes off. The masked man inserts the vault key, looks at the manager and demands, "Don't enter the panic code." The manager reaches for the combination dial, her hand trembling. She rotates it once, but misses the next number. The shotgun is pointed at her colleague. She pauses, trying to regain her composure, then steadies her hand and opens the vault. The masked man swiftly, yet meticulously, places cash into a gym bag, avoiding any dye packs. He rushes out the back entrance . . . and there he encounters the wailing sirens and blockade of three police cars. Another employee had discreetly activated the silent alarm minutes earlier. The bank robber is arrested and taken into police custody.

Unfortunately, scenes like this play out in banks across the country every day. Over 5,500 robberies, burglaries, and larcenies were committed in the United States against financial institutions and their employees in 2010, with over $43 million taken in loot. Federal Bureau of Investigation, Bank Crime Statistics 2010. The Federal Bank Robbery Act, codified under Title 18, U.S.C. § 2113, provides tools for federal prosecutors to combat these crimes. In the scenario above, the "masked man with the shotgun" clearly violated § 2113(a) and (d), which prohibits taking "by force and violence, or by intimidation" money belonging to a federally-insured bank and putting lives in jeopardy by the use of a dangerous weapon. However, some scenarios are less clear: What if the masked man had no sawed-off shotgun and merely slipped the teller a demand note—is that considered "intimidation?" When the masked man led the manager to the bank vault, was that "forced accompaniment" under § 2113(e)? What if the masked man spotted a police patrol car as he approached the bank and never entered? This article will discuss key issues relating to § 2113(a) paragraph one (bank robbery), § 2113(d) (armed bank robbery), § 2113(e) (killing and forced accompaniment), § 2113(a) paragraph two (bank burglary), and § 2113(b) (bank larceny)—and the elements that are necessary to prove these crimes.

II. Bank robbery under § 2113(a) paragraph one

The two paragraphs in § 2113(a) create separate offenses: bank robbery and bank burglary. *See Prince v. United States*, 352 U.S. 322, 323 (1957) ("[Section 2113] creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws . . . [i]nclud[ing] . . . bank robbery and entering a bank with intent to commit a robbery."). The first paragraph of § 2113(a) defines robbery in federally-protected financial institutions as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (2010). To establish bank robbery under this section, the government must prove the following three elements:

- The defendant took or attempted to take money from the person or presence of another, while that money was in the care or custody of the bank
- Such taking or attempted taking was by force and violence, or intimidation
- The deposits of the bank were then insured by the FDIC

A. Force and violence, or intimidation element

Proving "force and violence, or intimidation," and particularly the issue of what constitutes "intimidation," is a frequent subject for prosecutors and the courts. The requirement of a taking "by force and violence, or by intimidation" in this paragraph is disjunctive. The government must only prove "force and violence" *or* "intimidation" to establish this element. *United States v. Bellew*, 369 F.3d 450, 453 (5th Cir. 2004). The intimidation element is satisfied by an objective standard: whether "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation." *United States v. Ketchum*, 550 F.3d 363, 367 (4th Cir. 2008); *see also United States v. Gordon*, 642 F.3d 596, 598 (7th Cir. 2011); *United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002); *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996); *United States v. McCarty*, 36 F.3d 1349, 1357 (5th Cir. 1994).

The government can prove intimidation through the actions, words, and appearance of the defendant. The circuit courts have widely held that the simple act of demanding money from a bank teller is objectively threatening enough to constitute intimidation. *See Ketchum*, 550 F.3d at 367 ("[I]ntimidation generally may be established based on nothing more than a defendant's written or verbal demands to a teller."); *Gilmore*, 282 F.3d at 402 ("[M]aking a written or verbal demand for money to a teller is a common means of successfully robbing banks. Demands for money amount to intimidation because they carry with them an implicit threat."). In *United States v. Lawrence*, 618 F.2d 986 (2d Cir. 1980), a bank robber used no force or violence but said to the bank teller, "I don't want to see you or anyone else get hurt" and passed a note asking, "Do you understand what I mean?" *Id.* at 987. The Second Circuit held that those actions and words constituted intimidation and upheld the defendant's conviction under § 2113(a). *See also United States v. Henson*, 945 F.2d 430, 439 (1st Cir. 1991) (handing teller a note, accompanied by no threatening gestures, directing her to "put fifties and twenties into an envelope now!!" constituted intimidation); *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980)

(handing teller a note stating that she had "three seconds" to hand over money and repeating demand amounted to intimidation).

Actions alone—even without a written or verbal demand—might be enough to prove intimidation in some circumstances. In *United States v. Kelley*, 412 F.3d 1240 (11th Cir. 2005), the Eleventh Circuit found "intimidation" where two defendants—saying nothing—jumped onto a teller's counter hard enough that a teller heard the noise from another room, another teller was within arm's length of the defendants as they removed cash from the drawer, and the two tellers testified that they were frightened. *Id.* at 1245-46. However, compare that to the facts in *United States v. Wagstaff*, 865 F.2d 626 (4th Cir. 1989). In *Wagstaff*, the defendant entered a savings and loan, went to the teller's area and—saying nothing—began to grab money from the cash drawers. The Fourth Circuit reversed the conviction, finding that "where, as here, the thief was neither wearing nor carrying a weapon, produced no note and said nothing, and made no threatening gestures, we hold, as a matter of law that the evidence is insufficient to show a taking 'by intimidation.' " *Id.* at 629. *Wagstaff* appears to be distinguishable from a case like *Kelly* because the defendant never got closer than eight feet to the nearest teller and never made any sudden or loud physical movements.

The first paragraph of § 2113(a) prohibits not only bank robbery but also attempts to take money from a bank. However, the circuit courts are split on whether, in an attempted taking, the government must prove that the defendant *actually* used "force and violence, or intimidation." The majority view requires only that the government prove *attempted* force and violence or intimidation, and those circuit courts rely on the "substantial step" test for attempts. *See United States v. Wesley*, 417 F.3d 612, 618-19 (6th Cir. 2005); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990); *United States v. McFadden*, 739 F.2d 149, 151-52 (4th Cir. 1984); *United States v. Jackson*, 560 F.2d 112, 116-17 (2d Cir. 1977). In *McFadden*, for example, the defendants hid two guns and a disguise in the bushes outside of the bank, cased the bank to make sure no police were around, then exited their car and approached the bank's front door. The defendants spotted an armed FBI agent and reached for their weapons, but were apprehended before entering the bank. The Fourth Circuit, noting public policy concerns, said that if actual force was required for a violation under § 2113(a), then FBI agents would have had to wait until the armed robbers entered the bank and innocent people's lives would have been endangered. The Fourth Circuit affirmed the defendants' convictions, and in applying the "substantial step" test, found that the defendants "engaged in conduct which constituted a substantial step toward the commission of the crime, and that the step was strongly corroborative of the firmness of the defendants' criminal intent." *Id.* at 153.

The minority view applies the "plain meaning" of the first paragraph of § 2113(a) and requires actual force and violence or intimidation. *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008); *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004). Comparing the facts in *Thornton* and *Bellew* is instructive. In *Bellew*, the defendant entered a bank wearing an obvious wig and carrying a briefcase that contained a firearm, instructions on how to rob the bank, and a demand note. The defendant was not able to meet with the bank manager and left, but the police were alerted about his suspicious behavior. The defendant returned and approached the bank, but when he saw the bank manager talking to police, he began to run. This led to a stand off in the parking lot before the defendant surrendered to police. The Fifth Circuit reversed the conviction and, looking to the text of § 2113(a), held "the 'actual act of intimidation' reading to be the most natural reading . . . ." *Id.* at 454. In *Thornton*, the defendant took various steps towards robbing a bank, including drawing sketches of the bank and the surrounding area, recruiting a getaway driver, changing his license plates, and putting together an elaborate disguise. He then approached the front door of the bank wearing a bandana over his face and carrying a duffel bag, but just as he placed his hand on the bank door, a customer made eye contact with him. The defendant walked away without opening the door and when confronted by the customer, he panicked and ran back

to the getaway car. The Seventh Circuit reversed the defendant's conviction, also holding that the plain meaning of the first paragraph of § 2113(a) makes it clear that actual force and violence or intimidation is required. In a case like *Bellew*, where the government wants to charge an attempted bank robbery and the defendant actually entered the bank with the intent to steal money, the distinction between actual and attempted force matters less because the government can charge the defendant with bank burglary under paragraph two of § 2113(a). However, when confronted with facts like in *Thornton*—and the question becomes whether the defendant entered or attempted to enter the bank—the circuit split has a real impact on the ability to charge anything under § 2113(a). See Part III below for a more detailed discussion of bank burglary.

B. Federal character of banks element

The federal character of the financial institution, although defined in various ways under the statute in §§ 2113(f)-(h), usually can be established through proof of FDIC insurance. FDIC insurance can be proved by introducing the certified certificate of insurance in effect at the time of the offense and a canceled check showing that the insurance premium was paid, or testimony from a bank employee stating that the bank was insured at the time of the offense. Prosecutors must remain diligent in proving federal character as the government has received increasing criticism regarding the handling of this element. *See, e.g.*, *United States v. Hampton*, 464 F.3d 687, 690 (7th Cir. 2006) ("The government was sloppy in this case, as in many others in which federally insured status is an element. . . ."); *United States v. Rusan*, 460 F.3d 989, 994-95 (8th Cir. 2006) ("[W]e are at a loss to understand why the government did not introduce more specific evidence regarding the bank's insured status on the date of the offense, including a copy of the certificate of insurance.").

C. Bank extortion offense under § 2113(a) paragraph one

Section 2113(a) also creates a bank extortion offense. The extortion provision can be utilized by prosecutors when the taking or attempted taking of money was not "from the person or presence of another," but rather the money was to be left at a specified location for later pickup. *See, e.g.*, *United States v. Paul*, 175 F.3d 906, 908 (11th Cir. 1999) (examining a bank extortion conviction where defendant left the bank manager a note directing him to deliver money to a men's restroom in a specified location or else suffer violence).

D. Armed bank robbery offense under § 2113(d)

Armed bank robbery is defined under § 2113(d) and is often paired with the first paragraph of § 2113(a) under a single charge because the bank robbery provision is considered a lesser included offense and separate convictions would merge for the purposes of sentencing. *See, e.g.*, *United States v. Villiard*, 186 F.3d 893, 897 (8th Cir. 1999) ("Although [the defendant's] § 2113(d) conviction cannot be maintained, the evidence was sufficient to establish his guilt of violating § 2113(a) (robbery 'by force and violence, or by intimidation'), a lesser included offense."). Armed bank robbery increases the statutory maximum to 25 years' imprisonment. To establish armed bank robbery, the government must prove the three elements for bank robbery described above, as well as one additional element:

- The defendant assaulted some person or put some person's life in jeopardy by the use of a dangerous weapon or device, while engaged in taking the money.

Under § 2113(d), both the "assault" and the "putting in jeopardy" prongs require the use of a dangerous weapon or device. *Simpson v. United States*, 435 U.S. 6, 13 n.6 (1978). In view of *Simpson*, the government cannot prosecute a bank robbery under § 2113(d) where the defendant assaults another

resulting in serious injury but does not use a dangerous weapon or device. In *McLaughlin v. United States*, 476 U.S. 16 (1986), the Supreme Court held that an unloaded firearm is a dangerous weapon within the meaning of the statute because, among other reasons, the display of a gun instills fear in the average citizen and creates an immediate danger of a violent response. *Id.* at 17-18. This rationale can be extended to cases involving simulated weapons, such as toy guns and hoax bombs. *See, e.g.*, *United States v. Benson*, 918 F.2d 1, 3 (1st Cir. 1990) (finding defendant's statement that the bulge in his jacket was a gun put lives in jeopardy); *United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir. 1989) (finding that defendant's use of a toy gun put lives in jeopardy). Even if a weapon is not recovered, "use of a dangerous weapon or device" may be proved through credible eyewitness testimony that the defendant carried a gun during the robbery. *See, e.g.*, *Brewer v. United States*, 36 F.3d 266 (2d Cir. 1994) (affirming armed bank robbery and 924(c) convictions based on consistent, detailed descriptions of the gun from non-expert witnesses).

E. Killing or forced accompaniment during bank robbery offense under § 2113(e)

Section 2113(e) defines killing or forced accompaniment during a bank robbery as follows:

> Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

18 U.S.C. § 2113(e) (2010).

The three clauses in this subsection create three different bank robbery situations where killing and forced accompaniment are prohibited: (1) in the defendant's commission of the bank robbery; (2) in avoiding or attempting to avoid apprehension; and (3) in freeing himself or attempting to free himself from arrest or confinement. When a defendant is charged under the first clause, bank robbery and armed bank robbery under § 2113(a) and (d) are considered lesser included offenses and would merge into a single offense at sentencing. *See United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985) (finding a single offense under § 2113 where the bank robber held teller hostage but released her outside the bank); *United States v. Atkins*, 558 F.2d 133, 137 (3d Cir. 1977) (finding a single offense where a bank guard was shot and killed during the commission of the robbery). Although there is some uncertainty in the circuit courts with regard to the other two clauses, the weight of authority appears to hold that only a single offense occurs in those situations as well. *See United States v. Moore*, 688 F.2d 433, 434-35 (6th Cir. 1982); *United States v. Rossi*, 552 F.2d 381, 385 (1st Cir. 1977); *United States v. Pietras*, 501 F.2d 182, 187-88 (8th Cir. 1974); *Sullivan v. United States*, 485 F.2d 1352, 1354 (5th Cir. 1973). In *Moore*, for example, the Sixth Circuit held that where a kidnapping continued after a completed bank robbery, but was part of a continuing robbery scheme, a single offense occurred. *Moore*, 688 F.2d at 434-35. *But see United States v. Miller*, 793 F.2d 786, 792 (6th Cir. 1986) (holding that a kidnapping occurring during an escape "separate in time and space from the robbery" is a separate offense); *United States v. Fleming*, 594 F.2d 598, 609 (7th Cir.1979) (finding that a killing in avoiding and attempting to avoid apprehension from a bank robbery is a separate offense).

In order to prove forced accompaniment, there is no requirement that the movement be for any particular distance or that the victims be forced outside of the bank. In *United States v. Turner*, 389 F.3d 111 (4th Cir. 2004), for example, the Fourth Circuit affirmed a conviction under § 2113(e) where the bank robber, while inside the bank, forced the bank manager to accompany him to the vault and put

money into a pillowcase. *See also United States v. Stobhehn*, 421 F.3d 1017, 1019 (9th Cir. 2005) (affirming § 2113(e) conviction where the robber forced the bank guard at gunpoint to go from his post outside the bank, open the door, and lie face down on the floor inside the bank).

III. Bank burglary under § 2113(a) paragraph two

The second paragraph of § 2113(a) covers bank burglary. This paragraph states:

> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (2010). To prove bank burglary under this section, the government must prove:

- The defendant entered or attempted to enter the bank or building used in whole or part as a bank
- Such entering or attempt to enter was with the intent to commit a felony or any larceny affecting the bank
- The deposits of the bank were then insured by the FDIC

This second paragraph of § 2113(a) proscribes attempted bank larceny possibly because the larceny provision, § 2113(b), does not cover attempts. The Supreme Court has noted that this second paragraph was "inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering . . . . Rather the heart of the crime is the intent to steal ." *Prince v. United States*, 352 U.S. 322, 328 (1957). For example, in *United States v. Loniello*, 610 F.3d 488 (7th Cir. 2010), the defendant, while armed and in disguise, approached the front door of a bank and started to open it, before fleeing because a passerby noticed him. After the defendant was acquitted under the first paragraph of § 2113(a), the Seventh Circuit permitted a subsequent prosecution to move forward under paragraph two. *Id.* at 496. This second paragraph has also been applied in situations where a defendant breaks into a grocery store and attempts to enter an automated teller machine that was owned and managed by a bank and contained bank funds insured by FDIC. *See, e.g.*, *United States v. Haas*, 623 F.3d 1214, 1218-19 (8th Cir. 2010); *United States v. Rood*, 281 F.3d 353, 355-56 (2d Cir. 2002); *United States v. Rrapi*, 175 F.3d 742, 754-56 (9th Cir. 1999). However, courts have permitted prosecutions under paragraph two not only for attempted bank larcenies but also for a completed bank crimes. *See, e.g.*, *United States v. Phillips*, 609 F.2d 1271, 1273 (8th Cir. 1979) (affirming convictions under paragraph two of subsection (a) and under subsection (b) where the defendants robbed a bank of nearly $9,000).

The second paragraph of § 2113(a) significantly overlaps with § 2113(b), described in more detail below, and its application confounds even treatise writers: "[T]he principal reason why the crime of bank burglary set forth in the second paragraph of § 2113(a) is difficult to distinguish from the crime of bank larceny set forth in § 2113(b) is that the crime of bank burglary simply does not make much sense." LEONARD SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS & NANCY BATTERMAN, MODERN FEDERAL JURY INSTRUCTIONS—Criminal 53.01 (2011). As under § 2113(b), prosecutors need not prove "force and violence, or intimidation" nor that the money was taken

"from the person or presence of another" to establish a violation under paragraph two of § 2113(a). It seems the only difference between the elements required to prove the offenses, other than the amount threshold in § 2113(b), relates to the difference between an intent to commit a felony affecting the bank and an intent to steal the bank's money. Accordingly, most bank crimes that can be prosecuted under § 2113(b) can also be prosecuted as violations of § 2113(a) paragraph two, under which a greater statutory maximum penalty applies.

IV. Bank larceny under § 2113(b)

Bank larceny is defined under § 2113(b) as follows:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2113(b) (2010). This section also defines misdemeanor bank larceny where less than $1,000 is stolen and prescribes a maximum of one years' imprisonment for that offense. To prove felony bank larceny under this section, the government must prove:

- The defendant took and carried away money that had been in the care and custody of the bank
- The defendant intentionally took the money knowing that he was not entitled to it
- The money taken had a value in excess of $1,000
- The deposits of the bank were then insured by the FDIC

Bank larceny is not a lesser-included offense of bank robbery and the offenses do not merge at sentencing. *Carter v. United States*, 530 U.S. 255 (2000) (distinguishing between the elements of a § 2113(a) offense and a § 2113(b) offense). Section 2113(b) is a specific intent crime, meaning an essential element of the offense is that the defendant knew he was not entitled to the money taken. *Id*. at 267-71. Force, violence, or intimidation are not elements of bank larceny. *See, e.g.*, *United States v. Sandles*, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996). The taking need not be "from the person or presence of another."

Section 2113(b) generally applies where a bank's money is taken but no demands are made to the teller and no danger of bodily harm is evident. In *United States v. Tinker*, 1999 U.S. App. LEXIS 11058 (9th Cir. May 26, 1999) (unpublished), for example, the Ninth Circuit affirmed a conviction and sentence for bank larceny where a bank janitor took $17,000 that was left out of the vault by a bank teller. *Id.* at *2-4. The bank larceny statute is also applicable in cases where money is stolen from a bank's automated teller machine. *See, e.g.*, *United States v. Marshall*, 248 F.3d 525, 536 (6th Cir. 2001) (affirming bank larceny conviction where defendant, a courier who serviced ATMs for the bank, used keys and access codes to take $60,000 from ATM); *United States v. Willis*, 102 F.3d 1078, 1083-84 (10th Cir. 1996) (affirming conviction of conspiracy to commit bank larceny where defendant, disguised as a maintenance worker, attempted to remove ATM from shopping center). Other § 2113(b) cases involve armored transport carriers transporting money that remains in the custody and control of the bank even though it is in the possession of the carrier. *See, e.g.*, *United States v. King*, 178 F.3d 1376, 1378 (11th Cir. 1999) ("The bank . . . was never without legal title to the money [and t]he contract simply provided Loomis Fargo with custody of the money for the limited purpose of transferring the funds to the Federal Reserve."); *United States v. Chambers*, 14 Fed. App'x 140, 141 (4th Cir. 2001) (unpublished) (affirming

sentence for bank larceny conviction that arose out of theft of an armored truck containing over $14 million from the armored truck facility).

Section 2113(b) provides a more expansive definition of larceny than that found at common law. In *Bell v. United States*, 462 U.S. 356 (1983), the Supreme Court held that § 2113(b) proscribes the crime of obtaining property by false pretenses, noting the section "is [not] limited to common-law larceny." *Id.* at 357 (affirming conviction under § 2113(b) where defendant obtained possession of a check endorsed for deposit to the drawer's own account, altered the endorsement to show the defendant's account, deposited the check, and later withdrew the funds). Similar cases involving checks and false pretenses under § 2113(b) have been prosecuted in other circuits as well. *See, e.g.*, *United States v. Thorpe*, 191 F.3d 339, 341 (2d Cir. 1999) (examining sentence for bank larceny conviction where bank employee obtained blank cashiers check, forged required signature of bank officer, deposited the money into two customer accounts, and then withdrew and converted funds to his own use); *United States v. Sterley*, 764 F.2d 530, 531-32 (8th Cir. 1985) (examining a bank larceny conviction based on the taking of bank funds by means of the check collection process after the defendant issued worthless checks to creditors). The *Bell* court cautioned, however, that § 2113(b) may not cover the full range larceny offenses, particularly situations where there is no taking and carrying away. 462 U.S. at 362.

V. Conclusion

The FBI reported an average of 15 bank robberies a day in 2010, nearly three quarters of which involved the use or threatened use of a firearm or other weapon. Federal Bureau of Investigation, Bank Crime Statistics 2010. Federal prosecutors along with their state counterparts play a large role in making sure that the offenders, like the "masked man with the shotgun" described above, are brought to justice. Title 18, United States Code, § 2113 outlines and defines crimes against financial institutions and their employees, including bank robbery, bank burglary, and bank larceny. Understanding the different applications of these offenses and the key issues in proving their elements—from intimidation and dangerous weapons to bank custody and ATMs—allows the government to punish these offenders, deter others from committing bank crimes, and further its mission to ensure public safety.❖

ABOUT THE AUTHOR

❑**Jerome M. Maiatico** is a Trial Attorney with the Organized Crime and Gang Section of the Criminal Division. In 2011, Mr. Maiatico served as a Special Assistant United States Attorney in the District of Maryland, Greenbelt Division, and in the Eastern District of Virginia, Newport News Division. Prior to joining the Department of Justice, Mr. Maiatico was a law clerk with United States District Court Judge J. William Ditter, Jr., in Philadelphia, Pennsylvania.✠

Repurposing the Kidnapping and Hostage Taking Statutes to Combat Human Trafficking

Erin Creegan
Trial Attorney
Counterterrorism Section
National Security Division
Department of Justice

I. Introduction

The kidnapping and hostage taking statutes address two crimes with similar elements, so it can be difficult to know when to charge one versus the other. Both were created to fulfill specific needs: the federal kidnapping statute was enacted to handle kidnappings that occur across state and international lines, and the hostage taking statute was enacted to punish acts of terrorism. Notwithstanding the specific purposes for which Congress created these laws, the actual application of both statutes has shown both to be flexible and adaptable to new kinds of cases. Both may have a role to play in combating the phenomenon of human trafficking, a crime that sadly is becoming all too common.

II. Kidnapping or hostage taking?

A. Creation, language, and elements

How does a prosecutor know whether to charge a crime under the kidnapping statute, 18 U.S.C. § 1201, or under the hostage taking statute, 18 U.S.C. § 1203? Both are found in the "Kidnapping" chapter of Title 18 of the U.S. Code. The general federal kidnapping statute, § 1201, dates back to the 1930s and the sensational abduction of the Lindbergh baby. It is the statutory equivalent of the common law crime of kidnapping—abducting and transporting someone against their will. Section 1201 adds a few special wrinkles to the old formulation of kidnapping, including an interstate or foreign commerce requirement to trigger federal jurisdiction and certain protections for federal officials and "internationally protected persons," such as diplomats. Hostage taking, on the other hand, is an international law concept and a term that is more popular in the law of armed conflict tradition, as an example of a prohibited method of combat. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

The hostage taking statute, as well as the provision on internationally protected persons in the kidnapping statute, are examples of treaty crimes. Treaty crimes occupy a unique place in the array of federal statutes available to attorneys for the United States. The process of creating a treaty crime begins when the international community recognizes a common threat with an international scope. Examples of such concerns might include the rise of international terrorism, the use of violence against diplomats, piracy in international waters, the trafficking of persons, or international narcotics trafficking. States will then work together to combat a threat through a coordinated approach in each state's domestic laws. The states conclude what is called a "suppression convention," a treaty that is aimed at suppressing all

manifestations of the international crime by joint efforts. Such treaties typically provide for cooperation in the form of extraditions and mutual legal assistance, and importantly give a common definition as to what conduct should be criminalized.

The hostage taking statute, § 1203, comes from the Hostage Taking Act, Pub. L. No. 98-473, Title II, § 2002(a), 98 Stat. 2186 (1984), and is the United States' response to the 1979 International Convention Against the Taking of Hostages (Hostage Taking Convention), Dec. 18, 1979, T.I.A.S. No. 11,081. The Hostage Taking Convention is part of a particular tradition in international criminal law. It is one of the 13 "sectoral" conventions that target acts of terrorism. Rather than approach the criminalization of terrorism internationally through a single unified convention, the international community has typically concluded more narrow agreements that prohibit certain terrorism tactics. These conventions, for the most part, are retrospective; they criminalize tactics that have already been employed in order catch all future uses of those tactics. These sectoral treaties represent a compromise approach, due to the relative inability of the international community to come to a consensus on a single definition of terrorism.

Section 1203 was enacted to address specific foreign policy concerns. Hostage taking is a tactic that is often identified with terrorism and the undoubted goal of the Hostage Taking Convention was to suppress acts of terrorism. Nonetheless, it is not only terrorists that use terrorist tactics. A side effect of defining international anti-terrorism laws around the acts that terrorists perform, rather than around who the perpetrators are, is that non-terrorist criminal activity may fall within the scope of a "hostage taking."

So how does the international criminal prohibition of the terrorist crime of hostage taking, domesticated into federal criminal law by the Hostage Taking Act, sit alongside the more traditional kidnapping statute that has already been stretched to include a portion of another treaty crime? There are some clear redundancies. For example, the kidnapping statute provides:

> § 1201. Kidnapping
>
> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when–
>
> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;
>
> (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
>
> (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;
>
> (4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or
>
> (5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties,

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

. . .

(e) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if

(1) the victim is a representative, officer, employee, or agent of the United States,

(2) an offender is a national of the United States, or

(3) an offender is afterwards found in the United States .[. . .]

18 U.S.C. § 1201 (2010).

The hostage taking statute provides, in relevant part, the following:

§ 1203. Hostage taking

(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless--

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the Government of the United States.

(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States .[. . .]

18 U.S.C. § 1203 (2010).

The elements of § 1203 are that: (1) the defendant intentionally seized or detained another person (or attempted to do so) and threatened to kill, injure, or continue to detain that person; (2) the defendant's purpose was to compel a third person or a governmental organization to do an act or to abstain from doing an act as an explicit or implicit condition for the release of the person detained. Jurisdictionally, if the offense took place outside the United States, the government must prove (1) the offender was a national of the United States, (2) the person seized or detained was a national of the United States, (3) the offender was found in the United States, or (4) the United States government was the organization sought to be compelled. If the offense occurred in the United States, the offender may assert an affirmative defense that the statute does not apply "if both the victim and the offender are

nationals of the United States and the party to be compelled is not the United States government." *See United States v. Santos-Riviera*, 183 F.3d 367, 369 (5th Cir. 1999) (18 U.S.C. § 1203(b) exceptions are affirmative defenses.).

For kidnapping, the federal answer to the old common law crime of kidnapping, the elements are (1) the defendant knowingly and willfully confined, kidnapped, abducted, seized, inveigled, decoyed, or carried away a person; (2) the victim was thereafter transported in interstate or foreign commerce; and (3) the defendant held the victim for ransom, reward, or other benefit or reason.

In a kidnapping, the government must prove that the defendant held the victim "for ransom, reward or otherwise." *United States v. Atchison*, 524 F.2d 367, 369 (7th Cir. 1975). "For ransom, reward or otherwise" means that the victim was held for any reason that would in any way be of benefit to the defendant. *Id.* The defendant's reason need not have been for monetary benefit and it need not have been unlawful. "[I]t now appears to be well settled that purpose is not an element of the offense of kidnaping and need not be charged or proved to support a conviction under the kidnaping statute . . . ." *Id.* at 370; a*ccord Gawne v. United States*, 409 F.2d 1399, 1403 (9th Cir. 1969); *Clinton v. United States*, 260 F.2d 824, 825 (5th Cir. 1958) (per curiam).

For § 1201(a)(4), the treaty crime-based portion of the kidnapping statute, unlike any other portion of § 1201, the jurisdictional formulation is more like § 1203. If the victim was an internationally protected person outside of the United States, the government must show (1) the victim was a representative, officer, employee, or agent of the United States; (2) the offender is a national of the United States; or (3) the offender was afterwards found in the United States.

Although § 1201 and § 1203 have many similarities, it is important to note the differences between the two statutes. The hostage statute looks quite a lot like a kidnapping for ransom. The ransom requirement of the kidnapping statute is basically nonexistent since "for ransom or reward or otherwise" subsumes any purpose—yet compelling a third party to do some act is an outright element in the hostage taking statute. In keeping with its anti-terrorism purpose, the hostage taking statute also has broad extraterritorial application. And, whereas § 1203 only applies inside of the United States when one party is a non-national or the third party to be compelled is the United States government, § 1201 has broad applicability within the United States.

B. Application

Since § 1201 was adopted as a general federal kidnapping statute and § 1203 as a treaty-based crime for acts of terrorism, one might expect that they would be applied in markedly different cases. However, the similarity of their elements, as shown above, suggests that these statutes might easily be interchanged in many cases. One might expect that the differences in application would be between ordinary criminal abductions being charged as kidnappings and abductions with a political motive being charged as hostage takings.

However, the courts have not held that political motive is any kind of requirement in a § 1203 case. In *United States v. Pacheco*, 902 F. Supp. 469, 471 (S.D.N.Y. 1995), the defendants were drug dealers who held a person hostage for money. At trial, the defendants argued that § 1203 could not be applied to them because their motive was financial. The court disagreed, looking to the plain language of that statute and finding that Congress did not restrict the scope of § 1203 to acts of terrorism. *Id.* at 472-73. Section 1203 cases also do not require any international "nexus"; it is jurisdictionally sufficient if the offender is an alien. *United States v. Santos-Riviera*, 183 F.3d 367, 371 (5th Cir. 1999). However, § 1203 does have broader jurisdictional reach to fulfill its purpose in preventing the creation of safe havens for

terrorists. For example, in *United States v. Peralta*, 941 F.2d 1003, 1005 (9th Cir. 1991), the defendant, a United States citizen, kidnapped a non-citizen in Mexico and challenged jurisdiction in the United States for the subsequent criminal case. With the jurisdictional requirements of § 1203 met, the court held that, as long as the hostage taking was committed "in order to compel a third person . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained[,]" § 1203 was properly applied. *Id.* at 1010.

There clearly appears to be some confusion or disagreement as to when kidnapping or hostage taking is the more appropriate charge. For example, in recent years, both the kidnapping and hostage taking statutes were used in connection with a carjacking. *See United States v. Griffin*, 380 F. App'x 840, 841 (11th Cir. 2010) (kidnapping charge for a carjacking); *United States v. Tejada-Landaverde*, 2010 WL 3294332, at *4 (N.D. Ga. June 1, 2010) (hostage taking and carjacking). Both statutes have been used in connection with terrorist activity. *See United States v. Palmera Pineda*, 592 F.3d 199 (D.C. Cir. 2010) (where the hostage taking charge is used in connection with a terrorist group, in this case, the Fuerzas Armadas Revolucionarias de Colombia (FARC)); *United States v. Seale*, 600 F.3d 473 (5th Cir. 2010) (where kidnapping charges were used against a Ku Klux Klan member who victimized two African American men in the 1960s but never demanded ransom). Sometimes, the two charges also appear together in ransom kidnappings. *See, e.g.*, *United States v. Vega-Rubio*, 2011 WL 220033, at *1 (D. Nev. Jan. 21, 2011) (charges for both hostage taking and kidnapping in a drug conspiracy where members abducted a child to coerce a third party to pay a drug debt).

C. Multiplicitous Charges

Are kidnapping and hostage taking charges so similar that they are multiplicitous? The issue has been raised before. In the recent case of *United States v. Angeles*, 2010 WL 2103037 (E.D. Tenn. May 20, 2010), the court explained the following:

> Angeles also argues that the Court erred in denying his Rule 29 motion made at trial and that he is entitled to a judgment of acquittal or a new trial. At trial, counsel for Angeles argued that proof which arguably could support a conviction under the kidnapping charges (count one and count two), was the same as proof which could arguably support the hostage-taking charges (count six and count seven) . . . . Thus,
>
> counsel for Angeles argued, the hostage-taking charges were duplicitous of the kidnapping charges because both involved the same proof.
>
> . . .
>
> Two offenses are different if each offense requires proof of an element that the other does not. *See, e.g.*, *United States v. Martin*, 95 F.3d 406, 408 (6th Cir.1996) (discussing the "same elements" test in the context of a double jeopardy issue). In this case, the hostage-taking charge involved an element that the kidnapping charge did not. The hostage-taking charge specifically required the element of a third party - that the purpose of Angeles's conduct in the hostage-taking was to compel a third party to do an act. In this case, the government put forward proof that a condition of the victim's release was that a third party, a friend of the victim, was required to pay money.
>
> The kidnapping charge, on the other hand, does not contemplate or require any conduct or lack thereof by a third party. Rather, the victim must only be held for "ransom or reward, or otherwise." 18 U.S.C. § 1201(a)(1). In this case, while both the kidnapping and the hostage-taking charges involved the payment of money by the victim, the hostage-taking charge required

> that a third-party be compelled to do an act, something the kidnapping charge did not. In other words, without the government's proof of the third party element, Angeles could have been convicted of the kidnapping charge, but not the hostage-taking charge. However, because the government put on proof of a third party being compelled to do an act, namely, that a friend of the victim in Texas pay money, this element was satisfied.
>
> In sum, the charges, while similar, require a separate element of proof which make the charges separate and independent of one another.

Id. at *2-*4. This case presents a common fact pattern that illustrates how the elements of both crimes, although different, are often met with the same proof.

Even though we have seen that both statutes can be used interchangeably in some cases, or can be used in cases where the other statute seems more appropriate, do any trends emerge in the circumstances leading a prosecutor to charge one over the other? The answer is yes. In recent years the kidnapping statute has most commonly been used in traditional kidnapping cases: carjackings or cross-state personal crimes, *see e.g.*, *United States v. Vicol*, 404 F. App'x 1, 2 (6th Cir. 2010) (kidnapping of ex-girlfriend and her associate); *United States v. Pablo*, 625 F.3d 1285, 1288-89 (10th Cir. 2010) (a kidnapping conviction with carjacking, rape, and assault); *United States v. Larsen*, 615 F.3d 780 (7th Cir. 2010) (kidnapping and interstate domestic violence convictions); *United States v. Griffin*, 380 F. App'x 840, 841 (11th Cir. 2010) (a kidnapping conviction on a carjacking); or in connection with the drug trade or to raise money for organized crime, *see, e.g.*, *United States v. Sanchez*, 615 F.3d 836, 839 (7th Cir. 2010) (drug trafficking); *United States v. Whitmore*, 386 F. App'x 464, 466 (5th Cir. 2010) (kidnapping relating to a drug transaction); *United States v. Martinez*, 385 F. App'x 594 (7th Cir. 2010) (kidnapping scheme by members of the Latin Kings); *United States v. Hernandez*, 604 F.3d 48, 50 (2d Cir. 2010) (kidnapping in connection with drug trafficking); *United States v. Lujan*, 603 F.3d 850, 852 (10th Cir. 2010) (kidnapping in relation to a drug debt); *United States v. Marshall*, 360 F. App'x 24, 25-26 (11th Cir. 2010) (ransom kidnapping of a child after attempt to steal drugs and money failed). These cases fall relatively squarely within the ambit of what one might expect the statute to be used for: common law kidnappings that, because of interstate movement, have federal jurisdiction.

But what of the hostage taking statute? Is this statute by and large used for its intended purpose, as the kidnapping statute is? Is the use of the hostage taking statute mainly against terrorism operations? Surprisingly, the statute has a predominant use, and it is not to suppress terrorism. The main use of the hostage taking statute deals with alien smuggling operations. The court in *United States v. Rodriguez*, 587 F.3d 573 (2d. Cir. 2009) observed as much:

> [A]lthough the first case involving the Hostage Act arose out of a terrorist hijacking of an international flight, *see United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991), the case law that has developed under the Act has not limited it to conduct related to international terrorism, and has applied it to several instances of confining illegal aliens and demanding payment for their release. *See United States v. Tchibassa*, 452 F.3d 918 (D.C. Cir. 2006); *United States v. Si Lu Tian*, 339 F.3d 143 (2d Cir. 2003); *United States v. Ferreira*, 275 F.3d 1020 (11th Cir. 2001); *United States v. Fei Lin*, 139 F.3d 1303, supplemented by *United States v. Fei*, 141 F.3d 1180 (9th Cir. 1998) (table); *Wang Kun Lue*, 134 F.3d at 81; *United States v. Lopez-Flores*, 63 F.3d 1468 (9th Cir. 1995); *United States v. Carrion-Caliz*, 944 F.2d 220 (5th Cir. 1991); *see also United States v. Montenegro*, 231 F.3d 389 (7th Cir. 2000) (confinement of aliens to demand payment for narcotics); *United States v. Santos-Riviera*, 183 F.3d 367 (5th Cir. 1999) (confinement of United States citizen infant to demand ransom for her release); *United States v. Hung*

Shun Lin, 101 F.3d 760 (D.C. Cir. 1996) (confinement of aliens to demand payment of telephone bills).

Id. at 579-80.

Forced movements and detentions of or by aliens relate to another area of criminal concern. The phenomenon of human trafficking, sadly becoming a more ubiquitous crime than ever before, creates a new use for the hostage taking statute, and perhaps the kidnapping statute as well. Human trafficking is an amorphous term in its legal application. It can be found to cover slavery, peonage, debt bondage, forced migration of persons, and even the willing smuggling of persons. Because many trafficked people intend to be smuggled and are later exploited and co-opted into slavery or debt bondage, a nexus exists between willing migration and the resurgence in cases of slavery. Moreover, because this method of trafficking humans—enticing them with opportunities through illegal immigration only to hold them captive—is so common, the hostage taking and kidnapping laws may have a direct relationship to human trafficking cases.

Ironically, will a crime designed to end the tactic of one of the most pervasive international concerns, terrorism, end up having more of an impact on an entirely different international concern, human trafficking?

III. Combating human trafficking

The 2008 Department of State Trafficking in Human Persons Report estimates that 800,000 people a year are trafficked internationally, 80 percent female and 50 percent minors. In response to the growing number of trafficked persons, in 2000, the United Nations General Assembly adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as a supplement to the United Nations Convention Against Transnational Organized Crime. G.A. Res. 55/24, annex 2 (Nov. 15, 2000). The Protocol came into force in the United States in 2005. As a separate effort, the United States passed the Trafficking Victims Protection Act, a subsection of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2, 114 Stat. 1464, 1466 (2000), amended by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2877 (2003), and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005). Codifications appear at 18 U.S.C. §§ 1589-95 (forced labor, trafficking, sex trafficking of children, document fraud/destruction/misconduct connected to trafficking, mandatory restitution, benefitting financially from trafficking), in Chapter 77 with the older slavery and involuntary servitude crimes, and also in 22 U.S.C. §§ 7101-7110 (making findings and committing resources to combat human trafficking).

Migrant smuggling is distinct from human trafficking in the United Nations regime, where it is addressed with a different treaty: the Migrant Smuggling Protocol (a protocol to the same United Nations Convention Against Transnational Organized Crime treaty regime), G.A. Res. 55/25, annex 3 (Nov. 15, 2000). The implication is that there is a difference between a person who is subjected to pure exploitation by a trafficker, who might seduce a young woman in a third world country to travel to the United States with promises of a paid, legal nannying job when in reality she will ultimately be sold as a sex slave; and a person who voluntarily uses the services of a paid trafficker, known as a "snakehead" or "coyote," to willfully enter the United States. In the abstract, those distinctions are readily identifiable. In reality, however, the line separating the two is much cloudier. Trafficking and smuggling rings are run by organized criminal groups, sometimes operating both businesses at once. Many who ultimately end up in a position of sexual slavery, involuntary servitude, or debt bondage, are those who intended to migrate illegally but who were later taken prisoner, likely with their illegal immigration status used as a means of

coercion. While the Migrant Smuggling Protocol indicates that smuggled persons should not be punished criminally, in the United States they are. Illegal immigration is one of the most prosecuted federal crimes, making up 32.5 percent of all offenders sentenced in federal cases in 2010. U.S.S.G. 2010 Annual Report ch. 5, at 35 (2011).

The principal alien smuggling statute in the United States is 8 U.S.C. § 1324. In recent cases, the statute often appears in concert with hostage taking counts. Does the hostage taking statute or the kidnapping statute have any clear relationship with § 1324 or immigration and human trafficking crimes? From a look at the plain language of the statutes, they clearly do not. Section 1201 is a simple general statute, expanded by a treaty crime to protect diplomats. Although invented to fight terrorism and written broadly, preventing the work of snakeheads and coyotes was clearly not an anticipated use of the Hostage Taking Act either. It is important to note that using either statute to address the actions of snakeheads and coyotes was not necessarily disfavored, but was probably not contemplated by the framers of these laws. After acknowledging that these statutes were not framed to deal with such actions, the next inquiry seems to be, does that matter? Does that fact pose any challenge to the prosecutor wishing to use either statute to fight human trafficking? From the conflation between the uses of both statutes and their broad interchangeability to fight different kinds of crime, it does not appear that the original purpose of the statute should prevent either from being used to combat human trafficking.

The notion that the kidnapping and hostage taking statutes are excellent tools to suppress migrant smuggling crimes is hardly novel; their potential was discovered before the recent increase in their use for alien smuggling crimes. In December 1996, Assistant United States Attorney Michael J. Gennaco from the Central District of California, Assistant United States Attorney Thomas D. Warren, also from the Central District of California, and Attorney Steve Dettelbach from the Civil Rights Division, wrote an article titled, "International Kidnapping by Inveiglement and Hostage Taking: Potential Weapons in the Prosecutor's Arsenal Against Alien Smuggling?", United States Attorneys' Bulletin, vol. 44, No. 6 (Dec. 1996), that is available at http://dojnet.doj.gov/usao/eousa/ole/usabook/usab/9612/9612bu11.htm.

Even as the idea of "human trafficking" was still developing, federal prosecutors in the nation's border districts were already aware of the usefulness of the Hostage Taking Act to deal with the brutality of snakeheads and coyotes who traffic illegal immigrants into the United States and then seize on those immigrants' vulnerability to exhort ransoms. This article, although it refers to alien smugglings in its title, actually refers to a case of enslavement. It centers around a 1995 case involving 70 Thai nationals who were discovered in a condo complex. Some of the nationals had been enslaved for up to seven years, working under the watch of posted guards, surrounded by razor wire, and held in place by threats to their families. The captors, like so many who traffic in human beings, had promised these persons employment and financial success in the United States. The trickery and threats that they used to capture and control these people could support a kidnapping charge and possibly a hostage taking charge as well.

While the authors stressed that slavery cases such as this were rare, and alien smugglings more common, slavery connected to migrant smuggling has only grown as a problem in the last 15 years. What is particularly interesting is that, even after passing a number of laws to address human trafficking between 1996 and the present, there is still a robust role for the kidnapping and hostage taking statutes in trafficking cases. For example, there are about 150 published cases relating to prosecutions under § 1203. Nearly half of those cases contain a nexus to alien smuggling, harboring of illegal aliens, ransom of foreign nationals, or a related crime. Although the list of published results presents only an incomplete picture, it shows an increase in the utilization of the Hostage Taking Act with alien smuggling crimes in the last decade. A scan of recent cases will reveal that a majority of cases are now connected with alien smuggling crimes. Even with the addition of anti-human trafficking statutes, the hostage taking statute,

along with the kidnapping statute, remains useful a tool in a number of cases and is perhaps easier to prove.

What do these smuggling cases look like and why has the hostage taking statute become a weapon of choice in many of these cases? A recent case provides a typical fact pattern occurring in a number of alien smuggling cases that happens to resemble the legal proscription aimed at terrorist hostage-takings.

The facts of *United States v. Avila-Anguiano*, 609 F.3d 1046 (9th Cir. 2010), are as follows:

> On May 9, 2004, police officers in Phoenix were contacted by the Las Vegas Metro Police Department and advised of a hostage case in the Phoenix area. According to Las Vegas police officers, a person reported that he had received a telephone call several days earlier from an unknown male stating that he was an alien smuggler in the Phoenix area and was holding three of the subject's relatives hostage. The smuggler demanded immediate payment of six thousand dollars and threatened to kill the hostages if payment was not received. The person was instructed to call the smugglers back when he obtained the money. Thereafter, several times a day, the reporting party received phone calls demanding the money. The reporting party indicated he had talked to the three victims on the telephone and they indicated they were fed only once per day and were not given water. The victims were not aware of the location where they were being held. The relative contacted the police. Phoenix police turned the matter over to immigration officials.
>
> Immigration agents contacted the reporting party in Las Vegas and arrangements were made for him to travel to Phoenix. The reporting party arrived in Phoenix on the evening of May 9, 2004, and a recorded telephone call was made to the smugglers. During the call, the smugglers agreed to lower the fee to $3,000 and agreed to meet the following morning. The smugglers advised they were holding over twenty aliens, had four gunmen, and were located in the area of 67th Avenue and Camelback Road.
>
> On May 9, 2004, members of the Phoenix Special Assault Unit and immigration agents forcefully entered the home at 8801 W. Campbell Road in Phoenix. Eleven people were found huddled together in the back yard of the residence. Among the eleven people were the three relatives of the reporting party.
>
> The residence was secured and a search warrant was obtained and subsequently executed. Agents recovered a 7.62mm assault rifle, a loaded magazine, and 28 rounds of ammunition, miscellaneous documents, 97 rounds of 9mm Luger ammunition, and a cellular telephone.
>
> Subsequent interviews of the illegal aliens held at the residence identified Avila-Anguiano. According to the interviews, he answered the phones and made threats to the families of the aliens being held. He carried a gun and acted as security to make sure nobody left the room.

Id. at 1047-48.

A grand jury returned a six-count superseding indictment against Avila-Anguiano, charging him with conspiracy to commit hostage taking in violation of 18 U.S.C. § 1203, substantive hostage taking, in violation of 18 U.S.C. § 1203, use and carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), and three counts of bringing illegal aliens into the United States, in

violation of 8 U.S.C. § 1324(a)(2)(B)(ii). *Id.* at 1048. Avila-Anguiano was convicted on all counts, and eventually sentenced to 166 months of imprisonment. *Id.* at 1048, 1051.

This case shows how quickly a voluntary smuggling can devolve into an even worse nightmare for the smuggled persons. It is also a sadly common fact pattern, one that has created particular need for the hostage taking and kidnapping statutes.

IV. Conclusion

The addition of a number of laws that address human trafficking crimes was a significant and necessary step in combating slavery, peonage, and debt bondage. But human trafficking is an expansive concept, and many of its manifestations are not the simple cases of involuntary movement into the United States followed by being forced into slavery. In order to address trafficking crimes along the broad spectrum from voluntary smuggling to slavery, prosecutors may need to draw on a number of tools. The kidnapping and hostage taking statutes can be such tools. These statutes are flexible and shown to be adaptable to many kinds of cases and not merely limited to the narrower circumstances for which they were first written. Their application to alien smuggling operations has already been tested and proven and, sadly, as more trafficking operations come to light, they may be more needed than ever.❖

ABOUT THE AUTHOR

❑**Erin Creegan** is a Trial Attorney in the Counterterrorism Section of the National Security Division and an Adjunct Professor of International Criminal Law at the University of Maryland, College Park. She is a frequent author on international, comparative, and national security issues in the criminal law.✠

Carjacking

Julie Wuslich
Attorney
Organized Crime and Gang Section
Criminal Division

I. Introduction

In September 1992, two men forced Pamela Basu out of her car while she was idling at a stop sign not far from her home in Savage, Maryland. As they began to drive away, Basu attempted to rescue her 22-month-old daughter from the backseat of the car when her arm became entangled in the seat belt. Unconcerned, the assailants sped away and dragged Basu to her death. Within months of her killing, Congress enacted the carjacking statute, The Anti Car Theft Act of 1992, 18 U.S.C. § 2119 (1996), to punish and deter such violent car thefts. *See* H.R. REP. NO. 102-851, at 18 (1992) ("In [an armed carjacking], two or three criminals approach a car waiting at a traffic light . . . and force the driver to turn over the keys at gunpoint."); *Holloway v. United States*, 526 U.S. 1, 9 (1999) (Section 2119 reflects congressional "intent to authorize federal prosecutions as a significant deterrent to a type of criminal activity that was a matter of national concern."). Congress, therefore, appears to have sought to criminalize a specific type of violent car theft when it enacted § 2119.

Irrespective of congressional intent, the government has invoked the carjacking statute to punish not just the Basu-type of car theft but also an array of violent crimes involving a vehicle being taken or commandeered. In many cases the government has prevailed, but in a few noted exceptions mentioned below, it has not. The government's success has been due to the courts' generous interpretation of the statute and an expansive and distinguished reading of *Holloway*, further discussed below, which reinforced the statute's purpose by characterizing carjacking as a discreet criminal event. This article summarizes *Holloway*, the cases interpreting it, and other court opinions that have read the carjacking statute broadly, and what implications these decisions may have regarding venue. First, however, the article begins with a brief overview of the statute and a discussion of another important Supreme Court case concerning the structure of § 2119.

II. Overview of § 2119

As originally passed in 1992, the carjacking law required the use of a firearm to effect the theft of a vehicle. In 1994, however, Congress passed the Violent and Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), eliminating the firearm requirement and adding a specific intent element to the law. Two years later, the Carjacking Correction Act of 1996, 18 U.S.C. § 2119 (1996), added sexual abuse to the statute's definition of serious bodily injury. The carjacking statute now reads, in pertinent part:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that . . . would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119 (2010).

At first glance, the statute appears to criminalize a single, specific intent offense, providing for sentencing enhancements if the crime results in either serious bodily injury or death. The Supreme Court, however, held in *Jones v. United States*, 526 U.S. 227, 251-52 (1999), that the carjacking statute defines not one crime, but three: (1) the forceful taking of a vehicle, (2) the forceful taking of a vehicle that results in serious bodily injury, and (3) the forceful taking of a vehicle that results in death. In reaching this conclusion, the Court found that not only did subsections (2) and (3) provide for considerably higher penalties but also "condition[ed] them on further facts (injury, death) that seem [just] as important as the elements in the principal paragraph." *Id.* at 232-33. The Court further explained that reading these sub-provisions as sentencing factors, as opposed to elements of the crime, would dilute the jury's role and a defendant's right to indictment and notice, thus raising serious Sixth Amendment and due process questions. *Id.* at 248-49. Finding the statute to be "grammatically incomplete" and "equivocal," the Court resolved any doubts about the law's intent "in favor of avoiding those [constitutional] questions," and held that these aggravating factors are elements of the offense. *Id.* at 251-52. Accordingly, when the government prosecutes a carjacking crime that results in injury or death, the government must plead those facts and the other elements in the indictment, prove them beyond a reasonable doubt, and submit them to a jury for verdict.

III. Scope of § 2119

Although intended to define and punish the type of violent car theft epitomized by the *Basu* case, the carjacking statute has nevertheless been used to successfully prosecute a variety of violent crimes where the taking of a vehicle was involved.

As stated above, § 2119 is a specific intent crime, meaning the government must prove the defendant specifically intended to cause death or serious bodily injury (intent to harm) at the time the vehicle was taken. *Holloway*, 526 U.S. at 13. The defendants in *Holloway* were armed assailants who threatened to shoot the victims if they did not hand over their cars, but intended to harm them, they said, only if necessary to steal the vehicles. On these facts, the Court had to decide if, as the defendants argued, the statute requires proof of "an intent to harm or kill in all events" or, as the government claimed, proof only of "an intent to kill or harm if necessary to effect a carjacking." *Id.* at 3. Quoting the lower court, the Court stated that this was the type of case that "Congress and the general public would describe as carjacking, and that Congress intended to prohibit . . . in § 2119." *Id.* at 5. Relying further on its understanding of Congress' motive and the statutory text, the Court held that the "intent requirement . . . is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car)." *Id.* at 12. Therefore, under § 2119, intent to harm can be conditional (your car or your life) or unconditional (your life, no matter what), and the fact finder must determine "the defendant's state of mind at the precise moment" the vehicle is taken. *Id.* at 8. Accordingly, intent to harm can be conditional, but there must be a strong nexus between the intent to harm and the taking of the vehicle.

Applying *Holloway*, the Third and Fifth Circuits overturned carjacking convictions, finding the government did not prove the nexus between the intent to harm the victim and the theft of the victim's car. In *United States v. Harris*, 420 F.3d 467, 471, 473-75 (5th Cir. 2005), the court ruled that the government did not make the "connection in time" between the victim's murder and the theft of his car, failing to counter the defendant's story that he murdered the victim to repel his romantic advances and only after that decided to take the car to leave the murder site. In *United States v. Applewhaite*, 195 F.3d 679, 685-86 (3d Cir. 1999), the court concluded that the defendant and his co-defendant lover blugeoned the lover's estranged husband to harm him, not as the means to steal the car. *Id.* at 686. The court characterized the theft of the vehicle as an "afterthought" to remove the victim from the crime scene. *Id.* at 685. In *United States v. Perry*, 381 F. App'x 252, 255 (4th Cir. 2010), however, the Fourth Circuit distinguished *Applewhaite*, finding that the defendant intended to harm his estranged girlfriend when he gained entrance to her car. The *Perry* court emphasized that here, unlike in *Applewhaite*, the defendant "possessed the requisite intent [to harm] at the moment he took control over [the victim's] car." *Id.* at 254-55. *See also United States v. Casteel*, 721 F. Supp. 2d 842, 853 (S.D. Iowa 2010) (distinguishing *Harris* and *Applewhaite*, stating that the defendant possessed the intent to harm the victim if the victim resisted at any time during the robbery of her valuables and her car).

While there must be a connection between the intent to harm and the taking of the vehicle, these elements need not be present contemporaneously as they were in *Holloway*, as long as they co-exist as part of the same criminal plan. *See United States v. LeCroy*, 441 F.3d 914, 924-25 (11th Cir. 2006) (Although defendant raped and murdered the victim in her home and then stole her car, the defendant "formulated the intent to steal the car prior to exerting force against [the victim], and . . . the force was employed in furtherance of taking the car."); *Casteel*, 721 F. Supp. 2d at 849-53 (defendants possessed the intent to harm the victim during the course of the robbery, which culminated in the theft of her car); *United States v. Wilson*, 493 F. Supp. 2d 491, 504-05 (E.D.N.Y. 2007) (where the defendant murdered undercover officers to rob them, and the subsequent taking of the car was "an integral aspect of [the] planned robbery").

Some courts have extended the temporal limits of a carjacking beyond those described in *Casteel*, *LeCroy*, and *Wilson*, by defining the "taking" of the car as an act that extends beyond the initial seizure of the car and continues "while the carjacker maintains control over the victim and his or her car." *United States v. Figueroa-Cartagena*, 612 F.3d 69, 75 (1st Cir. 2010) (collecting cases). Referred to in the First Circuit as the "abduction rule," the theory serves to punish conduct that "occur[s] long after the vehicle [is] seized." *Id.* at 81. In *Figueroa,* the court re-examined the abduction rule in the context of aider and abettor liability. In that case, the defendant was convicted of aiding and abetting a carjacking for helping her co-defendants hold the victim hostage after they stole the car. In challenging her conviction, the defendant argued she could not have aided and abetted a crime that had been committed already, averring the offense was complete when her co-defendants first took the car, an act she neither facilitated nor participated in. Despite its criticism that the abduction rule is based on a tenuous legal analysis and confident that Congress did not intend to punish abductions under § 2119, the court nevertheless heeded First Circuit precedent and upheld the defendant's conviction. *Id.* at 80-82. The court explained that "Congress was simply not thinking about extended carjackings/abductions when it enacted § 2119" and that "[t]he origins of the abduction rule in this circuit . . . raise doubts about its validity." *Id.* The court proposed either a causation or transactional theory of liability instead. *Id.*

Just as the elements of intent and taking have been read expansively to apply § 2119 beyond the classic carjacking case, "the person or presence" element of the law has also been liberally construed. With regard to this element, the victim does not need to be in the car when it is stolen in order for the car to be taken from the victim's person or presence. Rather, the government must prove only that the victim

was in a position from where he could have prevented the theft if not for the carjacker's threat or use of violence. *See United States v. Savarese*, 385 F.3d 15, 18-20 (1st Cir. 2004) (collecting cases); *United States v. Kimble*, 178 F.3d 1163, 1167-68 (11th Cir. 1999); and *Casteel*, 721 F. Supp. 2d at 849-50. All of these cases adopted the principle articulated in *United States v. Burns*, 701 F.2d 840 (9th Cir. 1983). In *Burns,* the Ninth Circuit, interpreting a robbery statute's "person or presence" language, held that "property is in the presence of a person if it is so within his reach, inspection, observation or control, that he could if not overcome by violence or prevented by fear, retain his possession of it." *Id.* at 843. Therefore, the government does not have to prove that the victim was in the car or even beside it at the time it was taken. The government must only show that the victim could have prevented its theft had the victim not been afraid to act. *Burns*, 178 F.3d at 843; *see also Savarese*, 385 F.3d at 20 (victim's driveway); *Kimble*, 178 F.3d at 1168 (outside restaurant); and *Casteel*, 721 F.Supp. 2d at 849 (victim's driveway).

IV. Venue

The Constitution requires the government to prosecute a defendant in the location where the crime occurred. U.S. CONST. art. III, § 2, cl. 3. *See also* FED. R. CRIM. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed"). Although the rule is simply stated, the place where the crime was committed may not be obvious and the location of the crime must be determined by "identify[ing] the conduct constituting the offense (the nature of the crime) and then discern[ing] the location of the commission of the criminal acts." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999). As the court stated in *Figueroa-Cartagena*, "[t]he temporal scope of carjacking is likely to be a recurring issue," arising in cases involving "the intent element of carjacking" and, as such, "may. . . have implications for venue." *Figueroa-Cartagena*, 612 F.3d at 83. As discussed above, there must be a nexus between the intent to harm the victim and the taking of the vehicle for there to be a carjacking under 18 U.S.C. § 2119. Under *Holloway*, the Court found on the facts before it that a carjacking occurs at a "precise moment" in time, 526 U.S. at 8, but as demonstrated above, the courts have not applied *Holloway* so restrictively. As a result, venue could lie in more than one jurisdiction—not just where the car was seized from the victim initially, but also in the place where the defendant ultimately relinquished control of the car and the victim.

There are a couple of cases that discuss venue in the context of carjacking. In finding venue, one case relied on the law of conspiracy, *see United States v. Robinson*, 275 F.3d 371 (4th Cir. 2002) (venue to prosecute an 18 U.S.C. § 924(c)(1) offense was proper in the jurisdiction where gun was not used because conspiracy to commit carjacking, the underlying crime of violence, was a continuing offense that may be prosecuted in more than one district). In another case, *United States v. Fell*, 2005 WL 1026599, at *1-3 (D. Vt. Apr. 22, 2005), the defendant was charged with carjacking and kidnapping. He kidnapped the victim in Vermont, murdered her in New York, and was prosecuted in Vermont. Here, the court cited to the portion of 18 U.S.C. § 3237 that defines a "continuing crime" as one "involving . . . transportation in interstate . . . commerce . . ." and, therefore, allows the crime to be prosecuted in any district where a part of the crime was committed. The *Fell* court, with no analysis, found carjacking to be a continuing offense under this statute and also cited to *Rodriguez-Moreno*, comparing carjacking to kidnapping, the crime considered in that case.

With regard to 18 U.S.C. § 3237, that statute provides, in pertinent part:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. Any offense involving the use of mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise provided by an enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. § 3237 (2010).

As noted, the court in *Fell* relied on the second paragraph of this statute to find jurisdiction for the carjacking count, without discussing what is meant by the phrase "any offense involving the use of . . . transportation in interstate or foreign commerce." Other decisions, considering other criminal statutes, have found that the phrase "any offense involving" refers to the elements of the charged crime. *See United States v. Morgan*, 393 F.3d 192, 197-98 (D.C. Cir. 2004) (phrase refers to the elements of the charged offense, but cautioned applying the statute to any offense where "interstate transportation is among the circumstances related to the commission of the offense," thus allowing for venue to lie in a multitude of places); *United States v. Beech-Nut Nutrition Corp*., 659 F.Supp. 1487, 1494 (E.D.N.Y. 1987) ("involving" means "to include as a necessary circumstance" and continuous crimes are "not only offenses of actual transportation but include offenses of receipt from, and introduction into, interstate commerce"). While the interstate/foreign transportation of the stolen vehicle is an "essential element" of a carjacking offense, *see United States v. Glover*, 265 F.3d 337, 343 (6th Cir. 2001), the issue remains whether this element is "a necessary circumstance" of the crime itself or merely the mechanism by which the federal government secures jurisdiction to prosecute the offense. For that reason, relying on this statute to establish venue for a carjacking offense that spans more than one jurisdiction would be ill-advised. Rather, a more reasonable approach would be to aver that the offense continued while the defendant exercised control over the victim and the car, and during that time, the defendant maintained the intent to harm the victim at any point to effect the taking of the car.

V. Conclusion

When the carjacking law was passed, Congress was clearly motivated to act by the *Basu* murder, a case that captured national attention because it was vicious, random, and symptomatic of a crime spree of violent car thefts. *See Man Guilty in Carjacking in Which Woman Died*, THE NEW YORK TIMES, Aug. 15, 1993; E. Michael Kahoe, Howard B. Apple & Wayne M. Barrett, *Piracy: Vehicle Theft Takes a Deadly Turn*, USA TODAY, Sept. 1993; Ted G. Washington, *A Savage Story*, TIME MAGAZINE, Sept. 9, 1992. While the *Basu* case may have motivated Congress to act during a time when the nation perceived an epidemic of carjackings, the courts have chosen not to define the crime so narrowly. If and when courts have considered the legislative history of the carjacking law, they have not been beholden to it, but have rather used the law that Pamela Basu's death inspired to avenge the lives of others.❖

ABOUT THE AUTHOR

❑**Julie Wuslich** joined the Department of Justice in 1991 as an attorney in the Electronic Surveillance Unit of the Office of Enforcement Operations (OEO). In 1995, she became the chief of that unit and held that position until 2009 when she became an Associate Director in OEO. During her time as chief, she lectured on electronic surveillance issues before numerous law enforcement agencies, advised on electronic surveillance issues, and wrote training materials for an international symposium on electronic surveillance. As an Associate Director, Ms. Wuslich authorized requests to conduct video surveillance in criminal investigations and vetted requests by Assistant United States Attorneys to pursue dual prosecutions, immunize witnesses, search attorney offices, and prosecute attorneys. In addition, she developed model pleadings for use in electronic surveillance investigations and authored OEO's recent minimization policy and related procedures. In June 2011, Ms. Wuslich began a detail with the Organized Crime and Gang Section, reviewing RICO and VICAR indictments and responding to policy and legislative issues.✠

Threats

Jeff Breinholt
Counsel for Law and Policy
National Security Division
Department of Justice

I. Introduction

In the English language, a "threat" is the possibility that something bad will happen. In American criminal law, a threat is a verbal expression of an intention to do something bad. Saying something under one's breath is generally not enough to constitute a threat; threat crimes focus on the reasonable apprehensiveness of the would-be victim, meaning that the verbal expression must be expressed out loud, in a manner designed to intimidate. Even though the expression must be delivered in a manner designed to intimidate, a threat is in essence an oral crime; no affirmative act, other than one's expression, is required.

The United States Criminal Code contains several crimes of threat. Title 18 criminalizes threats to federal officials (§ 115(a)); federal judges (§ 115(a)); the President and Vice President of the United States (§ 871); foreign officials (§ 878); and Presidential candidates and former Presidents (§ 879). It is also a crime to transmit a threat against anyone by interstate wire (§ 875) or by mail (§ 876). Threats are sometimes charged with the federal hoax statute (§ 1038), as well. In addition, Title 18 U.S.C. § 2261A provides in relevant part:

> Whoever–
>
> travels in interstate . . . commerce . . . with the intent to kill, injure, harass, or to place under surveillance with intent to kill, injure, harass or intimidate another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to, or causes substantial emotional distress to that person, a member of the immediate family . . . of that person, or the spouse or intimate partner of that person . . . shall be punished as provided in section 2261(b).

It is a crime to interfere with commerce by threats under 18 U.S.C. § 1951. *See United States v. Rosario-Colon*, 2011 WL 3059764, at *1 (1st Cir. July 25, 2011). It is also a crime to threaten to unlawfully damage or destroy a building by means of an explosive under 18 U.S.C. § 844(e). *See United States v. Simmons*, 649 F.3d 301, 304 (5th Cir. 2011); *United States v. Scheutt*, 415 F. App'x 792 (9th Cir. 2011); *United States v. Kilkeary*, 410 F. App'x 554, 556 (3d Cir. 2011). This article focuses on threat prosecutions that have been the subject of appeals in 2010 and 2011.

II. The Supreme Court and threats: The *Watts* decision

No discussion of threat crimes would be complete without considering *Watts v. United States*, 394 U.S. 705 (1969), a threat case decided by the Supreme Court 30 years ago, because it occasionally comes up in more recent cases.

On August 27, 1966, Robert Watts, an 18-year-old, was present at a public rally on the grounds of the Washington Monument. In a discussion about whether young people should get more education before expressing their views, Watts stated:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . . They are not going to make me kill my black brothers.

Id. at 706. This statement was witnessed by an investigator for the Army Counter Intelligence Corps. Watts was arrested and charged under § 871.

At the close of the government's case, Watts' counsel moved for a judgment of acquittal, arguing that there was no evidence available for a jury to find that Watts made a threat against the life of the President. Noting that Watts statement was made during a political debate, that it was expressly made conditional upon an event—induction into the Armed Forces—that Watts vowed would never occur, and that both Watts and the crowd laughed after the statement was made, Watts counsel argued the following to the trial court:

> Now actually what happened here in all this was a kind of very crude offensive method of stating a political opposition to the President. What he was saying, he says, I don't want to shoot black people because I don't consider them my enemy, and if they put a rifle in my hand it is the people that put the rifle in my hand, as symbolized by the President, who are my real enemy.

Id. at 707.

The Supreme Court, in a per curiam opinion, agreed, concluding that the trial court should have granted the motion for acquittal. *Id.* at 707-08. In doing so, the Court held that § 871 was constitutional on its face:

> The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence. Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech . . . . [W]hatever the "willfulness" requirement implies, the statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by [Watts] fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The language of the political arena . . . is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Id. at 707-08 (internal citations omitted).

In his separate concurring opinion, Justice Douglas was not so charitable with the statute, stating, "Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution." *Id.* at 712.

Watts was the first time the Supreme Court considered the constitutionality of § 871. Prior to *Watts*, lower courts had placed an extremely broad interpretation on the "threat" requirement of § 871(a), refusing to exclude conditional language, *United States v. Jasick*, 252 F. 931, 933 (E.D. Mich. 1918); words obviously made in jest, *Pierce v. United States*, 365 F.2d 292, 293-94 (10th Cir. 1966); and political hyperbole, *Rothering v. United States*, 384 F.2d 385, 386 (10th Cir. 1967). In fact, the early cases indicate a preoccupation with the supposed disloyal nature of communications rather than their seriousness or imminence. *See United States v. Stobo*, 251 F. 689, 692-93 (D. Del. 1918).

III. Recent Presidential threat cases

On October 22, 2008, when Barack Obama's election was looking more and more likely, Walter Edward Bagdasarian, under the username "californiaradial," joined a "Yahoo! Finance—American International Group" message board where members of the public posted messages concerning financial matters, AIG, and other topics. At 1:15 a.m. on the day that he joined, Bagdasarian posted the following statement on the message board: "Re: Obama fk the niggar, he will have a 50 cal in the head soon." About 20 minutes later, he posted another statement on the same message board: "shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right? ? ? ? long term? ? ? ? never in history, except sambos." Bagdasarian also posted statements on the same message board that he had been extremely intoxicated at the time that he made the two earlier statements. He repeated at trial that he had been drinking heavily on October 22. Another participant on the message board, John Base, a retired Air Force officer, reported Bagdasarian's second statement regarding Obama to the Los Angeles Field Office of the United States Secret Service that same morning. Base told the Secret Service that an individual identified by the username "californiaradial" had made alarming statements directed at the Presidential candidate. He also provided the Secret Service with the Internet address link to the second message board posting.

A Secret Service agent located both posts on the Yahoo! message board and, one week later, Yahoo! provided the Secret Service with subscriber information for californiaradial@yahoo.com, registered in La Mesa, California. Yahoo! also provided the Secret Service with the Internet Protocol (IP) history for the "californiaradial" email account that Service agents used to identify the IP address from which the statements were posted. This IP address led the Service agents to Bagdasarian's home in La Mesa.

A month after the two statements for which Bagdasarian was indicted were posted on the AIG message board, two agents visited and interviewed him and he admitted to posting the statements from his home computer. When asked, he also told the agents that he had weapons in his home. The agents found one weapon on a nearby shelf; Bagdasarian said he had other weapons, as well. Four days later agents executed a federal search warrant at Bagdasarian's home and found six firearms, including a Remington model 700ML .50 caliber muzzle-loading rifle and .50 caliber ammunition.

The agents also searched the hard drive of Bagdasarian's home computer and recovered an email sent on Election Day with the subject, "Re: And so it begins." The email's text stated, "Pistol? ? ? Dude, Josh needs to get us one of these, just shoot the nigga's car and POOF!" The email provided a link to a Web page advertising a large caliber rifle. Another email that Bagdasarian sent the same day with the same subject heading stated, "Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this." It included a link to a video of a propane tank, a pile of debris, and two junked cars being blown up. These email messages would appear to confirm the malevolent nature of the previous statements as well as Bagdasarian's own malignant nature. Unlike his response to the first two message board

statements that he made two weeks earlier, Bagdasarian did not attempt to excuse his third inexcusable statement on the ground that he was intoxicated.

After the Secret Service filed a criminal complaint against Bagdasarian for the posting the "shoot the nig" and "Obama fk the niggar" statements, the prosecution obtained a superseding indictment, charging Bagdasarian in two counts under 18 U.S.C. § 879(a)(3) with threatening to kill and inflict bodily harm upon a major candidate for the office of President of the United States. Bagdasarian waived his right to a jury trial. The case was tried before a district judge on the foregoing stipulated facts. The district court found Bagdasarian guilty on both counts. He appealed. The Ninth Circuit reversed, holding that evidence was insufficient to sustain Bagdasarian's conviction:

> Taking the two message board postings in the context of all of the relevant facts and circumstances, the prosecution failed to present sufficient evidence to establish beyond a reasonable doubt that Bagdasarian had the subjective intent to threaten a presidential candidate. For the same reasons that his statements fail to meet the subjective element of § 879, given any reasonable construction of the words in his postings, those statements do not constitute a "true threat," and they are therefore protected speech under the First Amendment.

United States v. Bagdasarian, 2011 WL 2803583, at *8 (9th Cir. July 19, 2011). For another recent Presidential threat case where the prosecution fared better, see *United States v. Allen*, 2010 WL 4116815, at *2 (5th Cir. Oct. 19, 2010).

Other recent Presidential threat cases show a very common phenomenon—the inquiry into the defendant's mental competence. *See United States v. Wine*, 408 F. App'x 303, 305-06 (11th Cir. 2011) (affirming district court's inquiry into defendant's mental competence); *United States v. Larson*, 2010 WL 4598137, at *7 (10th Cir. Nov. 15, 2010) (following § 871 conviction, affirming district court's requirement of medical treatment); *United States v. Crape*, 603 F.3d 1237, 1247 (11th Cir. 2010) (defendant found not guilty by reason of insanity).

IV. Threats on federal officials

There is a specific statute dealing with threats to federal officials and federal judges. It provides, in part:

> (a)(1) Whoever–
>
> (B) threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).

18 U.S.C. § 115(a)(1) (2010). Note also that 18 U.S.C. § 876 contains special protection for federal officials and federal judges:

> (c) Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both. *If such a communication is addressed to a*

United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 876 (2010) (emphasis added).

The reach of § 115 was recently taken up by the Third Circuit in *United States v. Bankoff*, 613 F.3d 358 (3d Cir. 2010). Michael Bankoff threatened two employees of the Social Security Administration (SSA), including a claims representative, Daniel Sphabmixy, and an operations supervisor, Susan Tonik, after learning that the he had been overpaid $9,000 in disability benefits and the SSA was seeking to recover the amount of the overpayment. Bankoff made threatening statements over the phone and on voice mail in which he said that he would "kick the shit of out [Sphabmixy]" and "smack the shit out of that bitch [Tonik]". He made a similar statement to another SSA claims representative, Crystal Robinson.

On appeal, Bankoff challenged the application of § 115 and its incorporation of the protected parties of § 1114 to the employees of the SSA. Bankoff argued that the use of the term "official" in § 115 to reference § 1114 incorporates a subclass of those protected under § 1114, rather than the entire class of "any officer or employee of the United States." *Id.* at 362-63. Consequently, Bankoff argued that this subclass does not include the alleged victims because they were employees that perform routine and subordinate functions rather than officials.

The Third Circuit found that the use of the term "official" in § 115 has a "special meaning" to include employees, analogizing it to the statutory language of 18 U.S.C. § 201(a)(1) criminalizing public bribery. The court noted that § 1114, that once specifically enumerated each category of civil servants that was protected, had become too cumbersome to list and was amended in 1996 to its present language. *Id.* at 369-70. The court concluded that the term "official" in § 115 was "not used as a term of limitation, but as a general term that incorporates by reference all the individuals protected under § 1114, both 'officers and employees.' " *Id.* at 370. As a result, the Third Circuit affirmed the conviction on one count and reinstated the conviction on the other. *Id.* at 374.

What if the threat is charged under § 876, which prohibits the threatening of any "person"? Must the threat be addressed to a natural person? This question was addressed in *United States v. Havelock*, 2010 WL 3293614 (9th Cir. Aug. 23, 2010).

On Super Bowl Sunday, Kurt William Havelock made plans to randomly shoot people heading to the stadium for Super Bowl XLII in Glendale, Arizona. Shortly before kickoff, Havelock deposited six Priority Mail envelopes into a mailbox at a post office near the stadium. Four of the envelopes were addressed to the New York Times, the Los Angeles Times, the Phoenix Times, and the Associated Press; the other two were addressed to music-related Web sites, theshizz.org and azpunk.com. The envelopes contained various documents, including a five-page manifesto written by Havelock, an apologetic letter to the Tempe police, and an accounting of a recent incident involving Havelock, faux pipe bombs, and the Tempe police. After depositing the envelopes, Havelock drove to a parking lot near the stadium, prepared to engage his plan. Shortly after arriving, Havelock had a change of heart and, after speaking with his father, turned himself into Tempe police.

A federal grand jury indicted Havelock on six counts of mailing threatening communications in violation of 18 U.S.C. § 876(c). Each count was identical except for the name of the addressee. Each count stated that Havelock "knowingly deposited in the United States mail, with intent to threaten, a communication . . . containing a threat to injure the person of another . . . ." *Id.* at *2.

Prior to trial, Havelock moved to dismiss the indictment, claiming that the phrase "any other person" in § 876(c) referred solely to natural persons, making the envelopes addressed to media outlets insufficient for the charges. Havelock also argued for dismissal because the envelopes were devoid of "any threat to injure" and rather contained explanations for his intended actions. The trial court agreed that the statute applied only to natural persons but allowed the jury to review the envelopes and their contents to determine whether they were addressed to natural persons. Regarding the question of threats within the envelopes, the trial court also left the decision to the jury. Havelock was convicted on all six counts and was sentenced to 366 days in jail, followed by 36 months of supervised release.

The Ninth Circuit reversed the trial court's ruling because it erred in allowing the trier of fact to determine whether the mailed communication was "addressed to any other person" as the statute requires. *Id.* at *6. The statute requires that the "person" to whom the mail is addressed must be a natural person rather than an institution or a corporation. *Id.* at *3. The Ninth Circuit also determined that the addressee must be indicated on the outside of the envelope deposited in the mail. *Id.* at *6. The Ninth Circuit considered this conclusion to be the natural understanding for an addressee in the context of the postal service. Moreover, the contents of Havelock's envelopes contained no additional salutations. Because Havelock did not address natural persons on the exterior of the envelopes, the Ninth Circuit reversed his conviction and remanded the case to the district court for acquittal.

Scott Lewis Rendelman was convicted in the United States District Court for the District of Maryland of mailing threatening communications. In a 2005 letter addressed to the " 'United States Marshal's Service' Sacramento, CA 95814," he expressed several grievances against the government, particularly its penal system, and threatened to kill "government scumbags" and the President after being released from prison. The letter in part stated:

> I've decided I'm going to commit suicide, and I'm going to take as many government scumbags with me as I possibly can. When I'm released, I'm going to go to the White House, and I will suicide bomb the White House. . . . I will kill the President, whoever will be in the office at the time.

United States v. Rendelman, 641 F.3d 36, 40 (4th Cir. 2011). Rendelman signed the 2005 letter and placed it in an envelope directed to the Marshall's Service in California. He then deposited the letter in the mail at the Montgomery County Correctional Facility in Boyds, Maryland.

In a 2006 letter, Rendelman again expressed his disdain for the federal prison system and threatened to kill "the President and all White House employees" by bombing the White House. *Id.* at 40. The 2006 letter specified:

> The President must die. When I am released I will kill him. I will suicide bomb the White House. I will strap a bomb to my body and go to the White House and set myself off. The President will die in the blast and the White House will be reduced to ruins . . . . So I will kill the President and all White House employees.

Id.

Rendelman signed and mailed the 2006 letter to the Marshall's Service from the Maryland Correctional Institution in Hagerstown. Rendelman was charged under § 876(c) , not the Presidential threat statute, and a jury convicted him.

On appeal, Rendelman argued that the communication, which was addressed to the Marshall's Service, was not addressed to "any other person" as required by the statute and the indictment. The Fourth Circuit rejected this argument, reasoning that the person or entity to whom the threatening

communication is addressed is not an essential element of a § 876(c) offense and that the section merely requires proof that the accused knowingly mailed the threatening communication, not that he also intended to threaten the person of the recipient thereof. *Id.* at 46.

V. Other recent threats against federal judges and federal officials

Other recent cases involving threats to federal judges and officials show how often mental competence is an issue:

- In August 2006, Ann McHugh made several phone calls to, and left messages for, Carol Messick and Dennis Carroll, two employees of the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services. McHugh threatened to assault and murder Messick and Carroll because of frustration stemming from McHugh's difficulties in filling prescriptions needed to treat her mental illness. McHugh was charged under § 115. In May 2007, she pled guilty to two § 115 counts of threatening to assault and murder an official of the United States government and was sentenced to time already served and three years of supervised release. In July 2008, McHugh violated her probation by failing to take her prescribed medication and engaging in disruptive behavior that caused her to be removed from a rehabilitation center. In December 2008, the court sentenced her to 30 days imprisonment without supervised release afterwards. *United States v. McHugh*, 2010 WL 2889529, at *1 (3d Cir. July 22, 2010).
- While serving a sentence in state prison, Juan Oquendo sent a letter to a federal judge threatening to kill him. He plead guilty to 18 U.S.C. § 115(a)(1)(B) and the district court sentenced him to 77 months in prison, the bottom-end of the career offender guideline range. On appeal, the Third Circuit concluded that the district court gave reasonable and appropriate attention to Oquendo's childhood abuse and mental health issues and upheld his sentence. *United States v. Oquendo*, 2010 WL 2181744, at *1 (3d Cir. June 2, 2010).
- Justin Houghtaling mailed a threatening letter to a federal judge while he was serving a state sentence for first-degree murder. In his letter, Houghtaling claimed to be a leader of a white supremacist organization, referred to the judge as a prostitute, a "Jude lover," and repeatedly referred to the tragic murders of her mother and husband. Finally, he threatened to kill her. The court upheld his 120-month sentence. *United States v. Houghtaling*, 390 F. App'x 604 (7th Cir. 2010).
- In a Hobbs Act prosecution, Andre Corbett was convicted on 32 counts, including mailing threatening communications in violation of § 876. He received a sentence of 1,692 months' imprisonment. Count 31 charged Corbett with threatening an ATF agent who was working on his case. Corbett wrote a letter to the agent, describing how he wanted to slice her face with a box cutter. At trial he asserted that "making such statements was a form of therapy for him." The evidence was found to be sufficient to support Corbett's conviction on this count. *United States v. Corbett*, 2010 WL 1258253, at *7 (4th Cir. Apr. 2, 2010).

- Between 2003 and 2005, Barry Dean Bischof and other prisoners at a federal correctional institution in Reno sent threatening letters to federal officials, including the institution's warden. The prisoners claimed that they had obtained property interests in their names and demanded exorbitant sums as damages for copyright and trademark infringement. With the help of individuals outside of the prison, Bischof and others attempted to file liens on the real and personal property of the officials and to use those liens to negotiate their release. After the FBI learned of the scheme, a grand jury indicted Bischof for conspiracy to impede federal officials in violation of 18 U.S.C. § 372 and mailing threatening communications with intent to extort in violation of § 876(d). He was convicted by a jury, and sentenced to 168 months' imprisonment. *United States v. Bischof*, 2010 WL 3010349, at *2 (10th Cir. Aug. 3, 2010).
- Laurence Eustelle Wolff admitted that he had refused to pay federal income taxes since 1988. Beginning in 1996, the Internal Revenue Service (IRS) tried to collect these unpaid taxes from him but to no avail. The IRS, consequently, referred the matter to the Department of Justice. Assistant United States Attorney Carol Statkus filed a civil lawsuit in 2007 in federal district court in Wyoming before Chief Judge William Downes to foreclose on Wolff's property in order to partially satisfy his tax debt. In 2008, Chief Judge Downes ordered the foreclosure and sale of Wolff's residence in Wyoming to satisfy the tax lien. The order compelled Wolff to vacate the residence within 30 days. In response, Wolff mailed a 16-page letter entitled a "Brief Expose on the Fraud of the Internal Revenue Service" with 11 pages of attachments to 240 individuals, including Chief Judge William Downes, AUSA Statkus, Fred Bass (an IRS officer assigned to Defendant's tax collection matter), and Sheriff William Pownall of Campbell County, Wyoming. Additionally, in his 27-page mailing, he threatening a stand-off on his property. Members of the Campbell County Sheriff's Office arrested Wolff at a local restaurant as he got into his car in August 2008. The officers recovered a loaded handgun and additional ammunition. Law enforcement then secured his residence. Once inside, the officers discovered six loaded firearms and additional ammunition in various places within a bedroom. He was sentenced to 27 months' imprisonment and 3 years' supervised release. *United States v. Wolff*, 2010 WL 1049569, at *1 (10th Cir. Mar. 23, 2010).

The *McHugh*, *Oquendo*, and *Houghtaling* cases each involved an inquiry into the defendant's mental competency.

VI. Private threats

It is a crime to threaten anyone by mail (18 U.S.C. § 876) or electronic communication (18 U.S.C. § 875). Many of these recent "private threats" involve romances gone bad, while a few are just plain strange.

In the bizarre category is the case of Charles Zohfeld, who made threatening calls to the cardiac surgeon who had saved his life by performing an open heart surgery and implanting a pacemaker. After the surgery, Zohfeld threatened the surgeon over the phone, appeared at the clinic, and monitored the surgeon's family's whereabouts. The surgeon moved from Illinois to California, but Zohfeld did not give up. On one phone call, he stated that he had been practicing with his 9-millimeter handgun and would bring it by for the surgeon. On another phone call, he stated, "You really should consider taking out the stuff you put into me. I was the wrong person to stick a knife into. Got that?" *United States v. Zohfeld*, 595 F.3d 740, 742 (7th Cir.2010). Zohfeld pled guilty to two counts of making threatening phone calls in

violation of 18 U.S.C. § 875(c). He was sentenced to 24 months in prison and appealed his sentence. The Seventh Circuit affirmed. *Id.* at 744.

Similarly, Dennis D. Carson sent a letter to a law firm that was representing Springfield College, a defendant in a civil suit filed by Carson. The letter discussed Carson's firearms training and the Columbine High shootings and suggested similar events would occur if the college did not reinstate him with free tuition. Carson pled guilty after he was charged with transmitting in interstate commerce a threat to injure the person of another with the intent to extort money and other things of value in violation of § 875(b). The district court concluded that Carson's offense level was 21 and his criminal history category was IV, resulting in a guideline range of 57 to 71 months. The district court imposed an upward variance of 49 months because it found that Carson's criminal history category grossly underrepresented the danger he posed to society. He was sentenced to 120 months in prison. The Third Circuit affirmed his sentence. *United States v. Carson*, 2010 WL 1695635, at *3 (3d Cir. Apr. 28, 2010).

VII. White powder and 18 U.S.C. § 1038

Chad Conrad Castagana sent threatening letters to various celebrities and political figures and included a white powdery substance in the letters. Between September 7 and November 9, 2006, Castagana mailed 14 letters to such people as comedians Jon Stewart and David Letterman, Viacom executive Sumner Redstone, Representative Nancy Pelosi, Senator Charles Schumer, and political commentator Keith Olbermann. The letters expressed hostility to the addressees' political viewpoints, and included threats. The white powdery substance included in the letters was not dangerous; it was a combination of laundry soap and cleanser.

Castagana admitted sending the letters after being apprehended at his home just days after sending the last letter. Castagana stated he had no intent to harm anyone and he described the steps he used to avoid apprehension. Castagana also admitted that his goal was to get the attention of the addressees.

At trial, Castagana argued that he could not form the requisite intent needed for violations of 18 U.S.C. § 1038(a)(1) due to his mental disorders. Castagana proposed a jury instruction requiring the government to prove that Castagana intended his targets to reasonably believe that the letters contained anthrax. The district court refused Castagana's jury instruction and Castagana was convicted.

Castagana appealed solely on the refusal of the court to give the requested jury instruction. On appeal, the Ninth Circuit affirmed the district court's ruling. Castagana argued that the key phrase in § 1038(a)(1), "with intent," modified all clauses in the statute's key section. The district court, however, found that "with intent" meant only that Castagana needed to "intentionally convey[] false or misleading information." *United States v. Castagana*, 604 F.3d 1160, 1163 (9th Cir. 2010). The Ninth Circuit agreed with the district court and rejected Castagana's interpretation. It concluded that Castagana's interpretation was wrong and that the statute was unambiguous regarding the scienter requirement. *Id.* at 1163-64. The Ninth Circuit explained that Congress clearly intended for a subjective standard to apply to the intent requirement in the first part of the statute, the part describing those who "engage[] in any conduct with intent to convey false or misleading information." *Id.* at 1163. Conversely, the court saw clear Congressional intent that the recipient's belief that such action indicates terrorist activity need only be an objective belief. The Ninth Circuit believed that construing the statute to assess threats from an objectively reasonable standard is consistent with Congress' goal of "preventing the massive consequences of such hoaxes . . . ." *Id.* at 1164. Thus, the government only needed to prove that Castagana intended to convey false information, not that the recipients "reasonably believed" the false information. *Id.* at 1166.

VIII. Love gone sour

James E. Williams was a prisoner at a federal prison, serving a 70-month sentence for possession with intent to distribute cocaine base. Williams became upset when his wife cut off contact and became unavailable to plan his upcoming furlough. On June 12, 2008, Williams left two threatening messages on his wife's voice mail. Attempting to reach his wife, Williams called his mother and requested that she make a three-way call to his wife's cellular phone. William's mother put his 16-year old niece on the phone to complete the request. Williams gave his niece the number to call, directed her to let the call go to voice mail, and press "1" to leave a message. Williams then directed this process a second time, leaving messages laced with overt threats on his wife's voice mail both times.

Williams was charged with two counts of making a threatening telephone communication in violation of 18 U.S.C. § 875(c). Williams pled guilty to Count 1, while Count 2 was dismissed. The presentence investigation report recommended a two-level sentencing enhancement for using a minor to commit the offense. Williams objected to this recommendation. Williams' counsel argued that Williams did not intend for his niece to be complicit in the act and that "she just happened to be there." The district court overruled Williams' objection while discussing its belief that Williams directed his niece's actions in the telephone calls. *United States v. Williams*, 590 F.3d 616, 617 (8th Cir. 2010).

Williams argued that it was his mother, not himself, who requested his niece to assist in the calls. Williams also argued that the district court erred in relying on conduct that occurred after the completion the first telephone call, as Count 2 of the indictment had been dismissed. The Eighth Circuit determined that Williams' first argument was flawed in its definition of the term "use" as used in § 875(c). "Use" is not relegated to active recruitment, according to the Eighth Circuit. *Id.* at 618. It may include directing or commanding the minor to participate. Thus, the use of Williams' niece falls under the rule of § 875(c). Williams' second argument failed because he did not raise an objection to the district court's use of the second telephone call, thus warranting plain error review. Under a plain error review, the court found Williams' first call sufficient to warrant the sentence enhancement.

Kyle Matthew McDonald's conviction and 30-month sentence stemmed from telephone conversations he had with family members while serving a jail term for repeated violations of a protective order. McDonald had been convicted of stalking in a Virginia court as a result of his conduct toward his former girlfriend, Laura Chavez. In recorded phone calls to his father, mother, and sister, he stated his intent to harm or kill Chavez. He said, for example, that "[Chavez] is right now on my death list . . . . The first thing I'm [doing] when I get out of here is going after her." *United States v. McDonald*, 2011 WL 3805759, at *1 (4th Cir. Aug. 30, 2011). He further stated "I will mow people down . . . . Any one around her is going down . . . I walk into her party, I'm taking out everyone at the party." *Id.* He later told his father, "I'm killing the b* * * *. *Id.* I have offered so many good solutions and she . . . needs to admit she did something wrong." *Id.* When he was warned by his father that he could get 15 years of prison time for his statements, McDonald responded, saying, "fine, if I get fifteen more years, when she has eight-year-old kids or nine-year-old kids and I kill them too. So what." *Id.*

Earl Foy, Jr. was charged with sending three threatening letters to his ex-girlfriend between November and December 2005. All three letters contained death threats against her and others, while two of the letters also contained demands for thousands of dollars. Foy was incarcerated when these letters were sent. After the close of the government's case during a jury trial, Foy pled guilty to all counts without a plea bargain, which the trial court accepted. A few days later, Foy filed a motion to withdraw the plea and appoint new counsel. Foy also submitted pro se memoranda arguing that the government presented tampered or forged evidence at trial. The trial court denied Foy's motion to withdraw the plea. At sentencing the court denied Foy's motion for a downward variance and sentenced him to 480 months

imprisonment with two § 876(b) counts running consecutively and three § 876(c) counts running concurrently to one another and the § 876(b) counts. *United States v. Foy*, 2010 WL 3271234, at *1 (8th Cir. Aug. 20, 2010). The entirety of Foy's federal sentence was also to run consecutively to his incomplete state sentence. The Eighth Circuit affirmed. *Id.* at *6.

In 2005, Timothy Wyrick began working as a motorist assist technician with the Kansas Highway Patrol (KHP). In mid-March 2009, he began a 6-month campaign of making more than 60 harassing and threatening telephone calls to KHP Trooper Kristie Gatlin. During some of these calls, he either hung up before the call went to voice mail or let the call go to voice mail but did not leave a message or left an inaudible message. However, in a great number of these calls, he left messages on Gatlin's voice mail telling her he was watching her and stating facts indicating he knew her whereabouts and activities. The following provides one example:

> Hey, Kristie! You oughta tell them two guys in that pick up that they need to do a better job. Heck, that ain't a very good stake out, you can see 'em. Golly! Hey, I wanna ask ya, you ever been shot by a gun? Been stabbed by a knife? Well, it might happen! I'd watch my back if I was you. I got a lot of guns watchin' you.

United States v. Wyrick, 416 F. App'x 786, 787-88 (10th Cir. 2011).

Wyrick was arrested on September 15th and one of the telephones used to make some of the calls was found in his boot. In a post-arrest interview, he admitted to making some of the telephone calls.Wyrick was indicted on five counts of transmitting in interstate commerce a telephone call and voice mail message containing threats to injure the person of another in violation of § 875(c).

The Tenth Circuit affirmed, holding that the 37-month sentence was reasonable and the district court complied with statutes clarifying that it was inappropriate to impose a term of imprisonment solely for rehabilitative purposes or correctional treatment. *Id.* at 795.

IX. Private threats and the First Amendment

Are private threats ever the subject of the *Watts* First Amendment analysis? One recent case suggests that the answer is yes.

United States v. White, 2010 WL 438088, at *1 (W.D. Va. Feb. 4, 2010) involved a defendant, William White, who was charged under § 875 with intimidating with the intent to influence, delay, and prevent testimony in an official proceeding involving African-American tenants. He mailed packets containing both an offensive letter and an American National Socialist Workers Party magazine to tenants of a Virginia Beach housing development, including several who were named plaintiffs in a HUD complaint against their landlord.

The court acknowledged that, because the statute criminalizes pure speech, the analysis had to include First Amendment protections. With that, the court recognized that there are several categories of speech that do not enjoy First Amendment protection, among them being "true threats." *Id.* at *2. The court held that the defendant must have intended to transmit the interstate communication and that the communication itself must have contained a true threat in order for the defendant to be convicted under the statute. An objective reasonable recipient test applies in such cases.

For First Amendment purposes, the court also had to distinguish political hyperbole from true threat, listing numerous factors cited from *Watts v. United States*, 394 U.S. 705 (1969). The most important factor, according to the court, was the "backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open and that it may well

include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *White*, 2010 WL 438088, at *9.

In Count One, White searched for the work phone number of the victim by calling Citibank, the victim's place of employment, 50 times in 3 hours, and also called the victim on her home phone number. White also sent the victim an email referencing her home number, address, and his ability to disseminate her personal information to other disgruntled customers of Citibank. The email also referenced the murder of Judge Joan Lefkow's husband and mother by a disgruntled former litigant. Here, the court saw no public issue and further saw a true threat under a reasonable recipient analysis. *Id.* at *9-10.

In Count Five, White called the home phone number of the victim and the victim's work phone, where he spoke with the victim's secretary. White included these numbers, along with her home address, in an article he posted on his Web site, www.overthrow.com. In describing a University of Delaware diversity program, White decried both the university and the victim who was connected to the program. The court found that, unlike political speech, his actions were highly targeted to the victim. *Id.* at *10-11.

In the uncontested facts alleged for Count Six, White posted articles on various Web sites regarding the victim. Some of these postings included commentary referencing actions that should be taken against the victim. White also emailed an individual at the London Free Press and the victim, stating that "the people [of Canada] have a moral obligation to rise up against [Canada's elected officials], overthrow them, and put them to the sword." *Id.* at *12. White also mailed the victim an American National Socialist Workers Party Magazine at his home address, accompanied by a picture of the victim on the back cover with the caption, "We Beat This Prick" and his home address.

Here, the court found no true threat; rather, White's actions were protected First Amendment speech. *Id.* at *14. The court noted that much of the evidence and violent language was taken from open Internet blogs and articles as opposed to the targeted materials in the other charges. Additionally, the blog postings and Internet articles were made for like-minded individuals, like the group in *Watts*. Despite the violent tone of the language that was used, the court noted the First Amendment principle that the state may not forbid advocacy of the use of force except where such use is targeted to incite imminent lawlessness. Finally, the court considered the materials and actions taken by White against this particular victim as being held against the *Watts* standard of "a backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open [even when] it may include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at *10.

Other recent "private threat" cases include *United States v. Jensen*, 639 F.3d 802 (8th Cir. 2011), *United States v. Godsey*, 381 F. App'x 256 (4th Cir. 2010), and *United States v. Rutherford*, 599 F.3d 817 (8th Cir. 2010).

X. Stalking and cyberstalking

There is a new threat-like crime of interstate stalking—18 U.S.C. § 2261A (excerpted above)—where the prosecution history so far is a mixed bag.

In Arizona, Ricardo Infante was charged by complaint with interstate stalking of a woman to whom he was attracted. In June 2009, L.B., the alleged victim, met Infante at Arizona State University (ASU). They attended the same course that included a three week trip to Russia. L.B. and Infante had coffee one time and L.B. determined that she was not interested in Infante. L.B. returned home to New Jersey after the conclusion of the course at ASU.

While in New Jersey, on August 28, 2009, Infante contacted L.B. via her Internet Facebook account. In September 2009, L.B. returned to the University of Rochester, located in Rochester, New York. On February 6, 2010, Infante sent L.B. an email and sent several others between February 6 and 8, 2010. In one email, Infante stated that he had a "powerful longing" for L.B. He also stated in a text message that he wanted L.B.'s forgiveness for having been "a jerk, a masochist and even a criminal all this time . . . ." *United States v. Infante*, 2010 WL 1268140, at *1 (D. Ariz. Mar. 30, 2010).

L.B. received two phone messages from Infante on February 8, 2010, in which he said he was in Rochester and wanted to see her. On February 8, 2010, L.B. received an email from the University of Rochester Common Connection, advising her that a florist had flowers for her to pick up. L.B. called the florist and learned that the flowers were from Infante. On February 11, 2010, the flower shop advised Investigator Lafferty that Infante personally came into the shop on February 5, 2010 and ordered the flowers for L.B.

On February 9, 2010, Captain L.S. Strem of the Rochester Police Department spoke with Infante by telephone. Infante stated that he flew to Rochester on February 4, 2010 and went to the University of Rochester campus trying to find L.B. Infante explained how he tried to contact L.B. through emails, phone messages, through Professor Laura Givens, and through flowers and gifts. He indicated that he saw L.B. during his weekend in Rochester, including one occasion in the library. He stated that he did not get any closer to her than 10 to 15 feet and did not want to make eye contact with her. L.B. told the police that she suffered substantial emotional distress as a result of Infante traveling to Rochester and trying to contact her.

Investigator Lafferty spoke with Professor Laura Givens on February 10, 2010. She stated that an individual sat in her Russian class on February 8, 2010. After class, that individual asked about an individual who attended her class, trying to obtain information about L.B.

After Infante's arrest in the Phoenix area on March 5, 2010 on the Western District of New York's criminal warrant, a preliminary hearing was held before the Magistrate Judge on March 12, 2010. On March 30, 2010, the magistrate dismissed the complaint, holding that the government failed to establish probable cause that Infante acted with the subjective intent to harass the alleged victim. The court noted that the government was required to show a specific intent to harass and, according to the FBI affiant, Infante's purpose in going to Rochester was to start a romantic relationship with L.B., rather than to harass, bother, or panic her. The court asserted the following:

> From the express language used by Congress in adopting 18 U.S.C. § 2261A, the issue is not whether the Government presented sufficient evidence that a reasonable person would find Defendant's conduct constituted harassment of L.B.; rather, the issue is whether the Government presented sufficient evidence to show that Defendant's conduct was done with "the intent and purpose" to harass L.B. The Court finds that "a person of ordinary prudence and caution [would not] conscientiously entertain a reasonable belief" that Defendant's travel and conduct in Rochester, New York was with "the intent and purpose" to harass L.B.

Id. at *8.

The prosecution had better success in Ninth Circuit case. After Grob's girlfriend broke up with him during the summer of 2007, he sent her 22 threatening emails and 50 threatening text messages with subject headings such as, "I'm going to slit your throat." *United States v. Grob*, 2010 WL 4486751, at *1 (9th Cir. Nov. 10, 2010). Photographs of dead and dismembered women accompanied some messages. In reference to his girlfriend's miscarriage, Grob attached a photograph of a dead infant to an email titled,

"OMG our baby." *Id.* In an email titled, "I can't believe you killed our baby," sent on November 12, 2007, Grob wrote that he was not going away and was "not going to forget about the horrible shit you did to me." "Vengeance," he added, "will be mine. I will get you even if it is the last thing I do." *Id.* Fearing for her life, Grob's ex-girlfriend contacted law enforcement.

When officers interviewed Grob, he initially denied sending the messages but eventually admitted that he sent them to "scare" his ex-girlfriend. Grob ultimately pled guilty to one count of cyberstalking, in violation of 18 U.S.C. § 2261A(2)(B). Grob appealed his sentence, arguing that the district court's criminal history calculation improperly included a prior misdemeanor conviction for criminal mischief. The Ninth Circuit vacated and remanded for resentencing and held that (1) Grob's prior Montana misdemeanor conviction for criminal mischief was not similar to his offense of cyberstalking, and (2) the district court committed procedural error by counting the prior conviction when determining his criminal history category. *Id.* at *7-8.

By 2006 James Curley's 12-year marriage to Linda had deteriorated. Curley's behavior had become erratic, and, in May 2006, he demanded a divorce. Three times in the following month, he threatened to kill her. First, during an argument, Curley threatened to kill her and "leave [her] body in a pool of blood." *United States v. Curley*, 639 F.3d 50, 54 (2d Cir. 2011). Second, while they were in the car with their two children, he again threatened to kill her and promised he would not go to jail if he did. Third, after returning from a walk, Curley told Linda, "I found a place today where I could kill you and nobody would hear you scream." *Id.* at 54.

In July 2006, Curley served Linda with divorce papers accusing her of infidelity. Linda then filed for divorce herself and sought an order of protection and custody of the children. From July to August 2006, Linda regularly noticed Curley's truck following her and once saw his sister following her. She grew so frightened that she called the police and told them, "I really, really think he's gonna kill me . . . . Either him or his brother, somebody's gonna kill me." *Id.* In August 2006, the Rockland County Family Court granted Linda custody of the children and issued an order prohibiting Curley from, inter alia, assaulting, stalking, harassing, or intimidating her. Thereafter, Linda no longer saw him following her, but Curley began to track her through a GPS device that he had placed on her vehicle. Curley's friend tracked the device's movements through an Internet Web site and forwarded the information to Curley. From August to October 2006, someone accessed the GPS tracking Web site over 200 times.

In October 2006, Linda was involved in a car accident in New Jersey and when she took her car to a nearby repair shop, a mechanic discovered the GPS device. On October 9, 2006, Curley drove from New York to the repair shop in New Jersey. While speaking with the owner, Curley lied about his identity, giving varying reasons for his visit. After the owner wrote down the vehicle identification number of Curley's vehicle, Curley tried to alter the owner's notation. The owner reported the incident to the police and turned the GPS device over to them.

The Second Circuit vacated Curley's conviction and remanded, reasoning (1) the district court did not abuse its discretion in admitting evidence that defendant had abused his wife over the course of many years; (2) the district court abused its discretion in allowing the wife to testify that the defendant's brother had previously beaten her and pressured her to lie about the brother's assault of a police officer; (3) the district court abused its discretion in admitting evidence that the police subsequently stopped Curley while he was driving a reportedly stolen rental car and found three black powder rifles, ammunition, a bulletproof vest, a ski mask, and a last will and testament in the vehicle; and (4) the district court's errors were not harmless. *Id.* at 58, 59, 60, 62-63.

Where the stalking is related to drug dealing, firearms, or extortion, the courts have had less trouble affirming the § 2261A convictions. *See United States v. Dickens*, 2011 WL 2836367, at *12 (6th Cir. July 19, 2011); *United States v. Shevgert*, 373 F. App'x 915, 921 (11th Cir. 2010).

XI. Conclusion

Whether the case involves national security, such as a Presidential threat matter, or just private obnoxiousness, the various crimes of threat are a powerful tool in the federal prosecutor's arsenal. They effectively allow law enforcement to intercede at a very early part of a violent scheme and to stop incidents like this past year's attempted assassination of Rep. Gabrielle Giffords before the trigger is pulled, at least in those violent cases where an oral expression of intent occurs. Because these statutes are so powerful, they often involve an inquiry into whether the oral expression is somehow protected by the First Amendment. Like the Giffords case, the mental competency of the defendant is frequently an issue. As technology advances, we can expect to see more cyberstalking prosecutions and perhaps additional threat crimes for online behavior. ❖

ABOUT THE AUTHOR

❑**Jeff Breinholt** currently serves as Counsel for Law & Policy within the National Security Division (NSD). A 21-year DOJ veteran, he has served in the Tax Division Criminal Enforcement Section and the Criminal Division's Terrorism & Violent Crime Section, and as Deputy Chief of the NSD's Counterterrorism Section. He is a frequent author and lecturer on law enforcement and intelligence topics. ✠

Countering Attempts, Interference, and New Forms of Air Violence

Erin Creegan
Trial Attorney
Counterterrorism Section
National Security Division
Department of Justice

I. Introduction

Airplane hijackings, or "skyjackings," were once one of the most common and ubiquitous forms of terrorist violence. Throughout the 1960s, 1970s, and 1980s, air violence was a prevalent terrorist tactic that continued to be used in the following decades, leading to the most significant terrorism event in United States history, the hijackings of September 11, 2001. The response has been the intense securitization of our nation's airports since that time. The security features that have been developed make it extremely difficult to carry weapons, from small blades to possibly flammable liquids, beyond airport ticket counters, or to access a cockpit or overpower a flight crew.

As a result of the hardening of our security procedures, there have been relatively few instances of hijacking and air violence since September 11, 2001. Now the most common air violence charges are those relating to hoaxes, laser pointers in the eyes of pilots, and failed attempts to get dangerous substances onto airplanes, to gain control of an airplane, or to attack an airport. Alarmingly, criminals may be innovating new forms of air violence in response to the increased security of planes and airports.

II. Air violence crimes

As a result of a large number of aircraft hijackings all around the world by terrorists in the 1960s and 1970s, a number of treaties were adopted to address and criminalize the problem of air violence. These treaties were the Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention"), Dec. 16, 1970, 1956 WL 54428; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 1988; and Supplements to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Done at Montreal on September 23, 1971. These were multilateral "suppression" conventions that required all signatories to adopt similar domestic criminal prohibitions to the proscribed acts, as well as agree to try or extradite all persons who committed those crimes in order to eliminate "safe havens."

As a result of the Hague Convention in particular, the United States adopted the Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (1974). The crime of aircraft hijacking, as defined in the Antihijacking Act, is currently codified at 49 U.S.C. § 46502. There are six other air violence criminal offenses: (1) destruction of aircraft or aircraft facilities (18 U.S.C. § 32); (2) imparting or conveying false information, a generic hoax statute that applies to more than air violence-related hoaxes (18 U.S.C. § 35); (3) violence at international airports (18 U.S.C § 37); (4) interference with flight crew members and attendants (49 U.S.C. § 46504); (5) carrying a weapon or explosive on an aircraft (49 U.S.C.

§ 46505); and (6) a general provision that allows for the prosecution of certain crimes if committed on an aircraft (49 U.S.C. § 46506). For more background on the air violence crimes, *see* JEFF BREINHOLT, COUNTERTERRORISM ENFORCEMENT: A LAWYER'S GUIDE, CH. 4 (2004), *available at* http://dojnet.doj.gov/usao/eousa/ole/usabook/terr/04terr.htm. These crimes, written in the age of hijackings, have more recently been used to counter ancillary crimes of hoax, attempt, and interference with aircraft over the past few years.

III. Unsuccessful attempts

One of the persistent problems in protecting aircraft and airports from violence is maintaining constant vigilance and using strong punishments to deter those who attempt to gain control of an aircraft, sneak a weapon onto an aircraft, or target air commerce as the object of a potential mass casualty terrorist attack. Cases can be simple, such as when passengers who do not appear to intend to hijack a plane accidentally carry a weapon aboard a plane, or when passengers intentionally carry a weapon onto a plane but with no violent purpose. More frightening, and more clearly related to the deterrent and prophylactic purpose of many of the air safety laws, are cases where passengers clearly intend to execute a hijacking or use an airport as the target of a mass casualty attack.

United States v. Nobles, No. 2:08-cr-771 (E.D.N.Y.) (criminal complaint) illustrates the first kind of case. In October 2008, Steven Nobles was detained after attempting to pass through a security screening checkpoint at MacArthur Airport in Islip, New York. TSA officers discovered a knife and a device that appeared to be a pipe bomb in Nobles' carry-on bag. Nobles had a one-way ticket from Islip to Las Vegas. A search of Nobles' checked baggage revealed fireworks, electrical circuit boards, gun cartridges, and other materials. During an interview, Nobles admitted that the device was a pipe bomb but denied intending to detonate the pipe bomb on the airplane and claimed that he had carried it to the airport inadvertently.

Nobles was charged in an eight-count indictment with (1) attempting to carry an explosive on an aircraft (the pipe bomb) in violation of 49 U.S.C. § 46505(b)(3); (2) attempting to carry an explosive on an aircraft (fireworks) in violation of the same; (3) attempting to carry a concealed weapon on an aircraft in violation of 49 U.S.C. § 46505(b)(1); (4) transporting hazardous materials (the pipe bomb, fireworks, and gun cartridges) in violation of 49 U.S.C. § 46312; (5) interfering with persons engaged in the authorized operation of an aircraft in violation of 18 U.S.C. § 32(a)(5); (6) making a pipe bomb in violation of 26 U.S.C. §§ 5822(f) and 5871; (7) possessing a pipe bomb in violation of 26 U.S.C. §§ 5861(c) and 5871; and (8) possessing marijuana in violation of 21 U.S.C. § 844(a). In May 2009, Nobles pled guilty to count 6. All other counts were subsequently dismissed. In October of the same year, he was sentenced to two years of incarceration and three years of supervised release. *Id.*

Situations like Nobles', where weapons are being smuggled onto a plane, are scarcely uncommon. In *United States v. Davis*, 304 F. App'x 473, 474 (9th Cir. 2008), the defendant impersonated a federal customs agent in order to bring a gun on board a plane with him. There was no nexus to terrorism and no evidence that the defendant intended to hijack the plane. The defendant even went on to use the Second Amendment to challenge the statute that he was convicted under, 49 U.S.C. § 46505. He was, unsurprisingly, unsuccessful. *See id.* For other recent § 46505 cases, *see United States v. Brindle*, 2011 WL 305057, at *1 (N.D. Ohio Jan. 28, 2011) (where a wealthy defendant challenged the hefty fine he was ordered to pay after bringing a gun onto an airplane); and *Schier v. United States*, 2009 WL 405376, at *1 (11th Cir. Feb. 19, 2009) (where defendant brought an ice pick on board a plane and claimed ineffective assistance of counsel due to trial counsel not advocating that the ice pick was a valuable collectible).

In recent years, cases that involve defendants interfering with aircraft personal are more common than cases involving defendants that sneak weapons onto airplanes. The importance of 49 U.S.C. § 46504, interference with flight crew or attendants, is particularly clear in cases of hijacking where a small number of persons are able to overpower the flight crew and take over the plane. Thus, § 46504 plays an important role in criminalizing even the first few steps taken in hijacking a plane. However, as a prophylactic statute, it catches more than the early phases of a hijacking. *See, e.g.*, *United States v. Kernan*, 417 F. App'x 764 (10th Cir. 2011) (where a passenger reached between the legs of a female flight attendant); *United States v. Fontanez-Mercado*, 368 F. App'x 69 (11th Cir. 2010) (where a passenger attempted to get out of his seat multiple times and ultimately got in a brawl with a flight attendant and then on appeal unsuccessfully argued that a self-defense instruction was not given at trial); *United States v. Proskin*, 354 F. App'x 888 (5th Cir. 2009) (where a passenger became so physically and verbally abusive to the crew that the plane had to be landed). *See also United States v. Delis*, 558 F.3d 177 (2d Cir. 2009) (where the government pursued a misdemeanor 18 U.S.C. § 113(a) simple assault charge on an aircraft with jurisdiction pursuant to 49 U.S.C. § 46506 instead of a § 46504 charge); *United States v. Moradi*, 706 F. Supp. 2d 639 (D. Md. 2010) (same). However, not all § 46504 charges are against unlikely hijackers. *See United States v. Al-Murisi*, No. 3:11-cr-332 (N.D. Cal. May 9, 2011) (criminal complaint) (where the government alleged that a passenger tried to force his way into the cockpit of a plane on a commercial flight, only to be restrained by his fellow passengers while he tried to fight them off); *Lamons v. United States*, 2011 WL 3875996, at *1 (N.D. Ga. Aug. 10, 2011) (where a defendant set fire to an airplane lavatory and made threats of hijacking).

There are, of course, still very serious attempts made to disrupt the safety of airports and aircraft. In 2007, Russell Defreitas, Abdul Kadir, Kareem Ibrahim, and Abdel Nur were charged in connection to a plot to carry out a series of bombings at New York's John F. Kennedy International Airport. Specifically, the indictment charged the four men with conspiracy to attack a public transportation system under 18 U.S.C. § 2332f(a)(1), conspiracy to destroy buildings by fire or explosives under 18 U.S.C. § 844(n), conspiracy to attack aircraft and aircraft materials under 18 U.S.C. § 32(a)(8), conspiracy to destroy international airport facilities under 18 U.S.C. § 37(a), and conspiracy to attack a mass transportation facility under 18 U.S.C. § 1992(a)(4)(B). The indictment also charged Defreitas and Kadir with surveillance of a mass transportation facility under 18 U.S.C. § 1992(a)(8). *United States v. Defreitas*, No. 1:07-cr-543 (E.D.N.Y.) (indictment). Nur eventually pled guilty to a superseding information with a single count: material support of a designated terrorist organization in violation of 18 U.S.C. § 2339B. *Id.* (information-felony) (change of plea hearing). Defreitas and Kadir were convicted of all remaining counts, except Kadir was acquitted on the surveillance count. *Id.* (jury verdict). Kadir was sentenced to a life sentence plus 80 years. *Id.* (sentencing). Defreitas was sentenced to a life sentence plus 100 years. *Id.* (sentencing). Nur was sentenced to 15 years. *Id.* (sentencing). Ibrahim was tried separately and convicted on all five counts with which he was charged. *Id.* (jury verdict). He has not yet been sentenced.

Serious punishment for attempt cases remains important even when few attempts are successful. In *United States v. Abu Ali*, 528 F. 3d 210, 221 (4th Cir. 2008), an American citizen was convicted of a litany of terrorism offenses, including a conspiracy to murder then-President Bush and to hijack an aircraft in violation of 49 U.S.C. § 46502 and 18 U.S.C. § 32. While the Guidelines called for a severe sentence, the district judge in the Eastern District of Virginia imposed a sentence of only 30 years. *Id.* at 269. On appeal, the Fourth Circuit found the downward departure to be unreasonable and ordered Abu Ali to be resentenced, which he was, to life in prison. In appealing his second sentence in 2011, the Fourth Circuit held that the life sentence was substantively and procedurally reasonable. *United States v. Abu Ali*, 410 F. App'x 673, 682 (4th Cir. 2011).

IV. Laser pointers

Mocking the attempts to make airplanes safe and the climate of worry that surrounds airports and airplanes, those who use laser pointers to disrupt air travel may intend to capitalize on the fear of terrorism through an easy-to-replicate hoax.

The use of laser pointers targeting aircraft has been by far the most frequently-occurring form of air violence in recent years. The number of instances of lasering is staggering. Aside from the several criminal cases discussed below, the Federal Aviation Administration (FAA) estimates that in 2010 there were 2,836 known instances of laser assaults on aircraft cockpits. Bart Jansen, *Laser attacks on planes continue, despite greater penalties*, USATODAY (Oct. 23, 2011) (discussing dangerous laser assaults in airplanes and airports). By mid-October 2011, there had already been 2,733 such laserings. *Id.* In June 2011, the FAA increased civil fines, noting that arrests were very rare. *Id.* Los Angeles, Chicago O'Hare, Phoenix, San Jose, Las Vegas, and Philadelphia are the most frequent targets. *Id.* By way of comparison, only 300 laserings were known to have occurred in 2005. *Id.*

Federal authorities have recognized that shining lasers at an aircraft is an increasingly serious problem and have formed a working group to investigate and prosecute offenders. The focused beams of a laser remain powerful even at a long distance and can expose pilots to radiation levels above those considered to be safe. Brief exposure to even a relatively low-powered laser beam can cause discomfort and temporary visual impairments, such as glare, flash blind, and after images. This impairment of the pilot endangers the safety of everyone aboard the aircraft.

Not surprisingly, due to the security at airports and the altitude at which many planes fly, helicopters, particularly law enforcement helicopters, are subjected to a great deal of air violence. But the amount of enforcement against those who shine lasers at helicopters may also be due to the fact that only law enforcement helicopters are capable of tracking down offenders who shine lights over long distances into their cabins. The following cases sample some of the common facts and legal issues that can come up in lasering cases.

On the night of November 8, 2007, the pilots in a Kern County, California Sheriff's helicopter observed a green laser tracking the helicopter. It was then shined directly into the cockpit and one of the pilots was able to identify the residence from which the laser device was being pointed. An officer from the local police department responded to the location but received no response when he knocked at the door. The residents of the house were determined to be Jared James Dooley and his mother. A Joint Terrorism Task Force search of the residence and their vehicles revealed a red laser, a green laser, and laser tips. In an interview, Dooley admitted that he and his girlfriend, Kendra Christine Snow, were using the green laser on the night of November 8. Snow admitted using the laser. *United States v. Dooley*, No. 1:08-cr-8 (E.D. Cal.) (complaint).

In January 2008, an indictment was returned charging Dooley and Snow with two counts of violations of 18 U.S.C. § 2. *Id.* (indictment). They were also charged with violating 18 U.S.C. §§ 32(a)(5) and (a)(8)—conspiracy to interfere with the safe operation of aircraft, attempting to interfere with the safe operation of an aircraft, and aiding and abetting. Snow was sentenced to 18 months in prison for her involvement, *id.* (sentencing), after pleading guilty to only the conspiracy count, *id.* (plea agreement). A few weeks earlier Dooley, who also pled guilty to the attempt charge, was sentenced to two years incarceration and three years supervised release. *Id.* (sentencing).

A year later, a similar fact pattern unfolded. In April 2009, a federal grand jury returned a two-count indictment charging Balltazar Valladares of Roseville, California with interference with the safe operation of an aircraft by shining a powerful handheld laser into the cockpit of a commercial flight and

law enforcement helicopter. Both counts were violations of 18 U.S.C. §§ 32(a)(5) and (a)(8). *United States v. Valladares*, No. 2:09-cr-153 (E.D. Cal) (indictment). Valladares pled guilty on count 2, interference with the law enforcement helicopter, and count 1 was dismissed. He was sentenced to 37 months imprisonment and 36 months of supervised release. *Id.* (sentencing).

Valladares interfered with the safe operation of two different aircraft. The first was a jetliner that was on approach to Sacramento airport with 137 passengers aboard. The second was a law enforcement helicopter sent to investigate the laser hit on the jetliner. Valladares shined a green laser at each aircraft. After the helicopter crew located Valladares, local police officers arrested him and recovered a laser from his residence. At first, Valladares denied any knowledge of the events but later confessed when two parts of the laser were found pursuant to the conditions of his probation. Valldares admitted he knew that the laser could blind people and that what he was doing was wrong.

In a similar case that concluded in 2010, evidence introduced at a jury trial showed that a Massachusetts State Police helicopter was escorting a tanker through Boston Harbor when its operators noted a powerful laser moving across water. The helicopter was struck by a powerful green laser beam that filled the cabin with an intense green light. The pilots where concerned that the laser might target the tanker or planes landing at nearby Logan Airport. The pilots flew toward the source of the light that was directed at them many more times and were eventually able to determine that the beam was likely coming from a window in Gerard Sasso's apartment, located in Medford, Massachusetts. After initially denying involvement, Sasso confessed when police noted part of a powerful laser in plain view in his apartment. The laser used on the aircraft was the second most dangerous class of laser, one that can cause eye burning and blindness at a distance up to six-tenths of a mile. *United States v. Sasso*, No. 1:08-cr-10377 (D. Mass.) (affidavit) (indictment). Sasso was convicted by a jury of one count of willfully interfering with an aircraft operator with reckless disregard for human life in violation of 18 U.S.C. § 32(a)(5) and one count of making false statements in violation of 18 U.S.C. § 1001. *Id.* (judgment). Sasso was sentenced to three years of imprisonment and two years of supervised release. *Id.* (sentencing).

Again in 2010, Frank Newton Anderson aimed a green laser beam at an Orange County Sheriff's Office Bell helicopter. The helicopter was on routine patrol when the green laser beam illuminated the cockpit and temporarily blinded the pilot. The helicopter pilot and the flight observer lost temporary sight of the aircraft's instrumentation and the horizon due to the laser beam. After the cockpit of the helicopter was illuminated a second time, the helicopter pilot and flight observer directed ground units to Anderson's location. A class 3B laser, which emits a green colored, high intensity beam of laser light, was found approximately 100 yards from where Anderson was stopped and eventually arrested by local police. *United States v. Anderson*, No. 6:10-cr-326 (M.D. Fla.) (plea agreement).

Anderson pled guilty to a one count information charging him with interference with operation of an aircraft in violation of 18 U.S.C. §§ 32(a)(5) and (a)(8). *Id.* Anderson faced a maximum penalty of 20 years in federal prison. In a wrinkle on what has been developing as a standard fact pattern, the judge refused to sentence Anderson on his scheduled sentencing date. Citing the harm to the defendant's business and the purpose of the criminal statute as primarily to affect terrorism, the judge insisted the United States Attorney's Office consider a punishment other than a felony. When the United States Attorney's Office refused to do so, the judge recused himself, rescinding the plea. *Id.* (order of recusal). At his later sentencing before a different judge, after his plea was re-entered, Anderson received one year of probation and a fine of $4,000. *Id.* (plea and sentence).

Anderson's case was not the only one in recent years to challenge the importance of federal lasering prosecutions. In 2010, a federal grand jury returned an indictment charging Samuel Gregory Liebman with one count of interference with an aircraft in violation of 18 U.S.C. §§ 32 (a)(5) and (a)(8),

yet again for shining a laser into the cockpit of a law enforcement helicopter. *United States v. Liebman*, No. 2:10-cr-452 (E.D. Cal.) (indictment). The defense filed a motion to dismiss the indictment based on the reasoning that the helicopter was not a "civil aircraft" and not in interstate or foreign commerce, or that people using a "star-gazing" laser do not have sufficient notice that shining a laser at an airplane 10,000 feet away would violate the law. The motion was denied. *Id.* (motion to dismiss) (motion hearing).

The *Liebman* case raises issues not unlike the *Bond* case that was recently viewed by the Supreme Court. *Bond v. United States*, 131 S. Ct. 2355 (2011). In that case, a woman used a chemical weapon to poison a woman who slept with and became pregnant by the defendant's husband. After she was convicted of violating 18 U.S.C. § 229, a statute enacted pursuant to the Chemical Weapons Convention, she appealed on the grounds that this international treaty should not be applied to her behavior. The Third Circuit had rejected her claims on the grounds that she did not have standing to raise a Tenth Amendment issue, that is, whether the federal government had overreached its authority by applying an international treaty to her very local behavior, exacerbating penalties. *Id.* at 2361. The Supreme Court found that Bond did have standing. *Id.* at 2367. Although it expressed no opinion as to the likely outcome of such a challenge, the case was remanded.

Unsurprisingly, many non-terrorists who commit similar crimes or use terrorist tactics argue that federal statutes should not apply to them. There is no doubt that most of the cases in this article are not terroristic in nature. However, the federal government has the authority to proscribe these activities in order to draw a protective line around dangerous and frequently terroristic crimes, such as aircraft hijacking or the use of chemical weapons. As a result, Liebman's claim that the statute should not be applied to him failed, like a number of claims before it have. *See, e.g.*, *United States v. Ferreira*, 275 F.3d 1020, 1027 (11th Cir. 2001) (upholding the Hostage Taking Act based on the Hostage Taking Convention); *United States v. Lue*, 134 F.3d 79, 80-81 (2d Cir. 1998) (same); *United States v. Emmanuel*, 2007 WL 2002452, *9 (S.D. Fla. July 5, 2007) (upholding the Torture Act based on the Convention Against Torture).

Despite challenges in *Anderson* and *Liebman* to the federal importance of deterring less serious forms of air violence, prosecutions remain important to stem the tide of the recent rash of aircraft laserings.

V. Hoax and threat

Cases of air violence-affiliated hoaxes have actually decreased significantly in recent years. However, they have not completely disappeared and can be very serious. For example, in 2009, Apun Mahapatra was sentenced to 45 days in the custody of the Bureau of Prisons as a condition of a sentence of three years of probation and restitution of $35,294 to Delta Airlines, as a result of a hoax and threat. *United States v. Mahapatra*, No. 2:08-cr-237 (E.D. Cal.) (sentencing). Earlier that year, Mahapatra had pled guilty to making a hoax bomb threat to Delta Airlines in violation of 18 U.S.C. § 1038(a)(2). Pursuant to the plea agreement, the government dismissed the second count of the indictment, making a threat to destroy an aircraft in violation of 18 U.S.C. § 35(b).

In pleading guilty, Mahapatra admitted that, in May 2008, he accessed the Delta Airlines Web site and signed into a live chat session with a Delta Airlines operator employee. In response to a message from the Delta employee asking, "How may I assist you?", Mahapatra typed a message indicating that a flight scheduled to leave Mumbai International Airport for Atlanta, Georgia should be cancelled because there would be a "Hijack and Bomblast." At the time he sent the message to Delta, Mahapatra knew that there was a Delta Airlines commercial jetliner scheduled to depart Mumbai for New York and Atlanta on

that date. Mahapatra made the hoax threat because he had recently returned from India where he had been involved in a domestic dispute with his wife and he believed that she may have been traveling on that flight. He intended for the delay to harass her.

Hoaxes such as this one were more common up until the 1990s. It is hard to say what the decrease in cases can be attributed to but it is possible that a prosecutorial crackdown on hoaxes has had a deterrent effect or at least increased awareness among would-be pranksters of the consequences of making a hoax. It could also be that, post-9/11, fewer pranksters and attention seekers are inclined to target airports, but this latter theory would be hard to square with the increase in laserings.

VI. Violent alternatives to hijacking

Without the benefit of access to hijackable planes, some terrorists or other would-be hijackers try to imagine new or similar technologies that can be utilized to the same destructive effect. One particularly frightening situation occurred when a defendant attempted to use large model planes to deliver lethal explosive payloads.

In September 2011, Rezwan Ferdaus was indicted on charges of attempting to damage and destroy a federal building by means of fire or explosive in violation of 18 U.S.C. § 844(f), attempting to damage and destroy national-defense premises in violation of 18 U.S.C. § 2155, receipt of explosive materials in violation of 18 U.S.C. § 844(d), receipt and possession of unregistered firearms in violation of 26 U.S.C. § 5861(d), attempting to provide material support to terrorists in violation of 18 U.S.C. § 2339A, and attempting to provide material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B. *United States v. Ferdaus*, No. 1:11-cr-10331 (D. Mass.) (indictment). Ferdaus was a Northeastern University graduate student with a bachelor's degree in physics. The government alleged that, from about January through April 2011, Ferdaus met a number of times with an FBI confidential human source (CHS). During these meetings, Ferdaus asked the CHS to help him obtain weapons or explosives in order to conduct an attack on the Pentagon using remote-controlled model aircraft. Ferdaus explicitly chose to use model airplanes because of the less-strict regulation of model airplanes as opposed to other kinds of aircraft. He knew that a larger model could be designed to carry a considerable explosive payload and estimated the planes could go 100 miles-per-hour and carry up to 50 pounds of explosives.

In March 2011, the CHS introduced Ferdaus to two undercover employees (UCEs). Ferdaus continued to plan his attack on the Pentagon with the UCEs and expanded this plan to include an airplane attack on the United States Capitol Building. In May, Ferdaus gave the UCEs flash drives of pictures that he had taken in the Washington, D.C. area along with a detailed attack plan. Ferdaus created a very detailed written "Abstract" of an attack plan, divided into subsections on the aircraft, autopilot hardware, hardware and aircraft configuration, software overview, software procedure (mission), location (with highlighted maps, pictures, diagrams), payload, and total financial estimate. Ferdaus also proposed adding a "ground directive" of six people in two teams with automatic weapons to be used contemporaneously with the aircraft attacks in order to maximize damage.

This case is a startling one. Much of the approach that has been taken to prevent air violence has focused on hardening security at airports and prosecuting those attempts and first steps toward hijackings, such as carrying a weapon onto a plane or attacking or interfering with flight crew. If the air continues to be the preferred method of delivery for a terrorist attack, what other work-arounds will frustrated hijackers turn to in order to attack government buildings or civilian populations? This model airplane may not be the last attempt to get around the security of airports by turning to other kinds of aircraft.

Ferhaus' case is not the only one where a criminal attempts to find an alternative to hijacking to commit extreme damage to an aircraft. In the District of Puerto Rico, Edwin Astacio-Espino unloaded machine gun fire on a police helicopter, endangering all three law enforcement pilots and killing one. *United States v. Astacio-Espino*, 783 F. Supp. 2d 287, 289-90 (D.P.R. 2011); *United States v. Astacio-Espino*, 748 F. Supp. 2d 131, 131-32 (D.P.R. 2010). Because helicopters fly at low altitudes, they are particularly vulnerable to laserings and the rarer ground attack, and this suggests another potential trend in air violence crime.

VII. Conclusion

Aircraft hijackings were once one of the most feared types of violent crime, not only because of their extreme destructiveness, a threat that continues to linger today, but because they were not uncommon. Between the 1960s and 1980s and up until the tragic hijackings of September 11, 2011, these crimes claimed thousands of lives. Due to continual improvements in the safety of planes and airports, the United States has had fewer instances of skyjacking to prosecute. However, to maintain constant vigilance against a resurgence of such a deadly crime, a number of preparatory actions have been criminalized and the laws criminalizing these actions have been strictly enforced. Such actions include among others, bringing a weapon onto a plane or interfering with flight crew. Hoaxes, a crime more common during the 1960s to 1990s, have also declined in recent years, only to be replaced with a tenfold increase in the number of aircraft laserings. Thus, while dangerous hijackings and hoaxes have declined, dealing with attempts and laserings remains an important prosecutorial priority.

Sometimes this approach is met with skepticism by judges who do not want to conflate the preparatory acts of a hijacking or the extreme indiscretion of a lasering with the more serious offense of a hijacking. The rapidly increasing number of laserings, representing the most common type of air violence crime, are a serious threat to the safety of those they target and, while law enforcement helicopters may be able to locate offenders, the vast majority of laserings targeting commercial flights are never prosecuted. Hopefully, the deterrent effect that prosecuting hoaxes may have had on the ultimate decline in hoax cases will ultimately come to pass with the increase in lasering prosecutions.

However, attempts to initiate or simulate an aircraft hijacking remain the most serious concern. Cases involving attempts to carry weapons onto a plane or storm a cockpit continue to occur and are a high prosecutorial priority. What may emerge as a new area of concern in the future is a situation where a person who would have attempted a hijacking if he thought he had any chance of success becomes frustrated with trying to evade the security of United States airports and instead envisions new methods of attacking aircraft, by turning to less protected aircraft such as helicopters or by attempting to simulate the danger of a hijacking with new and deadly inventive means. Recent cases suggest that potential hijackers are still interested in access to aircraft and in using air delivery systems to carry out deadly assaults. Although the face of air violence seems to be changing, deterring violent air crimes remains as important as ever.❖

ABOUT THE AUTHOR

❑**Erin Creegan** is a Trial Attorney in the Counterterrorism Section of the National Security Division and an Adjunct Professor of International Criminal Law at the University of Maryland, College Park. She is a frequent author on international, comparative, and national security issues in the criminal law.✠