IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

TELDRIN FOSTER,
JOHN GAINES A/K/A MARTY GAINES,
JERRY BAPTISTE, AND
CARLA JACKSON

Criminal Action No.

1:20-CR-296-JPB

PARTIES' CONSOLIDATED JURY INSTRUCTIONS

The Parties, by their undersigned counsel, jointly file these Proposed Jury Instructions. The Parties respectfully request the opportunity to amend and revise these charges as needed during the course of the trial.

The Table below specifies, for each proposed jury instruction, the Eleventh Circuit Pattern Jury Instruction that the instruction is based on and whether the proposed instruction is agreed or opposed.

Request No.	Pattern Instruction	Parties' Positions
1	P1	Agreed
2	T3	Agreed
3	T1.1	Agreed
4	T2	Agreed
5	B1	Agreed
6A	B2.1	Agreed
6B	B2.2	Agreed
7	B3	Agreed
8	B4	Agreed
9	B5	Agreed
10	S2.2	Government objects

11	S3	Government objects
12A	B6.1	Agreed
12B	B6.2	Agreed
12C	B6.3	Agreed
12D	B6.5	Agreed
13	B6.7	Agreed
14	S12	Agreed
15	S1.2	Agreed
16	S4.1	Agreed
17	S5	Agreed
18	B7	Agreed
19	B8	Agreed
20	S7	Agreed
21	O52	Agreed
22	O51	Agreed
23	O54	Agreed
24	O13.2	Agreed
25	O39	Agreed
26	O74.2	Agreed; partial government objection
27	B8.1	Agreed
28	S17	Agreed
29	B9.1A	Agreed
30	S8	All defendants object
31	B10.4	Agreed
32	N/A	Defendant Foster objects
33	B11	Agreed
34	B12	Agreed

Dated: January 23, 2024

Respectfully submitted,

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PRELIMINARY INSTRUCTION

REQUEST TO CHARGE NO. 1 (Agreed):

Members of the Jury:

Now that you have been sworn, I need to explain some basic principles about a criminal trial and your duty as jurors. These are preliminary instructions. At the end of the trial I will give you more detailed instructions.

Duty of jury:

It will be your duty to decide what happened so you can determine whether the defendants are~~is~~ guilty or not guilty of the crimes charged in the indictment.[1] At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you even if you do not agree with the law.

What is evidence:

You must decide the case solely on the evidence presented here in the courtroom. Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion. Some evidence proves a fact indirectly, such as a witness who saw wet grass outside and people walking into the courthouse carrying wet umbrellas. Indirect evidence, sometimes called circumstantial evidence, is simply a chain of circumstances that proves a fact. As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind and should give every piece of evidence whatever weight you think it deserves.

[1] Modifications to the Eleventh Circuit Pattern Jury Instructions are designated using Tracked Changes.

<u>What is not evidence:</u>

Certain things are not evidence and must not be considered. I will list them for you now:

- Statements and arguments of the lawyers. In their opening statements and closing arguments, the lawyers will discuss the case, but their remarks are not evidence;

- Questions and objections of the lawyers. The lawyers' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because a lawyer's question suggests that it is. For instance, if a lawyer asks a witness, "you saw the defendant hit his sister, didn't you?" – that question is no evidence whatsoever of what the witness saw or what the defendant did, unless the witness agrees with it.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, then the question may be answered or the exhibit received. If I sustain the objection, then the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and not try to guess what the answer would have been.

Sometimes I may order that evidence be stricken and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider that evidence.

Some evidence is admitted only for a limited purpose. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and no other.

Credibility of witnesses:

In reaching your verdict, you may have to decide what testimony to believe and what testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- The opportunity and ability of the witness to see or hear or know the things testified to;
- The witness's memory;
- The witness's manner while testifying;
- The witness's interest in the outcome of the case and any bias or prejudice;
- Whether other evidence contradicted the witness's testimony;
- The reasonableness of the witness's testimony in light of all the evidence; and
- Any other factors that bear on believability.

I will give you additional guidelines for determining credibility of witnesses at the end of the case.

Rules for criminal cases:

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

First, the defendants are~~is~~ presumed innocent until proven guilty. The indictment against the defendants brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else. The defendants therefore start~~s~~ out with a clean slate.

Second, the burden of proof is on the government until the very end of the case. Each~~The~~ defendant has no burden to prove ~~[~~his~~]~~ or ~~[~~her~~]~~ innocence or to present any evidence, or to testify. Since the defendants have~~s~~ the right to remain silent and may choose whether to testify, you cannot legally put any weight on a defendant's choice not to testify. It is not evidence.

Third, the government must prove each~~the~~ defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that the level of proof required is high.

Conduct of the jury:

Our law requires jurors to follow certain instructions regarding their personal conduct in order to help assure a just and fair trial. I will now give you those instructions:

> Do not talk, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court, but you may not discuss with them or anyone else anything related to the case.
>
> Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person, any type of payment or benefit in return for supplying any information about the trial.
>
> You must promptly tell me about any incident you know of involving an attempt by any person to improperly influence you or any member of the jury.

> Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use Internet maps or Google Earth or any other program or device to search for a view of any location discussed in the testimony.
>
> Do not read, watch, or listen to any accounts or discussions related to the case which may be reported by newspapers, television, radio, the Internet, or any other news media.
>
> Do not attempt to research any fact, issue, or law related to this case, whether by discussions with others, by library or Internet research, or by any other means or source.

In this age of instant electronic communication and research, I want to emphasize that in addition to not talking face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, Internet chat, chat rooms, blogs, or social-networking websites and apps such as Facebook, Instagram, Snapchat, YouTube, or Twitter. You may not use any similar technology of social media, even if I have not specifically mentioned it here.

You must not provide any information about the case to anyone by any means whatsoever, and that includes posting information about the case, or what you are doing in the case, on any device or Internet site, including blogs, chat rooms, social websites, or any other means.

You also must not use Google or otherwise search for any information about the case, or the law that applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge. It is important that you understand why these rules exist and why they are so important:

Our law does not permit jurors to talk with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else is so qualified.

Our law also does not permit jurors to talk among themselves about the case until the court tells them to begin deliberations, because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you can't be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have a mistaken view of the scene that neither party may have a chance to correct. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. Also, the law often uses words and phrases in special ways, so it's important that any definitions you hear come only from me, and not from any other source. It wouldn't be fair to the parties for you to base your decision on some reporter's view or opinion, or upon other information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and our law accordingly sets forth serious consequences if the rules are not followed. I trust that you understand and appreciate the importance of following these rules, and in accord with your oath and promise, I know you will do so.

Taking notes:

Moving on now, if you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you so that you do not hear other answers by witnesses. When you leave the courtroom, your notes should be left in the jury room. Whether or not you take notes, you should rely on your own memory of what was said. Notes are to assist your memory only. They are not entitled to any greater weight than your memory or impression about the testimony.

Separate consideration for each defendant:

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to a particular defendant and disregard any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Course of the trial:

The trial will now begin. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor argument.

The government will then present its witnesses, and counsel for the defendants may cross-examine them. Following the government's case, each~~the~~ defendant may, if ~~[~~he~~]~~ or ~~[~~she~~]~~ wishes, present witnesses whom the government may cross-examine. After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and I will instruct you on the law. After that, you will go to the jury room to decide your verdict.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, P1.

INSTRUCTIONS DURING TRIAL

REQUEST TO CHARGE NO. 2 (to be read if a Transcript is used) (Agreed):

Explanatory Instruction
Transcript of Tape Recorded Conversation[2]

Members of the Jury: Exhibit _____ has been identified as a typewritten transcript~~ [and partial translation from Spanish into English]~~ of the oral conversation heard on the tape recording received in evidence as Exhibit _____. ~~[~~The transcript also purports to identify the speakers engaged in the conversation.~~]~~

I've admitted the transcript for the limited and secondary purpose of helping you follow the content of the conversation as you listen to the tape recording ~~[, particularly those portions spoken in Spanish,] [~~and also to help you identify the speakers.~~]~~

But you are specifically instructed that whether the transcript correctly reflects the content of the conversation ~~[~~or the identity of the speakers~~]~~ is entirely for you to decide based on ~~[your own evaluation of the testimony you have heard about the preparation of the transcript, and from] ~~your own examination of the transcript in relation to hearing the tape recording itself as the primary evidence of its own contents.

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, T3.

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[2] The Parties have included these bolded titles for the Court's ease of review, but their understanding is that the Court will not include these titles in the jury instructions provided and read to the jury.

<u>REQUEST TO CHARGE NO. 3 (to be read if 404(b) evidence is admitted) (Agreed):</u>

Cautionary Instruction
Similar Acts Evidence
(Rule 404(b), Fed. R. Evid.)

You have just heard evidence of acts allegedly done by ~~the~~ Defendant [insert name] that may be similar to those charged in the indictment, but were committed on other occasions. You must not consider this evidence to decide if ~~the~~ Defendant [insert name] engaged in the activity alleged in the indictment. In addition, you must not consider this evidence to decide if Defendants [insert names of other Defendants] engaged in the activity alleged in the indictment. But you may consider this evidence to decide whether:

- ~~the~~ Defendant [insert name] had the state of mind or intent necessary to commit the crime charged in the indictment;
- ~~the~~ Defendant [insert name] had a motive or the opportunity to commit the acts charged in the indictment;
- ~~the~~ Defendant [insert name] acted according to a plan or in preparation to commit a crime; or
- ~~the~~ Defendant [insert name] committed the acts charged in the indictment by accident or mistake.

<u>Authority:</u> Eleventh Circuit Pattern Jury Instruction, Criminal Cases, T1.1.

REQUEST TO CHARGE NO. 4 (to be read if any witness is questioned about earlier statements or testimony) (Agreed):

Witness's Prior Statement or Testimony
Explanatory Instruction

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

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

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, T2.

INSTRUCTIONS AT CONCLUSION OF TRIAL

REQUEST TO CHARGE NO. 5 (Agreed):

Face Page – Introduction

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

CASE NO. 1:20-CR-296

-vs-

TELDRIN FOSTER,
JOHN GAINES A/K/A MARTY GAINES,
JERRY BAPTISTE, AND
CARLA JACKSON

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B1.

REQUEST TO CHARGE NO. 6A (to be read only if any Defendant testifies) (Agreed):

The Duty to Follow Instructions And the Presumption of Innocence

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

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B2.1.

REQUEST TO CHARGE NO. 6B (to be read only if no Defendant testifies) (Agreed):

The Duty to Follow Instructions and the Presumption Of Innocence When a Defendant Does Not Testify

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

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B2.2.

<u>REQUEST TO CHARGE NO. 7 (Agreed):</u>

Definition of "Reasonable Doubt"

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

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

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

<u>Authority:</u> Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B3.

REQUEST TO CHARGE NO. 8 (Agreed):

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

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

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

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

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

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B4.

REQUEST TO CHARGE NO. 9 (Agreed):

Credibility of Witnesses

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

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B5.

REQUEST TO CHARGE NO. 10 (Government Objection):

Confession or Statement of Multiple Defendants

If the Government offers evidence that a Defendant made a statement or admission to someone after being arrested or detained, you must consider that evidence with caution and great care.

You must decide for yourself (1) whether the Defendant made the statement, and (2) if so, how much weight to give to it. To make these decisions, you must consider all the evidence about the statement – including the circumstances under which it was made.

Any such statement is not evidence about any other Defendant.

Defendant Foster's Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S2.2. Mr. Foster requests that the Court give the instruction because, regardless of whether the statement was given after being arrested or detained, the questions that the jury has to consider are the same: whether Mr. Foster made the statement and how much weight to give to it.

It is also critical to instruct the jury that any statement is not evidence as to any other defendant.

Government's Objection: The government objects to this instruction because the instruction, by its terms, applies where "a Defendant made a statement or admission to someone *after being arrested or detained*." No defendant in this case made a statement or admission to anyone after being arrested or detained. Rather, all statements that the government will introduce at trial were pre-arrest, voluntary statements to law enforcement.

REQUEST TO CHARGE NO. 11 (Government Objection):

Identification Testimony

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

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

I suggest that you ask yourself questions:

1. Did the witness have an adequate opportunity to observe the person at the time the crime was committed?
2. How much time did the witness have to observe the person?
3. How close was the witness?
4. Did anything affect the witness's ability to see?
5. Did the witness know or see the person at an earlier time?

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

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

Defendant Foster's Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S3. Mr. Foster requests that the instruction be given. Mr. Foster believes that Darrell Thomas will identify him as a participant in this offense, but believes that it is highly relevant for the jury to consider "whether the witness is telling the truth. But even if you believe the witness is telling the truth, you must still decide how accurate the identification is." Whether Mr. Foster was the person sending the e-mails and other messages is a critical part of his defense. Mr. Foster is entitled to have the jury instructed on this because it is his theory of defense, and there will be evidence adduced at trial that is relevant to this defense. *United States v. Grady*, 18 F.4th 1275, 1294 (11th Cir. 2021).

Mr. Foster believes that the instruction can be modified to alleviate the risk of confusion, including by deleting the questions and the paragraph that follows those questions. Therefore, Mr. Foster maintains that the instruction could be given as follows:

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

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

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

Government's Objection: The government objects to this instruction because it does not fit within the circumstances of this case. This instruction applies in cases where a defendant is identified through a photographic line-up, live lineup, or other pre-trial identification procedure. *See United States v. King*, 751 F.3d 1268, 1272–73, 1276 (11th Cir. 2014) (pattern instruction S3 given in case where several witnesses identified the defendant in photo lineups); *United States v. Owens*, 445 F. App'x 209, 217–18 (11th Cir. 2011) (pattern instruction S3 given in case where the defendant was identified through a photo lineup).

This is not a case in which a discrete crime (like a robbery) was observed by witnesses who later identified a defendant through an identification procedure. Thus, the jury will be confused if instructed to consider whether (1) "the witness ha[d] an adequate opportunity to observe the person at the time the crime was committed"; (2) "how much time . . . the witness ha[d] to observe the person"; (3) "how close . . . the witness" was; and (4) whether "anything affect[ed] the witness's ability to see." Those concepts about a witness's observation of a crime have no application to the type of fraud crime at issue in this trial. Instead, the Court's instructions regarding credibility of witnesses and reasonable doubt are sufficient. *See United States v. Martinez*, 763 F.2d 1297, 1304–05 (11th Cir. 1985) (finding no error in failure to give instruction regarding identification because "the court's jury instructions concerning reasonable doubt and credibility of witnesses adequately covered the matter of identification").

REQUEST TO CHARGE NO. 12A (to be read only if any witness is impeached by inconsistent statements and no defendant testifies) (Agreed):

Impeachment of Witnesses Because of Inconsistent Statements

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B6.1.

REQUEST TO CHARGE NO. 12B (to be read only if any witness is impeached by inconsistent statements or by a felony conviction and no defendant testifies) (Agreed):

Impeachment of Witnesses Because of Inconsistent Statements or Felony Conviction

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

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement.

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B6.2.

REQUEST TO CHARGE NO. 12C (to be read only if any witness is impeached by inconsistent statements and a defendant testifies) (Agreed):

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

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

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

A defendant has a right not to testify. But since ~~the~~ Defendant [insert name] did testify, you should decide whether you believe ~~the~~ Defendant [insert name]'s testimony in the same way as that of any other witness.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B6.3.

REQUEST TO CHARGE NO. 12D (to be read only if any witness is impeached by inconsistent statements or by a felony conviction and a defendant testifies) (Agreed):

Impeachment of Witnesses Because of Inconsistent Statements or Felony Conviction (Defendant with no Felony Conviction Testifies)

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

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement.

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

A defendant has a right not to testify. But since ~~the~~ Defendant [insert name] did testify, you should decide whether you believe ~~the~~ Defendant [insert name]'s testimony in the same way as that of any other witness.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B6.

REQUEST TO CHARGE NO. 13 (to be read only if any witness is impeached by bad reputation for, or opinion about, truthfulness) (Agreed):

Impeachment of Witness Because of Bad Reputation for (or Opinion about) Truthfulness

There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided; or that others have a bad opinion about the witness's truthfulness.

You may consider reputation and community opinion in deciding whether to believe or disbelieve a witness.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B6.7.

<u>REQUEST TO CHARGE NO. 14 (to be read only if character evidence is presented as to any defendant) (Agreed):</u>

Character Evidence

Evidence of a defendant's character traits may create a reasonable doubt.

You should consider testimony that a defendant is an honest and law-abiding citizen along with all the other evidence to decide whether the Government has proved beyond a reasonable doubt that the Defendant committed the offense.

<u>Authority:</u> Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S12.

<u>REQUEST TO CHARGE NO. 15 (to be read only if co-defendant with plea agreement testifies) (Agreed):</u>

Testimony of Accomplice or Codefendant with Plea Agreement

You must consider some witnesses' testimony with more caution than others.

In this case, the Government has made a plea agreement with a Codefendant in exchange for ~~[~~his~~]~~ or ~~[~~her~~]~~ testimony. Such "plea bargaining," as it's called, provides for the possibility of a lesser sentence than the Codefendant would normally face. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

But a witness who hopes to gain more favorable treatment may have a reason to make a false statement in order to strike a good bargain with the Government.

So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

And the fact that a witness has pleaded guilty to an offense isn't evidence of the guilt of any other person.

<u>Authority:</u> Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S1.2.

REQUEST TO CHARGE NO. 16 (to be read only if 404(b) evidence is admitted) (Agreed):

Similar Acts Evidence
(Rule 404(b), Fed. R. Evid.)

During the trial, you heard evidence of acts allegedly done by ~~the~~ Defendants [insert names] on other occasions that may be similar to acts with which those~~e~~ Defendants are~~is~~ currently charged. You must not consider any of this evidence to decide whether the Defendant engaged in the activity alleged in the indictment. This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether ~~[~~the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the acts charged in the indictment] [the Defendant acted according to a plan or in preparation to commit a crime] [the Defendant committed the acts charged in the indictment by accident or mistake].

You should not consider the evidence of acts allegedly done by any Defendant against any other Defendant.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S4.1.

REQUEST TO CHARGE NO. 17 (Agreed):

Note-taking

You've been permitted to take notes during the trial. Most of you – perhaps all of you – have taken advantage of that opportunity.

You must use your notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence. And you must not allow yourself to be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S5.

REQUEST TO CHARGE NO. 18:

Expert Witness

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B7.

REQUEST TO CHARGE NO. 19 (Agreed):

Introduction to Offense Instructions

The indictment charges 48 separate crimes, called “counts,” against some or all of the Defendants.~~–~~ Each count has a number. Specifically, Defendant Foster is charged in counts 1 through 28, counts 30 through 41, and count 59; Defendant Gaines is charged in counts 6 through 8, count 37, and counts 44 through 47; Defendant Baptiste is charged in counts 9 through 11, count 38, and counts 48 through 50; and Defendant Jackson is charged in counts 46 and 47. You’ll be given a copy of the indictment to refer to during your deliberations.

~~[~~Some of the ~~C~~counts~~ [count number]~~ charge~~s~~ that ~~the ~~Defendants Gaines, Baptiste, and/or Foster knowingly and willfully conspired to commit bank fraud and/or wire fraud.~~ [describe alleged object(s) of the conspiracy].]~~

Other ~~[C~~counts ~~[count numbers] ~~charge that Defendants Jackson, Gaines, Baptiste, and/or Foster committed what are called “substantive offenses,” specifically bank fraud, wire fraud, making false statements to a federally insured financial institution, and/or money laundering~~ [describe alleged substantive offenses]~~. I will explain the law governing those substantive offenses in a moment.~~]~~

~~[~~But first note that the Defendants who are charged in conspiracy counts are not charged in those c~~C~~ounts~~ [conspiracy count number]~~ with committing a substantive offense – they are charged with conspiring to commit that offense.~~]~~

~~[~~I will also give you specific instructions on conspiracy.~~]~~

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B8.

REQUEST TO CHARGE NO. 20 (Agreed):

Aiding and Abetting; Agency
18 U.S.C. § 2

It's possible to prove ~~the~~ a Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S7.

REQUEST TO CHARGE NO. 21 (Agreed):

Bank Fraud
18 U.S.C. § 1344

It's a Federal crime to carry out or attempt to carry out a scheme to defraud a financial institution, or to get money or property owned or controlled by a financial institution by using false pretenses, representations, or promises.

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

> the Defendant knowingly carried out or attempted to carry out a scheme ~~[~~to defraud a financial institution~~]~~ or ~~[~~to get money, assets, or other property from a financial institution~~]~~ by using false or fraudulent pretenses, representations, or promises about a material fact;
>
> the false or fraudulent pretenses, representations, or promises were material;
>
> the Defendant intended to defraud ~~[~~the financial institution~~] [someone]~~; and
>
> the financial institution was federally ~~[~~insured~~] [chartered]~~.

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

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

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

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

The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme substantially similar to the one alleged in the indictment.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, O52.

REQUEST TO CHARGE NO. 22 (Agreed):

Wire Fraud
18 U.S.C. § 1343

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

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

> the Defendant knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;
>
> the false pretenses, representations, or promises were about a material fact;
>
> the Defendant acted with the intent to defraud; and
>
> the Defendant transmitted or caused to be transmitted by ~~[~~wire~~] [radio] [television]~~ some communication in interstate commerce to help carry out the scheme to defraud.

A "scheme to defraud" means any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises.

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

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

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

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

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

Each separate use of the interstate ~~[~~wire~~] [radio] [television]~~ communications as part of the scheme to defraud is a separate crime.

<u>Authority:</u> Eleventh Circuit Pattern Jury Instruction, Criminal Cases, O51.

REQUEST TO CHARGE NO. 23 (Agreed):

Conspiracy to Commit Bank Fraud and/or Wire~~[Mail]~~ Fraud
18 U.S.C. § 1349

It's a Federal crime to knowingly and willfully conspire or agree with someone to do something that, if actually carried out, would result in the crime of ~~mail~~ bank fraud or wire fraud.

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

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

> two or more persons, in some way or manner, agreed to try to accomplish a common and unlawful plan to commit ~~mail~~ bank fraud or wire fraud, as charged in the indictment; and
>
> the Defendant knew the unlawful purpose of the plan and willfully joined in it;

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all of the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also, a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, O54.

REQUEST TO CHARGE NO. 24 (Agreed):

**Multiple Objects of a Conspiracy –
for use with General Conspiracy Charge 13.1**

In this case, some of the conspiracy counts in the indictment allege that a Defendant~~regarding the alleged conspiracy, the indictment charges that the Defendants~~ conspired to commit bank fraud~~[first crime]~~ and to commit wire fraud~~[second crime]~~. In other words, in some counts, the Defendants are charged with conspiring to commit two separate substantive crimes.

The Government does not have to prove that a~~the~~ Defendant willfully conspired to commit both crimes. It is sufficient if the Government proves beyond a reasonable doubt that a~~the~~ Defendant willfully conspired to commit one of those crimes. But to return a verdict of guilty, you must all agree on which of the two crimes the Defendant conspired to commit.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, O13.2. Although this instruction refers to the general conspiracy charge, 18 U.S.C. § 371, the same principle applies to conspiracies charged under 18 U.S.C. § 1349. *See also* Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B8.1.

REQUEST TO CHARGE NO. 25 (Agreed):

False Statement to a Federally Insured Institution
18 U.S.C. § 1014

It's a Federal crime to knowingly make a false statement or report to a federally insured financial institution.

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

the Defendant made a false statement or report;

~~– or –~~

~~(when the alleged wrongdoing is overstating the value of an asset or income)~~

~~[the Defendant willfully overvalued land property or security;]~~

the Defendant did so knowingly and with intent to influence an action of the institution described in the indictment regarding an application, advance, commitment, or loan, or a change or extension to any of those; and

the deposits of the institution were insured by the Federal Deposit Insurance Corporation.

A statement or report is "false" if it is untrue when made and the person making it knows it is untrue.

The heart of the crime is the attempt to influence the action of the institution by ~~[~~knowingly~~] [willfully]~~ making a false statement or report. The Government does not have to prove that the institution was actually influenced or misled.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, O39. The word "willfully" was deleted because Defendants have been charged with "knowingly mak[ing] any false statement or report," not with "willfully overvalu[ing] any land, property or security." *See* 18 U.S.C. § 1014.

REQUEST TO CHARGE NO. 26 (Agreed with Partial Government Objection):

Money Laundering: Concealing Proceeds
of Specified Unlawful Activity
or
Avoiding Transaction Reporting Requirement
18 U.S.C. § 1956(B)and

It's a Federal crime to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

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

> the Defendant knowingly conducted or tried to conduct a financial transaction~~s~~;
>
> the Defendant knew that the money or property involved in the transaction were the proceeds of some kind of unlawful activity;
>
> money or property did come from a specified~~n~~ unlawful activity, specifically wire fraud~~[describe the specified unlawful activity alleged in the indictment]~~; and
>
> ~~[~~ the Defendant knew that the transaction was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership, or the control of the proceeds.~~]~~
>
> ~~or~~
>
> ~~[the Defendant participated in the transaction to avoid a transaction reporting requirement under state or Federal law.]~~

To "conduct a transaction" means to start or finish a transaction, or to participate in a transaction at any point.

A "transaction" means a purchase, sale, loan, promise, gift, transfer, delivery, or other disposition of money or property. ~~[~~A transaction with a financial institution also includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, use of a safe deposit box, or purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument.~~]~~

A "financial transaction" means –

~~[~~a transaction that in any way or to any degree affects interstate or foreign commerce by sending or moving money by wire or other means.~~]~~

or

~~[~~a transaction that in any way or to any degree affects interstate or foreign commerce by involving one or more "monetary instruments." The phrase "monetary instruments" includes coins or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in a form that allows ownership to transfer on delivery.~~]~~

~~or~~

~~[a transaction that in any way or to any degree affects interstate or foreign commerce by involving the transfer of title to any real property, vehicle, vessel or aircraft.]~~

or

~~[~~a transaction involving the use of a financial institution that is involved in interstate or foreign commerce, or whose activities affect, interstate or foreign commerce in any way or degree. The phrase "financial institution" includes a bank insured by the Federal Deposit Insurance Corporation~~[give appropriate reference from 31 U.S.C.~~ § ~~5312or the regulations thereunder]]~~.

"Interstate or foreign commerce" means trade and other business activity between people or businesses in at least two states or between people or businesses in the United States and people or businesses outside the United States.

To know "that the money or property involved in the transaction came from some kind of unlawful activity" is to know that the money or property came from an activity that's a felony under state, Federal, or foreign law.

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of the activity.

The phrase "specified unlawful activity" means wire fraud~~[describe the specified unlawful activity listed in subsection of the statute and alleged in the indictment]~~.

To prove the element of concealment, the government must prove that the purpose, *not merely the effect*, was to conceal or disguise the nature, location, source, ownership, or control of the proceeds. Evidence of concealment must be substantial. Merely conducting a transaction with money whose nature has been concealed is not in and of itself a crime.

~~[A "transaction-reporting requirement" means a legal requirement that a domestic financial institution must report any transaction involving a payment, receipt, or transfer of United States coins or currency totaling more than $10,000. But personal or cashier's checks, wire transfers, or transactions involving other monetary instruments do not have to be reported.]~~

~~[A "transaction reporting requirement" means a legal requirement that a person who causes or attempts to cause the transportation, mailing, or shipment of currency [or [description of other reportable instruments from the indictment]] totaling more than $10,000 at one time from a place inside the United States to a place outside the United States or from a place outside the United States to a place inside the United States.]~~

~~[A "transaction reporting requirement" means a legal requirement that a person engaged in a trade or business who in the course of that trade or business receives currency totaling more than $10,000 in a single transaction or in two or more related transactions must file a report with the Internal Revenue Service.]~~

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, O74.2.

The government objects to the language highlighted in yellow.

Defendant Foster's Authority: This language is from: *Cuellar v. United States*, 553 U.S. 550, 567, 128 S.Ct. 1994, 2005 (2008), and *United States v. Johnson*, 440 F.3d 1286, 1291 (11th Cir. 2006).

Government's Objection: The Eleventh Circuit's Pattern Jury Instruction as to concealment money laundering sufficiently advises the jury as to that charge. The cases that Foster relies on are more than 15 years old, and Foster cites no Eleventh Circuit authority holding that Pattern Instruction O74.2 is insufficient or inaccurate.

REQUEST TO CHARGE NO. 27 (Agreed):

Conjunctively Charged Counts

Where a statute specifies multiple alternative ways in which an offense may be committed, the indictment may allege the multiple ways in the conjunctive, that is, by using the word "and." If only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as you agree unanimously as to that alternative.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B8.1.

REQUEST TO CHARGE NO. 28 (Agreed):

Good-Faith Defense

"Good faith" is a complete defense to a charge that requires intent to defraud. A defendant isn't required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be fraudulent intent – even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can't establish fraudulent intent.

But an honest belief that a business venture would ultimately succeed doesn't constitute good faith if the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent.

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S17.

<u>REQUEST TO CHARGE NO. 29 (Agreed):</u>

On or About; Knowingly; Willfully – Generally

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

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

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

<u>Authority:</u> Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B9.1A.

REQUEST TO CHARGE NO. 30 (Objection by all Defendants):

Deliberate Ignorance as Proof of Knowledge

If a Defendant's knowledge of a fact is an essential part of a crime, it's enough that the Defendant was aware of a high probability that the fact existed – unless the Defendant actually believed the fact didn't exist.

"Deliberate avoidance of positive knowledge" – which is the equivalent of knowledge – occurs, for example, if a defendant possesses a package and believes it contains a controlled substance but deliberately avoids learning that it contains the controlled substance so he or she can deny knowledge of the package's contents.

So you may find that a defendant knew about the possession of a controlled substance if you determine beyond a reasonable doubt that the defendant actually knew about the controlled substance, or had every reason to know but deliberately closed ~~[~~his~~]~~ or ~~[~~her~~]~~ eyes.

But I must emphasize that negligence, carelessness, or foolishness isn't enough to prove that the Defendant knew about the possession of the controlled substance.

Government's Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, S8. This instruction is appropriate "when there are facts supporting the 'inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.'" *United States v. Maitre*, 898 F.3d 1151, 1157 (11th Cir. 2018) (citation omitted). Thus, for example, the Eleventh Circuit affirmed the district court's deliberate ignorance instruction where "the record contain[ed] evidence that would have allowed the jury to conclude that [the defendant] deliberately put his head in the sand" and "the jury could have chosen not to credit the evidence supporting the notion that [the defendant] had actual knowledge." *United States v. Verdeza*, 69 F.4th 780, 792–93 (11th Cir. 2023). It is appropriate to give the deliberate ignorance instruction "when the evidence could support *both* actual knowledge *or* deliberate ignorance." *Maitre*, 898 F.3d at 1157 (emphases added); *Verdeza*, 69 F.4th at 793 (same).

In addition, given that the defendants have asked the Court to give a good faith instruction, the evidence relevant to good faith almost certainly would likewise justify issuance of the deliberate ignorance instruction.

<u>All Defendants' Objection:</u> All defendants object to the giving of a deliberate ignorance instruction. If it is applicable to other defendants, then the instructions should specify which defendants it applies to.

"A district court should not instruct a jury regarding deliberate ignorance 'when the evidence only points to either actual knowledge or no knowledge on the part of the defendant.'". *United States v. Schlei*, 122 F.3d 944, 973 (11th Cir. 1997) (quoting *United States v. Stone,* 9 F.3d 934, 937 (11th Cir.1993), *cert. denied,* 513 U.S. 833, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994)).

<u>Defendant Foster's Additional Objection:</u> Regarding Mr. Foster, to our knowledge, the government is claiming that Mr. Foster directly prepared some of the fraudulent documents submitted in support of the PPP loans. That does not support an instruction for deliberate ignorance. To be clear, we have not requested the good-faith instruction, but do not oppose its being given as to the other defendants.

<u>Defendant Jackson's Additional Objection:</u> Defendant Carla Jackson objects to the use of this instruction in her case. In *United States v. Rivera,* 944 F.2d 1563, 1570–1571 (11th Cir. 1991), the Court noted that "[other] courts which have adopted deliberate ignorance instructions have properly cautioned that such a charge should not be given in every case in which a defendant claims lack of knowledge, 'but only in those comparatively rare cases where . . . there are facts that point in the direction of deliberate ignorance." The *Rivera* Court also noted that "a district court should not instruct the jury on 'deliberate ignorance' when the relevant evidence only points to *actual knowledge,* rather than deliberate avoidance." *Id.* Defendant additionally objects to the use of this instruction as it would apply to the facts of this case.

Defendant Baptiste's Additional Objection: Defendant Baptiste also objects for all the reasons set forth above.

Defendant Gaines's Additional Objection: Defendant John Gaines also objects for the same reasons.

REQUEST TO CHARGE NO. 31 (Agreed):

Caution: Punishment
(Multiple Defendants, Multiple Counts)

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

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B10.4.

REQUEST TO CHARGE NO. 32:

Anonymized Indictment

The indictment identifies various financial institutions, banks, and other entities using anonymized terms such as Financial Institution 1, Bank 1, etc. The anonymized terms correspond to the following entities:

Designation in Indictment	Entity
Financial Institution 1	Cross River Bank
Financial Institution 2	Celtic Bank
Financial Institution 3	Customers Bank
Financial Institution 4	Harvest Small Business Finance
Financial Institution 5	CDC Small Business Finance
Company 1	Bluevine Inc.
Bank 1	JPMorgan Chase Bank
Bank 3	PNC Bank
Bank 4	Bank of America
Bank 5	Wells Fargo Bank

Government's Authority: The jury must be informed which entities correspond to the anonymized entities listed in the indictment so that it can decide whether the government has proven the conduct charged in the indictment. For example, count 46 charges Defendants Gaines and Jackson with a money laundering transaction based on a wire transfer from "Bank 1 account ending in 6500" to "Bank 5 account ending in 1207." The jury needs to know the identities of Bank 1 and Bank 5 to determine whether the evidence at trial proved that Gaines and Jackson are guilty of money laundering as to that transaction.

Defendant Foster's Objection: Mr. Foster objects to any instruction that amounts to instructing the jury on facts that it has to find in order to convict the defendants. *Roe v. United States*, 287 F.2d 435, 440-41 (5th Cir. 1961) ("[N]o fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the Trial Court may never instruct a verdict either in whole or in part."); *United States v. Goetz*, 746 F.2d 705, 708 (11th Cir. 1984) (the district court "may not decide a disputed fact and instruct a verdict in whole or in part."). This issue is one of the government's own making, and it can address it through the presentation of evidence.

<u>REQUEST TO CHARGE NO. 33 (Agreed):</u>

Duty to Deliberate

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

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

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

<u>Authority:</u> Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B11.

REQUEST TO CHARGE NO. 34 (Agreed):

Verdict

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

A verdict form has been prepared for your convenience.

[Explain verdict]

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

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

Authority: Eleventh Circuit Pattern Jury Instruction, Criminal Cases, B12.