

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES

v.

Criminal No. 2:20-cr-114-FTM-66MRM

CASEY DAVID CROWTHER

Defendant.

_____ /

Defendant Crowther's Proposed Jury Instructions

Table of Contents

PRELIMINARY INSTRUCTIONS

P1 Criminal Cases

P2 Anonymous Jury

BASIC INSTRUCTIONS

B1 Face Page - Introduction

B2.2 Presumption of Innocence when a Defendant does not testify

B3 Reasonable Doubt

B4 Consideration of Direct and Circumstantial Evidence; Argument of Counsel;

Comments by the Court

B5 Credibility of Witnesses

B6 Impeachment of Witnesses Because of Inconsistent Statements

B7 Expert Witnesses

B8 Introduction to Offense Instruction

B9.2 On or About a Particular Date; Knowingly

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

B11 Duty to Deliberate

B12 Verdict

SPECIAL INSTRUCTIONS

S4.1 Similar Acts Evidence (Rule 404(b), Fed. R. Evid.)

S5 Note Taking

S17 Good-Faith Defense

Ambiguity

Interim Final Rules

OFFENSE INSTRUCTIONS

052 Bank Fraud 18 U.S.C. §1344

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

074.6 Money Laundering 18 U.S.C. §1957

P1
Preliminary Instructions – Criminal Cases

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 defendant is guilty or not guilty of the crime charged in the indictment. 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.

What is not evidence:

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

Second, the burden of proof is on the government until the very end of the case. The defendant has no burden to prove his innocence or to present any evidence, or to testify. Since the defendant has 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 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:

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

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 defendant may cross-examine them. Following the government's case, the defendant may, if he 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.

P2
Preliminary and Explanatory Instructions
to Innominate (Anonymous) Jury

Before selecting jury members, I'll tell you about something that affects how a jury is selected and how a trial is conducted.

Sometimes criminal trials attract the attention of the media and the public. The level of interest is unpredictable and not within my control. This case may attract an unusual amount of attention, so there may be curiosity about the participants – the lawyers, witnesses, defendants, judge, and perhaps even the jurors.

People may ask questions to learn more about the case. Even though these questions may be well-intentioned, they may still distract you from your duties as a juror. These questions can be awkward or inconvenient for you, your family, and your friends. They can be part of unwanted and improper approaches toward you from outside the courtroom.

During your service as a juror, you must not discuss this case with anyone. And even after the case is finished, you will never be required to explain your verdict or jury service to anyone.

Your names and personal information will be known only to court personnel and will not be disclosed.

To discourage unwanted publicity, telephone calls, letters, and questions,

you will be referred to only by your juror number.

ANNOTATIONS AND COMMENTS

The term “innominate” jury (in preference to anonymous jury) is taken from *United States v. Ippolito*, 10 F. Supp. 1305, 1307 n.1 (M.D. Fla. 1998), as approved in *United States v. Carpa*, 271 F.3d 962 (11th Cir. 2001) (reversing in part on other grounds).

The selection of an innominate jury is a “drastic measure” but is an approved technique in this Circuit when circumstances warrant. *United States v. Ross*, 33 F.3d 1507, 14191522 (11th Cir. 1994). See also, *United States v. Salvatore*, 110 F.3d 1131, 1143-1144 (5th Cir. 1997).

B1 Face Page – Introduction

**UNITED STATES DISTRICT COURT
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UNITED STATES

v.

Criminal No. 2:20-cr-114-FTM-66MRM

CASEY DAVID CROWTHER

Defendant.

_____ /

COURT’S INSTRUCTIONS TO THE JURY

Members of the Jury:

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

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

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

B2.2

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

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

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

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

ANNOTATIONS AND COMMENTS

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

B3
Definition of “Reasonable Doubt”

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

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

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

ANNOTATIONS AND COMMENTS

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

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

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

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case.

Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

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

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

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

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

give to either direct or circumstantial evidence.

ANNOTATIONS AND COMMENTS

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

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

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

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

B5
Credibility of Witnesses

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

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

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

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

B6.1**Impeachment of Witnesses Because of Inconsistent Statements**

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

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

ANNOTATIONS AND COMMENTS

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

B7
Expert Witness

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

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

ANNOTATIONS AND COMMENTS

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

B8
Introduction to Offense Instructions

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

Counts One and Count Five charge that the Defendant knowingly executed a scheme and artifice to defraud a financial institution in violation of 18 U.S.C. §1344.

Counts Two and Six charge that the Defendant knowingly made a false statement, for the purpose of influencing the actions of the Lender, an institution the accounts of which are insured by the FDIC in violation of 18 U.S.C. §1014.

Counts Three and Four charge that the Defendant knowingly engaged and attempted to engage in a monetary transaction, in and affecting interstate and foreign commerce, in criminally derived property of a value of greater than \$10,000, such property having been derived from specified unlawful activity, bank fraud, in violation of 18 U.S.C. §§1957 and 2.

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction

B9.2

On or About a Particular Date; Knowingly

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 offense 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.

ANNOTATIONS AND COMMENTS

United States v. Creamer, 721 F.2d 342, 343 (11th Cir. 1983), "on or about" language upheld in case in which alibi defense was used by the defendant; the court "rejected the contention that time becomes a material element of a criminal offense merely because the defense of alibi is advanced." See also United States v. Reed, 887 F.2d 1398 (11th Cir. 1989), reh'g denied, 891 F.2d 907 (1989), cert. denied, 493 U.S. 1080, 110 S. Ct. 1136, 107 L. Ed. 2d 1041 (1990).

B10.2

Caution: Punishment (Single Defendant, Multiple Counts)

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

I caution you that the Defendant is on trial only for the specific crimes charged in the indictment. You're here to determine from the evidence in this case whether the Defendant is guilty or not guilty of those specific crimes. You must never consider punishment in any way to decide whether the Defendant is guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.

ANNOTATIONS AND COMMENTS

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

B11
Duty to Deliberate

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

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

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

ANNOTATIONS AND COMMENTS

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

B12
Verdict

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

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it, date it, and carry it. Then you'll return it to the courtroom. If you wish to communicate with me at any time, please write down your message or question and give it to the marshal. The marshal will bring it to me and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted one way or the other at that time.

ANNOTATIONS AND COMMENTS

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

586 F.2d 572 (5th Cir. 1978), reh'g denied, 589 F.2d 1114 (1979), cert. denied, 442 U.S. 909, 99 S. Ct. 2821, 61 L. Ed. 2d 274 (1979).

S4.1
Similar Acts Evidence (Rule 404(b), Fed. R. Evid.)

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant 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 acted according to a plan or in preparation to commit a crime].

ANNOTATIONS AND COMMENTS

Rule 404. [Fed. R. Evid.] Character Evidence; Crimes or Other Acts

* * * * *

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. See *id.* at 911 n.15.

Both the Supreme Court and the Eleventh Circuit have expressly endorsed the Beechum test. *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Miller*, 959 F.2d 1535 (11th Cir. 1992) (en banc), cert. denied, 506 U.S. 942 (1992).

S5
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.

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

S17 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.

ANNOTATIONS AND COMMENTS

United States v. Goss, 650 F.2d 1336 (5th Cir. 1981), failure to give this instruction as a theory-of-defense charge, when requested to do so, is error if there is any evidentiary foundation to support the Defendant’s claim. Note, however, that there must be some evidentiary basis for the request. If the usual instructions are given defining willfulness and intent to defraud, that will ordinarily suffice in the absence of evidence of good faith. United States v. Boswell, 565 F.2d 1338 (5th Cir. 1978), reh’g denied, 568 F.2d 1367 (11th Cir. 1978), cert. denied, 439 U.S. 819, 99 S. Ct. 81, 58 L. Ed. 2d 110 (1978); United States v. England, 480 F.2d 1266 (5th Cir. 1973), cert. denied, 414 U.S. 1041, 94 S. Ct. 543, 38 L. Ed. 2d 332 (1973); United States v. Williams, 728 F.2d 1402 (11th Cir. 1984).

Ambiguity

To prove that any statement was false, the government must prove beyond a reasonable doubt that the statement was not true under any reasonable interpretation of the loan documents provided by the Lender and the Interim Final Rules pursuant to the Paycheck Protection Program.

ANNOTATIONS AND COMMENTS

United States v. Harra, No. 19-1105 (3d Cir. 2021), Third Circuit vacates convictions based on a bank's reporting of "past due" loans; to prove falsity beyond a reasonable doubt in this situation, the government must prove either that its interpretation of the reporting requirement is the only objectively reasonable interpretation or that the defendant's statement was also false under the alternative, objectively reasonable interpretation.

Interim Final Rules

During the trial you have heard the Parties and witnesses talk about Interim Final Rules which are regulations issued by the Small Business Administration to implement the Paycheck Protection Program as included in the CARES Act.

An “Interim Final Rule” is a rule adopted by a federal agency that becomes effective without prior notice and public comment and that invites public comment *after* its effective date.

ANNOTATIONS AND COMMENTS

An Interim Final Rule has the same legal effect as a Final Rule, and is subject to judicial review like any other Final Rule. *See e.g. Career College Ass’n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir.. 1996). “The key word in the title ‘Interim Final Rule’ . . . is not interim, but final. ‘Interim’ refers only to the Rule's intended duration—not its tentative nature.” *Id.*

This interim final rule is being issued without advance notice and public comment because section 1114 of the CARES Act and section 303 of the Economic Aid Act authorize SBA to issue regulations to implement the Paycheck Protection Program without regard to notice requirements. In addition, this rule is being issued to allow for immediate implementation of these changes. The intent of both the CARES Act and the Economic Aid Act is that SBA provide relief to America’s small businesses expeditiously. Given the urgent need to provide borrowers with timely relief and the short period of time before the program ends on March 31, 2021, SBA in consultation with Treasury has determined that it is impractical and not in the public interest to provide a 30-day delayed effective date. An immediate effective date will allow SBA to give small businesses affected by this interim final rule the maximum amount of time to apply for loans and lenders the maximum amount of time to process applications before the program ends.

O52
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.

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

- (1) the Defendant knowingly carried out or attempted to carry out a scheme to get money, assets, or other property from a financial institution by using false or fraudulent pretenses, representations, or promises about a material fact;
- (2) the false or fraudulent pretenses, representations, or promises were material;
- (3) the Defendant intended to defraud the financial institution; and
- (4) the financial institution was federally insured.

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.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1344 provides:

Whoever knowingly executes, or attempts to execute, a scheme or artifice - -
(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than \$1,000,000 or imprisoned not more than (30) years or both.

See 18 U.S.C. § 20 for an enumeration of the financial institutions covered by § 1344.

An additional element is required under the Apprendi doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. See Pattern Instruction 50.1.

Proof that the financial institution is federally chartered or insured is an essential element of the crime, as well as necessary to establish federal jurisdiction. *United States v. Scott*, 159 F.3d 916, 921 (5th Cir. 1998). Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1, 25 (1999).

There are two separate offenses possible under Section 1344: (1) defrauding a financial institution; or (2) obtaining money or funds from the financial institution by means of material false or fraudulent pretenses, representations, or promises. *United States v. Dennis*, 237 F.3d 1295, 1303 (11th Cir. 2001) (discussing elements of bank fraud under section 1344); *United States v. Mueller*, 74 F.3d 1152, 1159 (11th Cir. 1996). In the case of defrauding a financial institution, the Government must establish “that the defendant (1) intentionally participated in a scheme or artifice to defraud another of money or property; and (2) that the victim of the scheme or artifice was an insured financial institution.” *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir. 1997). Under the alternative theory, the Government must prove “(1) that a scheme existed in order to obtain money, funds, or credit in the custody of the federally insured institution; (2) that the defendant participated in the scheme by means of false pretenses, representations or promises, which were material; and (3) that the defendant acted knowingly.” *Id.* As the Supreme Court explained in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), to prove a violation under Section 1344(s), the Government need not prove that the defendant intended to defraud a bank.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. See *United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) (“A jury

cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit.” (internal quotation marks and citation omitted)).

While materiality is an element of the bank fraud offense under *Neder*, see also *United States v. Williams*, 390 F.3d 1319, 1324 (11th Cir. 2004) (same), the Supreme Court has held (pre-*Neder*) that materiality is not an element of the offense in a prosecution under 18 U.S.C. § 1014, a similar statute which prohibits making a false statement to a federally insured bank or designated financial institution. *United States v. Wells*, 519 U.S. 482 (1997).

O39
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 Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant made a false statement or report;
- (2) 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
- (3) 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.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1014 provides:

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, ... [or] the Resolution Trust Corporation... upon any application,

advance,... commitment, or loan, or any change or extension of any of the same [shall be guilty of an offense against the United States].

Maximum Penalty: Thirty (30) years imprisonment and applicable fine.

United States v. Key, 76 F.3d 350, 353 (11th Cir. 1996), a defendant need not know of the victim institution's insured status to be guilty of this offense; rather, it is sufficient that the defendant knowingly directed conduct at a bank that the government proves was insured.

United States v. Greene, 862 F.2d 1512, 1514 (11th Cir. 1989), section applies to representations made in connection with conventional loan or related transactions.

United States v. Wells, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997), materiality is not an element of this offense.

Section 1014 also includes "willfully overvalues" as an alternative offense. If that is charged, this instruction must be modified accordingly. The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

O74.6
Money Laundering
18 U.S.C. § 1957

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

The Defendant can be found guilty of this offense only if all the following are proved beyond a reasonable doubt;

- (1) the Defendant knowingly engaged or attempted to engage in a monetary transaction;
- (2) the Defendant knew the transaction involved property or funds that were the proceeds of some criminal activity;
- (3) the property had a value of more than \$10,000;
- (4) the property was in fact proceeds of fraud on a financial institution; and
- (5) the transaction took place in the United States.

The term “monetary transaction” means transfer of funds by, through, or to a financial institution in a way that affects interstate commerce.

A “financial institution” means an insured bank of the FDIC for the bank fraud charges associated with the PPP and a loan or finance company for the bank fraud charges associated to the purchase of a residential home.

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.

It doesn't matter whether the Defendant knew the precise nature of the crime or that the property came from committing [unlawful activity alleged in indictment]. But the Government must prove that the Defendant knew that the property involved in the monetary transaction was obtained or derived from committing some crime. Also it doesn't matter whether all the property involved was derived from a crime. The Government only has to prove that \$10,000 worth of the property was obtained or derived from committing a crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1957(a) and (d) provide:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

* * * * *

(d) The circumstances referred to in subsection (a) are - -

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

3

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

Maximum Penalty: Ten (10) years and applicable fine.

United States v. Adams, 74 F.3d 1093, 1101 (11th Cir. 1996), the Eleventh Circuit recommended that district courts make clear in the jury instruction that at least \$10,000 of the property at issue must be criminally derived.

In United States v. Christo, 129 F.3d 578, 580 (11th Cir. 1997), the Eleventh Circuit held that the predicate crime must be completed before the offense of money laundering can occur under section 1957.

The term “proceeds” as used in both 18 U.S.C. § 1956 and § 1957 was expressly defined by the Fraud Enforcement and Recovery Act of 2009 (“FERA”), Pub. L. No. 111-21, effective May 20, 2009. The FERA expanded the concept of monetary proceeds, for purposes of enforcing prohibitions against money laundering, to include gross receipts. See 18 U.S.C. § 1956(c)(9).

The FERA was a direct response to United States v. Santos, 128 S. Ct. 2020 (2008). In Santos, a plurality of the U.S. Supreme Court held that the definition of the term “proceeds” in 18 U.S.C. § 1956(a)(1)(A)(i) refers to “profits” rather than “receipts” when applied to a prosecution arising from an illegal stand-alone gambling operation. Until the FERA, the definition of “proceeds” in the money laundering statute remained unclear.

The Eleventh Circuit has construed the fragmented Santos opinion narrowly. In United States v. Demarest, 570 F.3d 1232 (11th Cir. 2009), a case in which the trial took place prior to the FERA’s enactment, the Court noted:

Santos has limited precedential value... The narrow holding in [the case], at most, was that the gross receipts of an unlicensed gambling operation were not ‘proceeds’ under section 1956...

Id. at 1242.

See United States v. Velez, 586 F.3d 875 (11th Cir. 2009) (holding that the plain language of § 1957(f)(1) clearly exempts criminally derived proceeds used to secure legal representation to which an accused is entitled to under the Sixth Amendment).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Nicole H. Waid, attorney for Casey David Crowther, do hereby certify that I have, this day, filed the foregoing with the Clerk of Court via the CM/ECF system, which has caused a true and correct copy to be served on all counsel of record.

/s/ Nicole H. Waid
Nicole H. Waid, Esq.