UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 25-cr-00076-JMC**
	:	
CORTNEY MERRITTS,	:	
	:	
Defendant.	:	

ATTACHMENT 3 TO JOINT PRETRIAL STATEMENT
PROPOSED JURY INSTRUCTIONS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, and defendant Cortney Merritts, by and through his attorneys Justin Gelfand and Joseph DiRuzzo, respectfully propose the following jury instructions for the Court to use at trial. Unless otherwise noted, all proposed instructions come from the Standardized Criminal Jury Instructions for the District of Columbia ("Redbook").

INSTRUCTIONS ON WHICH THE PARTIES AGREE

PRELIMINARY INSTRUCTIONS

1. Preliminary Instructions Before Trial, Criminal Jury Instructions for the District of Columbia § 1.102

2. Notetaking by Jurors, Criminal Jury Instructions for the District of Columbia § 1.105

3. Preliminary Instructions to Jury Where Identity of Alternates is Not Disclosed § 1.107

4. A Juror's Recognition of a Witness or Other Party Connected to the Case § 1.108

FINAL JURY INSTRUCTIONS

PART ONE: GENERAL – INTRODUCTORY

1. Furnishing the Jury with a Copy of the Instructions, Criminal Jury Instructions for the District of Columbia § 2.100
2. Function of the Court, Criminal Jury Instructions for the District of Columbia § 2.101
3. Function of the Jury, Criminal Jury Instructions for the District of Columbia § 2.102
4. Jury's Recollection Controls, Criminal Jury Instructions for the District of Columbia § 2.103
5. Evidence in the Case, Criminal Jury Instructions for the District of Columbia § 2.104
6. Statements of Counsel, Criminal Jury Instructions for the District of Columbia § 2.105
7. Indictment Not Evidence, Criminal Jury Instructions for the District of Columbia § 2.106
8. Burden of Proof, Criminal Jury Instructions for the District of Columbia § 2.107
9. Reasonable Doubt, Criminal Jury Instructions for the District of Columbia § 2.108
10. Direct and Circumstantial Evidence, Criminal Jury Instructions for the District of Columbia § 2.109
11. Nature of Charges Not to be Considered, Criminal Jury Instructions for the District of Columbia § 2.110
12. Number of Witnesses, Criminal Jury Instructions for the District of Columbia § 2.111
13. Inadmissible and Stricken Evidence, Criminal Jury Instructions for the District of Columbia § 2.112 (if applicable)

PART TWO: EVALUATION OF TESTIMONY

1. Credibility of Witnesses, Redbook Criminal Jury Instructions for the District of Columbia § 2.200

2. Police Officer's Testimony, Criminal Jury Instructions for the District of Columbia § 2.207

3. Right of Defendant Not to Testify, Criminal Jury Instructions for the District of Columbia § 2.208 (if applicable)

4. Defendant as Witness, Criminal Jury Instructions for the District of Columbia § 2.209 (if applicable)

5. False or Inconsistent Statement by Defendant § 2.210 (if applicable)

6. Effect of Refusal of Witness to Answer Question, Criminal Jury Instructions for the District of Columbia § 2.211 (if applicable)

7. Invocation of Fifth Amendment Privilege Against Self-Incrimination, Criminal Jury Instructions for the District of Columbia § 2.212 (if applicable)

8. Character of the Defendant, Criminal Jury Instructions for the District of Columbia § 2.213 (if applicable)

9. Cross-Examination of Character Witness, Criminal Jury Instructions for the District of Columbia § 2.214 (if applicable)

10. Evaluation of Prior Inconsistent Statement, Criminal Jury Instructions for the District of Columbia § 2.216 (if applicable)

11. Evaluation of Prior Consistent Statement, Criminal Jury Instructions for the District of Columbia § 2.217 (if applicable)

PART THREE: EVALUATION OF OTHER EVIDENCE

1. Motive, Criminal Jury Instructions for the District of Columbia § 2.307
2. Other Crimes Evidence, Criminal Jury Instructions for the District of Columbia § 2.321 (if applicable)

PART FOUR: ASPECTS OF DELIBERATIONS

1. Multiple Counts—One Defendant, Criminal Jury Instructions for the District of Columbia § 2.402

2. Unanimity—General, Criminal Jury Instructions for the District of Columbia § 2.405

3. Verdict Form Explanation, Criminal Jury Instructions for the District of Columbia § 2.407

PART FIVE: CLOSING REMARKS

1. Summary Exhibits[1]: Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.[2] If you find that any charts or summaries do not correctly reflect facts or figures shown by the evidence in this case, you should disregard any part of the charts or summaries you find to be inaccurate.[3]

2. Redacted Exhibits, Criminal Jury Instructions for the District of Columbia § 2.500 (if applicable)

3. Exhibits During Deliberations, Criminal Jury Instructions for the District of Columbia § 2.501

4. Selection of Foreperson, Criminal Jury Instructions for the District of Columbia § 2.502

5. Possible Punishment Not Relevant, Criminal Jury Instructions for the District of Columbia § 2.505

6. Cautionary Instruction on Publicity, Communication, and Research, Criminal Jury Instructions for the District of Columbia § 2.508

7. Communication Between Court and Jury During Jury's Deliberations, Criminal Jury Instructions for the District of Columbia § 2.509

8. Attitude and Conduct of Jurors in Deliberations, Criminal Jury Instructions for the District of Columbia § 2.510

9. Excusing Alternate Jurors, Criminal Jury Instructions for the District of Columbia § 2.511

10. Defendant's Theory of the Case § 9.100

---

[1] As noted in a separate pleading, the Defendant objects to at least some of the government's summary exhibits. But if they are admitted, the Defendant does not object to this language.

[2] Adapted from Fed. R. Evid. 1006.

[3] Adapted from O'Malley, 1A Fed. Jury Prac. & Inst. 14:02 (6th ed.)

DEFINITIONS AND THEORIES OF LIABILITY

1. Proof of State of Mind, Criminal Jury Instructions for the District of Columbia § 3.101

2. Willfully Causing An Act To Be Done, Criminal Jury Instructions for the District of Columbia § 3.102

3. "On or About," Criminal Jury Instructions for the District of Columbia § 3.103

INSTRUCTIONS ON WHICH THE PARTIES DO NOT AGREE

OFFENSE INSTRUCTIONS

GOVERNMENT'S PROPOSAL[4]

Counts One and Two of the indictment charge the defendant with wire fraud, which is a violation of federal law.

Elements of the Offense

In order to find the defendant guilty of wire fraud, you must find that the government proved each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;

Second, that the false pretenses, representations, or promises were about a material fact;

Third, that the defendant acted with the intent to defraud; and

Fourth, that the defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud.

Definitions

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 was itself false or fraudulent; or that using the wire was intended as

[4] Adapted from 11th Cir. Model Crim. Jury Instr. O51, unless otherwise noted.

the specific or exclusive means of carrying out the alleged fraud; or that the defendant personally made the transmission over the wire. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone, or that the defendant actually realized any gain from the scheme or that any intended victim actually suffered any loss.[5]

To "use" interstate wire communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business. The use of the internet to send a message, such as an e-mail, or to communicate with a website may constitute a wire transmission in interstate commerce.[6]

Each separate use of the interstate wire communications as part of the scheme to defraud is a separate crime.

For purposes of Count One, the alleged interstate wire signal is the defendant's July 8, 2020, submission of an Economic Injury Disaster Loan Program application over the internet from Missouri to a server located in Iowa used in processing such applications for the United States Small Business Administration.

For purposes of Count Two, the alleged interstate wire signal is the defendant's April 22, 2021, submission of a Paycheck Protection Program loan application over the internet from Missouri to a server located in Virginia used in processing such applications for the United States Small Business Administration.

---

[5] Adapted from 3d Cir. Model Crim. Jury Instr. 6.18.1341-1.

[6] Adapted from 3d Cir. Model Crim. Jury Instr. 6.18.1343-1.

DEFENDANT'S PROPOSAL[7]

The defendant is charged in counts I and II of the indictment with a violation of 18 U.S.C. section 1343.

This law makes it a crime to use interstate wire communication facilities in carrying out a scheme to defraud.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant devised or intended to devise a scheme to defraud, as alleged in the indictment;

Second: the defendant acted with specific intent to defraud;

Third: the defendant used interstate or foreign wire communications facilities for the purpose of carrying out the scheme; and

Fourth: the scheme employed false or fraudulent pretenses, representations, or promises that were material.

A "scheme to defraud" is conduct intended to or reasonably calculated to deceive persons of ordinary prudence or comprehension.

A "scheme to defraud" includes a scheme to deprive another of money, property, or the intangible right of honest services.

An "intent to defraud" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity.

A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

---

[7] Adapted from the 10th Cir. Pattern Crim. Jury Instruction 2.57 Wire Fraud, 18 U.S.C. Section 1343.

WIRE FRAUD – GOOD FAITH DEFENSE

DEFENDANT'S PROPOSAL[8]

(1) The good faith of the defendant is a complete defense to the charge of wire fraud contained in Counts I and II of the indictment because good faith on the part of the defendant is, simply, inconsistent with an intent to defraud.

(2) A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

(3) A defendant does not act in good faith if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.

(4) While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

(5) The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with an intent to defraud.

(6) If the evidence in this case leaves you with a reasonable doubt as to whether the defendant acted with an intent to defraud or in good faith, you must acquit the defendant.

GOVERNMENT'S OBJECTIONS[9]

The defendant is not entitled to a standalone "good faith" jury instruction because the substantive offense instruction for wire fraud already adequately informs the jury of the requisite "intent to defraud" *mens rea* that the government must prove beyond a reasonable doubt. "[I]t is unnecessary to give a particular defense instruction if its essential points are covered in another instruction[,]" so therefore "[a] good faith instruction is not required where lack of good faith is part of the charge." *United States v. Johnson*, 874 F.3d 990, 1002 (7th Cir. 2017) (holding that because the defendants in a wire fraud case "were convicted of crimes that required the jury to find bad faith, and specifically the intent to commit fraud, they were not entitled to an additional instruction for good faith") (citations omitted); *see also United States v. Kismat*, 570 F. App'x 155, 158 (3d Cir. 2014) ("We have upheld refusals to give a separate good faith instruction when the

---

[8] Adapted from the 6th Cir. Pattern Crim. Jury Instruction 10.04 Wire Fraud, Good Faith Defense.

[9] The Defendant notes that the elements instruction and good faith instruction proposed by the defense are both pattern jury instructions from federal circuits. The defense intends to file a supplemental pleading at the appropriate time as to why both of these instructions should be given and why the Government's proposed elements instruction should not.

instructions, taken as a whole, adequately define the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant.") (citation omitted); *United States v. Dockray*, 943 F.2d 152, 154–55 (1st Cir. 1991) ("Jury instructions are to be evaluated in the context of the charge as a whole, and a defendant has no absolute right to the use of particular language. Although good faith is an absolute defense to a charge of mail or wire fraud, the court need only convey the substance of the theory to the jury. There is nothing so important about the words 'good faith' that their underlying meaning cannot otherwise be conveyed. Thus, where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required.") (citations omitted); *United States v. Howard*, 245 F. Supp. 2d 24, 38 (D.D.C. 2003) (holding that "a separate instruction regarding the 'good faith defense' was unnecessary" because the offense instruction itself already "accurately recited the level of intent the government had to prove to establish the mail and wire fraud charges") (collecting cases).

Finally, to the extent the Court determines that a standalone good faith instruction may nonetheless be appropriate, such an instruction should only be given if evidence that the defendant acted in good faith is actually introduced at trial. *See* 6th Cir. Model Crim. Jury Instr. 10.02, Use Note. If no such evidence is introduced, then a separate good faith instruction is per se inappropriate.