

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

CASE NO. 1:20 CR 228-MHC

-VS-

DANIEL ERIC JAY

DEFENDANT’S PROPOSED JURY INSTRUCTIONS

COMES NOW DANIEL ERIC JAY, by and through the undersigned counsel and submits the following proposed jury instructions, numbers 1-26. The Defendant seek permission to submit additional requests as the evidence proceeds and the need for additional, alternative, or modified instructions is revealed, including, but not limited to the requested charge on the theory of defense. *United States v. Opdahl*, 930 F.2d 1530 (11th Cir. 1991).

DAN JAY'S REQUEST TOCHARGE NO. 1

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

ANNOTATIONS AND COMMENTS No annotations associated with this instruction

DAN JAY'S REQUEST TO CHARGE NO. 2

B2.1**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 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] [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.

ANNOTATIONS AND COMMENTS *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970) (The due process clause protects all criminal defendants “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); see also *Harvell v. Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995), reh'g denied, 70 F.3d 1287 (11th Cir. 1995)

DAN JAY'S REQUEST TOCHARGE NO. 3

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] [her] 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.”)

DAN JAY'S REQUEST TOCHARGE NO. 4

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).

DAN JAY'S REQUEST TO CHARGE NO. 5

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.”

DAN JAY'S REQUEST TO CHARGE NO. 6

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.

DAN JAY'S REQUEST TO CHARGE NO. 7

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).

DAN JAY'S REQUEST TO CHARGE NO. 8

B6.2
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.

ANNOTATIONS AND COMMENTS

See United States v. Solomon, 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).

DAN JAY'S REQUEST TO CHARGE NO. 9

B6.7
Impeachment of Witness Because of Bad Reputation for (or Opinion
about) Truthfulness
(May Be Used With 6.1 – 6.6)

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.

ANNOTATIONS AND COMMENTS

Rule 608. [Fed. R. Evid.] Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. - - The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

See United States v. Watson, 669 F.2d 1374, 1381-1383 (11th Cir. 1982) distinguishing between reputation witnesses and personal opinion witnesses, and finding error in the exclusion of opinion testimony.

See also, Special Instruction 11, Character Evidence (relating to evidence of the character of the accused offered under Rule 404(a)(1), Fed. R. Evid.), and the Annotations and Comments following that instruction.

DAN JAY’S REQUEST TO CHARGE NO. 10

B8
Introduction to Offense Instructions

The indictment charges ____ 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.

[Count [count number] charges that the Defendants knowingly and willfully conspired to [describe alleged object(s) of the conspiracy].]

[Counts [count numbers] charge that Defendants committed what are called “substantive offenses,” specifically [describe alleged substantive offenses]. I will explain the law governing those substantive offenses in a moment.]

[But first note that the Defendants are not charged in Count [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.]

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

DAN JAY'S REQUEST TO CHARGE NO. 11

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).

DAN JAY’S REQUEST TO CHARGE NO. 12

B9.1A
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] [her] conduct may be violating.]

ANNOTATIONS AND COMMENTS

The Definition of willfulness in this instruction can be used in most cases where willfulness is an element. For crimes requiring a particularized knowledge of the law being violated, such as tax and currency-structuring cases, use 9.1B’s definition of willfulness.

The committee in its most recent revisions to the pattern instructions has changed the approach to how “willfully” should be charged in the substantive offenses which include it as an essential element of the offense. The previous editions of the pattern

instructions included the following definition that historically has been used in most cases:

The word “willfully,” as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Although this definition has been useful as a general definition that encompasses many different aspects of the legal concept of “willfulness” in a concise and straightforward manner, the Committee has concluded, along with every other Circuit Pattern Instruction Committee that has considered the issue, that the definition is not accurate in every situation. A review of the case law reveals how the courts have struggled with the meaning of “willfulness” as a *mens rea* requirement for substantive criminal offenses. *See Bryan v. United States*, 524 U.S. 184, 189-92, 114 S. Ct. 1939, 1944-45 (1998) (“The word ‘willfully’ is sometimes said to be ‘a word of many meanings’ whose construction is often dependent on the context in which it appears.” (citing *Spies v. United States*, 317 U.S. 492, 497, 63 S. Ct. 364, 367 (1943))); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41, 114 S. Ct. 655, 659 (1994); *United States v. Phillips*, 19 F.3d 1565, 1576-84 (11th Cir. 1994) (noting the difficulty in defining “willfully” and discussing the term in various contexts), amended to correct clerical errors, 59 F.3d 1095 (11th Cir. 1995); *United States v. Granda*, 565 F.2d 922, 924 (5th Cir. 1978) (noting, *inter alia*, that “willfully” has defied any consistent interpretation by the courts”); *see generally United States v. Bailey*, 444 U.S. 394, 403, 100 S. Ct. 624, 631 (1980) (“Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* requirement for any particular crime.”).

Based on the case law, the Committee has concluded that the criminal offenses that expressly include “willfulness” as an essential element can be divided into two broad categories. For the first category (Instruction 9.1A, which encompasses most offenses) “willfully” is defined to require that the offense be committed voluntarily and purposely with the intent to do something unlawful. However, the person need not be aware of the specific law or rule that his or her conduct may be violating. This definition is narrower than the traditional definition that has been used in our pattern charges in the past, but the Committee believes that this narrower definition is required under the law. *See, e.g. Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939 (1998) (holding that the term “willfully” in 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D) requires proof that the defendant knew that his conduct was generally unlawful, but does not require that the defendant knew of the specific licensing requirement that he was violating).

The second category of criminal offenses that have “willfulness” as an essential element have a heightened *mens rea* requirement. For this limited class of offenses,

the Government must prove more than the defendant knew that his conduct was done with a bad purpose to disobey the law in general. The Government must prove that the defendant had an intent to violate a known legal duty, that is with the *specific* intent to do something the law forbids. For these offenses, the Committee recommends that the definition of “willfully” in Instruction 9.1B be given to the jury. These offenses include currency structuring statutes and certain tax laws, which tend to involve “highly technical statutes that present the danger of ensnaring individuals engaged in apparently innocent conduct.” *Bryan*, 118 S. Ct. at 1946 – 47. For example, see *Ratzlaf v. United States*, 114 S. Ct. 655 (1994) (holding that with respect to 31 U.S.C. § 5322(a) and the monetary transaction provisions that it controls, the Government must prove that the defendant acted willfully, *i.e.*, with specific knowledge that the structuring of currency transactions in which he was engaged was unlawful); see also *Cheek v. United States*, 111 S. Ct. 604, 609-10 (1991) (explaining that due to the complexity of tax laws, there is an exception to the general rule that “ignorance of the law or a mistake of law is no defense to criminal prosecution,” and “[t]he term ‘willfully’ [as used in certain federal criminal tax offenses] connot[es] a ‘voluntary, intentional violation of a known legal duty’” (citing *United States v. Pomponio*, 429 U.S. 10, 12, 97 S. Ct. 22, 23 (1976) and *United States v. Bishop*, 412, U.S. 346, 360-61, 93 S. Ct. 2008, 2017 (1973))). In *Cheek*, the Supreme Court found error in the trial court’s instruction to the jury that in order for the defendant’s belief that he was not violating the law to be a defense, his good-faith belief must have been objectively reasonable. The Court further explained, however, that “a defendant’s views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper.” *Cheek*, 498 U.S. at 206, 111 S. Ct. at 613.

The Committee observes that the required mental state may be different even for different elements of the same crime. This possibility should be considered when determining what definition of *mens rea* should be charged. See *Liparota v. United States*, 471 U.S. 419, 423, 105 S. Ct. 2084, 2087 n.5 (1985).

Note: If the Defendant raises a good faith defense, it may be appropriate to give Special Instruction 9 [Good Faith Defense to Willfulness (as under the Internal Revenue Code)], Special Instruction 18 [Good Faith Reliance Upon Advice of Counsel].

DAN JAY'S REQUEST TO CHARGE NO. 13

B9.1B**On or About; Knowingly; Willfully – Intentional
Violation of a Known Legal Duty**

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 done voluntarily and purposely with the specific intent to violate a known legal duty, that is, with the intent to do something the law forbids. Disagreement with the law or a belief that the law is wrong does not excuse willful conduct.

ANNOTATIONS AND COMMENTS

For crimes requiring a particularized knowledge of the law being violated, such as tax and currency-structuring cases, use this definition of willfulness.

Note: Please refer to the Annotations and Comments following Instruction 9.1A for a detailed commentary regarding the selection of the applicable "willfully" definition. Additionally, there may be instances where a case presents one substantive offense charging a crime subject to the general willfulness *mens rea* requirement and a separate offense charging a crime subject to the more rigorous *mens rea* standard set forth above. In such a situation, the Committee recommends providing the applicable definition within the offense instruction itself.

DAN JAY'S REQUEST TO CHARGE NO. 14

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).

DAN JAY'S REQUEST TO CHARGE NO. 15

S1.1

Testimony of Accomplice, Informer, or Witness with Immunity

You must consider some witnesses' testimony with more caution than others. For example, paid informants, witnesses who have been promised immunity from prosecution, or witnesses who hope to gain more favorable treatment in their own cases, 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.

ANNOTATIONS AND COMMENTS See *United States v. Shearer*, 794 F.2d 1545, 1551 (11th Cir. 1986). See also *United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988), cert. denied, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989) (holding that, as a general rule, a cautionary instruction regarding the credibility of accomplices should be given).

DAN JAY'S REQUEST TO CHARGE NO. 16

S1.2

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] [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.

ANNOTATIONS AND COMMENTS

United States v. Solomon, 856 F.2d 1572, 1578-79 (11th Cir. 1988), cert. *denied*, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989).

DAN JAY'S REQUEST TO CHARGE NO. 17

S1.3
**Testimony of Accomplice, Witness Using Addictive Drugs,
or Witness With Immunity**

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

For example, a witness may testify about events that occurred during a time when the witness was using addictive drugs, and so the witness may have an impaired memory of those events. And a witness who has been promised immunity from prosecution or witnesses who hope to gain more favorable treatment in [his] [or] [her] own case 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.

ANNOTATIONS AND COMMENTS

See United States v. Fajardo, 787 F.2d 1523, 1527 (11th Cir. 1986). *See also United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988), *cert. denied*, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989) (holding that, as a general rule, a cautionary instruction regarding the credibility of accomplices should be given).

DAN JAY'S REQUEST TO CHARGE NO. 18

S9**Good-Faith Defense to Willfulness**

Good-Faith is a complete defense [to the charge(s) in the indictment] since good-faith on the part of the Defendant is inconsistent with willfulness, and willfulness is an essential part of the charge(s). If the Defendant acted in good faith, sincerely believing [himself] [herself] to be exempt by the law [from the withholding of income taxes], then the Defendant did not intentionally violate a known legal duty – that is, the Defendant did not act “willfully.” The burden of proof is not on the Defendant to prove good-faith intent because the Defendant does not need to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted willfully as charged.

Intent and motive must not be confused. “Motive” is what prompts a person to act. It is why the person acts.

“Intent” refers to the state of mind with which the act is done.

If you find beyond a reasonable doubt that the Defendant specifically intended to do something that is against the law and voluntarily committed the acts that make up the crime, then the element of “willfulness” is satisfied, even if the Defendant believed that violating the law was [religiously, politically, or morally] required or that ultimate good would result.

ANNOTATIONS AND COMMENTS

This instruction has been updated and now more closely resembles the language of other good faith defenses.

See United States v. Anderson, 872 F.2d 1508, 1517-18 (11th Cir. 1989), *cert. denied*, 493 U.S. 1004 (1989). However, in *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996), *cert. denied*, 521 U.S. 1106 and 522 U.S. 1014 (1997), the Eleventh Circuit noted that although the jury instructions given in the case were legally sufficient as a whole, a portion of the former Special Instruction 9 “might potentially be deemed confusing.” *Id.* at 1285. The updated instruction eliminates the confusion. It may be given when appropriate as a supplement to Basic Instruction 9.1B.

DAN JAY'S REQUEST TO CHARGE NO. 19

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).

DAN JAY'S REQUEST TO CHARGE NO. 20

S3

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.

ANNOTATIONS AND COMMENTS See *United States v. Martinez*, 763

F.2d 1297, 1304 (11th Cir. 1985).

DAN JAY'S REQUEST TO CHARGE NO. 21

S16**Duress and Coercion (Justification or Necessity)**

The Defendant claims that if he committed the acts charged in the indictment, he did so only because he was forced to commit the crime. If you conclude that the Government has proved beyond a reasonable doubt that the Defendant committed the crime as charged, you must then consider whether the Defendant should nevertheless be found “not guilty” because his actions were justified by duress or coercion. To excuse a criminal act, the Defendant must prove by a preponderance of the evidence: First: That there was an unlawful and present, immediate, and impending threat of death or serious bodily harm to the Defendant or another; Second: That the Defendant’s own negligent or reckless conduct did not create a situation where the Defendant would be forced to engage in a crime; Third: That the Defendant had no reasonable legal alternative to violating the law; and Fourth: That avoiding the threatened harm caused the criminal action. A “preponderance of the evidence” is enough evidence to persuade you that the Defendant’s claim is more likely true than not true. If you find that the Defendant has proven each of these elements by a preponderance of the evidence, you must find the Defendant not guilty.

ANNOTATIONS AND COMMENTS The substantive elements of this instruction are taken from *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), cert. denied, 530 U.S. 1264, 120 S. Ct. 2724 (2000). The Court of Appeals reiterated the requirements of the defense in *United States v. Harmon*, 213 Fed. Appx. 914, 916 (11th Cir. 2007) (unpublished) (citing *Deleveaux*, 205 F.3d at 1297). The instruction also is based in part on Modern Federal Jury Instructions – Criminal § 8.06 (2008), which was revised following the Supreme Court’s decision in *Dixon v. United States*, 548 U.S. 1, 126 S. Ct. 2437 (2006). Dixon resolved a split among the circuits regarding which party bears the burden of persuasion for a duress defense. In Dixon, the defendant was charged with receiving a firearm while under indictment in violation of 18 U.S.C. § 922(n) and with making false statements in connection with the acquisition of a firearm in violation of § 922(a)(6). The Supreme Court held that (1) the jury instructions given “did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence,” and (2) under modern law, in the context of the firearms offenses at issue, duress is an affirmative defense that does not require the government to bear the burden of disproving the defendant’s defense beyond a reasonable doubt. See *Dixon*, 548 U.S. at 6-8, 15-17, 126 S. Ct. at 2442, 2447-48. Accordingly, the above instruction clearly reflects that the Government bears the burden of proving beyond a reasonable doubt each element of the offense, and if the jury finds that the Government has met its burden, then a defendant who seeks to use the justification defense must prove the affirmative defense by a preponderance of the evidence. In *Deleveaux* the Court of Appeals cautioned that this defense is available in only “extraordinary circumstances” (205 F.3d at 1297), and the holding was expressly limited to prosecutions under 18 U.S.C. § 922(g)(1) - - felon in possession of a firearm. See Offense Instruction 34.6, *infra*. In *Harmon*, the Court

of Appeals noted that “[t]he imminency prong ‘requires nothing less than an immediate emergency.’” 213 Fed. Appx. at 916 (citing *United States v. Bell*, 214 F.3d 1299, 1300 (11th Cir. 2000)); see also *United States v. Rice*, 214 F.3d 1295 (11th Cir. 2000) (affirming the defendant’s conviction on the ground that the facts proffered were insufficient to establish a justification defense, as the defendant did not face an immediate emergency). The defense of duress or necessity “does not negate a defendant’s criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to ‘avoid liability... because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present.” *Dixon*, 548 U.S., 1, 7, 126 S. Ct. at 2442 (citing *United States v. Bailey*, 444 U.S. 394, 402 100 S. Ct. 624, 631 (1980)). Further, the Dixon Court noted that “there may be crimes [such as common-law crimes requiring ‘malice’] where the nature of the mens rea would require the Government to disprove the existence of duress beyond a reasonable 3 doubt. *Id.* at 2442 n.4. *Bailey* discusses the common law distinction between coercion/duress and necessity/justification, observing: “While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor’s control rendered illegal conduct the lesser of two evils.” *Bailey*, 444 U.S. at 409, 100 S. Ct. at 634. However, the Supreme Court noted that, [m]odern cases have tended to blur the distinction...” *Id.*

DAN JAY'S REQUEST TO CHARGE NO. 22

O51
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 Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;
- (2) the false pretenses, representations, or promises were about a material fact;
- (3) the Defendant acted with the intent to defraud; and
- (4) 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.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years' imprisonment and \$1 million fine.)

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - -

(1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and

(2) in the case of an offense under any of those sections that - -

(A) victimized ten or more persons over the age of 55; or

(B) targeted persons over the age of 55,

shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

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. § 1343 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and

victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

If you find beyond a reasonable doubt that the defendant is guilty of using interstate [wire] [radio] [television] communications facilities in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing] [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

Wire fraud requires showing (1) that the Defendant knowingly devised or participated in a scheme to defraud; (2) that the Defendant did so willfully and with an intent to defraud; and (3) that the Defendant used interstate wires for the purpose of executing the scheme. *Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1312 (11th Cir. 2000). Materiality is an essential element of the crimes of mail fraud, wire fraud, and bank fraud and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-20 (11th Cir. 1999), *cert. denied* 530 U.S. 1261 (2000).

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)).

In wire fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value."

United States v. Cooper, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not “property” for the purposes of this statute. *Cleveland v. United States*, 531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000) (addressing “property” for purposes of mail fraud statute).

The mail fraud and wire fraud statutes are “given a similar construction and are subject to the same substantive analysis.” *Belt v. United States*, 868 F.3d 1208, 1211 (11th Cir. 1989).

See also *United States v. Svete*, 556 F.3d 1157, (11th Cir. 2009) and discussion *supra* Offense Instruction 50.1.

DAN JAY'S REQUEST TO CHARGE NO. 23

O54
Conspiracy to Commit [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 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.

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

- (1) two or more persons, in some way or manner, agreed to try to accomplish a common and unlawful plan to commit mail fraud, as charged in the indictment; and
- (2) 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 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.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1349 provides:

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Maximum penalty: As stated above.

Section 1349 applies to all fraud offenses in Chapter 63, i.e., Sections 1341 through 1348, So, a conspiracy could be charged with any of those substantive offenses as the underlying count. This instruction is thus intended to be modified to fit the specific underlying fraud alleged in the indictment, and it is in the same general form as the controlled substances conspiracy instruction for 21 U.S.C. § 846 and the money laundering conspiracy instruction for 18 U.S.C. 1956(h). No overt act is required by

Section 1349, and Congress' omission of that requirement (which is specifically included in 18 U.S.C. § 371) has been held by both the Supreme Court and the Eleventh Circuit to mean that it has dispensed with such a requirement. *Cf. United States v. Shabani*, 513 U.S. 10, 12, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994); *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999).

For a case involving conspiracy to defraud the United States arising under 18 U.S.C. § 371, *see United States v. Mendez*, 528 F.3d 811 (11th Cir. 2008).

DAN JAY’S REQUEST TO CHARGE NO. 24

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 defraud a financial institution] [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] [someone]; and
- (4) 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.

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).

DAN JAY'S REQUEST TO CHARGE NO. 25

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. Brokmond, 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).

DAN JAY'S REQUEST TO CHARGE NO. 26

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. Brokmond*, 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).

CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing Proposed Jury Instructions, 1-26, with the Clerk of Court using the CM/ECF system which will automatically send email notifications of such filing to the following:

Mr. Russell Phillips
Assistant United States Attorney
600 U.S. Courthouse
75 Ted Turner Drive, S. W.
Atlanta, Georgia 30303.

DATED: This 5th day of July, 2022.

s/ L. Burton Finlayson

L. BURTON FINLAYSON
ATTORNEY FOR DAN JAY
State Bar Number: 261460