IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

PLAINTIFF,

V. CASE NO.: 2:24-cr-00192-01

KISHA SUTTON,

DEFENDANT.

DEFENDANT SUTTON'S AMENDED PROPOSED JURY INSTRUCTIONS

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DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 1

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard of give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

PROOF – REASONABLE DOUBT

The defendant has pled not guilty to the charges in the Indictment. The government has the burden of proving the defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the defendant not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are a few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilty. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime(s) as charged, you must find him guilty. If, on the other hand, you think there is a reasonable possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

MULTIPLE COUNTS

A separate crime is charged against the defendant in each count of the Indictment. You must separately consider the evidence against the defendant on each count. Your verdict as to any one count, whether it is guilty or not guilty, should not influence your verdict as to any other count.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

ON OR ABOUT

You will note that the Indictment charges that the crimes were committed on or about certain dates. The government must prove beyond a reasonable doubt that the defendant committed the crime or crimes reasonably near the date or dates charged.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

EVIDENCE – DEFINED

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of the court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, and the stipulations that the lawyers agreed to.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, to the extent that I did not let you hear the answers to some of the questions that the lawyers asked, or ruled that you could not see some of the exhibits that the lawyers wanted you to see, or ordered you to disregard things that you saw or heard, or struck from the record, you must completely ignore all of those things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

EVIDENCE – DIRECT AND CIRCUMSTANTIAL – INFERENCES

There are, generally speaking, two types of evidence from which a jury may properly determine the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of facts which point to the existence or non-existence of certain other facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts which have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

NON-TESTIFYING DEFENDANT

The defendant did not testify and I remind you that you cannot consider a decision not to testify as evidence of guilt. You must understand that the Constitution of the United States grants to a defendant the right to remain silent. That means the right not to testify. That is a constitutional right in this country, it is very carefully guarded, and you must not presume or infer guilt from the fact that a defendant does not take the witness stand and testify.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 8

CREDIBILITY OF A WITNESS

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testify in this case. You should think about the testimony of each witness you have heard and decide whether you believe all or any part of what each witness had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the witness impress you as honest? 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 have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he/she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection – like failure of recollection – is not uncommon.

In reaching a conclusion on a particular point, or ultimately in reaching a verdict in this case, do not make any decisions simply because there were more witnesses on one side than on the other side.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

IMPEACHMENT

You are instructed that a witness may be discredited or impeached by contradictory evidence or by evidence that, at other times, the witness made statements which are inconsistent with the witness's present testimony.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to determine the credibility of the witness and to give the testimony of that witness such weight, if any, as you may think it deserves.

If any witness is shown to have knowingly testified falsely concerning any material matter, you have the right to distrust such witness's testimony in other particulars, and you may reject all or any part of the testimony of that witness, or give it only such weight as you may think it deserves.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

CAUTION – CONSIDER ONLY CRIMES CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or crime not charged in the Indictment.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

PUNISHMENT

If you find the defendant guilty of any of the crimes charged, it will be my duty to decide what the punishment will be. You should not discuss or consider the possible punishment in any way while deciding your verdict.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 12

LAW ENFORCEMENT WITNESS

You have heard the testimony of a law enforcement official. The fact that a witness may be employed by the federal or state government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weigh than that of an ordinary witness.

It is your decision after reviewing all the evidence whether to accept the testimony of the law enforcement witness and to give that testimony whatever weight, if any, you find it deserves.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

CONSPIRACY - AGREEMENT

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. It is kind of a "partnership in criminal purposes" in which each member becomes the agent or partner of every other member. Once a person becomes a member of a conspiracy, he is held legally responsible for the acts of the other members done in furtherance of the conspiracy, even though he was not present or aware that the acts were being committed.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

The evidence in the case need not show that the members entered into any express or formal agreement. Nor is it necessary that the evidence show that the members stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. In order to establish proof that a conspiracy existed, the evidence must show beyond a reasonable doubt that the members in some way or manner, or through some contrivance, expressly or impliedly came to a mutual understanding to try to accomplish a common and unlawful plan.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

CONSPIRACY – EVIDENCE

The evidence in the case need not establish that all the means or methods set forth in the Indictment were agreed upon to carry out the alleged conspiracy; nor that all the means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were members. Rather the evidence in the case must establish beyond a reasonable doubt that the alleged conspiracy was knowingly formed; and that one or more of the means or methods described in the Indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the Indictment; and that two or more persons were knowingly members of the conspiracy.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15

MEMBERSHIP IN CONSPIRACY

If you conclude from the evidence beyond a reasonable doubt that a conspiracy as charged did exist, then you must next determine whether the defendant was a member of that conspiracy; that is, whether he participated in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives. In determining whether a defendant was a member of the conspiracy, the jury must consider only his acts and statements. A defendant cannot be bound by the acts or declaration of other participants until it is established that a conspiracy existed, and that he was one of its members.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16

INTENT TO DEFRAUD

To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about a financial gain to one's self.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 17

PROOF OF INTENT

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. You may infer the defendant's intent from the surrounding circumstances. Intent may be and usually is proved by circumstantial evidence if it is proved at all. You may consider any statements made and any acts done or omitted by the defendant, and all other facts and circumstances in evidence that indicate his state of mind.

You may consider it reasonable to draw an inference and thus find that a person intends the natural and probable consequences of acts knowingly done. As I have said, it is entirely up to you to decide what facts to find from the evidence.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18

KNOWINGLY

An act is done "knowingly" if it is done voluntarily and intentionally, and not because of ignorance, mistake, or accident.

The term "knowingly," as used in these instructions to describe the alleged state of mind of the defendant, means that he was conscious and aware of his actions. You may consider evidence of the defendant's words, acts or omissions, along with all of the other evidence, in deciding whether the defendant acted knowingly.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 19

INTERSTATE COMMERCE – DEFINED

"Interstate Commerce" means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

If you decide that there was any effect at all on interstate commerce, then that is enough to satisfy this element. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 20

DUTY TO DELIBERATE

In a moment, the bailiff will escort you to the jury room and provide you each with a copy of the Indictment and instructions that I have just read. Any exhibits admitted into evidence will also be placed in the jury room for your review.

When you go to the jury room, you should first select a foreperson, who will help to guide your deliberations and will speak for you here in the courtroom. The second thing you should do is review the instructions. Not only will your deliberations be more productive if you understand the legal principles upon which your verdict must be based, but for your verdict to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, but you are bound by your oath to follow the law stated in the instructions.

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the Indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

You must consult with one another and deliberate in an effort to reach an agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced you were wrong. But do not give up your honest beliefs solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are the judges – judges of the facts. You must decide whether the government has proved the defendant guilty beyond a reasonable doubt.

A form of verdict as been prepared for your convenience. The foreperson will write the unanimous answer of the jury in the space provided for each count of the Indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should sign and date the Verdict Form.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21

PRESUMPTION OF INNOCENCE SUFFICIENT TO ACQUIT

The presumption of innocence alone is sufficient to acquit the defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all evidence in the case. The defendant is never convicted on mere suspicion or conjecture.

1 L. Sand, et al., Modern Federal Jury Instructions 6-4 (1997).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

SPECULATION NOT ALLOWED

Any personal opinion which you may have as to the facts not established by the evidence cannot be properly considered by you as a basis for your verdict. As jurors, sworn to try this case and to render a true verdict on the law and the evidence, you may act only upon evidence which has been introduced before you during the course of the trial. You cannot speculate or guess as to what may have happened in the absence of evidence or testimony on a given point and you should carefully consider the testimony of each and every witness and not disregard or overlook any testimony or evidence.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 23

DEFINITIONS OF WEIGHT AND CREDIBILITY OF WITNESS

You are the sole judges of the credibility of the witnesses and the weight of the evidence. "The credibility of the witnesses" means the believability or the lack of believability of the witness. "The weight of the evidence" means the extent to which you are or you are not convinced by the evidence.

In determining the credit and weight you will give to the testimony of any witness who has testified before you, you may consider, if found by you from the evidence the good memory or lack of memory of the witness, the self-interest or lack of self-interest of the witness in the outcome of the trial, the relationship of any witness to any of the parties or any other witness, the demeanor and manner of testifying of the witness, the opportunity and means or lack of opportunity and mean of having knowledge of the matters of which the witness testifies, the reasonableness or unreasonableness of the testimony of the witness, the apparent fairness or lack of fairness of the witness, the intelligence or lack of intelligence of the witness, the bias, prejudice, hostility, friendliness of the witness for or against either party to the proceedings, contradictory statements of any witness, contradictory acts of any witness, the intoxication, mental condition or drug influences of any witness at the time of the events of which the witness testified.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 24

CONFLICT OF EVIDENCE

The Court instructs the jury that if you find there is a conflict in the evidence in this case on any fact or circumstances tending to establish the guilt or innocence of the defendant, a part of which is in favor of the theory of the State and a part is in favor of the theory of the defendant, and the jury should entertain a reasonable doubt as to which is true, then it is the duty of the jury in arriving at their verdict to adopt the evidence, theory and conclusion most favorable to the accused.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 25

DEFENDANT'S TESTIMONY

The defendant has no duty to take the stand as a witness in his own behalf. The fact that the defendant did not testify as a witness in his own behalf cannot be taken or considered by the jury as evidence or even a circumstance showing or tending to show in the slightest degree the guilt of the accused and you should draw no inference therefrom as to his guilt or innocence. You should entirely disregard it and not discuss it.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO.: 26

VENUE

The government must prove by a preponderance of the evidence that the offense(s) charged occurred in the district where this trial is being held – the Southern District of West Virginia. This is called establishing "venue."

Criminal Defendants have a constitutional right to be tried in the State and district where the alleged crime was committed.[1] When, as here, a defendant is charged in multiple criminal counts, venue must lie as to each count.[2] The venue inquiry may yield more than one appropriate venue, including a venue in which the defendant has never set foot.[3]

In this case, venue is determined based on the nature of the alleged crime and the location of the act or acts constituting it with a focus on the essential conduct elements of the charged offense(s).[4] Venue for a continuing offense, can be established by a preponderance of the evidence, showing where the essential conduct elements of the offense began, continued, or was completed.[5]

The essential conduct element of bank fraud is the execution of the scheme to defraud.[6] Preparatory acts, such as devising a scheme, are not part of the venue determination of a continuing offense.[7] Likewise, acts in furtherance of the execution of the scheme are not part of the venue determination.[8]

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[1] *United States v. Powers*, 40 F.4th 129, 134 (4th Cir. 2022).
[2] *United States v. Engle*, 676 F.3d 405, 413 (4th Cir. 2012).
[3] *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005).
[4] *Id.*
[5] *United States v. Stewart*, 256 F.3d 231, 243 (4th Cir. 2001).
[6] *United States v. Colton*, 231 F.3d 890, 908-09 (4th Cir. 2000).
[7] *United States v. Sterling*, 860 F.3d 233, 244-45 n.3 (4th Cir. 2017); *United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012).
[8] *Id. at 367.*

Therefore, as to Bank Fraud, in order to find proper venue, you must find that the Government has proven the Defendant executed the bank fraud scheme to defraud a financial institution in the Southern District of West Virginia by a preponderance of the evidence. It is not enough that the effects of the offense were felt here or that the proceeds were eventually spent or possessed here unless those facts reflect part of the execution of the scheme itself.

If you find that the government has not proven venue by a preponderance of the evidence, then you must acquit the defendant of bank fraud.

For the crime of money laundering, the law defines the "essential conduct element" of the offense as the financial transaction involving the proceeds of unlawful activity.[9] Therefore, to prove venue for money laundering, the government must prove by a preponderance of the evidence that the financial transaction itself occurred in the Southern District of West Virginia. As stated above, it is not enough for the government to show that the unlawful activity that generated the funds occurred in this district; the funds were obtained, possessed, or transported through this district; or the defendant was located in this district at some point.[10] Unless the government proves that the actual financial transaction constituting the money laundering offense took place, at least in part, in the Southern District of West Virginia, then venue has not been established.

If you find that the government has not proven venue by a preponderance of the evidence, then you must acquit the defendant of money laundering.

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[9] *U.S. v. Cabrales*, 524 U.S. 1, 7 (1998).
[10] *United States v. Cowden*, 405 F.3d 240 (4th Cir. 2005).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO.: 27

FINANCIAL INSTITUTION - MORTGAGE LENDING

As part of the offense of bank fraud, the government must prove beyond a reasonable doubt that the alleged scheme to defraud involved a "financial institution."

The term "financial institution" includes not only traditional banks and credit unions, but also certain other types of businesses that are treated as financial institutions under federal law.

For this case, the government alleges that the target of the fraudulent scheme, Benworth Capital, was a mortgage lending business. Under federal law, a "mortgage lending business" is defined as:

> "An organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce"

or,

> "any person or entity that makes in whole or in part a federally related mortgage loan".

For purposes of the latter, a "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which:

> "Is secured by a first or subordinate lien on residential property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and
>
> "Is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the federal government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government; or

> Is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or
>
> Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or
>
> Is made in whole or in party by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term creditor" does not include any agency or instrumentality of any State.

To find that the alleged victim was a "financial institution" as defined by law, you must find that the government has proven, beyond a reasonable doubt, that the business was a mortgage lending business, as defined above.

If you do not find that the government has proven that the alleged victim was a "financial institution" as defined by law, you must acquit the Defendant of bank fraud.

18 U.S.C. §20(10).

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DEFENDANT.

CERTIFICATE OF SERVICE

I, Connor Robertson, certify that on the 13th day of July, 2025, a copy of the foregoing **"Defendant Sutton's Amended Proposed Jury Instructions"** was served on the United States by ECF, to Jonathan Storage, Assistant United States Attorney to the following:

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Assistant United States Attorney
Jonathan.Storage@usdoj.gov

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