

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC SHIBLEY,

Defendant.

NO. CR20-174JCC

JOINT PROPOSED
JURY INSTRUCTIONS

(CITED)

JOINT PROPOSED JURY INSTRUCTIONS (CITED)

Pursuant to LCR 51 of the Western District of Washington and the Court's minute order of November 8, 2021 (Dkt. #101), the parties hereby submit these Proposed Jury Instructions (Cited).

//

//

//

1 As set forth in LCR 51 and the Court's order, the parties have indicated in the
2 table of instructions at the beginning of this document, as well as at the top of the page
3 for each requested instruction, which proposed instructions are agreed, which are
4 proposed by the government, and which are proposed by the defense. In cases of
5 disagreement, the positions of both parties are set forth herein.

6
7 DATED: November 11, 2021
8

9 Respectfully submitted,

10 NICHOLAS W. BROWN
11 United States Attorney

12 /s/ Michael Nance
13 MICHAEL NANCE
14 *Attorney for Eric Shibley*

/s/ Brian Werner
BRIAN WERNER
Assistant United States Attorney

15 JOSEPH S. BEEMSTERBOER
16 Acting Chief, Fraud Section
17 Criminal Division, U.S. Dept. of Justice

18 /s/ Laura Connelly
19 LAURA CONNELLY
20 Trial Attorney
21
22
23
24
25
26
27
28

PRELIMINARY INSTRUCTIONS

Proposed Preliminary Instruction No.	Description	9th Circuit Model No. / Source	Page No.	Proposing Part(ies)
1	Duty of Jury	1.1	6	Joint
2	The Charge - Presumption of Innocence	1.2	7–8	Joint
3	What Is Evidence	1.3	9	Joint
4	What Is Not Evidence	1.4	10	Joint
5	Direct and Circumstantial Evidence	1.5	11	Joint
6	Ruling on Objections	1.6	12	Joint
7	Credibility of Witnesses	1.7	13	Joint
8	Conduct of the Jury	1.8	14–15	Joint
9	No Transcript Available to Jury	1.9	16	Joint
10	Taking Notes	1.10	17	Joint
11	Bench Conferences and Recesses	1.16	18	Joint
12	Outline of Trial	1.11	19	Joint

MID-TRIAL INSTRUCTIONS

Proposed Mid-Trial Instruction No.	Description	9th Circuit Model No.	Page No.	Proposing Part(ies)
1	Cautionary Instructions – First Recess	2.1	20-21	Joint
2	Stipulations of Fact	2.3	22	Joint
3	Transcript of Recording in English	2.6	23	Joint

FINAL INSTRUCTIONS

Proposed Final Instruction No.	Description	9th Circuit Model No.	Page No.	Proposing Part(ies)
1	Duties of Jury to Find Facts and Follow Law	3.1	24	Joint
2	Charge Against the Defendant Not Evidence – Presumption of Innocence – Burden of Proof	3.2	25	Joint
3	Defendant's Decision to Testify/Not to Testify	3.3, 3.4	26	Joint
4	Reasonable Doubt- Defined	3.5	27	Government
4	Reasonable Doubt – Defined	3.5 (modified)	28	Defendant
5	What is Evidence	3.6	29	Joint
6	What is Not Evidence	3.7	30	Joint
7	Direct and Circumstantial Evidence	3.8	31	Joint
8	Credibility of Witnesses	3.9	32-33	Joint
9	Activities Not Charged	3.10	34	Joint
10	Separate Consideration of Multiple Counts	3.11	35	Joint
11	Statements by the Defendant	4.1	36	Joint

12	Government's Use of Undercover Agents and Informants	4.10	37	Government
13	Charts and Summaries in Evidence	4.17	38	Joint
14	Charts and Summaries Not in Evidence	4.16	39	Joint
15	Wire Fraud (18 U.S.C. § 1343)	8.124	40-41	Joint
16	Bank Fraud – Scheme to Defraud by False Promises (18 U.S.C. § 1344(2))	8.127	42	Joint
17	Money Laundering (18 U.S.C. § 1957)	8.150	43-44	Government
17	Money Laundering (18 U.S.C. § 1957)	8.150 (modified)	45-46	Defendant
18	Knowingly – Defined	5.7	47	Joint
19	Intent to Defraud	5.12	48	Joint
20	Good Faith		49	Defendant
21	Aiding and Abetting	5.1A	50	Joint
22	Willfully		51	Government
22	Willfully		52	Defendant
23	Specific Issue Unanimity		53	Defendant
24	On or About – Defined	3.18	54	Joint
25	Duty to Deliberate	7.1	55	Joint
26	Consideration of Evidence	7.2	56-57	Joint
27	Use of Notes	7.3	58	Joint
28	Jury Consideration of Punishment	7.4	59	Government
29	Verdict Form	7.5	60	Joint
30	Communication With Court	7.6	61	Joint

1 PROPOSED PRELIMINARY INSTRUCTION NO. 1

2 INSTRUCTION NO. ____
3

4 Jurors: You now are the jury in this case, and I want to take a few minutes to tell
5 you something about your duties as jurors and to give you some preliminary
6 instructions. At the end of the trial I will give you more detailed [written] instructions
7 that will control your deliberations.
8

9 When you deliberate, it will be your duty to weigh and to evaluate all the
10 evidence received in the case and, in that process, to decide the facts. To the facts as
11 you find them, you will apply the law as I give it to you, whether you agree with the
12 law or not. You must decide the case solely on the evidence and the law before you.

13 Perform these duties fairly and impartially. You should not be influenced by
14 any person's race, color, religious beliefs, national ancestry, sexual orientation, gender
15 identity, gender, or economic circumstances. Also, do not allow yourself to be
16 influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or
17 biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or
18 preferences that people may consciously reject but may be expressed without
19 conscious awareness, control, or intention. Like conscious bias, unconscious bias can
20 affect how we evaluate information and make decisions.
21
22
23
24
25
26

27 Ninth Circuit Model Jury Instruction - 1.1 (2010 Edition)
28

PROPOSED PRELIMINARY INSTRUCTION NO. 2

INSTRUCTION NO. ____

This is a criminal case brought by the United States government. The government charges the defendant with wire fraud, bank fraud, and money laundering. The charges against the defendant are contained in the indictment. The indictment simply describes the charges the government brings against the defendant. The indictment is not evidence and does not prove anything.

The defendant has pleaded not guilty to the charges and is presumed innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant has the right to remain silent and never has to prove innocence or present any evidence.

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crimes that the government must prove to make its case:

As to the crime of wire fraud, the elements are first, the defendant knowingly devised a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or omitted facts; second, the statements made or facts omitted as part of the scheme were material; third, the defendant acted with the intent to defraud, that is, the intent to deceive and cheat; and fourth, the defendant caused an interstate wire communication to be used to carry out an essential part of the scheme.

As to the crime of bank fraud, the elements are first, the defendant knowingly carried out a scheme or plan to obtain money or property from the financial institution by making false statements or promises; second, the defendant knew that the statements or promises were false; third, the statements or promises were material; fourth, the defendant acted with the intent to defraud; and fifth, the financial institution was federally insured.

1 As to the crime of money laundering, the elements are first, the defendant
2 knowingly engaged or attempted to engage in a monetary transaction; second, the
3 defendant knew the transaction involved criminally derived property; third, the property
4 had a value greater than \$10,000; fourth, the property was, in fact, derived from wire
5 fraud or bank fraud, as charged in the Indictment; and fifth, the transaction occurred in
6 the United States.
7

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26 Ninth Circuit Model Jury Instruction - 1.2 (2010 Edition) (modified to include elements
27 of offenses charged).
28

PROPOSED PRELIMINARY INSTRUCTION NO. 3

INSTRUCTION NO. ____

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness; and
- (2) the exhibits which are received in evidence; and
- (3) any facts to which the parties agree.

Ninth Circuit Model Jury Instruction - 1.3 (2010 Edition)

PROPOSED PRELIMINARY INSTRUCTION NO. 4
INSTRUCTION NO. ____

The following things are *not* evidence, and you must not consider them as evidence in deciding the facts of this case:

1. statements and arguments of the attorneys;
2. questions and objections of the attorneys;
3. testimony that I instruct you to disregard; and
4. anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

Ninth Circuit Model Jury Instruction - 1.4 (2010 Edition)

PROPOSED PRELIMINARY INSTRUCTION NO. 5

INSTRUCTION NO. ____

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Ninth Circuit Model Jury Instruction - 1.5 (2010 Edition)

1 PROPOSED PRELIMINARY INSTRUCTION NO. 6

2 INSTRUCTION NO. ____
3

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

11 Sometimes I may order that evidence be stricken from the record and that you
12 disregard or ignore the evidence. That means that when you are deciding the case, you
13 must not consider the evidence that I told you to disregard.
14
15
16
17
18
19
20
21
22
23
24
25
26

27 Ninth Circuit Model Jury Instruction - 1.6 (2010 Edition)
28

PROPOSED PRELIMINARY INSTRUCTION NO. 7

INSTRUCTION NO. ____

In deciding the facts in this case, you may have to decide which testimony to believe and which 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:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

You must avoid bias, conscious or unconscious, based on a witness's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it. What is important is how believable the witnesses are, and how much weight you think their testimony deserves.

Ninth Circuit Jury Instruction - 1.7 (2010 Edition)

PROPOSED PRELIMINARY INSTRUCTION NO. 8

INSTRUCTION NO. ____

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. In addition, you must report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media

1 accounts or commentary about the case or anything to do with it, although I
2 have no information that there will be news reports about this case; do not
3 do any research, such as consulting dictionaries, searching the Internet or
4 using other reference materials; and do not make any investigation or in any
5 other way try to learn about the case on your own. Do not visit or view any
6 place discussed in this case, and do not use Internet programs or other
7 devices to search for or view any place discussed during the trial. Also, do
8 not do any research about this case, the law, or the people involved—
9 including the parties, the witnesses or the lawyers—until you have been
10 excused as jurors. If you happen to read or hear anything touching on this
11 case in the media, turn away and report it to me as soon as possible.
12

13 These rules protect each party's right to have this case decided only on evidence
14 that has been presented here in court. Witnesses here in court take an oath to tell the
15 truth, and the accuracy of their testimony is tested through the trial process. If you do
16 any research or investigation outside the courtroom, or gain any information through
17 improper communications, then your verdict may be influenced by inaccurate,
18 incomplete or misleading information that has not been tested by the trial process. Each
19 of the parties is entitled to a fair trial by an impartial jury, and if you decide the case
20 based on information not presented in court, you will have denied the parties a fair trial.
21 Remember, you have taken an oath to follow the rules, and it is very important that you
22 follow these rules.

23 A juror who violates these restrictions jeopardizes the fairness of these
24 proceedings [,and a mistrial could result that would require the entire trial process to start
25 over]. If any juror is exposed to any outside information, please notify the court
26 immediately.
27

28 Ninth Circuit Model Jury Instruction - 1.8 (2010 Edition)

PROPOSED PRELIMINARY INSTRUCTION NO. 9

INSTRUCTION NO. ____

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not have a written transcript of the trial. I urge you to pay close attention to the testimony as it is given.

Ninth Circuit Model Jury Instruction - 1.9 (2010 Edition)

1 PROPOSED PRELIMINARY INSTRUCTION NO. 10

2 INSTRUCTION NO. ____
3

4 If you wish, you may take notes to help you remember the evidence. If you do
5 take notes, please keep them to yourself until you and your fellow jurors go to the jury
6 room to decide the case. Do not let note-taking distract you from being attentive. When
7 you leave court for recesses, your notes should be left in the [courtroom] [jury room]
8 [envelope in the jury room]. No one will read your notes.

9 Whether or not you take notes, you should rely on your own memory of the
10 evidence. Notes are only to assist your memory. You should not be overly influenced by
11 your notes or those of your fellow jurors.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27 Ninth Circuit Model Jury Instruction - 1.10 (2010 Edition)
28

1 PROPOSED PRELIMINARY INSTRUCTION NO. 11

2 INSTRUCTION NO. ____
3

4 During the trial, I may need to take up legal matters with the attorneys privately,
5 either by having a conference at the bench when the jury is present in the courtroom, or
6 by calling a recess. Please understand that while you are waiting, we are working. The
7 purpose of these conferences is not to keep relevant information from you, but to decide
8 how certain evidence is to be treated under the rules of evidence and to avoid confusion
9 and error.

10 Of course, we will do what we can to keep the number and length of these
11 conferences to a minimum. I may not always grant an attorney's request for a
12 conference. Do not consider my granting or denying a request for a conference as any
13 indication of my opinion of the case or what your verdict should be.

14
15
16
17
18
19
20
21
22
23
24
25
26

27 Ninth Circuit Model Jury Instruction - 1.16 (2010 Edition)
28

PROPOSED PRELIMINARY INSTRUCTION NO. 12

INSTRUCTION NO. ____

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The government will then present evidence and counsel for the defendant may cross-examine. Then, if the defendant chooses to offer evidence, counsel for the government may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Ninth Circuit Model Jury Instruction - 1.11 (2010 Edition)

PROPOSED MID-TRIAL INSTRUCTION NO. 1

INSTRUCTION NO. ____

At the End of Each Day of the Case:

As I indicated before this trial started, you as jurors will decide this case based solely on the evidence presented in this courtroom. This means that, after you leave here for the night, you must not conduct any independent research about this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see while browsing the internet or your social media feeds.

At the Beginning of Each Day of the Case:

As I reminded you yesterday and continue to emphasize to you today, it is important that you decide this case based solely on the evidence and the law presented here. So you must not learn any additional information about the case from sources outside the courtroom. To ensure fairness to all parties in this trial, I will now ask each of you whether you have learned about or shared any information about this case outside of this courtroom, even if it was accidental.

[ALTERNATIVE 1 (in open court): if you think that you might have done so, please let me know now by raising your hand. [Wait for a show of hands]. I see no raised hands; however, if you would prefer to talk to the court privately in response to this question, please notify a member of the court's staff at the next break. Thank you for your careful adherence to my instructions.]

1 [ALTERNATIVE 2 (during voir dire with each juror, individually): Have you
2 learned about or shared any information about this case outside of this courtroom? . . .
3 Thank you for your careful adherence to my instructions.]
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ninth Circuit Model Jury Instruction - 2.1 (2010 Edition)

PROPOSED MID-TRIAL INSTRUCTION NO. 3

INSTRUCTION NO. ____

The parties have agreed to certain facts that have been stated to you. Those facts are now conclusively established.

Ninth Circuit Model Jury Instruction - 2.3 (2010 Edition)

PROPOSED MID-TRIAL INSTRUCTION NO. 3

INSTRUCTION NO. ____

You are about to [hear] [watch] a recording that has been received in evidence. Please listen to it very carefully. A transcript of the recording has been provided to help you identify speakers and as a guide to help you listen to the recording. However, bear in mind that the recording is the evidence, not the transcript. If you hear something different from what appears in the transcript, what you hear is controlling. After the recording has been played, the transcript will be taken from you.

Ninth Circuit Model Jury Instruction - 2.6 (2010 Edition) (modified)

PROPOSED FINAL INSTRUCTION NO. 1

INSTRUCTION NO. ____

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

Ninth Circuit Model Jury Instruction - 3.1 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 2

INSTRUCTION NO. ____

The indictment is not evidence. The defendant has pleaded not guilty to the charges. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence. The defendant does not have to prove innocence; the government has the burden of proving every element of the charges beyond a reasonable doubt.

Ninth Circuit Model Criminal Jury Instruction No. 3.2 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 7

INSTRUCTION NO. ____

DEFENDANT’S DECISION TO TESTIFY

The defendant has testified. You should treat this testimony just as you would the testimony of any other witness.

DEFENDANT’S DECISION NOT TO TESTIFY

A defendant in a criminal case has a constitutional right not to testify. In arriving at your verdict, the law prohibits you from considering in any manner that the defendant did not testify.

Ninth Circuit Model Criminal Jury Instruction Nos. 3.4 and 3.3 (2010 Edition)

GOVERNMENT’S PROPOSED JURY INSTRUCTION NO. 4

INSTRUCTION NO. ____

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Citation for Government’s Proposed Instruction: Ninth Circuit Model Criminal Jury Instruction No. 3.5 (2010 Edition)

Defendant’s Objection: Defendant offers a revised version of this instruction.

1 DEFENDANT’S PROPOSED JURY INSTRUCTION NO. 4

2 INSTRUCTION NO. ____

3 Proof beyond a reasonable doubt is proof that leaves you firmly convinced the
4 defendant is guilty. It is not required that the government prove guilt beyond all possible
5 doubt.

6 A reasonable doubt is a doubt based upon reason and common sense and is not based
7 purely on speculation. It may arise from a careful and impartial consideration of all the
8 evidence, or from lack of evidence.

9 If after a careful and impartial consideration of all the evidence, you are not
10 convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the
11 defendant not guilty. On the other hand, if after a careful and impartial consideration of all
12 the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty,
13 you should find the defendant guilty.

14
15
16 Citation for Defendant’s Proposed Instruction: Ninth Circuit Model Criminal Jury
17 Instruction No. 3.5 (2010 Edition) – changed to “should find defendant guilty.”

18
19 Government’s Objection: The model instruction is appropriate and should not be changed
20 in this one-sided manner.

PROPOSED JURY INSTRUCTION NO. 5

INSTRUCTION NO. ____

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits received in evidence; and
- (3) any facts to which the parties have agreed.

Ninth Circuit Model Criminal Jury Instruction No. 3.6 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 6

INSTRUCTION NO. ____

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, [will say in their] closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.
2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. [In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.]
3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Ninth Circuit Model Criminal Jury Instruction No. 3.7 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 7

INSTRUCTION NO. ____

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Ninth Circuit Model Criminal Jury Instruction No. 3.8 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 8

INSTRUCTION NO. ____

In deciding the facts in this case, you may have to decide which testimony to believe and which 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:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

1 The weight of the evidence as to a fact does not necessarily depend on the number
2 of witnesses who testify. What is important is how believable the witnesses were, and
3 how much weight you think their testimony deserves.
4

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27 Ninth Circuit Model Criminal Jury Instruction No. 3.9 (2010 Edition)
28

PROPOSED JURY INSTRUCTION NO. 9

INSTRUCTION NO. ____

You are here only to determine whether the defendant is guilty or not guilty of the charges in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

Ninth Circuit Model Jury Instruction - 3.10 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 10

INSTRUCTION NO. ____

A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Ninth Circuit Model Criminal Jury Instruction No. 3.11 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 11

INSTRUCTION NO. ____

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Ninth Circuit Model Criminal Jury Instruction No. 4.1 (2010 Edition)

GOVERNMENT’S PROPOSED INSTRUCTION NO. 12

INSTRUCTION NO. ____

You have heard testimony that an undercover agent was involved in the government’s investigation in this case. Law enforcement officials may engage in stealth and deception, such as the use of undercover agents, in order to investigate criminal activities. Undercover agents may use false names and appearances.

Citation for Government’s Proposed Instruction: Ninth Circuit Model Criminal Jury Instruction No. 4.10 (2010 Edition)

Defendant’s Objection:

PROPOSED JURY INSTRUCTION NO. 13

INSTRUCTION NO. ____

Certain charts and summaries have been admitted into evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

Ninth Circuit Model Criminal Jury Instruction No. 4.17 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 14

INSTRUCTION NO. ____

During the trial, certain charts and summaries were shown to you in order to help explain the evidence in the case. These items were not admitted into evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard the charts and summaries and determine the facts from the underlying evidence.

Ninth Circuit Model Criminal Jury Instruction No. 4.16 (2010 Edition)

1 PROPOSED JURY INSTRUCTION NO. 15

2 INSTRUCTION NO. ____

3
4 The defendant is charged in Counts One through Seven of the Indictment with
5 wire fraud in violation of Section 1343 of Title 18 of the United States Code. In order for
6 the defendant to be found guilty of that charge, the government must prove each of the
7 following elements beyond a reasonable doubt:

8 First, the defendant knowingly devised a scheme or plan to defraud, or a scheme
9 or plan for obtaining money or property by means of false or fraudulent pretenses,
10 representations, or promises. Deceitful statements of half-truths may constitute false or
11 fraudulent representations;

12 Second, the statements made or facts omitted as part of the scheme were material;
13 that is, they had a natural tendency to influence, or were capable of influencing, a person
14 to part with money or property;

15 Third, the defendant acted with the intent to defraud, that is, the intent to deceive
16 and cheat; and

17 Fourth, the defendant used, or caused to be used, an interstate wire communication
18 to carry out or attempt to carry out an essential part of the scheme.

19
20 In determining whether a scheme to defraud exists, you may consider not only the
21 defendant's words and statements, but also the circumstances in which they are used as a
22 whole.

23 A wiring is caused when one knows that a wire will be used in the ordinary course
24 of business or when one can reasonably foresee such use.

25 It need not have been reasonably foreseeable to the defendant that the wire
26 communication would be interstate in nature. Rather, it must have been reasonably
27 foreseeable to the defendant that some wire communication would occur in furtherance of
28

1 the scheme, and an interstate wire communication must have actually occurred in
2 furtherance of the scheme.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 Ninth Circuit Model Criminal Jury Instruction No. 8.124 (2010 Edition)
27
28

PROPOSED JURY INSTRUCTION NO. 16

INSTRUCTION NO. ____

The defendant is charged in Counts Eight through Ten of the Indictment with bank fraud in violation of Section 1344(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly carried out a scheme or plan to obtain money or property from the financial institution by making false statements or promises;

Second, the defendant knew that the statements or promises were false;

Third, the statements or promises were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;

Fourth, the defendant acted with the intent to defraud; and

Fifth, the financial institution was federally insured.

Ninth Circuit Model Criminal Jury Instruction No. 8.127 (2010 Edition)

1 GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 17

2 INSTRUCTION NO. ____

3
4 The defendant is charged in Counts Eleven through Fifteen of the Indictment with
5 money laundering in violation of Section 1957 of Title 18 of the United States Code. In
6 order for the defendant to be found guilty of that charge, the government must prove each
7 of the following elements beyond a reasonable doubt:

8 First, the defendant knowingly engaged or attempted to engage in a monetary
9 transaction;

10 Second, the defendant knew the transaction involved criminally derived property;

11 Third, the property had a value greater than \$10,000;

12 Fourth, the property was, in fact, derived from wire fraud or bank fraud, as
13 charged in Counts One through Ten of the Indictment; and

14 Fifth, the transaction occurred in the United States.

15 The term "monetary transaction" means the deposit, withdrawal, transfer, or
16 exchange, in or affecting interstate commerce, of funds or a monetary instrument by,
17 through, or to a financial institution.

18 The term "financial institution" means a federally insured bank or any credit
19 union.

20
21 The term "criminally derived property" means any property constituting, or
22 derived from, the proceeds of a criminal offense. The government must prove that the
23 defendant knew that the property involved in the monetary transaction constituted, or was
24 derived from, proceeds obtained by some criminal offense. The government does not
25 have to prove that the defendant knew the precise nature of that criminal offense, or knew
26 the property involved in the transaction represented the proceeds of wire fraud and bank
27 fraud, as charged in Counts One through Ten of the Indictment.
28

1 Although the government must prove that, of the property at issue more than
2 \$10,000 was criminally derived, the government does not have to prove that all of the
3 property at issue was criminally derived.
4

5
6
7 Citation for Government's Proposed Instruction: Ninth Circuit Model Criminal Jury
8 Instruction No. 8.150 (2010 Edition)
9

10 Defendant's Objection: Defendant offers a revised version of this instruction that
11 includes "willfully" because that term is used in the Indictment.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 17

INSTRUCTION NO. ____

The defendant is charged in Counts Eleven through Fifteen of the Indictment with money laundering in violation of Section 1957 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly and willfully engaged or attempted to engage in a monetary transaction;

Second, the defendant knew the transaction involved criminally derived property;

Third, the property had a value greater than \$10,000;

Fourth, the property was, in fact, derived from wire fraud or bank fraud, as charged in Counts One through Ten of the Indictment; and

Fifth, the transaction occurred in the United States.

The term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate commerce, of funds or a monetary instrument by, through, or to a financial institution.

The term "financial institution" means a federally insured bank or any credit union.

The term "criminally derived property" means any property constituting, or derived from, the proceeds of a criminal offense. The government must prove that the defendant knew that the property involved in the monetary transaction constituted, or was derived from, proceeds obtained by some criminal offense. The government does not have to prove that the defendant knew the precise nature of that criminal offense, or knew the property involved in the transaction represented the proceeds of wire fraud and bank fraud, as charged in Counts One through Ten of the Indictment.

1 Although the government must prove that, of the property at issue more than
2 \$10,000 was criminally derived, the government does not have to prove that all of the
3 property at issue was criminally derived.
4

5
6 Citation for Defendant's Proposed Instruction: Ninth Circuit Model Criminal Jury
7 Instruction No. 8.150 (2010 Edition); Indictment Paragraph 52.
8

9 Government's Objection: The model instruction is appropriate and there is no need to add
10 "willfully." The indictment charges that defendant "knowingly engaged in ... monetary
11 transactions." Dkt. #31 at Para. 52. The indictment's further language that defendant
12 "willfully caused others to engage in ... monetary transactions" does not require the
13 government prove that defendant acted willfully. 18 U.S.C. § 1957.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROPOSED JURY INSTRUCTION NO. 18

INSTRUCTION NO. ____

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Ninth Circuit Model Criminal Jury Instruction No. 5.7 (2010 Edition)

PROPOSED JURY INSTRUCTION NO. 19

INSTRUCTION NO. ____

An intent to defraud is an intent to deceive and cheat.

Ninth Circuit Model Criminal Jury Instruction No. 5.12 (2010 Edition)

1 DEFENDANT’S PROPOSED JURY INSTRUCTION NO. 20

2 INSTRUCTION NO. ____

3 In order to prove wire fraud or bank fraud, beyond a reasonable doubt, the
 4 government must prove that the defendant knew and intended that action be taken with
 5 the intent to defraud, that is, the intent to deceive and cheat. But one who acts on an
 6 honest and good faith misunderstanding as to the requirements of the law does not act
 7 with an intent to defraud simply because their understanding of the law is wrong or even
 8 irrational. Nevertheless, merely disagreeing with the law does not constitute a good faith
 9 misunderstanding of the law because all persons have a duty to obey the law whether or
 10 not they agree with it.

11 Citation for Defendant’s Proposed Instruction: Ninth Circuit Model Criminal Jury
 12 Instruction No. 8.21 (comments - modified to reflect the language of the indictment);
 13 *United States v. Miller*, 953 F.3d 1095, 1101-03 (9th Cir. 2020).

14 Government’s Objection: The evidence in this case does not support that defendant acted
 15 in good faith. Further, “a specific good faith instruction is unnecessary where the court
 16 has already adequately instructed the jury as to specific intent,” which the Proposed Jury
 17 Instructions do. *United States v. Dees*, 34 F.3d 838, 842 (9th Cir. 1994). A good faith
 18 defense would only be available if defendant believed in the truth of his
 19 misrepresentations. *See United States v. Hickey*, 580 F.3d 922 (9th Cir. 2009) (holding
 20 that “[w]hile an honest, good-faith belief in the truth of the misrepresentations may
 21 negate intent to defraud, a good-faith belief that the victim will be repaid and will sustain
 22 no loss is no defense at all”) (internal citations omitted). Defendant’s proposed
 23 instruction about the “requirements of the law” is inappropriate in this case where the
 24 crimes do not require proof that defendant acted willfully.

REQUESTED INSTRUCTION NO. 21

INSTRUCTION NO. ____

A defendant may be found guilty of the crime(s) charged even if the defendant did not personally commit the act(s) constituting the crime if the defendant willfully caused an act to be done that if directly performed by him would be an offense against the United States.

A defendant who puts in motion or causes the commission of an indispensable element of the offense may be found guilty as if he had committed this element himself.

Ninth Circuit Model Criminal Jury Instruction No. 5.1A (2010 Edition)

GOVERNMENT’S PROPOSED JURY INSTRUCTION NO. 22

INSTRUCTION NO. ____

With regard to Instruction Number 21, an act is done willfully if it is undertaken with bad purpose and with knowledge that the conduct is unlawful.

Citation for Government’s Proposed Instruction: 18 U.S.C. § 2.

Defendant’s Objection:

DEFENDANT’S PROPOSED JURY INSTRUCTION NO. 22

INSTRUCTION NO. ____

An act is done willfully if it is undertaken with bad purpose and with knowledge that the conduct is unlawful.

Citation for Defendant’s Proposed Instruction: *United States v. Awad*, 551 F.3d 930 (9th Cir. 2009).

Government’s Objection: A “willfully” instruction is only appropriate if tied to the aiding and abetting instruction.

1 DEFENDANT’S PROPOSED JURY INSTRUCTION NO. 23

2 INSTRUCTION NO. ____

3
4 With respect to each of the counts charged in the indictment, the defendant is
5 alleged to have engaged in particular conduct. If you find that the evidence presents
6 more than one instance or pattern of conduct by the defendant which supports the
7 charge(s), you must be unanimous in determining that a particular instance or pattern of
8 conduct by that defendant occurred before you can convict that defendant of the related
9 charge(s).

10
11
12 Citation for Defendant’s Proposed Instruction: Ninth Circuit Model Criminal Jury
13 Instruction No. 7.9 (comments); *United States v. Lyons*, 472 F.3d 1055 (9th Cir. 2007);
14 *United States v. Anguiano*, 873 F.2d 1314, 1319 (9th Cir. 1989).

15
16 Government’s Objection: This jury instruction is not appropriate in this case. “In the
17 ordinary case, the general unanimity instruction suffices to instruct the jury that they must
18 be unanimous on whatever specifications form the basis of the guilty verdict.” *United*
19 *States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999) (citations omitted).

PROPOSED JURY INSTRUCTION NO. 24

INSTRUCTION NO. ____

The Indictment charges that the offenses alleged in Counts One through Fifteen were committed “on or about” a certain date.

Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in Counts One through Fifteen of the Indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

Ninth Circuit Model Criminal Jury Instruction No. 3.18 (2010 Edition)

PROPOSED FINAL INSTRUCTION NO. 25

INSTRUCTION NO. ____

When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Perform these duties fairly and impartially. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community.

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong.

Ninth Circuit Model Jury Instruction - 7.1 (2010 Edition)

PROPOSED INSTRUCTION NO. 26

INSTRUCTION NO. ____

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This restriction includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or any other forms of social media. This restriction applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial

1 could result that would require the entire trial process to start over. If any juror is
2 exposed to any outside information, please notify the court immediately.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

27 Ninth Circuit Model Jury Instruction - 7.2 (2010 Edition)
28

PROPOSED FINAL INSTRUCTION NO. 27

INSTRUCTION NO. ____

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Ninth Circuit Model Jury Instruction - 7.3 (2010 Edition)

GOVERNMENT’S PROPOSED FINAL INSTRUCTION NO. 28

INSTRUCTION NO. ____

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Citation for Government’s Proposed Instruction: Ninth Circuit Model Criminal Jury Instruction No.7.4 (2010 Edition)

Defendant’s Objection:

PROPOSED FINAL INSTRUCTION NO. 29

INSTRUCTION NO. ____

A verdict form has been prepared for you. [*Explain verdict form as needed.*] After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the Court that you are ready to return to the courtroom.

Ninth Circuit Model Jury Instruction - 7.5 (2010 Edition)

PROPOSED FINAL INSTRUCTION NO. 30

INSTRUCTION NO. ____

If it becomes necessary during your deliberations to communicate with me, you may send a note through the clerk, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, on any question submitted to you, including the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

Ninth Circuit Model Jury Instruction - 7.6 (2010 Edition)