

014
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES

v.

W. LYMAN JENKINS

:
:
:
:
:

Criminal No. 2: 99-cr-45-01

JURY INSTRUCTIONS

This case is a criminal prosecution brought by the United States against the defendant W. Lyman Jenkins. You will receive a copy of the indictment to take with you into the jury room.

Counts 2 and 6 of the indictment allege that the defendant committed wire fraud by participating in a scheme to defraud by means of false representations and promises; and in furtherance of that scheme, he knowingly caused interstate or foreign wires to be used in violation of 18 United States Code section 1343. Counts 3 through 5 and 7 through 10 of the indictment charge that the defendant committed the crime of mail fraud by participating in a scheme to defraud by means of false representations and promises; and in furtherance of that scheme, he knowingly caused private and commercial interstate mail carriers to be used in violation of 18 U.S.C. §1341.

Counts 11 through 16 charge the defendant with introducing and delivering for introduction into interstate commerce maple sugar that had been adulterated with cane sugar, with the intent to defraud in violation of 21 U.S.C. §331(a) and §333(a)(2).

Count 17 of the indictment charges the defendant with devising a scheme to defraud and to obtain money from a federally insured bank in violation of 18 U.S.C. §1344. Count 18 alleged that the defendant made a false statement and report to an FDIC insured bank for the purpose of obtaining a loan, in violation of 18 U.S.C. §1014.

Counts 19-21 of the indictment charge the defendant with filing a false or fraudulent tax return in violation of 29 U.S.C. §7206(1).

ROLE OF INDICTMENT

At this time, I would like to remind you of the function of a grand jury indictment. An indictment is merely a formal way to accuse the defendant of a crime preliminary to trial. The indictment is not evidence. The indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the nature of the charges against the defendant.

The defendant pleaded not guilty to all of the charges in the indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the indictment and the denials made by the not guilty plea. You are to perform this duty without bias or prejudice against the defendant or the prosecution.

MULTIPLE COUNTS

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to each charge should be considered separately. You must return separate verdicts on each count in which the defendant is charged. The fact that you may find the defendant not guilty or guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

"ON OR ABOUT"

You will note that the indictment charges that the offenses were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that each offense was committed on a date reasonably near the date alleged.

REASONABLE DOUBT

The law presumes a defendant to be innocent of a crime. Thus, although accused, a defendant begins the trial with a "clean slate" -- with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against a defendant. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration

of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

You must remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

So if, after careful and impartial consideration of all the evidence in the case, you have a reasonable doubt that the defendant is guilty of an offense charged in the indictment, then you must acquit the defendant of that offense. Unless the government proves, beyond a reasonable doubt, that the defendant has committed each and every element of the offense charged in the indictment, you must find the defendant not guilty of the

offense. Furthermore, if you view the evidence in the case as reasonably permitting either of two conclusions as to any count - one of innocence, the other of guilt, you must, of course, adopt the conclusion of innocence and find the defendant not guilty of that count.

As I have instructed you, the law presumes that a defendant is innocent of the charges against him. The presumption of innocence lasts throughout the trial and ends only if you, the jury, find beyond a reasonable doubt that the defendant is guilty. Should the Government fail to prove the guilt of a defendant beyond a reasonable doubt, you must acquit him.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been received in evidence, and all the facts which may have been admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses -- something she or he has seen, felt, touched, or heard. Direct

evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

You may convict a defendant on the basis of circumstantial evidence alone, but only if that evidence convinces you of the guilt of that defendant beyond a reasonable doubt.

When you look at the evidence, you may notice that some of the exhibits have more than one exhibit sticker. For your information, and to avoid confusion, some of these exhibits were used in a prior proceeding in this case.

EXPERT WITNESSES

You have heard testimony from expert witnesses. An expert is allowed to express an opinion on those matters about which the expert has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts. In weighing the

expert's testimony, you may consider the expert's qualifications, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether to believe a witness' testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists, as I have said, only of the sworn testimony of witnesses, the stipulations made by the government and the defendant, and all exhibits received in evidence.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. You should not assume that I hold any opinion on matters to which my questions may have related. At all times, you, the jurors, are at liberty to disregard all

questions and comments by me in making your findings as to the facts.

When the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proven.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, since you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the

case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward the defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you

also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case you have heard testimony from a number of witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented to you in this case.

LAW ENFORCEMENT WITNESS

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

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that their testimony may be colored by a personal or professional interest in the outcome of the case.

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

IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

You may not infer that the defendant is guilty of participating in criminal conduct merely from the fact that he

associated with other people who were guilty of wrongdoing.

RECORDINGS

The government has offered evidence in the form of tape recordings of the defendant's conversations. The use of these procedures to gather evidence is lawful, and the government is entitled to use the tape recordings in this case.

CHARTS AND SUMMARIES ADMITTED AS EVIDENCE

The government has presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries along with the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

GOVERNMENT WITNESS - NOT PROPER TO CONSIDER GUILTY PLEA

You have heard testimony from at least one government witness who pled guilty to charges arising out of some of the same facts as this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

BENEFIT TO COOPERATING WITNESS

There was testimony from a government witness that he may have received some benefits for his cooperation with the government at his sentence. There is evidence that the government agreed to recommend a more lenient sentence as the result of such cooperation.

The government is permitted to recommend such a reduction in the witness' sentence as a result of his cooperation. You, in turn, may accept the testimony of such a witness and give it whatever weight you deem appropriate.

However, you should bear in mind that a witness who has received such a benefit has an interest in this case different than any ordinary witness. A witness who realizes that he may obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has a motive to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. If, after scrutinizing his testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.

CONSCIOUSNESS OF GUILT FROM FALSE EXCULPATORY STATEMENTS

You have heard testimony that the defendant made certain statements outside the courtroom to law enforcement authorities in which the defendant claimed that his conduct was consistent with innocence and not with guilt. The government claims that these statements in which he exonerated or exculpated himself are false.

If you find that the defendant gave a false statement in order to divert suspicion from himself, you may, but are not required to infer that the defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is, in fact, guilty of the crime for which he is charged.

In your evaluation of evidence of an exculpatory statement shown to be false, you may consider that there may be reasons - fully consistent with innocence - that could cause a person to give a false statement showing their innocence. Fear of law enforcement, reluctance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement of explanation.

Whether or not the evidence as to a defendant's statements shows that the defendant believed that he was guilty, and the significance, if any, to be attached to any such evidence, are matters for you, the jury, to decide.

INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE

Having told you the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the

law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

The parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

THE INDICTMENT AND THE STATUTE

Counts 2 and 6 of the indictment charges that the defendant devised a scheme to defraud by means of false representations and in furtherance of that scheme knowingly caused interstate or foreign wires to be used.

The relevant statute on this subject is Section 1343 of Title 18 of United States Code. It 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 [is guilty of an offense].

Counts 3 though 5 and 7 through 10 of the Indictment charge that the defendant devised this same scheme to defraud by means of false representations and in furtherance of that scheme, knowingly caused the mail or interstate carrier to be used.

The relevant statute on this subject is section 1341 of

Title 18 of the United States Code. It 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 . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . or knowingly causes to be delivered by mail or such carrier according to the direction thereon . . . any such matter or thing, shall be [guilty of a crime].

ELEMENTS OF THE OFFENSE

In order to sustain the wire fraud charges, the government must prove each of the following elements beyond a reasonable doubt:

First, that there was a scheme or artifice to defraud or to obtain money or property by false and fraudulent pretenses, representations or promises, as alleged in the indictment.

Second, that the defendant knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud; and

Third, that in execution of that scheme, the defendant used or caused to be used interstate or foreign wires as specified in the indictment.

ELEMENTS OF THE OFFENSE

In order to sustain the mail fraud charges, the government must prove each of the following elements beyond a reasonable doubt:

First, that there was a scheme or artifice to defraud or to

obtain money by materially false and fraudulent pretenses, representations or promises, as alleged in the indictment.

Second, that the defendant knowingly and wilfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud; and

Third, that in execution of that scheme, the defendant used or caused the use of the mail or private or commercial interstate carrier as specified in the indictment.

Thus, mail fraud and wire fraud are similar. The only difference is whether the fraud is executed through an interstate wire as opposed to the mail or interstate carrier.

FIRST ELEMENT -- EXISTENCE OF SCHEME

The first element the government must prove beyond a reasonable doubt for both wire fraud and mail fraud is that there was a scheme or artifice to defraud customers of money or property by means of false or fraudulent pretenses, representations or promises.

This first element is almost self-explanatory.

A "scheme or artifice" is merely a design or plan for the accomplishment of an objective.

A scheme to defraud is any plan, device, or course of action to obtain money or property (or the intangible right of honest services) by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term which embraces all the various

means which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions or suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is merely a plan to deprive another of money or property or of the intangible right to honest services by trick, deceit, deception or swindle.

The scheme to defraud is alleged to have been carried out by making false or fraudulent representations.

A statement, representation, claim or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made.

A representation or statement is fraudulent if it was falsely made with the intention to deceive.

Deceitful statements of half truths or the concealment of material facts, and the expression of an opinion not honestly entertained by the speaker also constitute false or fraudulent statements under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of the words or the circumstances in which they are used may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished is immaterial.

The failure to disclose information may also constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the

defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.

The false or fraudulent representation or failure to disclose must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision.

This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person or investor might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.

The representations which the government charges were made as part of the scheme to defraud are set forth in the indictment, which I have already read to you. It is not required that every misrepresentation charged in the indictment be proved. It is sufficient if the prosecution proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of the alleged scheme to defraud.

In addition to proving that a statement was false or fraudulent and related to a material fact, in order to establish a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property.

A scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in

the case.

If you find that the government has sustained its burden of proof, that a scheme to defraud, as charged, did exist, you next should consider the second element.

SECOND ELEMENT -- PARTICIPATION IN SCHEME WITH INTENT

The second element that the government must prove beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully and with specific intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another or of depriving another of the intangible right of honest services.

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is

not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime must be established beyond a reasonable doubt.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to a charge of mail and wire fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt.

Under the mail and wire fraud statutes, even false representations or statements, or omissions of material facts, do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

As a practical matter, then, in order to sustain the charges

against the defendant, the government must establish beyond a reasonable doubt that the defendant knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of causing some loss to another.

The government can also meet its burden of showing that the defendant had knowledge of the falsity of statements if it establishes beyond a reasonable doubt that he acted with deliberate disregard of whether the statements were true or false, or with a conscious purpose to avoid learning the truth. If the government establishes that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed the statements to be true. This guilty knowledge, however, cannot be established by demonstrating that the defendant was merely negligent or foolish.

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme or that he lacked the specific intent to defraud, you should acquit him. On the other hand, if you find that the government has established beyond a reasonable doubt not only the first element, namely the existence of the scheme to defraud, but also this second element, that the defendant was a knowing participant and acted with specific intent to defraud, and if the government has also established the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict the defendant.

THIRD ELEMENT -- USE OF THE MAILS

The third and final element that the government must establish for mail fraud beyond a reasonable doubt is the use of the mails in furtherance of the scheme to defraud. The use of the mails as I have used it here includes material sent through either the United States Postal Service or a private or commercial interstate carrier.

The mailed matter need not contain a fraudulent representation or purpose or request for money. It must, however, further or assist in the carrying out of the scheme to defraud.

It is not necessary for the defendant to be directly or personally involved in the mailing, as long as the mailing was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the mailing by others. This does not mean that the defendant must specifically have authorized others to do the mailing. When one does an act with knowledge that the use of the mail can reasonably be foreseen, even though not actually intended, then he causes the mails to be used. The government contends that it was reasonably foreseeable that the mails would be used in the ordinary course of business, and therefore that the defendant caused the mailings.

With respect to the use of the mails, the government must

establish beyond a reasonable doubt the particular mailing charged in the indictment. However, the government does not have to prove that the mailings were made on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the mailing was made on a date substantially similar to the date charged in the indictment.

THIRD ELEMENT -- USE OF THE WIRES

The third and final element that the government must establish beyond a reasonable doubt is the use of interstate or foreign wire communication in furtherance of the scheme to defraud. The wire communication must pass between two or more states as, for example, a telephone call between New York and New Jersey; or it must pass between the United States and a foreign country, such as a telephone call from New York to Belgium.

It is not necessary for the defendant to be directly or personally involved in any wire communication, as long as the communication is reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participation.

In this regard, it would be sufficient to establish this element of the crime if the testimony justifies a finding that the defendant caused the wires to be used by others; and this does not mean that the defendant himself must specifically have authorized others to make the wire communication. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use of the wires

can reasonably be foreseen, even though not actually intended, then he causes the wires to be used.

With respect to the use of the wires, the government must establish beyond a reasonable doubt the particular use charged in the indictment. However, the government does not have to prove that the wires were used on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the wires were used on a date reasonably near the dates alleged in the indictment.

THE STATUTE AND THE INDICTMENT

Counts 11 through 16 charge the defendant with introducing and delivering for introduction into interstate commerce adulterated food, with intent to defraud.

The relevant statutes on this subject are:

Section 331(a) and 333(a)(2) of Title 21 of the United States Code provide, in part, that:

"The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded" "with intent to defraud or mislead" is an offense against the United States.

THE ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED

In order to sustain its burden of proof for the crime of delivering adulterated food into interstate commerce, the government must prove the following three essential elements beyond a reasonable doubt:

First, that the defendant caused the introduction into

interstate commerce or delivery for introduction into interstate commerce the food product described in the indictment;

Second, that the food product was adulterated at the time of its introduction or delivery for introduction;

Third, that the defendant acted with intent to defraud or mislead.

INTERSTATE COMMERCE DEFINED

"Interstate commerce" means commerce, trade or travel between one State, territory, possession or the District of Columbia and another state, territory, possession.

ADULTERATED - DEFINED

Food is "adulterated" if any substance has been substituted wholly or in part for a valuable constituent of the food.

THE INDICTMENT AND THE STATUTE

Count 17 of the indictment charges the defendant with devising a scheme to defraud and to obtain money from a federally insured bank.

The relevant statute on this subject is Section 1344 of Title 18 of United States Code. It 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, representation, or promises shall be [guilty of a crime].

ELEMENTS OF THE OFFENSE

In order to prove the defendant guilty of the crime charged

in the indictment, the government must establish each of the following elements beyond a reasonable doubt:

First, that there was a scheme to defraud a bank or a scheme to obtain money or funds owned or under the custody or control of a bank by means of materially false and fraudulent pretenses, representations or promises, as charged in the indictment;

Second, that the defendant executed or attempted to execute the scheme with the intent to defraud the bank; and

Third, at the time of the execution of the scheme, the bank had its deposits insured by the Federal Deposit Insurance Corporation.

Thus, the only difference between the two offenses is the first element. One offense is based on a scheme to defraud and the other a scheme to obtain money or funds by means of materially false and fraudulent information. In order to convict on this count, you must unanimously agree on at least one of these prongs of the bank fraud offense.

FIRST ELEMENT - SCHEME TO DEFRAUD

First, the government must prove beyond a reasonable doubt either a scheme to defraud as charged in the indictment or a scheme to obtain money owned a bank by false or fraudulent representations, as described in the indictment. A "scheme to defraud" is defined as a pattern or course of conduct designed to deceive a federally insured bank into releasing property with the intent to cause the bank to suffer an actual or potential loss.

A representation is fraudulent if it was falsely made with

the intent to deceive. Deceitful statements of half truth, the concealment of material facts, and the expression of an opinion not honestly entertained may constitute false or fraudulent representations under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of words, or the circumstances in which they are used may convey a false and deceptive appearance. If there is intentional deception, the manner in which it is accomplished does not matter.

The fraudulent representation must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision. This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.

The representations which the government charges were made as part of the scheme are set forth in the indictment, which I have already read to you. It is not required that every misrepresentation charged in the indictment be proved. It is sufficient if the prosecution proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of the alleged scheme.

Although it is not necessary for the government to prove an

actual loss of funds by the bank, the government must prove beyond a reasonable doubt that by executing or attempting to execute the scheme alleged in the indictment, the defendant placed the bank at a risk of loss and that the bank did not knowingly accept such a risk.

SECOND ELEMENT - INTENT TO DEFRAUD

The second element that the government must prove beyond a reasonable doubt is that the defendant executed or attempted to execute the scheme knowingly, willfully and with specific intent to defraud the bank.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

To act with intent to defraud means to act willfully and with the specific intent to deceive, for the purpose of causing some financial loss to another.

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is

not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom. Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged must be established beyond a reasonable doubt.

THIRD ELEMENT - BANK WAS FEDERALLY INSURED OR CHARTERED

The last element the government must prove beyond a reasonable doubt is that the Howard Bank was insured by the Federal Deposit Insurance Corporation at the time of the execution of the alleged scheme to defraud.

It is not necessary for the government to prove that the defendant knew the identity of the particular financial institution or that the defendant knew that the institution was insured by the Federal Deposit Insurance Corporation. It must prove, however, that the defendant intended to defraud a financial institution.

THE INDICTMENT AND THE STATUTE

Count 18 of the indictment charges the defendant with making a false statement and report to the Howard Bank for the purpose of obtaining a loan.

The relevant statute on this subject is section 1014 of

Title 18 of United States Code, which provides:

Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application. . . or loan [shall be guilty of a crime].

PURPOSE OF THE STATUTE

The essence of the crime is the making of a false statement in an application for a loan (or bank credit card) for the purpose of influencing in any way the action of the bank from which the loan is sought. It is not dependent upon the accomplishment of that purpose.

The law focuses on the application for a loan and the statements contained therein. Thus, it requires that such statements, which have the capacity of influencing in any way the action of the bank from which the loan is sought, be accurate.

The statute does not require proof that the bank's officials relied upon the allegedly false statements. It has nothing whatsoever to do with defrauding the bank or whether the bank is actually defrauded. Similarly, the statute has nothing to do with defrauding the government. Thus, it is of no consequence whether or not the loan was granted, or, if granted, whether it was subsequently paid so that the bank suffered no loss. The fact that no pecuniary losses may have been sustained by the bank is not relevant under this law.

ELEMENTS OF THE OFFENSE

In order to prove the defendant guilty of the crime charged in the indictment, the government must prove each of the

following elements beyond a reasonable doubt:

First, that the defendant made or caused to be made a false statement or report relating to an application to a bank for loan proceeds;

Second, that the defendant acted knowingly;

Third, that the false statement or report was made for the purpose of influencing in any way the bank's action on the loan application; and

Fourth, that the bank was then insured by the Federal Deposit Insurance Corporation.

FIRST ELEMENT - DEFENDANT MADE FALSE STATEMENT

The first element that the government must prove beyond a reasonable doubt is that the defendant made or caused to be made a false statement or report relating to a loan.

It is not necessary for the government to prove that the defendant personally made or physically wrote the statement. It is sufficient to satisfy this element if the government proves that the defendant caused the statement to be made and if the statement was untrue when made.

If you find that the defendant did not make the statement or cause it to be made, or if you find that the statement was not false - or if you have a reasonable doubt as to either aspect of this element - then it is your duty to acquit.

SECOND ELEMENT - STATEMENT KNOWINGLY MADE

The second element that the government must prove beyond a reasonable doubt is that the defendant "knowingly" made the

statement which you found to be false. It is not a crime to make a false statement inadvertently or negligently. Thus, before you can find that the government has established the second element, that the defendant acted knowingly, you must be satisfied beyond a reasonable doubt that the defendant, in making or causing the statement to be made, acted deliberately, intentionally, and understandingly; that is, that he knew what he was doing; that he knew the statement was false at the time it was made.

THIRD ELEMENT - PURPOSE OF THE STATEMENT

The third element the government must establish is that the defendant made or caused to be made such false statement to be made "for the purpose of influencing in any way" the bank's action in its lending activities.

The quoted words almost define themselves. The emphasis of the statute is upon the person making the false statement. Thus, to act "for the purpose of influencing" the bank means that the person making the false statement intended that the bank take action based on that statement.

As I previously instructed you, the government is not required to prove that the bank actually relied upon the alleged false statement.

FOURTH ELEMENT - BANK DEPOSITS WERE FEDERALLY INSURED

The fourth element which the government must prove beyond a reasonable doubt is that the false statement was made in connection with a loan from a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

I instruct you that it is not necessary for the government to prove that the defendant knew that the bank to which the loan application was submitted was insured by the Federal Deposit Insurance Corporation. It is also not necessary that the defendant make the statement directly to the insured institution. Rather, the proof need only show that the defendant knew it was a bank which he intended to influence.

THE INDICTMENT AND STATUTE

Counts 19 through 21 of the indictment charge the defendant with filing a false or fraudulent tax return.

The indictment alleges that the defendant violated section 7206(1) of Title 26 of the United States Code which provides that:

Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter [shall be guilty of a crime].

ELEMENTS OF THE OFFENSE

In order to prove the tax fraud offense charged in the indictment, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant subscribed and filed a tax return.

Second, that the return contained a written declaration that it was made under penalty of perjury.

Third, that the defendant did not believe the return to be true and correct as to every material matter.

Fourth, that the defendant acted willfully.

FIRST ELEMENT - DEFENDANT FILED A RETURN

The first element that the government must prove beyond a reasonable doubt is that the defendant subscribed and filed a tax return.

A tax return is subscribed to at the time it is signed. A tax return is filed at the time it is delivered to the Internal Revenue Service.

SECOND ELEMENT - RETURN WAS FILED UNDER PENALTY OF PERJURY

The second element that the government must prove beyond a reasonable doubt is that the return contained a written declaration that it was made under penalty of perjury.

To satisfy this element, the government must prove that on its face the return contained a statement indicating that the return was made under penalty of perjury.

THIRD ELEMENT - RETURN WAS MATERIALLY AND KNOWINGLY FALSE

The third element that the government must prove beyond a reasonable doubt is that the defendant did not believe the return to be true and correct as to every material matter. To prove this element, the government must prove that the return was materially false and that the defendant knew that this was so.

An income tax return may be false not only by reason of understatement of income, but also because of an overstatement of lawful deductions or because deductible expenses are mischaracterized on the return.

The government must also prove that the defendant knew that the statement was false. A person acts knowingly when he acts

intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proved by the defendant's conduct and by all of the facts and circumstances surrounding the case.

FOURTH ELEMENT - WILFULNESS

The fourth element that the government must prove beyond a reasonable doubt is that the defendant acted willfully.

In order for the government to prove this element, it must establish beyond a reasonable doubt that the defendant acted voluntarily and intentionally, with the specific intent to make a statement that the defendant knew was false, when it was the legal duty of the defendant to answer truthfully, and the defendant knew it was his legal duty to answer truthfully.

AIDING AND ABETTING

The defendant is also charged with aiding and abetting in Counts 4 through 16. The aiding and abetting statute, section 2(a) of Title 18 of the United States Code provides that:

Whoever commits an offense against the United States or aids or abets or counsels, commands or induces, or procures its commission, is punishable as a principal.

THE ELEMENTS OF AIDING AND ABETTING

Under the aiding and abetting statute, it is not necessary for the government to show that the defendant himself physically committed the crime with which he is charged in order for you to find the defendant guilty.

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find a defendant guilty if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime, and that he willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and

abettor must have some interest in the criminal venture.

To determine whether the defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

Did he participate in the crime charged as something he wished to bring about?

Did he associate himself with the criminal venture knowingly and willfully?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense.

NOTES

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

CONCLUSION

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant before you

today solely from the evidence in this case. I remind you that the mere fact that the defendant has been indicted is not evidence against him. Also, the defendant is not on trial for any act or conduct or offense not alleged in the Indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

You should know that the punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with the other jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. But also do not surrender your honest convictions about the case solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous.

At this time, I would like to offer my sincere thanks to the alternates.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in

court. A verdict form has been prepared for your convenience. After you have reached agreement as to each of the counts contained in the Indictment, you will have your foreperson record a verdict of guilty or not guilty as to each count of the Indictment. Your foreperson will then sign and date the verdict form and you will then return to the courtroom.

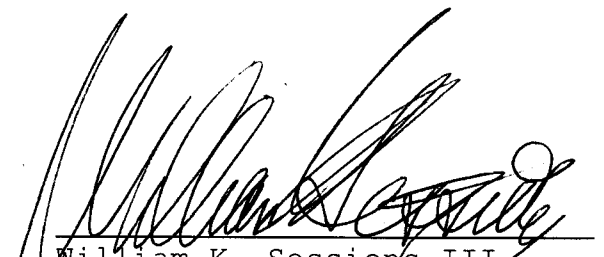
If, during your deliberations you should desire to communicate with the Court, please put your message or question in writing signed by the foreperson, and pass the note to the marshal who will then bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

Also, copies of this charge will go with you into the jury room for your use.

I appoint Christopher Peterman as your foreperson.

Dated, Burlington, Vermont

August 4, 2000



William K. Sessions III
United States District Judge