UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v. **Criminal No. 2:18-cr-00134**

ALLEN H. LOUGHRY II

UNITED STATES' PROPOSED JURY INSTRUCTIONS

Now comes the United States of America, by Philip H. Wright, and R. Gregory McVey, Assistant United States Attorneys for the Southern District of West Virginia, and submits the following proposed jury instructions.

UNITED STATES OF AMERICA

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UNITED STATES' PROPOSED INSTRUCTION NO. _____

COUNTS ONE, FOUR THROUGH EIGHTEEN, AND TWENTY-ONE
WIRE FRAUD
(18 U.S.C § 1343)

The defendant has been charged in Counts One, Four through Eighteen, and Twenty-One with wire fraud, in violation of 18 U.S.C. § 1343. Section 1343 of Title 18 of the United States Code provides in pertinent part, that:

"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 a wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . ." shall be guilty of an offense against the United States.

18 U.S.C. § 1343.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

ELEMENTS OF THE OFFENSE
WIRE FRAUD
(18 U.S.C § 1343)

To find defendant Loughry guilty of wire fraud, the United States must prove three elements beyond a reasonable doubt:

ONE: The defendant knowingly devised a scheme to defraud or for obtaining money or property by false or fraudulent pretenses, representations, or promises that were material;

TWO: The defendant did so with the intent to defraud; and

THREE: In advancing, furthering, or carrying out this scheme, the defendant used or caused the use of an interstate wire transmission or the interstate wire transmission was reasonably foreseeable to him.

So long as the government proves these three elements, it is not relevant whether anyone was actually defrauded. In other words, it is not necessary that the fraud be successful for you to find the defendant guilty of this offense.

United States v. Harvey, 532 F.3d 326, 333 (4th Cir. 2008) (identifies four elements). *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001) (identifies only the classic two essential elements of (1) a scheme to defraud and (2) the use of the mails or wire communication in furtherance of the scheme); *United States v. Burfoot*, 899 F.3d 326, 335 (4th Cir. 2018) (holding that one causes the use of a wire communication when one acts with the knowledge that such use will follow in the ordinary course of business or when such use can reasonably be foreseen, even though not actually intended); *United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995) (fraud need not succeed).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

COUNTS TWO, THREE, AND NINETEEN
MAIL FRAUD
(18 U.S.C § 1341)

The defendant has been charged with a similar crime in Counts Two, Three, and Nineteen – mail fraud, in violation of 18 U.S.C. § 1341. Section 1341 of Title 18 of the United States Code provides in pertinent part, that:

"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, … and for the purpose of executing such scheme or artifice or attempting so to do, . . . knowingly causes to be delivered by mail according to the direction thereon [any matter or thing whatever to be delivered by the Postal Service] …" shall be guilty of an offense against the United States.

18 U.S.C. § 1341.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

ELEMENTS OF THE OFFENSE
MAIL FRAUD
(18 U.S.C § 1341)

To find the defendant guilty of mail fraud, the United States must prove three elements beyond a reasonable doubt:

ONE: The defendant knowingly devised a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises that were material;

TWO: The defendant did so with the intent to defraud; and

THREE: For the purpose of executing or attempting to execute the scheme, the defendant used or caused the use of the U.S. mail, or the use of the mail was reasonably foreseeable to the defendant.

Again, as with the wire fraud offenses, it is not necessary that the fraud be successful for you to find the defendant guilty of this offense.

United States v. Harvey, 532 F.3d 326, 333 (4th Cir. 2008) (identifying four elements); *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001) (identifies only two essential elements of (1) a scheme to defraud and (2) the use of the mails or wire communication in furtherance of the scheme). Intent to defraud is inherently part of proving the scheme to defraud. *See also Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *Schmuck v. United States*, 489 U.S. 705, 710 (1989); *United States v. Grubb*, 11 F.3d 426, 435 (4th Cir. 1993); *United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995) (fraud need not succeed).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

TERMS COMMON TO WIRE AND MAIL FRAUD
"Fraud" and "Scheme to Defraud"

Fraud is an intentional or deliberate misrepresentation of the truth for the purpose of inducing another to part with a thing of value or to surrender a legal right. Fraud, then, is a deceit—whether perpetrated by words, conduct, or silence—that is designed to cause another to act upon it to his legal injury. A statement, claim or document is fraudulent if it was falsely made, or made with reckless indifference as to its truth or falsity, and made or caused to be made with an intent to deceive.

A "scheme to defraud" includes any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value. There must be proof of a material misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension. So, even absent a false statement or false representation, a scheme to defraud may be based on fraudulent omissions. Similarly, actions designed to avoid detection, or to lull a fraud victim into complacency, may be part of the scheme to defraud, even if the actions occur after the defendant has obtained or taken control of the money or property. All fraud depends upon avoiding detection. Thus, a scheme to defraud includes the knowing concealment of material facts or information done with the intent to defraud.

It is not necessary that the United States prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the information

or material sent by U.S. mail or interstate wire transmission was itself false or fraudulent, or that the use of the U.S. mail or interstate wire transmission was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment. The United States must prove that the defendant knew that his conduct was calculated to deceive and for the purpose of causing some loss to another.

United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997); *United States v. Evans*, 473 F.3d 1115, 1121 (11th Cir. 2006); *United States v. Allen*, 76 F.3d 1348, 1363 (5th Cir. 1996); *Pereira v. United States*, 347 U.S. 1, 8, 9 (1954).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

TERMS COMMON TO WIRE AND MAIL FRAUD
"Intent to Defraud"

To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant under consideration acted with the intent to defraud or mislead. The United States does not have to prove precisely when the intent to defraud first materialized.

Good faith on the part of the defendant is not consistent with an intent to defraud. However, good faith is not consistent with willful misrepresentations or deliberate omissions of material facts. If the defendant participated in a scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on the part of the defendant that the scheme would not cause a loss, would excuse fraudulent actions or false representations by him.

In determining whether an act or omission was done with intent to deceive, you may consider whether the act or omission violated any specific law, regulation, or code which establishes specific standards of conduct reasonably related to this case. You have heard evidence about specific provisions of the Code of Judicial Conduct. You may consider such evidence, and whether the defendant violated any provision of the Code of Judicial Conduct, only for this limited purpose, that is, whether he acted with an intent to deceive.

United States v. Ellis, 326 F.3d 550, 556 (4th Cir. 2003); *United States v. Curry*, 461 F.3d 452, 458 (4th Cir. 2006); *United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997); *United States v. Painter*, 314 F.2d 939, 943 (4th Cir. 1963); *United States v. Allen*, 491 F.3d 178, 187 (4th Cir. 2007); *United States v. Morlang*, 531 F.2d 183, 191-92 (4th Cir. 1975) (holding that insofar as the court instructed the jury about standards of conduct for HUD employees involving specific mandates "such as . . . using public office for private gain, etc." the district court's instruction to the jury was not error).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

TERMS COMMON TO WIRE AND MAIL FRAUD
"False" or "Fraudulent"

A statement or representation is "false" or "fraudulent" if it is known to be untrue or is made with reckless indifference as to its truth or falsity, when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud. "No actual misrepresentation of fact is necessary to make the crime complete."

The United States need not prove that any victim justifiably relied on any fraudulent statement, representations or omissions. Justifiable reliance is not an element of the mail and wire fraud statutes, which serve to protect the gullible as well as the skeptical or wary person.

The susceptibility of the victim of the fraud is irrelevant to the analysis: "If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright."

Lemon v. United States, 278 F.2d 369, 373 (9th Cir. 1960); *Neder v United States,* 119 S. Ct. 1827, 1839-41 (1999); *Chisolm v. TranSouth Fin. Corp*., 95 F.3d 331, 336 (4th Cir. 1996); *United States v. Colton,* 231 F.3d 890 (4th Cir. 2000).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

TERMS COMMON TO WIRE AND MAIL FRAUD
"Material"

A statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement representation or pretense actually influenced or affected the decision-making process of the agency or fact-finding body.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

TERMS COMMON TO WIRE AND MAIL FRAUD
"Property"

"Property" is anything in which one has a right that can be assigned, traded, bought, and otherwise disposed of. The property of which a victim is deprived need not be tangible property and the United States does not have to prove that the victim suffered a financial loss. The United States need only prove that the victim was deprived of some right over that property, such as the right to exclusive use.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

TERMS COMMON TO WIRE AND MAIL FRAUD

"Use"

To "use" the U.S. mail or an interstate wire communication is to act so that something would normally be sent in the normal course of business. It is not necessary for the defendant to be directly or personally involved in the delivery by mail or the transmission by interstate wire, as long as such delivery or transmission was reasonably foreseeable in the execution of the scheme to defraud. This does not mean that the defendant must have specifically authorized others to make the delivery or wire transmission. When one does an act with knowledge that the use of the mail or a wire transmission will follow in the ordinary course of business or where such use can reasonably be foreseen, even though not actually intended, then he causes the use of the mail or the wire transmission.

Such use need not in and of itself be fraudulent to constitute an offense. The materials or information that was mailed or transmitted may be totally innocent. The use of the mail or an interstate wire transmission does not need to be an essential part of the fraudulent scheme, but the United States must prove that they played a significant part in the execution of the scheme, such as obtaining a financial benefit from the scheme or concealing the scheme by lulling a victim into inaction. But, it is not necessary that the intended victims of the alleged scheme be the recipients of the material or information that was mailed or transmitted by interstate wire.

Schmuck v. United States, 489 U.S. 705, 712 (1989); *United States v. Evans*, 473 F.3d 1115, 1120 (11th Cir. 2006); *Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *United States v. Grubb*, 11 F.3d 426, 435 (4th Cir. 1993); *United States v. Burfoot*, 899 F.3d 326, 335 (4th Cir. 2018) (holding that one causes the use of a wire communication when one acts with the knowledge that such use will follow in the ordinary course of business or when such use can reasonably be foreseen, even though not actually intended).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

COUNT TWENTY - WITNESS TAMPERING
(18 U.S.C § 1512(b)(1))

The defendant has been charged in Count Twenty with witness tampering in violation of 18 U.S.C. § 1512(b)(1). Section 1512(b)(1) of Title 18 of the United States Code provides in pertinent part, that:

"Whoever knowingly corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to influence or prevent the testimony of any person in an official proceeding. . ." shall be guilty of an offense against the United States.

18 U.S.C. § 1512(b)(1).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

ELEMENTS OF THE OFFENSE
WITNESS TAMPERING
(18 U.S.C § 1512(b)(1))

To find defendant Loughry guilty of witness tampering, the United States must prove the following elements beyond a reasonable doubt:

ONE: The defendant engaged in misleading conduct toward another person, or corruptly persuaded or attempted to corruptly persuade another person;

TWO: In doing so, the defendant acted knowingly; and

THREE: The defendant acted with the intent to influence or prevent the testimony of that person in an official proceeding.

United States v. Cruzado-Laureano, 404 F.3d 470, 487 (1st Cir. 2005); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-08 (2005); *United States v. Acevedo*, 882 F.3d 251, 257 (1st Cir. 2018); *United States v. Guadalupe*, 402 F.3d 409, 412 (3d Cir. 2005).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

WITNESS TAMPERING
DEFINITION OF TERMS

"Official proceeding" means a proceeding before a judge or court of the United States, or a Federal grand jury. The proceeding need not be pending or about to be instituted at the time of the offense. The defendant, however, must have some contemplation of an official proceeding or that one would occur.

18 U.S.C. §§ 1515(a)(3) & 1512(f)(1); *United States v. Perry*, 335 F.3d 316, 322 n.9 (4th Cir. 2003).

"Misleading conduct" means (A) knowingly making a false statement; (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; or (C) knowingly using a trick, scheme, or device with intent to mislead.

18 U.S.C. § 1515(a)(3).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

WITNESS TAMPERING
CORRUPTLY PERSUADES and INTENT TO INFLUENCE

"Corruptly persuade" includes attempting to influence testimony through sheer persuasion with a corrupt purpose. "Corrupt" describes conduct motivated by a wrongful, inappropriate, or improper purpose. "Corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

To prove that a defendant intended to influence testimony, the United States need only show that the defendant was aware that the natural and probable consequences of his actions would be to influence the testimony of a witness. Whether the defendant actually influenced any testimony is immaterial.

18 U.S.C. § 1515(a)(6); *United States v. Davis*, 380 F.3d 183, 196 (4th Cir. 2004) (defendant's persuasion of his girlfriend to testify falsely met "corrupt[] persua[sion]" standard, even though there was no coercion or deception); *United States v. Wilson*, 796 F.2d 55, 57 (4th Cir. 1986) (attempts to dissuade testimony are sufficient for conviction under 18 U.S.C. § 1512(b)(1)); *United States v. Hull*, 456 F.3d 133, 142 (3d Cir. 2006); *United States v. Hakimian*, 2010 WL 2673407 (N.D. Cal., July 1, 2010).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

COUNT TWENTY-TWO – OBSTRUCTION OF JUSTICE
(18 U.S.C. § 1503)

The defendant is charged in Count Twenty-Two with obstruction of justice, in violation of 18 U.S.C. § 1503. Section 1503 of Title 18 of the United States Code provides in pertinent part, that:

Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice . . ." shall be guilty of an offense against the United States.

18 U.S.C. § 1503.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

ELEMENTS OF THE OFFENSE
OBSTRUCTION OF JUSTICE
(18 U.S.C § 1503)

To find defendant Loughry guilty of obstruction of justice, the United States must prove the following elements beyond a reasonable doubt:

ONE: A judicial proceeding was pending;

TWO: The defendant knew of or had notice of the proceeding; and

THREE: The defendant corruptly endeavored to influence, obstruct, or impede the due administration of justice.

The word "corruptly" is sometimes referred to as "intent to do an act which results in obstruction."

United States v. Grubb,11 F.3d 426, 437 (4th Cir. 1993); *United States v. Brooks*, 111 F.3d 365, 372 (4th Cir. 1997); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005); *United States v. Blair*, 661 F.3d 755, 767 (4th Cir. 2011); *United States v. Neiswender*, 590 F.2d 1269, 1274 (4th Cir.), *cert. denied*, 441 U.S. 963, 99 S.Ct. 2410, 60 L.Ed.2d 1068 (1979).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

OBSTRUCTION OF JUSTICE

I instruct you that a judicial proceeding may include a federal grand jury investigation. The United States need not prove that a grand jury had actually taken testimony or had a role in deciding whether to issue a subpoena. Furthermore, the grand jury investigation remains pending throughout its course, at least through, and in some cases beyond, the indictment that results from the investigation.

A defendant acts corruptly when he acts with a specific intent to obstruct or to obstruct justice, which may be shown through knowledge of the consequences or results of his actions. There must be a nexus or connection between the defendant's obstructive acts and the pending proceeding. The defendant's conduct must be directed at the court or grand jury and must be such that the conduct has the natural and probable effect of obstructing or interfering with the court or grand jury. The United States, however, need not prove that the defendant was successful in obstructing or impeding the due administration of justice. The defendant must merely "endeavor" to obstruct justice.

"Endeavor" means any effort to accomplish the evil purpose. The United States need only show that the endeavor was designed to interfere or obstruct or the natural and probable effect of the endeavor would have interfered or obstructed the due administration of justice.

United States v. Fleming, 215 F.3d 930, 936-37 (9th Cir. 2000); *United States v. Macari*, 453 F.3d 926, 938 (7th Cir. 2006); *United States v. Bedoy*, 827 F.3d 495, 504 (5th Cir. 2016); *United States v. Blair*, 661 F.3d 755, 767 (4th Cir. 2011); *United States v. Beale*, 620 F.3d 856, 865 (8th Cir. 2010); *United States v. Aguilar*, 515 U.S. 593, 599, 602-03, 610 (1995).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

COUNTS TWENTY-THREE THROUGH TWENTY-FIVE
FALSE STATEMENT TO A FEDERAL AGENT
(18 U.S.C § 1001(a)(2))

The defendant is charged in Counts Twenty-Three through Twenty-Five with making a materially false, fictitious and fraudulent statement to an FBI Special Agent, in violation of 18 U.S.C. § 1001(a)(2). Section 1001(a)(2) of Title 18 of the United States Code provides in pertinent part:

"Whoever, in a matter within the jurisdiction of the executive . . . branch of the Government of the United States, knowingly and willfully makes any materially false, fictitious, or fraudulent statement or representation . . ." shall be guilty of an offense against the United States.

18 U.S.C. § 1001(a)(2).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

ELEMENTS OF THE OFFENSE
FALSE STATEMENT TO A FEDERAL AGENT
(18 U.S.C § 1001(a)(2))

To find defendant Loughry guilty of making a false statement, the United States must prove the following elements beyond a reasonable doubt:

ONE: The defendant made a false, fictitious, or fraudulent statement or representation;

TWO: The false, fictitious, or fraudulent statement or representation was material to a matter within the jurisdiction of the executive branch of the Government of the United States; and

THREE: The defendant acted knowingly and willfully.

United States v. Gonsalves, 435 F.3d 64, 72 (1st Cir. 2006); *United States v. Daughtry*, 48 F.3d 829, 831-32 (4th Cir.), *vacated on other grounds*, 516 U.S. 984 (1995); *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990); *United States v. Hildebrandt*, 961 F.2d 116, 118 (8th Cir. 1992); *United States v. Ajoku*, 718 F.3d 882, 890 (9th Cir. 2013); *Walker v. United States*, 192 F.2d 47, 49-50 (10th Cir. 1951).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

DEFINITION OF "WILLFULLY"
FALSE STATEMENT TO A FEDERAL AGENT
(18 U.S.C § 1001(a)(2))

For the purposes of Counts Twenty-Three through Twenty-Five, the word "willfully" means that the defendant committed the act voluntarily and purposely, and with knowledge that his conduct was, in a general sense, unlawful. That is, the defendant must have acted with a bad purpose to disobey or disregard the law. The United States need not prove that the defendant was aware of the specific provision of the law that he is charged with violating or any other specific provision.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

"KNOWINGLY"

You have heard the term "knowingly" used throughout these instructions. A person acts "knowingly" if that person consciously and with awareness and comprehension and not because of ignorance, mistake or misunderstanding or other similar reason.

You may infer that a person intends the natural and probable consequences of his knowing acts.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

SYMPATHY

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the Second Superseding Indictment and the denial made by the Not Guilty plea of the defendant. This must be decided on the evidence that is presented in this case and not from anything else. You are to perform this duty without bias or prejudice as to any party. You are not permitted to be governed by sympathy or public opinion. Both the defendant under consideration and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

1A O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, § 12.01 (6th ed. 2008) (modified).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

IGNORANCE OF THE LAW - NO DEFENSE

Except as noted in my definition of willfully, as applied to Counts Twenty-Three through Twenty-Five, it is not necessary for the United States to prove that the defendant knew at the time the acts were committed, as alleged in the Second Superseding Indictment, that the acts violated the laws of the United States. Ignorance of the law is not a defense to Counts One through Twenty-Two charged in the Second Superseding Indictment. And again, with regard to Counts Twenty through Twenty-Five, the United States need only prove the defendant knew, in a general sense, that his conduct was unlawful. The United States need not prove the defendant was aware of the specific provision of the law he is charged with violating.

United States v. Wilson, 133 F.3d 251, 261 (4th Cir. 1997).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

EVIDENCE INFERENCES - DIRECT AND CIRCUMSTANTIAL

There are two types of evidence from which you may find the truth as to the facts of a case -- direct and circumstantial evidence. Direct evidence is the testimony of a person who asserts actual knowledge of a fact, such as an eyewitness.

Circumstantial evidence is where one fact or a chain of facts gives rise to a reasonable inference of another fact. If one fact or group of facts on the basis of common sense and common experience leads you logically and reasonably to infer other facts, then this is circumstantial evidence. Circumstantial evidence is no less valid and no less weighty than direct evidence provided that the inferences drawn are logical and reasonable. In a criminal case where a defendant's state of mind is at issue, where there are questions of what the defendant intended or what his purpose was, circumstantial evidence is often an important means of proving what the state of mind was at the time of the events in question. Sometimes it is the only means of proving state of mind.

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. Do not be concerned about whether evidence is "direct evidence" or

"circumstantial evidence." You should consider and weigh all of the evidence that was presented to you.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

"ON OR ABOUT"

You will note the Second Superseding 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 offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

United States v. Kimberlin, 18 F.3d 1156, 1159 (4th Cir. 1994); *United States v. Ward*, 676 F.2d 94, 96 (4th Cir. 1982); 1A O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, § 13.05 (6th ed. 2008) (modified).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

"AT OR NEAR"

You will note the Second Superseding Indictment charges that the offenses were committed "at or near" a certain location. The proof need not establish with certainty the exact location of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed at a location reasonably near the location alleged.

UNITED STATES' PROPOSED INSTRUCTION NO. _____

CONJUNCTIVE-DISJUNCTIVE

You will find that the Second Superseding Indictment is charged in the conjunctive, meaning that it uses the word "and" between two elements of the offense. However, the law may not require proof of both elements. Therefore, you should be guided by this Court's instructions as to the actual elements that must be proven.

United States v. Montgomery, 262 F.3d 233, 242 (4th Cir.)("where a statute in the disjunctive, federal pleading requires the Government to charge in the conjunctive."), *cert. denied*, 534 U.S. 1034 (2004); *United States v. Simpson*, 228 F.3d 1294, 1300 (11th Cir. 2000); 2B O'Malley, Grenig, and Lee, *Federal Jury Practice and Instructions*, § 64.07 (6th ed. 2010).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

SUMMARIES

Summaries have been prepared by the United States and have been admitted into evidence, and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents which are in evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give it such weight or importance, if any, as you feel it deserves.

Federal Rule of Evidence 1006; *United States v. Scales*, 594 F.2d 558, 562-64 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979); *United States v. Lattus*, 512 F.2d 352, 353 (6th Cir. 1975); *United States v. Rath*, 406 F.2d 757, 758 (6th Cir.), *cert. denied*, 394 U.S. 920 (1969); *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir.1968).

UNITED STATES' PROPOSED INSTRUCTION NO. _____

TAPES AND TRANSCRIPTS

Recordings of conversations have been received in evidence and have been played for you. Typewritten transcripts of these recorded conversations have been furnished to you. These typewritten transcripts of the conversations are being given to you solely for your convenience in assisting you in following the conversation or in identifying the speakers.

The recordings themselves are evidence in the case and the typewritten transcripts are not evidence. What you hear on the recordings is evidence. What you read on the transcript is not. If you perceive any variation between the two, you will be guided solely by the recordings and not by the transcripts.

If you cannot, for example, determine from the recording that particular words were spoken or if you cannot determine from the recording who said a particular word or words, you must disregard the transcripts insofar as those words or that speaker are concerned.

1A O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, § 11.10 (6th ed. 2008); *United States v. Meredith*, 824 F.2d 1418, 1428 (4th Cir. 1987); *United States v. Collazo*, 732 F.2d 1200, 1203 (4th Cir. 1984); *United States v. Long*, 651 F.2d 239, 243 (4th Cir. 1981); *United States v. Bryant*, 480 F.2d 785, 79 (2d Cir. 1973).

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing UNITED STATES' PROPOSED JURY INSTRUCTIONS have been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this 26th day of September, 2018, to:

John A. Carr, Esq.
John A. Carr Attorney at Law, PLLC
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