

Contents

Table of Contents 1

Introduction

- A. “Theory of Defense” instructions withheld 4
- B. Severability of instructions, law vs. language 4
- C. Constitutionally-compelled rules of structure must be applied 5
- D. Substantive crimes, *then* conspiracy 6

A. Basic Instructions

- 1 — Indictment Not Evidence; Defendants Not a Group 7
- 2 — Duty to Follow Instructions-Presumption of Innocence 8
- 3 — Burden of Proof 9
- 4 — Definition of Reasonable Doubt 10
- 5 — Credibility of Witnesses 11
- 6 — Credibility - Falsis in Uno, etc. 12
- 7 — Impeachment - Inconsistent Statement and Felony Convictions 13
- 8 — Impeachment - Bad Reputation (Or Opinion) Concerning Truthfulness 14
- 9 — Missing Witness 15
- 10 — Spoliation 16
- 11 — Amount of Evidence 17
- 12 — Duty to Deliberate 18
- 13 — Consider Only Crimes Charged 19
- 14 — Expert Witnesses 20
- 15 — Caution - Punishment (Multiple Defendants - Multiple Counts) 21
- 16 — Cooperating Witnesses 22

B. Special Instructions

- 17 — Character Evidence 23
- 18 — Good Faith Defense To Charge of Intent to Defraud 24
- 19 — Burden Does Not Shift 25
- 20 — Unanimous Verdict: Do not need to agree on what creates a reasonable doubt . 26
- 21 — Summary Witnesses and Charts 27
- 22 — Circumstantial Evidence - Reasonable Doubt 28
- 23 — Accomplice – Informer – Immunity 29
- 24 — Testimony of Law Enforcement Officers 30
- 25 — Witness Receiving Benefit From Prosecution 31

C. Offense Instructions

C-I Bribery
26 - 48 – Coker adopts McGregor Charges A1-A23 32
49 - 55 – Coker adopts McGregor Charges B1-B7 33

C-II Honest Services Mail and Wire Fraud
56 - 62 – Coker adopts McGregor Charges C1-C7 34
63 – Knowing Involvement in Scheme 63

C-III Conspiracy
64 - 69 – Coker adopts McGregor Charges D1-D7 36
70 — What a Conspiracy is Not 37
71 — “The Conspiracy” Alleged In the Indictment 38

C-IV Miscellaneous Charges
72 — Aiding and Abetting 39
73 — Exceptions to Pinkerton Liability 40

Certificate of Service 41

Introduction

1. “Theory of Defense” instructions withheld

Tom Coker is in no position to articulate so-called “theory of defense” instructions at this point in the case. Coker reserves the right to submit a “Theory of Defense” instruction pursuant to this Court’s Order which requires that such instruction is “due 48 hours before the end of the evidence in this case, based on the defendants’ good faith estimate of that deadline as the evidence draws to a close.” (Doc 1051 p.2 entered on 5/2/11) As the Eleventh Circuit has noted “the threshold burden a defendant must satisfy to have an instruction on his theory of defense is ‘extremely low.’ The defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence.” *United States v. Martinelli*, 2006 U.S. App. LEXIS 17107 (11th Cir. 2006), citing *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995).

2. Severability of instructions, law vs. language

The following defense requests are modular and severable. Each individual request is offered on its own. Each is requested not merely for the “language” used to describe a rule, but for the rule itself, however it might be accurately stated in alternate language desired by the Court. Therefore we seek to reserve the continuing right to attempt to restate these rules in language acceptable to the court and reject any suggestion that we have assumed a “take it or leave it” approach. We are committed to assisting the Court in any way we can to find the most appropriate way to fulfill its obligation to instruct on the applicable rules in accurate and comprehensible language. The obligation to give a proper instruction is not defeated by the

language used by the requesting party. *United States v. Morris*, 20 F.3d 1111 (11th Cir. 1994) (defendant requested a good faith defense instruction in language that was somewhat argumentative; nevertheless, it was reversible error to fail to give a good faith instruction).

3. Constitutionally-compelled rules of structure must be applied

These requests incorporate the points made in: A) Coker's Trial Brief (Doc. 1079 filed under seal on May 9, 2011); B) Coker's Motion to Dismiss Count Ten Based on its Duplicity (Doc. 426); C) Coker's First Motion to Dismiss Regarding Charges Premised on 18 USC § 666 (Doc. 408 and brief Doc. 410); D) Coker's Second Motion to Dismiss (Regarding "Honest Services" Charges (Doc. 411 and brief Doc. 412); E) Coker's Third Motion to Dismiss (Doc. 486). Further, Coker incorporates all related pleadings, responses, replies and objections to the Magistrate's Reports and Recommendations along with the related motions and briefs of co-defendants which he has adopted incorporated as his own. They reflect and incorporate the defendant's fundamental right to a jury determination on each element of any offense, which requires not only that each element be separately stated, but comprehensibly distinguished from other elements (especially the *mens rea* elements), and defined independently of each other. Adherence to these principles, as outlined in our memorandum, is necessary to protect the defendant's rights 6th and 14th Amendment rights to a "beyond a reasonable doubt" determination on each separate element of the charges (defined in a way to present discrete components of criminal liability), to jury unanimity in that determination, non-dilution of the government's burden of proof, and a fair trial.

4. Substantive crimes, *then* conspiracy

Coker requests a separate charge on each crime, and specifically that the substantive counts be defined separately, and prior to, the conspiracy count. Jury confusion is invited, indeed unavoidable, where the substantive counts are introduced first only as conspiracy objects. Otherwise, each is described as being established by the defendant's "agreement" and not his conduct. This process, treating the substantive crimes as elements of the conspiracy only, and not in their own right, not only leaves the jury adrift, but carries with it the grotesque suggestion that the conspiracy charge is of more consequence than the substantive charges.

There is no additional effort, on the other hand, in first instructing on the substantive charges and then the conspiracy. Once the jury understands the real structure of a substantive offense, it will be far easier for it to understand the difference between that and its role as an object of a conspiracy. The conspiracy object and substantive charges have to be different in such cases because the court has the obligation to tailor its instructions "to the facts and issues." *White v. Honeywell, Inc.*, 141 F.3d 1270, 1279 (8th Cir. 1998) (holding that given the facts at issue in this case, the district court's refusal to tailor the jury instructions to the facts of the case affected defendant's substantial rights).¹

¹"The district court must tailor its instructions to the facts of the case before it." 2 C. Wright, *Federal Practice and Procedure* § 485, at 710-13. "Each case has its own peculiar facts and formalized instructions must be tailored to the facts and issues." Devitt, *Ten Practical Suggestions About Federal Jury Instructions*, 38 F.R.D. 75, 77 (1965)"

A. Basic Instructions

Defendant's Requested Jury Instruction No. 1

**Indictment Not Evidence
Defendants Not a Group**

The charges against the Defendants are contained in the indictment. The indictment is simply the description of the charge against the Defendants; it is not evidence of anything. Each Defendant has pleaded not guilty to the charge and denies committing the crime. Each Defendant is presumed innocent and may not be found guilty by you unless all of you unanimously find that the government has proven his or her guilt beyond a reasonable doubt.

The Defendants are being tried together because the Government has charged that they acted together. But you will have to give separate consideration to the case against each Defendant. Do not think of the Defendants as a group.

Authority: First Circuit Pattern Instruction 1.02. The later point –“Do not think of the defendants as a group.” is omitted from the Eleventh Circuit Pattern Instruction Preliminary #1. It is however, included in the Fifth Circuit Pattern Instruction 101.

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 2²

**Duty To Follow Instructions
Presumption Of Innocence**

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Authority: Basic Instruction 2.1: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

Given

Refused

² If the Defendant does not testify in this case, the Defendant requests that Instruction 2.2 of the Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (2003 revision) be substituted for this Requested Instruction.

Defendant's Requested Jury Instruction No. 3

Burden of Proof

In a criminal case, the government must prove each and every element of a charged offense beyond a reasonable doubt and the defendant has no burden to produce any evidence at all.

Authority: *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Harvell v. Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995)

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 4

Definition Of Reasonable Doubt

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Authority: Basic Instruction 3: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 5

Credibility Of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

Authority: Basic Instruction 5: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 6

Credibility - Falsis in Uno, etc.

If you find a witness to have testified falsely concerning any material fact, you have a right to disregard that witness' entire testimony. You may reject all the testimony of that witness or only such part as you believe not worthy of consideration, and give whatever weight or credibility to the remainder of the testimony as you think it deserves.

Authority: See Charges to the Jury in a Criminal Case, §6:34 "Willfully Giving False Testimony" (Rev. Ed. 1988); *Kane v. United States*, 431 F.2d 172, 176 (8th Cir. 1970) ; Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 73.04 (4th ed. 1987); Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* §15.06 (5th ed. 2000).

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 7³

**Impeachment - - Inconsistent Statement and Felony Conviction
(Defendant Testifies with No Felony Conviction)**

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe that witness.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

Authority: Basic Instruction 6.5: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

____ Given

____ Refused

³ If the Defendant does not testify in this case, the Defendant requests that Instruction 6.2 of the Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (2003 revision) be substituted for this Requested Instruction.

Defendant's Requested Jury Instruction No. 8

**Impeachment
Bad Reputation (Or Opinion) Concerning Truthfulness**

There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided; or that others have an unfavorable opinion of the truthfulness of the witness.

You may consider those matters also in deciding whether to believe or disbelieve such a witness.

Authority: Basic Instruction 6.7: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 9

Missing Witness

If it is peculiarly within the power of the government to produce a witness who could give material testimony, or if a witness, because of [his/her] relationship to the government, would normally be expected to support the government's version of events, the failure to call that witness may justify an inference that [his/her] testimony would in this instance be unfavorable to the government. You are not required to draw that inference, but you may do so. No such inference is justified if the witness is equally available to both parties, if the witness would normally not be expected to support the government's version of events, or if the testimony would merely repeat other evidence.

Authority: *First Circuit Pattern Instruction 2.12.* (Note: We do not yet know whether this instruction will be needed.)

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 10

Spoliation

If you find that the Government destroyed or obliterated a document that it knew would be relevant to a contested issue in this case and knew at the time it did so that there was a potential for prosecution, then you may infer (but you are not required to infer) that the contents of the destroyed evidence were unfavorable to the Government.

Authority: *First Circuit Pattern Instruction 2.13*

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 11

Amount of Evidence

Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other.

Authority: The first paragraph is drawn from *First Circuit Pattern Instruction 3.06* and the second from *Fifth Circuit Pattern Instruction 1.08*.

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 12

Duty To Deliberate

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Authority: Basic Instruction 11: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 13

Consider Only Crimes Charged

You are here to decide whether the government has proved beyond a reasonable doubt that the defendants are guilty of the crime charged. The defendants are not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

Authority: *Fifth Circuit Pattern Instruction* No. 1.19

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 14

Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters. Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Authority: Basic Instruction 8: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 15

**Caution - - Punishment
(Multiple Defendants—Multiple Counts)**

A separate crime or offense is charged against one or more of the Defendants in each count of the indictment. Each charge, and the evidence pertaining to it should be considered separately. Also, the case of each Defendant and the evidence pertaining to each Defendant should be considered separately and individually. The fact that you may find any one or more of Defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offense alleged in the indictment.

Authority: Basic Instruction 10.4 : *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision) as modified. The last two sentences have been eliminated. These are:

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted the matter of punishment is for the Judge alone to determine later.

This language is misleading under the facts of this case. "Punishment" can be considered with regard to the testimony of Gilley, Massey and Pouncy as it relates to their credibility and bias.

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 16

Cooperating Witness

We have had testimony from what are sometimes called a "cooperating witness." A "cooperating witness" is someone who provides testimony for the government in exchange for some benefit, such as money, lenient treatment or to avoid being prosecuted themselves.

The testimony of a "cooperating witness" must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The desire to avoid prosecution, or imprisonment can provide powerful motivation for a person to lie or avoid the truth.

_____ were cooperating witnesses.

The jury must determine whether the "cooperating witness" testimony has been affected by self-interest or by the agreement he has with the government, or by prejudice against the defendant.

Authority: *See* Devitt and Blackmar, Federal Jury Practice and Instructions (4th Ed. 1992) §15.02; *On Lee v. United States*, 343 U.S. 747, 757 (1952)

___ Given

___ Refused

B. Special Instructions

Defendant's Requested Jury Instruction No. 17

Character Evidence

The Defendant has offered evidence of the Defendant's traits of character, and such evidence may give rise to a reasonable doubt.

Where a Defendant has offered testimony that the Defendant is an honest and law-abiding citizen, the jury should consider that testimony, along with all the other evidence, in deciding whether the Government has proved beyond a reasonable doubt that the Defendant committed the crime charged.

Authority: Special Instruction 12: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 18

Good Faith Defense to Charge of Intent to Defraud

Good faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the Defendant to prove good faith, of course, since the Defendant has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud as charged in the indictment.

One who expresses an honestly held opinion, or an honestly formed belief, is not chargeable with fraudulent intent even though the opinion is erroneous or the belief is mistaken; and similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as that term is used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

Authority: Special Instruction 17: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 19

Burden Does Not Shift

In a criminal case the burden is at all times upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to the defendants. Which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt.

Authority: *United States v. Veltmann*, 6 F.3d 1483, 1491 (11th Cir. 1993)

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 20

Unanimous Verdict: Do not need to agree on what creates a reasonable doubt

Although all the members of the jury must agree on a verdict, it is not necessary for each of the jurors have the same reason for voting a particular way. Thus, each juror is required to vote "not guilty" if they have a reasonable doubt. But it is not necessary for all the jurors to have the same doubt or to agree on what it is in the case that creates such a reasonable doubt.

Authority: 6th Amendment, United States Constitution

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 21

Summary Witness and Charts -- Cautionary Instruction

You have heard summaries by a person who was represented by the government to be an expert witness. The testimony of the summary witness was only for the purpose of assisting you to understand the evidence which had been previously introduced in the record. The witness did not testify to his own knowledge of any of the events which are relevant to these proceedings. The Court instructs the jury that the credibility of the witness is affected by the fairness of his preparation of exhibits, and the impartiality of his testimony.

Furthermore, charts and other summary materials utilized by the attorneys for the purpose of summarizing the evidence are no better than the books or the testimony upon which they are based. They are an interpretation of the evidence by the party who submitted them. It is for you to decide whether the charts, schedules or summaries correctly present the data set forth in the testimony and exhibits upon which they are based.

Authority: *United States v. Griffin* 324 F3d 330 (5th Cir. 2003); *U.S. v. Goldberg*, (2nd Cir. 1968) 401 F2d 644, 647-48 (2nd Cir. 1968) and *U.S. v. Johnson*, 54 F3d 1150, 1160-61 (4th Cir. 1995).

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 22

Circumstantial Evidence – Reasonable Doubt

Circumstantial evidence may also permit the inference the defendant is not guilty of the offense. Again such evidence may be stronger even than a defendant's denial of guilt. That is, circumstantial evidence alone may be sufficient to create in your minds a reasonable doubt of the defendant's guilt, and if it does so, then you must find him not guilty.

___ Given

___ Refused

Defendant's Requested Jury Instruction No. 23

Accomplice - - Informer - - Immunity

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government.

So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

Authority: Special Instruction 1.1: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)

_____ Given

_____ Refused

Defendant's Requested Jury Instruction No. 24

**Testimony Of Law Enforcement Officers:
Credibility To Be Judged As Any Other Witness**

You have heard the testimony of law enforcement officers. The fact that a witness is employed by the state or federal government as a law enforcement officer does not mean that his testimony necessarily deserves more or less weight than that of an ordinary witness.

In fact, the point is that he is an ordinary witness. You should consider the same questions of bias, stake in the outcome, behavior while testifying, strength of recollection, experience, and logical soundness of his testimony that you consider with any other witness.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness, and exactly what weight, if any, to give it.

Authority: *Bush v. United States*, 375 F.2d 602 (D.C. Cir. 1967); *United States v. Greene*, Criminal No. 92-32 (S.D. Iowa 1992); *United States v. Lamon*, No. 89-CR-134 (E.D. Wis. 1989).

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 25

**Witness Receiving Benefit From Prosecution:
Downward Sentencing Departure Must Be Requested By Prosecutor**

In weighing the testimony of a witness who is facing federal charges or one who has been convicted, but not yet sentenced, or who has asked a court to reduce a sentence, you may consider that a federal court has only a very limited discretion in determining what sentence it will impose.

Federal law includes sentencing guidelines and a federal judge, under most circumstances, must sentence a defendant convicted of a drug offense to a term of imprisonment within the guideline range.

However, when the prosecutor believes that a defendant has given substantial assistance to the government, the prosecutor may ask this Court to impose a sentence below the guideline range and then the Court has the power to do so. A defendant cannot secure such a reduction by himself; the Court cannot do it on its own.

If the prosecutor does not ask for a "downward departure," then the Court is powerless to give one regardless of its attitude toward a defendant.

Authority: *Bush v. United States*, 375 F.2d 602 (D.C. Cir. 1967); *United States v. Greene*, Criminal No. 92-32 (S.D. Iowa 1992); *United States v. Lamon*, No. 89-CR-134 (E.D. Wis. 1989).

_____ Given

_____ Refused

C. Offense Instructions**C-I. Bribery**

26-48. Coker has reviewed Defendant McGregor's proposed jury instructions related to Bribery. Coker believes that each proposed instruction is an accurate statement of the law, is neither confusing nor misleading and that there is a factual basis for giving such instruction. Accordingly, Coker adopts and incorporates Defendant McGregor's charges A1-A23 as if herein set forth and requests the jury be charged accordingly.

| | | |
|--------------------------------|--------------------------------|----------------------------------|
| Coker Charge 26 (McGregor A1) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 27 (McGregor A2) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 28 (McGregor A3) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 29 (McGregor A4) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 30 (McGregor A5) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 31 (McGregor A6) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 32 (McGregor A7) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 33 (McGregor A8) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 34 (McGregor A9) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 35 (McGregor A10) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 36 (McGregor A11) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 37 (McGregor A12) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 38 (McGregor A13) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 39 (McGregor A14) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 40 (McGregor A15) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 41 (McGregor A16) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |
| Coker Charge 42 (McGregor A17) | <input type="checkbox"/> Given | <input type="checkbox"/> Refused |

Coker Charge 43 (McGregor A18) ___ Given _____ Refused
 Coker Charge 44 (McGregor A19) ___ Given _____ Refused
 Coker Charge 45 (McGregor A20) ___ Given _____ Refused
 Coker Charge 46 (McGregor A21) ___ Given _____ Refused
 Coker Charge 47 (McGregor A22) ___ Given _____ Refused
 Coker Charge 48 (McGregor A23) ___ Given _____ Refused

49-55. Coker has reviewed Defendant McGregor's proposed jury instructions related to Bribery as to 18 USC § 666(a)(2). Coker believes that each proposed instruction is an accurate statement of the law, is neither confusing nor misleading and that there is a factual basis for giving such instruction Accordingly, Coker adopts and incorporates Defendant McGregor's charges B1-B7 as if herein set forth and requests the jury be charged accordingly.

Coker Charge 49 (McGregor B1) ___ Given _____ Refused
 Coker Charge 50 (McGregor B2) ___ Given _____ Refused
 Coker Charge 51 (McGregor B3) ___ Given _____ Refused
 Coker Charge 52 (McGregor B4) ___ Given _____ Refused
 Coker Charge 53 (McGregor B5) ___ Given _____ Refused
 Coker Charge 54 (McGregor B6) ___ Given _____ Refused
 Coker Charge 55 (McGregor B7) ___ Given _____ Refused

C-II. Honest Services Mail and Wire Fraud.

56-62. Coker has reviewed Defendant McGregor's proposed jury instructions related to the Honest Services charges. Coker believes that each proposed instruction is an accurate statement of the law, is neither confusing nor misleading and that there is a factual basis for giving such instruction. Accordingly, Coker adopts and incorporates Defendant McGregor's charges C1-C7 as if herein set forth and requests the jury be charged accordingly.

Coker Charge 56 (McGregor C1) ___ Given _____ Refused

Coker Charge 57 (McGregor C2) ___ Given _____ Refused

Coker Charge 58 (McGregor C3) ___ Given _____ Refused

Coker Charge 59 (McGregor C4) ___ Given _____ Refused

Coker Charge 60 (McGregor C5) ___ Given _____ Refused

Coker Charge 61 (McGregor C6) ___ Given _____ Refused

Coker Charge 62 (McGregor C7) ___ Given _____ Refused

Defendant's Requested Jury Instruction No. 63

Knowing Involvement In the Scheme

Tom Coker may be held criminally liable for the conduct of another as alleged in the Indictment only if he was a knowing party to a scheme that included that conduct.

Authority: Similar to McGregor C-4. This is almost a verbatim recitation of *United States v. Siegelman*, 2011 U.S. App. LEXIS 9503 *26 (11th Cir. 1996) (“Siegelman may be held criminally liable for Scrusby’s conduct on the Board only if he was a knowing party to a scheme that included that conduct.”)

____ Given

____ Refused

C-III. Conspiracy

64-69. Coker has reviewed Defendant McGregor's proposed jury instructions related to Conspiracy. Coker believes that each proposed instruction is an accurate statement of the law, is neither confusing nor misleading and that there is a factual basis for giving such instruction. Accordingly, Coker adopts and incorporates Defendant McGregor's charges D1-D6 as if herein set forth and requests the jury be charged accordingly.

| | | | | |
|-------------------------------|--------------------------|-------|--------------------------|---------|
| Coker Charge 64 (McGregor D1) | <input type="checkbox"/> | Given | <input type="checkbox"/> | Refused |
| Coker Charge 65 (McGregor D2) | <input type="checkbox"/> | Given | <input type="checkbox"/> | Refused |
| Coker Charge 66 (McGregor D3) | <input type="checkbox"/> | Given | <input type="checkbox"/> | Refused |
| Coker Charge 67 (McGregor D4) | <input type="checkbox"/> | Given | <input type="checkbox"/> | Refused |
| Coker Charge 68 (McGregor D5) | <input type="checkbox"/> | Given | <input type="checkbox"/> | Refused |
| Coker Charge 69 (McGregor D6) | <input type="checkbox"/> | Given | <input type="checkbox"/> | Refused |

Defendant's Requested Jury Instruction No. 70

What a Conspiracy is Not

A conspiracy is not simply a group of people acting together in such a way that crimes are committed. A conspiracy lies in the agreement to commit crimes.

Joint or parallel activity by more than one person committing a crime does not itself establish a conspiracy. This is so even where one can say that all the actors agree concerning an ultimate goal.⁴ It is not permitted for the jury to substitute a belief in group responsibility for a criminal act with finding of individual guilt of conspiracy.

Authority: *E.g. United States v. Parker*, 839 F.2d 1473 (11th Cir. 1988) (insufficient that “all alleged coconspirators directed their efforts toward the accomplishment of a single goal or common purpose,” quoting *United States v. Elam*, 678 F.2d 1234, 1245 (5th Cir. 1982); *United States v. Bufalino*, 285 F.2d 408 (2nd Cir. 1960) (cannot infer a conspiracy from parallel conduct aimed at the same end). It is “improper to permit the jury to substitute a feeling of collective culpability for a finding of individual guilt.” *Id.* at 417; *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977) (joint purchase by defendant and his fiancée not enough to infer they intended to transfer); *United States v. Glinton*, 154 F.3d 1245 (11th Cir. 1998) (multiple buyers are not implicated in conspiracy with each other); *United States v. Ross*, 58 F.3d 154 (5th Cir. 1995) (simultaneous purchase of cocaine base from two individuals did not suggest a conspiracy among the sellers, even where they accepted large bills and were to make change amongst themselves).

____ Given

____ Refused

⁴ A number of actors can agree on the *result* that the dictator should be assassinated, but this would not establish a conspiracy in the absence of an agreement *among them* to effectuate that result.

Defendant’s Requested Jury Instruction No. 71

“The Conspiracy” Alleged In The Indictment

The government must also prove beyond a reasonable doubt the existence of the very agreement specified in the conspiracy count of the indictment. In this case, the conspiracy is alleged to be a conspiracy to commit federal programs bribery (the elements of which I have explained above). In addition, the conspiracy specifically alleges that things of value were offered “in return for” the favorable votes on SB 380.⁵ Therefore, in order to find the defendants guilty of the conspiracy count, you must find that the things of value were specifically offered “in return for” the legislators favorable vote on SB 380.

Authority: *United States v. Martinez*, 83 F.3d 371 (11th Cir. 1996) (conviction reversed where defendant was involved in conspiracy for theft of a suitcase which he thought contained money, but the indictment alleged contained drugs); *United States v. Charles*, 313 F.3d 1278 (11th Cir. 2002) (almost identical to *Martinez* except it involved a home invasion). In *United States v. Schwarz*, 283 F.3d 76, 110 (2d Cir. 2002) the Second Circuit reversed a conviction where the agreement to the specific object of the conspiracy was not proven.

____ Given

____ Refused

⁵ See paragraphs 31-35 of the Indictment which all contain the “in return for” language. This issues should be sufficiently covered by the bribery charges which seek to instruct the jury about the “in exchange for” element. However, this language (“in return for”) was specifically included by the Grand Jury in the indictment and therefore must be proven beyond a reasonable doubt by the Government.

Defendant's Requested Jury Instruction No. 72

Aiding and Abetting

A person intentionally aids and abets the commission of a crime, acting with knowledge or belief that another is committing or intends to commit a crime, he knowingly renders aid to the person who commits the crime while that person is in the act of committing the crime. An aider and abettor must consciously intend that his conduct will aid another person in the execution of a particular crime. Further, the conduct of the aider and abettor must as a matter of objective fact aid the other person in the execution of the crime.

Before you can find a defendant guilty of aiding and abetting another in the commission of a crime, you must find that the defendant knew in advance that this particular crime was to be committed and that he knowingly acted in such a way as to further its commission.

Mere association between the principal and those accused of aiding and abetting is not sufficient to establish guilt. Nor is mere presence at the scene at which a crime was to be committed sufficient to establish aiding and abetting. Mere presence at the scene of a crime is not evidence of guilt.

Authority: *United States v. Robinson*, No. 78-CR-106 (E.D. Wis. 1979); *United States v. Joiner*, 429 F.2d 489, 493 (5th Cir. 1970);

____ Given

____ Refused

Defendant's Requested Jury Instruction No. 73

Exceptions to Pinkerton Liability

[To be given if the Court gives Offense Instruction 13.5: *Pattern Jury Instructions, Criminal Cases, Eleventh Circuit* (2003 revision)]

The Pinkerton Liability I just explained does not apply if:

- 1) the "substantive offense" was not within the scope of the unlawful conspiracy as described in the indictment; nor if
- 2) that the offense was not committed in furtherance of the conspiracy; nor if
- 3) that the offense was not reasonably foreseeable to the defendant.

Authority: *United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990)

____ Given

____ Refused

Respectfully submitted,

/s/ David McKnight
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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2011, I served the foregoing by filing it electronically with the Clerk of the Court via PACER, which will in turn serve all counsel of record.

/s/ David McKnight
Of Counsel