

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

UNITED STATES OF AMERICA            )  
  )  
VS.    ) CASE NO. 2:10cr00186-MHT-WC  
  )  
JOSEPH R. CROSBY                        )

**DEFENDANT JOSEPH R. CROSBY'S JURY INSTRUCTIONS**

Defendant Joseph R. Crosby requests that the Court include  
the attached instructions in its instructions to the jury.

s/ Thomas M. Goggans  
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Attorney for Defendant  
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Defendant Crosby's requested jury instruction (preliminary)  
number 1

You have now been sworn as the jury to try this case. By your verdicts you will decide the disputed issues of fact. I will decide all questions of law that arise during the trial, and before you retire to deliberate together and decide the case at the end of the trial, I will then instruct you again on the rules of law that you must follow and apply in reaching your decision.

Because you will be called upon to decide the facts of the case you should give careful attention to the testimony and evidence presented for your consideration during the trial, but you should keep an open mind and should not form or state any opinion about the case one way or the other until you have heard all of the evidence and have had the benefit of the closing arguments of the lawyers as well as my instructions to you on the applicable law.

During the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence; and, insofar as the lawyers are concerned, as well as others whom you may come to recognize as having some connection with the case, you are instructed that, in order to avoid even

the appearance of impropriety, you should have no conversation whatever with those persons while you are serving on the jury.

I further caution you that you must not use any type of computer, including hand held devices, to obtain information about this case.

You must also avoid reading any newspaper articles that might be published about the case now that the trial has begun, and you must also avoid listening to or observing any broadcast news program on either television or radio because of the possibility that some mention might be made of the case during such a broadcast now that the trial is in progress.

The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case only on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatever.

From time to time during the trial I may be called upon to make rulings of law on motions or objections made by the lawyers. You should not infer or conclude from any ruling that I may make that I have any opinions on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the witness, you should not speculate on what answer might have been given, nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing concerning questions of law or procedure that require consideration by the Court alone. On some occasions you may be excused from the courtroom as a convenience to you and to us while I discuss such matters with the lawyers. I will try to limit such interruptions as much as possible, but you should remember at all times the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

In that regard, as you were told during the process of your selection, we expect the case to last about eight weeks, but I will make every effort to expedite the trial whenever possible.

Now, in order that you might better understand at the beginning of the case the nature of the decisions you will be asked to make and how you should go about making them, I would like to give you some preliminary instructions at this time concerning some of the rules of law that will apply.

Of course, the preliminary instructions I will give you now will not cover all of the rules of law applicable to this case. As stated before, I will instruct you fully at the end of the trial just before you retire to deliberate upon your verdicts, and will probably restate at that time some of the rules I want to tell you about now. In any event, you should not single out

any one instruction alone as stating the law, but should consider all of my instructions as a whole.

Presumption of Innocence. As you were told during the process of your selection, an indictment in a criminal case is merely the accusatory paper which states the charge or charges to be determined at the trial, but it is not evidence against a defendant or anyone else. Indeed, the defendants have entered pleas of not guilty and are presumed by the law to be innocent. 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.

Burden of Proof. Proof beyond a reasonable doubt 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.

Order of Proof - Defendant's Right Not To Testify. Because the Government has the burden of proof it will go forward and present its testimony and evidence first. After the Government finishes or "rests" what we call its "case in chief," the defendants may call witnesses and present evidence if they wish to do so. However, you will remember that the law does not require a defendant to prove his or her innocence or produce any evidence at all, and no inference whatever may be drawn from the

election of a defendant not to testify in the event he or she should so elect.

Credibility Of The Witnesses. As you listen to the testimony you should remember that you will be the sole judges of the credibility of "believability" of each witness and the weight to be given to his or her testimony. In deciding whether you believe or disbelieve any witness you should consider his or her relationship to the Government or to the defendant; the interest, if any, of the witness in the outcome of the case; his or her manner of testifying; the opportunity of the witness to observe or acquire knowledge concerning the facts about which he or she testified; the candor, fairness and intelligence of the witness; and the extent to which the witness has been supported or contradicted by other credible evidence. You may, in short, accept or reflect the testimony of any witness in whole or in part.

Trial Transcripts Not Available. You will notice that the Court Reporter is making a complete stenographic record of all that is said during the trial, including the testimony of the witnesses, in case it should become necessary at a future date to prepare printed transcripts of any portion of the trial proceedings. Such transcripts, however, if prepared at all, will not be printed in sufficient time or appropriate form for your review during your deliberations and you should not expect

to receive any transcripts. You will be required to rely upon your own individual and collective memory concerning what the testimony was.

Exhibits Will Be Available. On the other hand, any papers and other tangible exhibits received in evidence during the trial will be available to you for study during your deliberations. On some occasions, during the trial, exhibits may be handed to you for brief inspection there in the Jury box; others will not be handed to you. But do not be concerned because, as I said, you will get to see and inspect at the end of the case all of the exhibits that are received in evidence.

Note Taking - Permitted. Because transcripts will not be available, you will be permitted to take notes during the trial if you want to do so, and the Clerk will provide notebooks and pens or pencils for each of you. On the other hand, of course, you are not required to take notes if you do not want to. That will be left up to you, individually.

If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings. Don't try to summarize all of the testimony. Instead, limit your note taking to specific items of information that might be difficult to remember later such as dates, times, amounts, measurements or identities and relationships. But remember that you must decide upon the

credibility or believability of each witness, and you must therefore observe the demeanor and appearance of each witness while testifying. Note taking must not distract you from that task.

Also your notes should be used only as aids to your memory; and, whether you take notes or not, you should rely upon your own independent recollection or memory of what the testimony was and should not be unduly influenced by the notes of other Jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony was.

Conclusion. Now, we will begin the trial at this time by affording the lawyers for each side an opportunity to make opening statements to you in which they may explain the issues in the case and summarize the facts they expect the evidence will show. After all the testimony and evidence has been presented, the lawyers will then be given another opportunity to address you at the end of the trial and make their summations or final arguments in the case.

The statements that the lawyers make now, as well as the arguments they present to you at the end of the trial, are not to be considered by you either as evidence in the case (which comes only from the witnesses and exhibits), or as your instruction on the law (which will come only from me).



Nevertheless, these statements or arguments are intended to help you understand the evidence as it comes in, the issues or disputes you will be called upon to decide, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them in turn for the purpose of making an opening statement.

Given \_\_\_\_\_

Not Given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction No. 2.2. Modified); Eleventh Circuit Pattern Criminal Jury Instruction No. 3.1

Defendant Crosby's requested jury instruction number 2

In this case you have been permitted to take notes during the course of the trial, and most of you - - perhaps all of you - - have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Given \_\_\_\_\_

Not Given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction(Special Instructions) No. 5.

Defendant Crosby's requested jury instruction number 3

It is the duty of the attorneys on each side of this case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his or her client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not indicate any opinion as to the weight or effect of such evidence. You, the jurors, are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Given \_\_\_\_\_

Not given \_\_\_\_\_

United States v. Yates, 438 F.3d 1307 (11<sup>th</sup> Cir. 2006); United States v. Hernandez, 433 F.3d 1328 (11<sup>th</sup> Cir. 2005)

Defendant Crosby's requested jury instruction number 4

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions--what we call your deliberations.

It will be your duty to decide whether the government has proved beyond a reasonable doubt the specific facts necessary to find one or both of the defendants guilty of the crimes charged in the indictment.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Basic Instructions) No. 1.

Defendant Crosby's requested jury instruction number 5

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 public opinion or by either sympathy or prejudice for or against the defendants or the government. Both the defendants and the government expect a fair trial at your hands and that you will carefully and impartially consider this case, without prejudice or sympathy.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Basic Instructions) No. 2.1 (modified); United States v. Ogbonna, M.D.Ala. 2:07cr00061-MHT (Doc. 411)

Defendant Crosby's requested jury instruction number 6

This case involves government, politics, campaigns, and campaign contributions. It is very important for each of you to understand and follow this very important instruction: Your task is to apply the law, as I explain it to you, to the facts. Your job is not to decide on how politics or campaigns ought to be run, nor is it your job to set ethical or legal standards. You must also not approach your deliberations with any concern about how other people or the news media might react to a particular verdict. That must not matter to you at all. Furthermore, you must not be motivated by a desire to "send a message" to public officials or to anyone else, or by a desire to change the system of politics or to set a standard of behavior for officials or for those who interact with them. That is not the purpose of a trial such as this, and those considerations must not be any part of your verdict.

Given \_\_\_\_\_

Not given \_\_\_\_\_

The temptation may be enormous for the jury in this case either to think of itself as "cleaning up" the political system, or as being expected by the public or the media to do that task. The

proposed instruction would counteract that natural tendency, and focus the jury on its proper role.

With particular regard to the instruction that the jury should not think of itself as "sending a message" to anyone, the Court may note that in *United States v. Siegelman*, No. 2:05-cr-119-MEF, Mr. Feaga repeatedly asked the jury to think of itself as sending a message, through its verdict, to other non-party elected officials. See Transcript (Volume 31) p. 7353, p. 7405.

There is ample caselaw disapproving of similar arguments. See, e.g., *United States v. Riley*, 621 F.3d 312 (3rd Cir. 2010).

While the Government concedes that the prosecutor's "send a message" comment was improper, there was an immediate and sustained objection that cut off the prosecutor's remarks. Further, the District Court directly addressed the inappropriate nature of the "send a message" comment in its instructions to the jury. The District Court, in its curative jury instruction given the day after the prosecutor's comment, stated that

you must not think of your verdict as sending a message to anyone. Yesterday you heard me sustain an objection to [the prosecutor's] suggestion in summation that you should "send a message" by your verdict.

I sustained the objection because this was an improper comment. You must reach your verdict in this case based solely on the evidence, on the facts as you determine them based on the law as I present it to you now, without concern for public opinion or anything else outside of this case. That is what the law requires.

SA 1191:14. This jury instruction clearly addressed the improper comment ...

Id. at 339. See also *United States v. Reliford*, 58 F.3d 247, 251 (6<sup>th</sup> Cir. 1995):

As counsel for the Government well knows, every criminal defendant is entitled to be tried on the charges contained in the the indictment, and only on those charges. The jury may convict the accused only

if the evidence relating to those charges convinces them of the defendant's guilt beyond a reasonable doubt. The jury may not convict the accused in order to send a message to the public or the community at large; they may not hold the defendant responsible for the crimes of others.

(emphasis supplied). While the line as to what sort of argument in this vein is so improper that it will *require* judicial action is not perfectly clear, see United States v. Kopituk, 690 F.2d 1289, 1342-43 (11<sup>th</sup> Cir. 1982), the better course would be for the Court to issue this sort of instruction - both in order to avoid potentially improper argument, and also in order to make sure that the jury itself understands the concept.



Defendant Crosby's requested jury instruction number 7

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 a 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; and if a defendant chooses not to testify, you should not consider that in any way during your deliberations. 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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Jury Instruction (Basis) No. 2.2

Defendant Crosby's requested instruction number 8

The indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. That indictment was returned by a grand jury, which heard only the government's side of the case. I caution you, as I have before, that the fact that a defendant has had an indictment filed against him or her is no evidence whatsoever of [his/her] guilt. The indictment is simply an accusation. It is the means by which the allegations and charges of the government are brought before this court. The indictment proves nothing.

The indictment includes some passages, written by Government lawyers, that give the Government's position about what people were saying in certain conversations and what they meant by the words that they said. This, in particular, is not evidence. You should not assume or trust that the Government accurately wrote what the people said, or that the Government accurately described what they meant. You should rely on the evidence, and your recollection of it, not on the Government's description in the Indictment.

Given \_\_\_\_\_

Not given \_\_\_\_\_

The first paragraph is from First Circuit Pattern Instruction 3.08.

The second paragraph is included in case the jury is given a copy of the Indictment that includes the Government's purported selective transcripts and characterization of excerpts of recordings.

Defendant Crosby's requested jury instruction number 9

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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Fifth Circuit Pattern Instruction No. 1.19

Defendant Crosby's requested jury instruction number 10

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. A reasonable doubt can arise from the evidence or the lack of evidence. If you are convinced that a defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Jury Instruction (Basic Instructions)  
No. 3

Defendant Crosby's requested jury instruction number 11

The burden is upon the government to prove a defendant guilty beyond a reasonable doubt of each and every essential element of the crimes charged. The defendants in this case, like any other defendant in a criminal case in the United States, have the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the government, and upon evidence presented on behalf of the defendant. The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence.

Upon considering all the evidence, or lack of evidence, if you have a reasonable doubt about the guilt of a defendant arising out of the evidence, any part of the evidence or lack of evidence, you must find that defendant not guilty.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Basic Instructions) No. 3; In re: Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); United States v. Hansen, 262 F.3d 1217 (11<sup>th</sup> Cir. 2001); Hallford v. Culliver, 379 F.Supp. 2d 1232 (M.D.Ala 2004).

Defendant Crosby's requested jury instruction number 12

While reasonable inferences from evidence may furnish a basis for proof beyond a reasonable doubt, mere possibility, suspicion, or guesswork, no matter how strong, will not overcome the presumption of innocence. Therefore, the Court charges the jury that if you have a reasonable doubt as to the defendant's guilty arising from the evidence, any part of the evidence, or a lack of evidence then you must return a verdict of not guilty.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Basic Instructions) No. 3 Instruction No. 3; In re: Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); United States v. Hansen, 262 F.3d 1217 (11<sup>th</sup> Cir. 2001); Hallford v. Culliver, 379 F.Supp. 2d 1232 (M.D.Ala 2004).

Defendant Crosby's requested jury instruction number 13

I charge you as a matter of law that a reasonable doubt may be created in your minds by nothing more than the lack of evidence presented by the prosecution. That is, if, despite the evidence that the prosecution presented, there was other evidence that should or could have been presented which the prosecution did not present, the prosecution's failure to present such evidence may be sufficient to raise a reasonable doubt in your minds as to the Defendant's guilt. If that is the case, it will be your duty to return a verdict of not guilty.

Given \_\_\_\_\_

Not given\_\_\_\_\_

United States v. Hansen, 262 F.3d 1217 (11<sup>th</sup> Cir. 2001); Hallford v. Culliver, 379 F.Supp. 2d 1232 (M.D. Ala 2004)



Defendant Crosby's requested jury instruction number 14

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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

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

Defendant Crosby's requested jury instruction number 15

As stated earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding on you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence, you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not necessarily be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Basic  
Instructions) No. 4.1

Defendant Crosby's requested jury instruction number 16

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 necessarily controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary. In deciding whether you believe or do not believe any witness I suggest that you consider the demeanor and manner in which the witness testified, and 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?

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Basic Instructions) No. 5

Defendant Crosby's requested jury instruction number 17

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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Basic Instructions) No. 6.2

Defendant Crosby's requested jury instruction number 18

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.

And, of course, the fact that a witness has pleaded guilty to the crime charged in the indictment in this case is not evidence, in and of itself of the guilt of any other person.

Eleventh Circuit Pattern Criminal Jury Instruction (Special Instructions) No. 1.2



Defendant Crosby's requested jury instruction number 19

When the government offers testimony or evidence that a defendant made a statement to someone, you should consider the evidence concerning such a statement, with great care.

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

Of course, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instructions  
(Special Instructions) No. 2.2

Defendant Crosby's requested jury instruction number 20

Every defendant has a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that a defendant or defendants did not testify. For any of you to draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

Given \_\_\_\_\_

Not given \_\_\_\_\_

First Circuit Pattern Instruction 3.03

Defendant Crosby's requested jury instruction number 21

You should not give extra credence to a person's testimony just because of his or her status as a law enforcement officer. You must consider him or her as any other witness. Under the laws of the United States, witnesses, including law enforcement officers, are the same. Feelings of support for law enforcement officers, right or wrong, have no place under our system of justice.

Given \_\_\_\_\_

Not given \_\_\_\_\_

United States v. Ogbonna, M.D.Ala. 2:07cr00061-MHT (Doc. 411, pp. 10-11))

Defendant Crosby's requested jury instruction number 22

When knowledge of a technical subject matter might be helpful to a jury, a person having special training or expertise 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. Of course, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instructions (Basic Instructions) No. 7

Defendant Crosby's requested jury instruction number 23

You have heard summaries by a person who was represented by the government to be a 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 or her own knowledge of any of the events which are relevant to these proceedings. 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 book 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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

United States v. Griffin, 324 F.3d 330 (5<sup>th</sup> Cir. 2003); United States v. Goldberg, 401 F.2d 644, 647-648 (2<sup>nd</sup> Cir. 1968); United States v. Johnson, 54 F.3d 1150, 1160-1161 (4<sup>th</sup> Cir. 1995)

Defendant Crosby's requested jury instruction number 24

If you are reasonably satisfied that a witness has willfully and corruptly sworn falsely as to a matter, material to the issues in his case, you may, in your discretion, reject all of the testimony of that witness.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Liberty Mutual Insurance Co. v. Thompson, 171 F.2d 723 (5<sup>th</sup> Cir. 1948)

Defendant Crosby's requested jury instruction number 25

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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

First Circuit Pattern Instruction 2.12

Defendant Crosby's requested jury instruction number 26

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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

First Circuit Pattern Instruction 2.13; United States v. Lanzon, 2011 WL 1662901 (11<sup>th</sup> Cir. May 4, 2011)



Defendant Crosby's requested jury instruction number 27

A separate crime or offense is charged against one or more of the Defendants in sine counts of the indictment. Each charge, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. Unless indicated differently in these instructions, the fact that you may find one of the defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or 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.

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.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instructions (Basic Instructions) No. 10.4

Defendant Crosby's requested instruction number 28

For all charges, whether based on campaign contributions or otherwise, the Government must prove the type of agreement that is called a "quid pro quo." This phrase, which comes from Latin, means an agreement to exchange something for something - in this case, an agreement to exchange the campaign contribution or other thing of value, for action by the official.

Given \_\_\_\_\_

Refused \_\_\_\_\_

See, e.g., United States v. Kummer, 89 F.3d 1536, 1540 (11th Cir. 1996) ("The 'with intent to be influenced' language prohibits a bribe, which involves a quid pro quo."); *id.* ("a bribe involves a specific understanding that it will affect an official action -- a quid pro quo."); United States v. Martinez, 14 F.3d 543, 553 (11th Cir. 1994) (holding that there is a "quid pro quo" requirement under Hobbs Act even outside campaign contributions, though modified by *Evans* in that category of cases). See also Doc. 1018 (Government concedes that United States v. McNair, 605 F.3d 1152 (11th Cir. 2010) does not do away with a "quid pro quo" requirement, and that instead it speaks to the explicitness/specificity of the required quid pro quo)

Defendant Crosby's requested instruction number 29

The Government must prove beyond a reasonable doubt not just that there was a quid pro quo agreement, but beyond that must prove that the quid pro quo agreement was explicit.

Given \_\_\_\_\_

Not Given \_\_\_\_\_

As discussed at the May 5, 2011 hearing, this instruction should not be limited to campaign contributions and other electoral matters, but should include the entire case.

Defendant Crosby's requested instruction number 30

The word "explicit," in defining the sort of quid pro quo agreement that the Government must prove beyond a reasonable doubt, means that the agreement must be "stated clearly and in detail, leaving no room for confusion or doubt."

Given \_\_\_\_\_

Not Given \_\_\_\_\_

Oxford English Dictionary online,  
[http://oxforddictionaries.com/view/entry/m\\_en\\_us1245655#m\\_en\\_us1245655](http://oxforddictionaries.com/view/entry/m_en_us1245655#m_en_us1245655)

Defendant Crosby's requested instruction number 31

The word "explicit," in describing the Government's burden of proving beyond a reasonable doubt that there was an "explicit quid pro quo agreement," means that the agreement must have been express. It cannot have been an implied agreement.

Given \_\_\_\_\_

Not Given \_\_\_\_\_

Defendant Crosby recognizes that Siegelman indicates that "explicit" does not mean "express," and in an apparent reference to the possibility of an "implied" explicit agreement. However, this instruction would be supported by United States v. Ganim, 510 F.3d 134 (2nd Cir. 2007) (Sotomayor, J.). Defendant Crosby seeks to preserve this issue in requesting this instruction.

Defendant Crosby's requested instruction number 32

The Government must also prove beyond a reasonable doubt that the quid pro quo agreement was for a specific official action. The official must agree to take or forego some specific action in order for the doing of it to be criminal. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.

Given \_\_\_\_\_

Not given \_\_\_\_\_

See Siegelman, 2011 U.S. App. LEXIS 9503, \*23 ("The official must agree to take or forego some specific action in order for the doing of it to be criminal under § 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.")

Defendant Crosby's requested instruction number 33

For the charges pertaining to Mr. Crosby, the Government must prove beyond a reasonable doubt that the quid pro quo agreement was in exchange for "his official acts as they pertained to drafting gambling legislation, including SB380."

Given \_\_\_\_\_

Not given \_\_\_\_\_

See, e.g., Fifth Circuit Pattern Instruction 1.19 ("You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment.") As to Defendant Crosby, the indictment alleges that he was bribed "in connection with his official acts as they pertained to drafting gambling legislation, including SB380." (¶ 218).



Defendant Crosby's requested instruction number 34

In addition to the other aspects of the required proof of a quid pro quo agreement that I have explained to you, there is a further requirement. The Government must prove that the agreement was to affect the official's action. What this means more particularly is that the Government must prove beyond a reasonable doubt that the agreement was made to *alter* the official's action from what it otherwise would have been - that is, to cause the official to change an official position that he otherwise would have taken, or to take official action that he would not have taken but for the agreement.

Given \_\_\_\_\_

Not Given \_\_\_\_\_

United States v. Kummer, 89 F.3d 1536, 1540 (11th Cir. 1996) ("a bribe involves a specific understanding that it will affect an official action -- a quid pro quo."); Siegelman, 2011 U.S. App. LEXIS 9503 \*22 ("The government's initial brief on appeal states that, as to Counts 8 and 9, 'the jury had to find that Scrushy and Siegelman intended to deprive the public of their right to honest services and intended to deceive the public, and that Siegelman intended to alter his official actions as a result of Scrushy's purported campaign contributions.'"); United States v. Urciuoli, 613 F.3d 11, 15 (1st Cir. 2010) (affirming, and quoting jury instruction that required the government to "prove beyond a reasonable doubt the [the defendant] intended the payment to cause [the named legislator] to change an official position that he would otherwise have taken or to take official

actions that he would not have taken but for the payment");  
United States v. Gatling, 96 F.3d 1511, 1522 (D.C. Cir. 1996)  
("This court has held that 'payments to a public official for  
acts that would have been performed in any event ... are probably  
illegal gratuities rather than bribes'").

Defendant Crosby's requested instruction number 35

The Government must prove beyond a reasonable doubt that the payment, which is alleged to have been a bribe, was the prime mover or producer of the official act.

Given \_\_\_\_\_

Not Given \_\_\_\_\_

United States v. Brewster, 506 F.2d 62, 82 (D.C. Cir. 1974) ("We have laid emphasis under the bribery section on "corruptly . . . in return for being influenced" as defining the requisite intent, incorporating a concept of the bribe being the prime mover or producer of the official act.") and cases following Brewster in this respect. Brewster was a case under 18 U.S.C. § 201, but the same concept should apply under both § 666 and "honest services," given (a) the fact that 18 U.S.C. § 666 was designed after § 201 to a significant extent, and (b) the fact that the Supreme Court in Skilling cited § 201 as guidance for the concept of "bribery" in "honest services."

Defendant Crosby's requested instruction number 36

In addition to the other requirements that I have explained, the Government must prove beyond a reasonable doubt that there was an agreement that was "corrupt."

Given \_\_\_\_\_

Not Given \_\_\_\_\_

Siegelman, 2011 U.S. App. LEXIS 9503, \*30 ("corrupt agreement"); \*41 (emphasizing that "quid pro quo" includes not only the quid and the quo but also the "pro - the corrupt agreement to make a specific exchange.") 18 U.S.C. § 666 requires the element of "corruptly." That requirement also inheres in "honest services," by virtue of the discussion in Skilling about § 666 as a statute that gives further notice of the nature of what a Skilling "bribe" is.

Defendant Crosby's requested instruction number 37

Furthermore, the Government must prove that any agreement was "corrupt" in the sense that it was wrongful, immoral, depraved or evil.

Given \_\_\_\_\_

Not Given \_\_\_\_\_

Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005)  
("`Corrupt' and `corruptly' are normally associated with wrongful, immoral, depraved, or evil. See Black's 371; Webster's 3d 512; Am. Hert. 299-300.")

Defendant Crosby's requested instruction number 38

The indictment charges that the offense was committed "corruptly." An act is done "corruptly" if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an[y] unlawful method or mean. It is acting "corruptly" - dishonestly seeking an illegal goal or a legal goal illegally- that separates permissible from criminal.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Corruptly is not defined in the *Eleventh Circuit Pattern Jury Instructions - Criminal Cases* (2003). The above definition was obtained from *United States v. McNair*, 2010 WL 1881884, 21 (11<sup>th</sup> Cir. 2010).

Defendant Crosby's requested instruction number 39

In this case, you may not convict any defendant on the theory that payments were made in order to reward them for their past actions. Instead, the Government must prove beyond a reasonable doubt that payments were offered in regard to future actions by the officials, under the rules and definitions that I have explained to you.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Kummer, 89 F.3d 1536, 1540 (11th Cir. 1996) ("a bribe involves a specific understanding that it will affect an official action--a quid pro quo.") (emphasis, on future tense "will," supplied); McNair, 605 F.3d at 1191 (quoting Sun-Diamond, which distinguishes gratuities and bribes on this basis among others); United States v. Frega, 179 F.3d 793, 807 n.17 (9th Cir. 1999) (quoting instruction given: "Nor does giving a judge something as a reward for an official act on his part that he has already undertaken constitute a bribe unless there was an understanding prior to the act being taken that the judge would be so rewarded.").

Defendant Crosby's requested jury instruction number 40

It is a federal crime, under some circumstances, for anyone to corruptly give offer, or agree to give anything of value to a person who is an agent of a State government receiving significant benefits under a Federal under a Federal assistance program, when the person intends to influence or reward the government agent in connection with certain transactions of the government, or agency.

This definition that I have just given to you cannot be taken on its own. It has to be applied according to further instructions I am about to give you, and also according to other instructions I [have given you]/[will give you] about the definition of what constitutes an illegal bribe in this respect. You must apply those instructions as well as the ones I am about to give right now.

A Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the person to whom the defendant corruptly gave, offered, or agreed to give things of value was an agent of the State of Alabama.

(2) During the one-year period from May 1, 2009, to April 30, 2010, the State of Alabama received benefits greater than



\$10,000 under a Federal program involving some form of Federal assistance;

(3) The defendant intended to influence the person in connection with business, a transaction, or a series of transactions of the State of Alabama involving something worth \$5,000 or more. Again I remind you that I [have given]/[will give] further instructions explaining to you what this element means, as applied to this case; and explaining to you what this element means, as applied to this case; and

(4) the Defendant acted corruptly.

To act "corruptly" means to act voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.

An "agent is any employed, officer, or director of the State of Alabama, subject to the further explanation of that term that I will give you.

Edited version of pattern instructions, as explained above

Defendant Crosby's requested jury instruction number 41

For each count, you must consider the person to whom things were allegedly offered or given, and consider whether that person was an "agent" of the State of Alabama. A person might be an agent of some other entity, including an entity that is part of the State government but is not the State itself; but that itself would not make the person an agent of the State itself. The Government must prove beyond a reasonable doubt, as to each count, that the person involved was an agent of the State. This means that the Government must prove beyond a reasonable doubt that the person was authorized to act on behalf of the State itself.

Given \_\_\_\_\_

Not given \_\_\_\_\_

This instruction is supported by the fact that the Indictment explicitly and solely charges each person as an agent of the State, and by United States v. Langston, 590 F.3d 1226, 1233-35 (11<sup>th</sup> Cir. 2009) (reversing convictions on this basis). E.g., id. at 1233 ("These cases reach the common-sense conclusion that an employee of an agency entity cannot be an agent of the principal entity unless the legal construct establishes such a relationship."); id. at 1234 ("We must necessarily scrutinize that which purports to create the employment relationship with the agency to determine if the employee is authorized to act on the principal entity's behalf.").

Defendant Crosby's requested jury instruction number 42

In order to show that the person in question was an "agent" of the State of Alabama, the Government must prove beyond a reasonable doubt that the person was authorized to act on behalf of the State of Alabama with respect to its funds. The Government must prove, further, that the acts that are at issue in this case involved the person's role as an agent of the State in that sense.

Given \_\_\_\_\_

Not given \_\_\_\_\_

This instruction is supported by, e.g., United States v. Whitfield, 590 F.3d 325, 344 (5th Cir. 2009) ("In United States v. Phillips, we held that for an individual to be an 'agent' for the purposes of section 666, he must be 'authorized to act on behalf of [the agency] with respect to its funds.' 219 F.3d 404, 411 (5th Cir. 2000)."); *id.* at 345-46 (reversing convictions under § 666 because even if the defendants were agents of the entity alleged, their challenged and allegedly corrupt conduct did not pertain to their role as agent of that entity).

Defendant Crosby's requested jury instruction number 43

As I have mentioned, the Government must prove beyond a reasonable doubt that the Defendant offered or gave something or received something in order to influence an agent of the State or be influenced as an agent of the State of Alabama in connection with some business, transaction, or series of transactions of the State. These words include the requirement that the decision, in which the agent was to be influenced, concerned an aspect of how the State would spend or apply public funds. The Government must prove beyond a reasonable doubt that the Defendant converted public spending into unearned private gain.

Given \_\_\_\_\_

Not given \_\_\_\_\_

This proposed instruction makes sense of the words "business, transaction, or series of transactions," in light of the fact that § 666 was spending-clause legislation.

The second paragraph is based on the Supreme Court's explanation: "Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain," Sabri v. United States, 541 U.S. 600, 608, 124 S.Ct. 1941, 1947 (2004) (emphasis supplied).

Defendant Crosby's requested jury instruction number 44

It is not a crime to influence how legislation is written, nor is it a crime to influence how legislators vote on legislation. There are types of influence that are legal, because it is legitimate and lawful for people to try to influence legislation. That is part of the legitimate functioning of democracy. You must focus on whether the Government has proven, beyond a reasonable doubt, the particular type of influence that the law covers, as I have explained it to you: corrupt influence consisting of bribery, as I [have explained]/[will explain] the rules of what constitutes unlawful bribery.

Given \_\_\_\_\_

Not given \_\_\_\_\_

This instruction is necessary and appropriate in order to help ensure that the jury does not convict any defendant based on constitutionally-protected "lobbying" or advocacy-type conduct, and that the jury focuses on the narrower definition of the offense.

Defendant Crosby's requested jury instruction number 45

In considering the charges against each defendant under this statute, you must understand that the pending charges relate specifically to each defendant's individual conduct. No defendant is charged, or can be convicted, based on promises allegedly made by other defendants, or by other persons including any who pleaded guilty to similar charges. No defendant is charged with responsibility for any other person's conduct; each person's responsibility, if any, is only for conduct that he is proven beyond a reasonable doubt to have engaged in.

Given \_\_\_\_\_

Not given \_\_\_\_\_

In its opposition to the motions to dismiss some counts based on duplicitousness (Doc. 609), the Government recognized (p. 5) the propriety of a jury instruction designed to get at this point. The first paragraph, above, adapts language from the Government's filing (Doc. 609, p. 5): "the United States has confirmed on the record, here and in Count One of the Indictment, that the pending charges relate specifically to the defendants' individual conduct." As to the second paragraph, see Doc. 609, p. 3 (Government: "Both defendants McGregor and Coker claim that, as currently pled, they are in jeopardy of being tried under Counts Five and Ten for promises allegedly made by other defendants. This is simply not the case.") The third paragraph is suggested in order to make the same point clear.

Defendant Crosby's requested jury instruction number 46

It is a federal crime to use the United States mail, or to use interstate wire, radio, or television communications, to carry out a scheme to fraudulently deprive the public of a right to honest services.

A defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the intangible right of honest services;

(2) the defendant did so with an intent to defraud;  
and

(3) the defendant used the United States Postal Service by mailing or by causing to be mailed, some matter or thing to carry out the scheme to defraud; or that the Defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud.

A "scheme" includes any plan or course of action intended to deceive or cheat someone.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for

personal financial gain or to cause financial loss to someone else.

To "deprive someone else of the intangible right of honest services" is to violate, or to cause a public official or employee to violate, a duty to provide honest services to the public.

More particularly, the duty to provide honest services is violated only by bribery. I [have explained]/[will explain] to you, more particularly, various aspects of what "bribery" means, in the law applicable to this case.

The Government must prove that the Defendant intended to breach that duty and foresaw, or should have foreseen, that the State would suffer a loss as a result of the breach.

The Government must prove beyond a reasonable doubt that the Defendant specifically intended to defraud. "To defraud" means to perpetrate a fraud. This includes the requirement that it must be proven beyond a reasonable doubt that the Defendant intended that there would be a fraudulent statement or representation.

A statement or representation is "false" or "fraudulent" if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or



fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To "cause" the mail to be used is to do an act knowing that the use of the mail will follow in the ordinary course of business or where that use can reasonably be expected to follow. To "use" interstate wire communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business.

Given \_\_\_\_\_

Not given \_\_\_\_\_

This instruction is adapted from Eleventh Circuit Pattern Criminal Jury Instructions Nos. 50.1, 50.2, and 51. Pattern instruction 50.2, which is designed specifically for "honest services," cannot be used by itself. The pattern instruction, for instance, incorrectly omits "materiality" as an element in "honest services" fraud, and it was written to cover the pre-Skilling broader definition of "honest services." This proposed instruction corrects those problems. Additional instructions, below, are further necessary to elucidate other points not adequately covered in the pattern instruction, even as edited herein.

Defendant Crosby's requested jury instruction number 47

As I have explained, a "scheme to defraud" requires fraud. In this case, the Government's burden is to prove a type of fraud based on concealment of material information. The Government must prove beyond a reasonable doubt that the defendant intentionally did not disclose material information, that the Defendant thereby intended to create a false and fraudulent representation, and that the Defendant had a duty, explicit or implicit, to disclose the material information.

Given \_\_\_\_\_

Not given \_\_\_\_\_

The fact that this case is charged by the Government based on concealment of material information is directly shown by paragraph 234 of the Indictment (Doc. 3, p. 58).

The definition is taken from United States v. Browne, 505 F.3d 1229, 1265 (11th Cir. 2007) ("a defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation may constitute a violation of the mail fraud statute where the defendant had a duty, explicit or implicit, to disclose material information.")

Defendant Crosby's requested jury instruction number 48

"Good faith" is a complete defense to a charge that requires intent to defraud. A defendant isn't required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be fraudulent intent - even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can't establish fraudulent intent.

A failure to disclose material information cannot be fraudulent intent if the defendant honestly, even if mistakenly, believed that no disclosure was required or that any required disclosures would be made.

Given \_\_\_\_\_

Not given \_\_\_\_\_

The first two paragraphs are from Eleventh Circuit Pattern Criminal Jury Instructions (Special Instructions) No. 17 (excerpted to include pertinent part). The third paragraph speaks in the same terms, specifically as to non-disclosure (which is, as noted above, the type of fraud alleged by the Government in this case).

Defendant Crosby's requested jury instruction number 49

Good faith is a complete defense to the charges in the indictment since good faith on the part of a defendant is inconsistent with an intent to defraud or willfulness which is an essential part of the charges.

The burden of proof is not on the defendants to prove good faith, of course, since a defendant has no burden to prove anything. It is the government that must establish beyond a reasonable doubt that a defendant acted with specific intent to defraud as charged in the indictment.

Good faith is an honestly held opinion, or an honestly formed belief; one is not chargeable with fraudulent intent even if that opinion turns out to be erroneous or the belief to be mistaken. Similarly, evidence which establishes only that a person made a mistake in judgment or was careless, does not establish fraudulent intent.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instructions (Special Instructions) No. 17

Defendant Crosby's requested jury instruction number 50

No defendant can be held criminally liable because of another person's conduct, under these mail and wire related charges, unless he was a knowing party to a scheme that included that other person's conduct.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Authority and Explanation: See United States v. Siegelman, 2011 U.S. App. LEXIS 9503, \*33 ("Siegelman may be held criminally liable for Scrushy's conduct on the Board only if he was a knowing party to a scheme that included that conduct. United States v. Toney, 598 F.2d 1349, 1355 (5th Cir. 1979).")

Defendant Crosby's requested jury instruction number 51

You cannot convict any defendant on any of the mail or wire-based fraud charges, unless you unanimously agree on certain particulars as to such a charge.

You may not convict any defendant for any particular mailing or wiring unless you are all in unanimous agreement not only that the mailing or wiring was in furtherance of a scheme to defraud the public of honest services, but also unless if you are in unanimous agreement as to which official's honest services were at stake, if any, such that the mailing or wiring was in furtherance of the deprivation of that person's honest services.

Also, you may not convict any defendant for any mailing or wiring unless you are in unanimous agreement as to what material information, if any, was fraudulently concealed.

Given \_\_\_\_\_

Not given \_\_\_\_\_

See United States v. Atkinson, 135 F.3d 1363, 1377-78 (11<sup>th</sup> Cir. 1998) (explaining requirement of jury unanimity on the acts constituting the scheme to defraud). If the Court finds any particular problem with the phrasing of this requested instruction, Defendant Crosby requests the opportunity to

discuss and propose an alternative phrasing that adequately conveys the unanimity requirement.

Defendant Crosby's requested jury instruction number 52

The Government must prove beyond a reasonable doubt that there was a scheme that is substantially the same as the one charged in the Indictment. This includes the requirement that the Government must prove that the participants in the scheme were substantially the same as charged in the Indictment. If the Government has not met this requirement, you may not convict any defendant on any of Counts 23 through 33.

Given \_\_\_\_\_

Not given \_\_\_\_\_

See First Circuit Pattern Instruction # 4.18.1341 ("First, that there was a scheme, substantially as charged in the indictment, ..."); "But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment."); Fifth Circuit Pattern Instruction 2.59 ("... a scheme to defraud that was substantially the same as the one alleged in the indictment ...")

The second sentence of the proposed instruction (regarding substantial identity of participants) is a logical consequence of the basic principle.





Defendant Crosby's requested jury instruction number 53

The Government must prove beyond a reasonable doubt that the defendant willfully participated in the scheme.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if a defendant acted in good faith, he cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Taken from (and, in the first paragraph, slightly adapted from) First Circuit Pattern Instruction 4.18.1341.

Defendant Crosby's requested jury instruction number 54

The defendants are accused of conspiring to commit a federal crime— specifically, the crime of 18 U.S.C. § 666 bribery, as I have explained that offense to you. It is against federal law to conspire with someone to commit this crime.

For you to find a defendant guilty of conspiracy, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to commit the crime of bribery under 18 U.S.C. § 666; and

Second, that the defendant willfully joined in that agreement; and

Third, that one of the conspirators committed an overt act during the period of the conspiracy in an effort to further the purpose of the conspiracy.

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details.

But the government must prove beyond a reasonable doubt that those who were involved shared a general understanding

about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, but you may consider such factors.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before a defendant can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that a defendant willfully joined in the agreement must be based upon evidence of his or her own words and/or actions. You need not find that a defendant agreed specifically to or knew about all the details of the crime, or knew every other co-conspirator or that he or she participated in each act of the agreement or played a major role, but the government must prove beyond a reasonable doubt that he or she knew the essential features and general aims of the venture. Even if a

defendant was not part of the agreement at the very start, he or she can be found guilty of conspiracy if the government proves that he or she willfully joined the agreement later. On the other hand, a person who has no knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. Only one overt act has to be proven.

Given \_\_\_\_\_

Not given \_\_\_\_\_

This is based closely on First Circuit Pattern Instruction 4.18.371(1). The First Circuit Instruction is much more fair and complete than the Eleventh Circuit pattern instruction. The Eleventh Circuit instruction is taken up, to an excessive extent, with discussion about what the Government is not required to prove. Even to the extent such discussion may be legally correct, it is not nearly as helpful as a clear explanation of what the Government is required to prove, and (relatedly) what is not sufficient to constitute the crime. The First Circuit instruction is much more clear and balanced in this respect.

Defendant Crosby's requested jury instruction number 55

The Government must prove beyond a reasonable doubt that the defendants knowingly entered into an agreement to commit an unlawful act.

Given \_\_\_\_\_

Not given \_\_\_\_\_

"Under federal conspiracy law, the government must allege and prove that the defendants knowingly entered into an agreement to commit an unlawful act." United States v. Chandler, 388 F.3d 796, 800 (11<sup>th</sup> Cir. 2004)

Defendant Crosby's requested jury instruction number 56

In order to convict anyone of conspiracy, the Government must prove that the person knew of the overall scheme.

Given \_\_\_\_\_

Not given \_\_\_\_\_

"Since no one can be said to have agreed to a conspiracy that they do not know exists, proof of knowledge of the overall scheme is critical to a finding of conspiratorial intent." Chandler, 388 F.3d at 806.

Defendant Crosby's requested jury instruction number 57

The Government must prove beyond a reasonable doubt that each defendant had a deliberate, knowing, specific intent to join the conspiracy.

Given \_\_\_\_\_

Not given \_\_\_\_\_

"The government must prove an agreement . . .to pursue jointly an illegal objective." United States v. Adkinson, 158 F.3d 1147, 1153 (11<sup>th</sup> Cir. 1998). "The government must also prove beyond a reasonable doubt that each defendant had a 'deliberate, knowing, specific intent to join the conspiracy.'" Id.

Defendant Crosby's requested jury instruction number 58

Proof that a defendant willfully joined in the agreement must be based upon evidence of his own words and/or actions.

Authority and Explanation: First Circuit Pattern Instruction 4.18.371(1).



Defendant Crosby's requested jury instruction number 59

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single overall conspiracy.

You must decide whether the single overall conspiracy charged existed between two or more conspirators. If not, then you find the defendants not guilty of that charge.

But if you decide that a single overall conspiracy did exist, then you must decide who the conspirators were. And if you decide that a particular Defendant was a member of some other conspiracy - not the one charged - then you must find that defendant not guilty.

So to find a defendant guilty, you must all agree that the Defendant was a member of the conspiracy charged - not a member of some other separate conspiracy.

Given \_\_\_\_\_

Not given \_\_\_\_\_

Eleventh Circuit Pattern Criminal Jury Instruction (Special Instructions) No. 13.3

Defendant Crosby's requested jury instruction number 60

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.

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Defendant Crosby's Requested Instruction Number 61

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience. [Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at anytime, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 27<sup>th</sup> day of May, 2011, electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification to all counsel of record.

s/ Thomas M. Goggans  
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