

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CR. NO. 2:10cr186-MHT

MILTON E. McGREGOR,)

Defendant.)

PROPOSED JURY INSTRUCTIONS OF MILTON McGREGOR

Exhibit E

INTRODUCTION TO PROPOSED JURY INSTRUCTIONS #E-1 to E-12

This set of instructions covers preliminary (pre-trial) instructions and introductory or general post-trial instructions (as contrasted with specific “offense”/“element” instructions).

Mr. McGregor requests Eleventh Circuit Pattern Instructions on the following:

Preliminary, Nos. 1 and 2

Trial, Nos. 1 (if any 404(b) evidence is admitted) and 3 (if transcripts are admitted)

Basic, Nos. 1-12

Special, Nos. 1.2 or 1.3, 2.2, 4 (if any 404(b) evidence is admitted), 5, 7, 12 and 17.

As to some of those Pattern Instructions, a choice as to which variant to use will have to be made after evidence has been received. Mr. McGregor also requests additional instructions as set forth herein.

PROPOSED JURY INSTRUCTION #E-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. This instruction would be useful, as an addition to the Eleventh Circuit Pattern Instruction Preliminary #1, because it includes the concept of unanimity, the concept of the indictment as not being evidence (which is included in the Eleventh Circuit pattern instruction although not prominent enough to make any real impression), and the concept of not thinking of the defendants as a group. The latter point – “Do not think of the defendants as a group” – is also included in Fifth Circuit Pattern Instruction 1.01. It is important and should be included even if the Court declines to give the remainder of the instruction.

PROPOSED JURY INSTRUCTION #E-2
DIRECT AND CIRCUMSTANTIAL EVIDENCE

Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find or infer another fact. You may consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Authority and Explanation: From First Circuit Pattern Instruction 1.05. While the concept of direct and circumstantial evidence is treated in Eleventh Circuit Pattern Instruction (Basic) #4, this adds the important point that while the law *permits* a jury to give equal weight to both types, the law does not *instruct* that the jury *should* do so. The Eleventh Circuit instruction is wrong in this regard in saying “You shouldn’t be concerned about whether the evidence is direct or circumstantial,” because the jury certainly *can* be concerned about that, especially in regard to particular evidence, if the jury believes that such concern is appropriate.

PROPOSED JURY INSTRUCTION #E-3
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 and Explanation: While we do not yet know whether this instruction will be needed, it is drawn from First Circuit Pattern Instruction 2.12

PROPOSED JURY INSTRUCTION #E-4
SPOILIATION

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 and Explanation: This instruction may become appropriate. It is drawn from First Circuit Pattern Instruction 2.13.

PROPOSED JURY INSTRUCTION #E-5
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 and Explanation: This instruction is particularly appropriate in a long trial, to counteract the tendency to think that a long presentation of evidence is more impressive than a short one. The first paragraph is drawn from First Circuit Pattern Instruction 3.06, and the second from Fifth Circuit Pattern Instruction 1.08.

PROPOSED JURY INSTRUCTION #E-6
INDICTMENT NOT EVIDENCE (TO BE GIVEN AT END OF TRIAL, IF JURY
RECEIVES COPY OF INDICTMENT)

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 [defendant] has had an indictment filed against [him/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.

Authority and Explanation: 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.

PROPOSED JURY INSTRUCTION #E-7
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 and Explanation: Fifth Circuit Pattern Instruction No. 1.19

PROPOSED JURY INSTRUCTION #E-8
SUMMARIES AND CHARTS

Certain charts and summaries have been shown to you solely to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case.

These charts and summaries are not evidence or proof of any facts. You should determine the facts from the evidence.

Authority and Explanation: This may be appropriate depending on whether and how charts and/or summaries are used. It is from Fifth Circuit Pattern Instruction No. 1.43. If charts/summaries are allowed into evidence, Fifth Circuit Pattern Instruction No. 1.44 should be used (“Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.”).

PROPOSED JURY INSTRUCTION #E-9
RIGHT NOT TO TESTIFY

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.

Authority and Explanation: First Circuit Pattern Instruction 3.03

PROPOSED JURY INSTRUCTION #E-10
WITNESS WHO TESTIFIES FALSELY

If you find that any witness has willfully testified falsely as to any material matter either before this Court or under oath elsewhere, you have the right to reject the testimony of that witness in its entirety.

Authority and Explanation: Black's Law Dictionary 491 (7th ed.1999) (describing maxim of *falsus in uno, falsus in omnibus* as "[t]he principle that if the jury believes that a witness's testimony on a material issue is intentionally deceitful, the jury may disregard all of that witness's testimony"); see also Kevin F. O'Malley et al., Federal Jury Practice and Instructions § 15.06 (5th ed. 2000) (spelling out time-honored jury instruction that "[i]f a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters"); Edward J. Devitt et al., Federal Jury Practice and Instructions § 73.04 (4th ed. 1987) (spelling out similar jury instruction that "[i]f a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves").

PROPOSED JURY INSTRUCTION #E-11
JURY'S TASK AND PUBLIC REACTION

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.

Authority and Explanation: 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 (6th 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 (11th 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.

PROPOSED JURY INSTRUCTION #E-12
CHARACTER EVIDENCE

Milton McGregor presented evidence to show that he enjoys a reputation for honesty and integrity.

Such evidence may indicate to you that it is improbable that a person of such character would commit the crimes charged, and, therefore, cause you to have a reasonable doubt as to his guilt.

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

You should consider the evidence of Mr. McGregor's good character along with all the other evidence in the case and give it such weight as you believe it deserves. If, when considered with all the other evidence presented during this trial, the evidence of Mr. McGregor's good character creates a reasonable doubt in your mind as to his guilt, you should find him not guilty.

You may conclude that the evidence of Mr. McGregor's good character is enough, in itself, to cause you to have reasonable doubt.

Authority and Explanation: It is appropriate in this case to give the jury a better explanation of the relevance and potential effect of character evidence in this case, than in many other cases, because the evidence will have more direct relevance in this case than in many cases. That is, in this case the elements of the charged offenses include concepts such as “corruptly,” “intent to defraud,” conspiratorial agreement, and other things requiring proof beyond a reasonable doubt of a criminal state of mind. So the relevance of character evidence in this case goes beyond the ordinary inference “it is unlikely that a person of such good character would have engaged in the conduct that is alleged,” and includes also “it is unlikely that a person of such good character would have had the criminal state of mind upon which the Government’s case depends.”

The Eleventh Circuit pattern instruction is therefore inadequate, standing alone in this case, because it does not give the jury any understanding of how or why the character evidence might be useful in this case.

This proposed instruction is derived from parts of First Circuit Pattern Instruction 2.19 (“[Defendant] presented evidence to show that [he/she] enjoys a reputation for honesty, truthfulness and integrity in [his/her] community. Such evidence may indicate to you that it is improbable that a person of such character would commit the crime[s] charged, and, therefore, cause you to have a reasonable doubt as to [his/her] guilt. You should consider any evidence of [defendant]’s good character along with all the other evidence in the case and give it such weight as you believe it deserves. If, when considered with all the other evidence presented during this trial, the evidence of [defendant]’s good character creates a reasonable doubt in your mind as to [his/her] guilt, you should find [him/her] not guilty.”) and Fifth Circuit Pattern Instruction 1.09 (“Evidence of a defendant’s reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.”).

If the Court will not include both the second and third paragraphs, Mr. McGregor requests each separately.

The final paragraph is supported by *United States v. Thomas*, 676 F.2d 531, 536 (5th Cir. 1982) (recognizing that “[a]s Thomas’s requested instruction indicated, evidence of good character should be considered together with all the other evidence in a case and may of itself give rise to a reasonable doubt.”) (emphasis supplied). This requested paragraph does not ask the jury to consider the evidence “standing alone” (a type of requested instruction that is often denied), but (in conjunction with the other paragraphs) informs the jury that while it should consider all the evidence it may find the character evidence to be enough in this regard. This point, which is correct under *Thomas*, would be lost on the jury if this requested paragraph is not given.