

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA

PLAINTIFF

v.

Electronically Filed
CRIMINAL NO. 3:08CR-119-S

THOMAS SCHROEDER

DEFENDANT

UNITED STATES' PRETRIAL MEMORANDUM

_____ The United States submits the following Pretrial Memorandum in the above-styled criminal case.

I. Statute Involved and Elements of the Offense

Defendant Thomas Schroeder is charged in Count 1 of the Superseding Indictment with mail fraud, in violation of Title 18, United States Code, Section 1341. To establish a Title 18, Section 1341 offense, the government must prove the following elements beyond a reasonable doubt:

1. The defendant knowingly participated in and devised or intended to devise a scheme to defraud in order to obtain money or property;
2. The scheme included a material misrepresentation or concealment of a material fact;
3. The defendant had the intent to defraud; and
4. The defendant used the mail or caused another to use the mail in furtherance of the scheme.

Defendant Thomas Schroeder is charged in Count 2 of the Superseding Indictment with mail fraud, in violation of Title 18, United States Code, Section 1956(h). To establish a Title 18,

Section 1956(h) offense, the government must prove the following elements beyond a reasonable doubt:

1. That two or more persons conspired, or agreed, to commit the offense of laundering of a monetary instrument or of engaging in a monetary transaction in property derived from a specified unlawful activity, and
2. That the defendant knowingly and voluntarily joined the conspiracy.

Defendant Thomas Schroeder is charged in Count 3 of the Superseding Indictment with mail fraud, in violation of Title 18, United States Code, Section 371. To establish a Title 18, Section 371 offense, the government must prove the following elements beyond a reasonable doubt:

1. An agreement to defraud the United States and the Internal Revenue Service;
2. Knowing and voluntary participation; and
3. An overt act done by one or more conspirators in furtherance of the plan.

II. Statement of Facts

Counts 1 through 3 of the Superseding Indictment allege that Schroeder and Felner used a sham entity, the National Center on Public Education and Prevention (NCPEp), to execute a scheme to defraud and to conspire to do the same. Count 1 charges that they executed a scheme using NCPEp to defraud the National Center on Public Education and Social Policy, a division of URI, (NCPE-URI), the Rock Island County Council on Addiction (RICCA), and the University of Louisville (UofL). Count 2 charges they conspired to use NCPEp to launder the proceeds of the fraud charged in Count 1. Count 3 charges that they conspired to defraud the Internal Revenue Service through, among other means, the use of NCPEp.

In summary, the Superseding Indictment charges that from 2001 through 2008 Felner and Schroeder used NCPEp to commit a continuous fraud against NCPE-URI, RICCA, and UofL.

The general conspiracy involved each of the three victims is as follows:

1. From July 2001 through September 2007 Schroeder and Felner fraudulently used NCPEp to divert funds from NCPE-URI that were intended as payment for work actually completed by NCPE-URI. They diverted funds from three school districts, Santa Monica, Buffalo, and Atlanta, that were intended as payment for work completed by NCPE-URI. They used NCPEp to invoice the three school districts and deposited payments into NCPEp bank accounts. The school districts believed they were paying NCPE-URI. The scheme began while Felner was a dean at URI.
2. From June 2004 through June 2008 Schroeder and Felner fraudulently used NCPEp to invoice RICCA for work allegedly completed by NCPEp and Felner. The invoiced work was never completed and the RICCA payments were deposited into the NCPEp A.B.&T. bank account in Rock Island, Illinois, controlled by Schroeder. Schroeder was the executive director of RICCA at all times during this period.
3. In 2007 and 2008 Schroeder and Felner fraudulently used NCPEp to invoice UofL for work allegedly completed by NCPEp and Schroeder. The invoiced work was never completed and the UofL deposited payments were deposited into NCPEp bank accounts. The scheme began while Felner was a dean at UofL.

In all instances, NCPEp was invoicing the three school districts, RICCA, and UofL for work it did not complete. The only distinction was that Schroeder, on behalf of NCPEp, personally invoiced the three school districts and UofL, whereas Felner, on behalf of NCPEp, personally invoiced RICCA. The money from all three victims was laundered through NCPEp bank accounts controlled by Schroeder and/or Felner. RICCA was not aware of Schroeder's involvement with NCPEp. Similarly, NCPE-URI and UofL were not aware of Felner's involvement with NCPEp.

From its inception NCPEp was deliberately created as a subterfuge and from 2001 through 2008 NCPEp did no work. Instead, NCPEp was used exclusively to launder money stolen from URI, RICCA, and UofL. Schroeder's fingerprints were all over NCPEp from the beginning in 2001 through the execution of a federal search warrant in 2008. For example, on June 5, 2001, Schroeder submitted an application on behalf of the NCPEp for an employer identification number. Despite this, NCPEp never filed a tax return, even though more than \$2,000,000 passed through NCPEp bank accounts from 2001 through 2008. On October 17, 2001, NCPEp was incorporated in the State of Illinois. Schroeder signed as the incorporator of this "General-Not-For-Profit" corporation. In or about May 2001, Schroeder created an Executive Consulting Agreement with NCPEp to pay himself \$3,000 a month, initially covering the period from May 1, 2001, through April 30, 2002. On July 24, 2001, Schroeder, as executive director of NCPEp, signed a Royalty Agreement with Robert Felner for \$97,000. On March 1, 2006, the State of Illinois involuntarily dissolved NCPEp for failure to file annual reports. However, from that date until June 2008 Schroeder and Felner continued to actively use NCPEp bank accounts to deposit checks from the three school districts, RICCA, and UofL.

Evidence will be presented at trial that NCPEp never performed work for RICCA or UofL and that it was used to divert funds intended for NCPE-URI. In addition, evidence will be presented that Schroeder continuously received approximately \$3,000 per month from an NCPEp bank account during this period for an "executive director fee." In a May 27, 2008, email from Felner to Schroeder, Felner acknowledged that he was aware that Schroeder received his executive director fee for the last five years and he requested that Schroeder file some documents with the I.R.S. or the payments will stop. Evidence will be presented that Schroeder assisted Felner to defraud NCPE-URI and UofL and that Felner assisted Schroeder to defraud RICCA. It appears each assisted the other in committing a fraud and their payment was the other's assistance. Central to their scheme to defraud at all times, however, was Schroeder and Felner's continuous use of the bogus entity NCPEp to legitimize the fraud and to launder the proceeds of the fraud.

On July 17, 2001, NCPEp opened a bank account at American Bank & Trust ("NCPEp-AB&T") in Rock Island, Illinois. Schroeder was the sole signatory on the account. On June 28, 2002, Schroeder signed a new account form and opened a new account for NCPEp at Citizens Bank ("NCPEp-Citizens") in Rhode Island. On the next day, Robert Felner signed the new account form. Included in the new account form was a notarized NCPEp resolution showing Robert Felner as the Board Chair of NCPEp. The resolution was signed by Schroeder. On February 12, 2004, Robert Felner opened a business bank account in the name of NCPEp at Branch Banking and Trust ("NCPEp-BB&T Business") in Louisville, Kentucky. Felner was listed as the sole signatory on the account. The account application stated NCPEp was established on June 1, 1995, and that Felner was a "certifying officer" of the corporation. On or

about November 22, 2004, Felner opened an investment account at Branch Banking and Trust in the name of NCPEp ("NCPEp-BB&T Investment"). Felner opened the account as the executive director and as an officer of NCPEp. This account was linked to NCPEp-BB&T Business account and was used solely as a personal investment account by Felner.

An analysis of the NCPEp account records reveals that \$2,250,097 was deposited into NCPEp bank accounts from 2001 through 2008. The sole sources of the deposits were funds from the three school districts, RICCA, and UofL. Approximately \$296,935, all from the NCPEp-AB&T account, was disbursed for the benefit of Schroeder. The majority of these disbursements were recorded as "executive director fees." Approximately \$2,000,000, from all NCPEp accounts, was disbursed for the benefit of Felner. An analysis of the NCPEp bank accounts revealed nominal possible expenses, approximately \$15,000, being paid from 2001 through 2008 for possible operating expenses. Instead, the investigation determined that the NCPEp bank accounts were used to deposit, distribute, and launder the proceeds stolen from NCPE-URI, RICCA, and UofL.

With regard to the NCPEp-AB&T account used and controlled exclusively by Schroeder, from 2001 through 2008 approximately \$1,093,097 was deposited into the NCPEp-AB&T account by Schroeder. During this same period \$1,097,124 was disbursed from this account. Of these disbursements, Schroeder received approximately \$296,935. Approximately \$15,000 was paid to Schroeder's attorney, his accountant, and for pay bank fees. Schroeder and Felner received the remaining proceeds. The payments to Felner were in the form of payments directly to him, transfers to other NCPEp accounts, or payments to acquaintances of Felner. The account,

as was the case with all other NCPEp bank accounts, contained no evidence of an ongoing business.

The investigation, as charged in the Superseding Indictment, determined that the funds from the Buffalo, Atlanta, and Santa Monica school districts were diverted from NCPE-URI for work completed by NCPE-URI. The investigation determined that the funds from RICCA were payments for bogus NCPEp invoices that Schroeder and Felner caused to be submitted to RICCA. The investigation determined that funds from UofL were in payment for bogus NCPEp invoices Schroeder and Felner caused to be submitted to UofL. Each maintained a specific role in the overall scheme, which changed over time. Because Felner was dean at NCPE-URI and UofL Schroeder submitted the bogus NCPEp invoices for work he and NCPEp allegedly performed. As the dean, or former dean, Felner facilitated the fraud from his internal position. Their roles reversed with regard to RICCA because Schroeder was the executive director. Felner submitted bogus NCPEp invoices to RICCA for work he allegedly completed.¹

From 2001 through 2008 Schroeder received an “executive director fee” every month from the NCPEp-AB&T account. Initially, the source of the funds from June 2001 through May 2004 was payments from the three school districts intended for NCPE-URI. After May 2004 the sole source of deposits, other than a \$5,000 transfer in July 2004 from the NCPEp-Citizens account, was RICCA payments. From May 2004 forward, the investigation, however,

¹Although RICCA checks were made to Felner, it appears Schroeder forged Felner’s signature because the checks were deposited in the NCPEp-AB&T account in Rock Island, Illinois. In addition, a search of Schroeder’s RICCA computer following his resignation revealed that he may have created some of the invoices.

determined that Schroeder continued to assist Felner to defraud NCPE-URI and UofL and that Felner continued to assist Schroeder to defraud RICCA.

In addition, to the money Schroeder and Felner fraudulently obtained from RICCA, Schroeder was also on the payroll at both the URI and later UofL. Evidence will be presented that Felner placed Schroeder on the payroll at URI and UofL while he Felner was working at both institutions. Schroeder, however, produced no work at either URI or UofL. More particularly, evidence will also be presented that from 1997-2001 Felner caused Schroeder to be paid approximately \$53,550 from URI and that Schroeder performed no services in exchange for these payments. In addition, evidence will be presented that Felner caused UofL to make payments totaling \$84,658 from 2005 through 2008. Again evidence will be presented that Schroeder performed no work for UofL.

III. Substantive Issues of Law

None anticipated at this time.

IV. Evidentiary Issues

None anticipated at this time.

V. Other Trial Problems

None anticipate at this time.

VI. Proposed Voir Dire Questions

1. Have you, your spouse, your close friends or your relatives ever worked in law enforcement? If so, please specify who, when, where and in what capacity.
2. Any member of your family, or any close friend, an official or employee of the United States government? If yes, please explain.

3. Have you, a relative, friend or spouse ever been the subject of a criminal investigation?
4. Have any of you ever served on a jury before?
 - a. Federal Court
 - 1) Civil; or
 - 2) Criminal.
 - b. State Court
 - 1) Civil; or
 - 2) Criminal.
 - c. Were you able to reach a verdict in the case? If so, please state what the verdict was.
5. Has anything ever happened to you while serving as a juror prior to this case that would make it difficult for you now to serve as a fair and impartial juror?
6. Have any of you ever been a witness in a criminal case, either for the government or the defendant?
7. Have any of you ever had any claim or lawsuit or any other type of litigation against or with the United States, one of its agencies, or local law enforcement? I am speaking now of a lawsuit or some type of administrative proceeding. The agency could be the United States Postal Inspection Service, the Veterans Administration, the Federal Bureau of Investigation, or the Department of Health and Human Services? If so, please explain.
8. Are any of you suffering from a physical disability, especially one involving hearing, which would make it difficult for you to serve as an alert juror during the trial of this case?

9. Have any of you, your spouses, your close friends or your relatives ever been the victim of a crime?
 - a. If so, what?
 - b. Would that experience make it difficult for you to render a fair and impartial verdict in this case?
10. Have any of you ever been charged with a criminal offense? If so, do you feel you were treated fairly? What was the charge?
11. Have any of you or your immediate family ever been in any other trouble with the law?
 - a. If so, what type of trouble?
 - b. What was the outcome?
 - c. What was your reaction to this?
 - d. Did this affect your opinion of the criminal justice system? If so, how?
12. Have any of you ever had an unpleasant experience with the criminal justice system either as a victim, a defendant, or a witness?
 - a. If so, what type of experience?
 - b. Did this affect your opinion of the criminal justice system? If so, how?
13. The Court will give you instructions on the law at the conclusion of all the evidence and the argument of counsel as the law applies to the facts of this case. Will you abide by these instructions on the law and apply the law to the facts?
14. If one or more of the instructions on the law given to you by the Court are in conflict with your own personal beliefs, or if you disagree with any one of the Judge's instructions, will

you still abide by the Court's instructions on the law and put your own personal beliefs aside?

15. Do any of you feel that it is wrong for you to sit in judgment of another person? In other words, do you feel that you could not sit in judgment of these facts and vote to return a verdict of guilty regardless of the proof in the case?
16. Have you or anyone close to you ever received any legal training, practiced law, or worked in an attorney's office?
17. Do any of you have events going on in your lives that would distract your attention from the testimony and evidence of this case?
18. Is any member of the jury panel currently employed in a job requiring any type of bookkeeping, accounting, or accounts payable, payroll work? If not currently employed in such a position, has anyone been so employed at anytime in the past?
19. Any member of the panel ever been audited by the IRS, either concerning an individual or joint tax return filed with the IRS?
20. Any member of the panel ever been audited by the IRS, either concerning an business tax return filed with the IRS?
21. Any member of the panel harbor such ill feelings regarding the IRS or payment of federal or state income taxes that it would be difficult for them to hear the evidence in this case and render a fair verdict for either side?
22. No one enjoys paying taxes. Notwithstanding that fact, is there anyone on the panel who has had a bad experience in recent years with the Internal Revenue Service?

23. The Internal Revenue Service has, during recent years, received a considerable amount of public scrutiny. Does any member of the panel, as a result of information which has been publicized in newspapers accounts or broadcast over news programs, or for any other reason, hold such negative feelings about the IRS that it may prevent him or her from being fair minded in this matter?
24. Is there any member of the panel who personally believes or advocates that people do not have to pay federal income taxes and should refuse to pay such taxes?
25. Do you understand that in federal courts, punishment, if any, is imposed by the Court and that your verdict must in no way be affected by your concern for what punishment, if any, would be proper?
26. Do you understand that the duty of the United States is to prove guilty to the exclusion of reasonable doubt, but that is not required to prove guilty beyond all reasonable doubt?
27. Do you understand that a defendant on trial is entitled to a presumption of innocence, but as with all presumptions, it may be overcome with competent evidence?

VII. Proposed Jury Instructions

Attached and included with this Pretrial Memorandum are proposed jury instructions for use in this case.

Respectfully submitted,

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/s/ Bryan Calhoun
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by electronic transmission through the Court's ECF system on this 19th day of July, 2010, to counsel for defendant.

/s/ Bryan Calhoun
Bryan Calhoun
Robert Kilmartin
Assistant United States Attorneys

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DEFENDANT

PROPOSED JURY INSTRUCTIONS

Comes now the United States by and through the undersigned Assistant United States Attorneys, and requests that the following jury instructions be given in this case:

Proposed Instruction Number 1

Statute Defining Offense - 18 U.S.C. § 1341

Section 1341 of Title 18 of the United States Code provides, in part, that: If someone devises or intends to devise a scheme or artifice to defraud someone of money and property by means of false or fraudulent pretenses or representations and for the purpose of executing the scheme and causes any matter to be delivered by the Postal Service then an offense against the United States has been committed.

Proposed Instruction Number 2

Essential Elements of Offense - 18 U.S.C. § 1341

In order to sustain its burden of proof for the crime of mail fraud as charged in Count 1 of the Superseding Indictment, the government must prove the following four essential elements beyond a reasonable doubt:

First: That the defendant knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property as described in Count 1 the Indictment;

Second: That the scheme included a material misrepresentation or concealment of a material fact;

Third: That the defendant had the intent to defraud; and

Fourth: That the defendant used the mail or caused another to use the mail in furtherance of the scheme.

Now I will give you more detailed instructions on some of these terms.

A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

The term "false or fraudulent pretenses, representations or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself or to another person.

To "cause" the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

It is not necessary that the government prove all of the details alleged concerning the precise nature and purpose of the scheme, that the material transmitted by mail was itself false or fraudulent, that the alleged scheme actually succeeded in defrauding anyone, that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud, or that someone relied on the misrepresentation or false statement.

Authority

Pattern Jury Instructions, Sixth Circuit, 2009 Edition, Number 10.01.

Proposed Instruction Number 3

Statute Defining Offense - 18 U.S.C. § 1956(h)

Section 1956(h) of Title 18 of the United States Code provides, in part, that:

If two or more people conspire to commit an offense in violation of 18 U.S.C. § 1956, laundering of a money instrument, or 18 U.S.C. § 1957, engaging in an unlawful monetary transaction in property derived from a specified unlawful activity, then an offense against the United States has been committed.

Proposed Instruction Number 4

Essential Elements of Offense - 18 U.S.C. § 1956(h)

In order to sustain its burden of proof for the crime of money laundering conspiracy as charged in Count 2 of the Superseding Indictment, the government must prove the following two essential elements beyond a reasonable doubt:

First: That two or more persons conspired, or agreed, to commit the offense of laundering of a monetary instrument or of engaging in a monetary transaction in property derived from a specified unlawful activity, and

Second: That the defendant knowingly and voluntarily joined the conspiracy.

Authority

Pattern Jury Instructions, Sixth Circuit, 2009 Edition, Number 3.01A (Instruction partially modified from general conspiracy instruction).

Proposed Instruction Number 5

Substantive Offense - 18 U.S.C. § 1956 - money laundering

One of the objects of the conspiracy charged in Count 2 is the crime of money laundering in violation of 18 U.S.C. § 1956. While the government does not have to prove all the elements of money laundering, the elements are as follows:

First: That the defendant conducted or attempted to conduct a financial transaction;

Second: That the financial transaction involved property that represented the proceeds of illegal gambling;

Third: That the defendant knew that the property involved in the financial transaction represented the proceeds from some form of unlawful activity.

Fourth: That the defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, location, source,, ownership, control of the proceeds of illegal gambling or with the intent to evade and defeat part of the income tax due and owing by them to the United States.

Now I will give you more detailed instructions on some of these terms.

The term "financial transaction" means a transaction involving the use of a financial institution which is engaged in, or the activities or which affect, interstate or foreign commerce in way or degree.

The term "financial institution" means an insured bank or any credit union. The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

The word "proceeds" includes what is produced by or derived from unlawful activity.

The phrase "knew that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew the funds involved in the transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under state or federal law. The government does not have to prove the defendant knew the property involved represented proceeds of a felony as long as he knew the property involved represented proceeds of some form of unlawful activity.

Authority

Pattern Jury Instructions, Sixth Circuit, 2009 Edition, Number 11.02.

Proposed Instruction Number 6

Substantive Offense - 18 U.S.C. § 1957 - unlawful monetary transaction

One of the objects of the conspiracy charged in Count 2 is engaging in an unlawful monetary transaction in violation of 18 U.S.C. § 1957. While the government does not have to prove all the elements of money laundering, the elements are as follows:

First: The defendant engaged or attempted to engage in a monetary transaction;

Second: That defendant knew the transaction involved criminally derived property;

Third: The property had a value greater than \$10,000;

Fourth: The property was derived from mail fraud; and

Fifth: The transaction occurred in the United States.

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

The term "monetary transaction" means the deposit, withdrawal, transfer or exchange, in or affecting interstate commerce, of funds or a monetary instrument, by, through, or to a financial institution.

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state.

The term "financial institution" includes commercial banks, trust companies, businesses engaged in vehicle sales including automobile sales, and businesses and persons engaged in real estate closings or settlements.

Authority

Pattern Jury Instructions, Seventh Circuit.

Proposed Instruction Number 7

Statute Defining Offense - 18 U.S.C. § 371

Section 371 of Title 18 of the United States Code provides, in part, that: If two or more persons conspire to defraud the United States, or any agency thereof, and one or more of such persons do any act to effect the object of the conspiracy then an offense against the United States has been committed.

Proposed Instruction Number 8

Essential Elements of Offense - 18 U.S.C. § 371

In order to sustain its burden of proof for the crime of conspiracy to defraud the United States as charged in Count 3 of the Superseding Indictment, the government must prove the following three essential elements beyond a reasonable doubt:

First: The conspiracy, agreement, or understanding to defraud the United States, as described in the Indictment, was formed, reached, or entered into by two or more persons;

Second: At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in Count 3 of the Indictment in order to further or advance the purpose of the agreement; and

Third: At some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement, or understanding.

Authority

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions*, (4th Edition 1990), Section 28.0;3 *United States v. Falcone*, 311 U.S. 205, 210 (1940) *United States v. O'Campo*, 973 F.2d 1015, 1021 (1st Cir. 1992); *United States v. Wiley*, 846 F.2d 150, 153-54 (2nd Cir. 1988); *United States v. Rankin*, 870 F.2d 109, 113 (3d Cir.), cert. Denied, 493 U.S. 840 (1989); *United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987); *United States v. Yamin*, 868 F.2d 130, 133 (5th Cir.), cert. denied, 492 U.S. 924 (1989); *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973) *United States v. Mealy*, 851 F.2d 890, 896 (7th Cir. 1988); *United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987), cert. denied, 486

F.2d 1006 (1988); *United States v. Penagos*, 823 F.2d 346, 348 (9th Cir. 1987); *United States v. Gonzalez*, 797 F.2d 915, 916 (10th Cir. 1986); *United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986); *United States v. Treadwell*, 760 F.2d 327, 333 (D.C. Cir. 1985), cert. denied, 474 U.S. 1064 (1986).

Proposed Instruction Number 9

Conspiracy – Existence of an Agreement

A criminal conspiracy as charged in Counts 2 and 3 of the Superseding Indictment is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. To prove that a conspiracy existed, moreover, the government is not required to show that all of the people named in the indictment as members of the conspiracy were, in fact, parties to the agreement, or that all of the members of the alleged conspiracy were named or charged, or that all of the people whom the evidence shows were actually members of a conspiracy agreed to all of the means or methods set out in the indictment.

The government must prove that a defendant and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would defraud the United States by means of some common plan or course of action as alleged in Count 1 of the Indictment. It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy. Unless the government proves beyond a reasonable doubt that a conspiracy, as just explained, actually existed, then you must acquit the defendant.

Authority

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 28.04; *United States v. Falcone*, 311 U.S. 205, 210 (1940); *United States v. Labat*, 905 F.2d 18, 21 (2d Cir. 1990); *United States v. DePew*, 932 F.2d 324, 328 (4th Cir.), cert. denied, 112 S. Ct. 210 (1991); *United States v. Nicoll*, 664 F.2d 1308, 1315 (5th Cir.), cert. denied, 457 U.S. 1118 (1982); *United States v. Hopkins*, 916 F.2d 207, 212 (5th Cir. 1990); *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991); *United States v. Schultz*, 855 F.2d 1217, 1221 (6th Cir. 1988); *United States v. McNeese*, 901 F.2d 585, 599 (7th Cir. 1990); *United States v. Kibby*, 848 F.2d 920, 922 (8th Cir. 1988); *United States v. Powell*, 853 F.2d 601, 604 (8th Cir. 1988); *United States v. Boone*, 951 F.2d 1526, 1543 (9th Cir. 1992); *United States v. Gonzalez*, 940 F.2d 1413, 1417 (11th Cir. 1991), cert. denied, 112 S. Ct. 910 (1992).

Proposed Instruction Number 10

Before the jury may find the defendant became a member of the conspiracy charged in Counts 2 and 3 of the Superseding Indictment, the evidence must show beyond a reasonable doubt that the defendant the purpose or goal of the agreement or understanding and that he deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action.

If the evidence establishes beyond a reasonable doubt that the defendant, as charged in Count 2 of the Superseding Indictment, knowingly and deliberately entered into an agreement to launder money or engage in a monetary transaction in property derived from a specified unlawful activity or, as charged in Count 3 of the Superseding Indictment, knowingly and deliberately entered into an agreement to defraud the United States by impeding and impairing the IRS in its lawful responsibility of accessing and collecting proper federal income taxes due and owing from a taxpayer, the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding the defendant's membership in the conspiracy.

Merely associating with others and discussing common goals, or merely being present at the place where a crimes takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.

Authority

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed., 1990) Section 28.05.

Proposed Instruction Number 11

"Overt Act" - Defined Success of Conspiracy Immaterial

In order to sustain its burden of proof on Count 3 of the Superseding Indictment, the government must prove beyond a reasonable doubt that one of the members of the conspiracy or parties to the agreement knowingly performed at least one overt act and that this overt act was performed during the existence of the life of the conspiracy and was done to somehow further the goal of the conspiracy or agreement. The government is not required to prove an overt act for Count 2 of the Superseding Indictment.

The term "overt act" means some type of outward, objective action performed by one of the parties to the agreement or one of the members of the conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

The government is not required to prove that the parties to the agreement or members of the conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

Authority

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Sections 28.07, 28.08; *United States v. Yates*, 354 U.S. 298, 334 (1957); *United States v. Arboleda*, 929 F.2d 858, 865 (1st Cir. 1991); *United States v. Anderson*, 611 F.2d 504, 510 (4th Cir. 1979); *United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985);

United States v. Hermes, 847 F.2d 493, 495 (8th Cir. 1988); *United States v. Zielie*, 734 F.2d 1447, 1456 (11th Cir. 1984), cert. denied, 469 U.S. 1216 (1985).

Proposed Instruction Number 12

Overt Act During Period of Conspiracy

The government must also establish beyond reasonable doubt that at least one of the overt acts as alleged in Count 3 of the Superseding Indictment occurred while the conspiracy was still in existence. Again, the government is not required to prove an overt act for Count 2 of the Superseding Indictment.

Authority

Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 27.09; *United States v. Arboleda*, 929 F.2d 858, 865 (1st Cir. 1991); *United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985); *United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979); *United States v. Yates*, 354 U.S. 298, 334 (1957).

Proposed Instruction Number 13

Separately tried co-conspirators

Now, some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

Authority

Pattern Jury Instructions, Sixth Circuit, 3.06.

Proposed Instruction No. 14

Summary Exhibits

Certain exhibits variously referred to as schedules or summaries have been admitted into evidence. Strictly speaking, these exhibits are not actual evidence, but are admitted as summaries of other evidence in the case and are admitted only for your assistance and convenience in considering other evidence which they purport to summarize.

In other words, the summaries are used only as a matter of convenience. These summaries have no independent value, and you should consider them only insofar as you have concluded that they accurately reflect the documents and testimony introduced into evidence. If you find that the summaries do not accurately reflect the evidence in this case, you should disregard them entirely.

Authority:

Rule 1006, Federal Rules of Evidence

United States v. Scales, 594 F.2d 558, 562-64 (6th Cir. 1979).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by electronic transmission through the Court's ECF's system on this 19th day of July, 2010 to David Mejia, counsel for Thomas Schroeder.

/s/ Bryan Calhoun

Bryan Calhoun
Robert Kilmartin
Assistant United States Attorneys