

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

THERESA A. WINGER,

Defendant.

---

PRETRIAL MOTION  
HEARING ORDER

06-CR-184-C

This court held the pretrial motion hearing on January 18, 2007. Defendant Theresa Winger was present with her attorney, Corey Chirafisi. The government was represented by Assistant United States Attorney Grant Johnson.

During the hearing, I granted Attorney Alexander M. Salerno's motion for admission pro hac vice so that he could take over representation of Winger in this case. Then I excused Attorney Chirafisi from representing Winger. Attorney Salerno acknowledged that he is not seeking any continuances and is prepared to go forward on the existing schedule. Winger, through Attorney Salerno, withdrew the motion to suppress (dkt. 13) which everyone acknowledges was filed simply as a placeholder while the attorney situation was worked out. After taking a brief discovery proffer from the government, I denied as unnecessary the motions docketed as 10-11, and granted the motion docketed as 12.

The parties had no other matters to bring to the court's attention. I have attached draft voir dire questions, jury instructions and a verdict form to this order for the parties'

consideration when preparing the submissions for the final pretrial conference.

Entered this 18<sup>th</sup> day of January, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge

Voir dire: United States v. Winger, 06-CR-184-C

Statement of the case: This is a criminal case, in which the defendant, Theresa Winger, is charged with defrauding the Countrywide Bank in Simi, California by allegedly submitting false documents in support of mortgage loans. She also is charged with unlawfully using credit cards to obtain items of value. The defendant has entered a plea of not guilty to these charges.

- i. Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?
- ii. Scheduling: this case will begin today and will conclude by Wednesday. Are any of you actually unable to sit as jurors because of this schedule?
- iii. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?
- iv. The court reads Federal Criminal Jury Instructions of the Seventh Circuit:

Presumption of Innocence. The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The fact that the defendant has been charged with crimes is not evidence against her and it does not create any inference of guilt.

Burden of Proof. The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove her innocence or to produce any evidence.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

- v. Ask counsel to introduce themselves, the defendant, and the case agent. Ask whether jurors know them.

- vi. Invite each juror, in turn, to rise, and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you listen regularly to talk radio and if so, to which programs.

- vii. Do any of you in the jury box know each other from before today?
- viii. Have any of you, your family or close friends ever held any sort of account in any branch of Countrywide Bank in California or elsewhere? Have you ever been employed by this bank, owned stock in this bank, or had any other dealings with this bank? Would this affect your ability to be impartial in this case?
- ix. Have any of you, your family or close friends ever been the victim, or believe that you have been the victim, of any actual or attempted misuse of your credit or debit cards, or your card numbers? Would this affect your ability to be impartial in this case?
- x. Have any of you, your family or close friends ever been the victim, or believe that you have been the victim, of any fraud or swindle, or

attempted fraud or swindle involving a property mortgage? Would this affect your ability to be impartial in this case?

- xi. Have any of you, your family or close friends ever been the victim, or believe that you have been the victim, of any other type of fraud or swindle, or attempted fraud or swindle? Would this affect your ability to be impartial in this case?
- xii. Do any of you, by virtue of past dealings with the United States government, or for any reason, have any bias for or against the government in a criminal case?
- xiii. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?
- xiv. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement, investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?
- xv. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?
- xvi. If the defendant were to choose to testify, would any of you judge the defendant's credibility differently from other witnesses solely because it was the defendant who was testifying?
- xvii. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?
- xviii. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?
- xix. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?
- xx. Have any of you, your relatives, or close friends ever had any negative

experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

- xxi. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.
- xxii. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?
- xxiii. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?
- xxiv. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?
- xxv. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

THERESA A. WINGER,

Defendant.

---

JURY INSTRUCTIONS

06-CR-184-C

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow my instructions on the law, even if you disagree with them. Each of the instructions is important. You must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. Do not allow any person's race, color, religion, national ancestry or sex to influence you.

Nothing I say now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts that may be regarded as matters of

common knowledge. You may accept those facts as proved, but you are not required to do so.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider among other things: the witness's age; the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

You should judge the defendant's testimony in the same way that you judge the testimony of any other witness.

You should use common sense in weighing the evidence. Consider the evidence in light of your own observations in life. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

Some of you have heard the phrases "circumstantial evidence" and "direct evidence." Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts that tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. You should consider all the evidence in the case, including the circumstantial evidence, in reaching your verdict.



Certain things are not evidence. I will list them for you:

First, testimony and exhibits that I struck from the record or that I told you to disregard are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and must not influence your verdict.

Third, questions and objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your collective memory is what counts.

It is proper for a lawyer to interview any witness in preparation for trial.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

You have received evidence of statements said to be made by the defendant to \_\_\_\_\_ . You must decide whether the defendant made any of the statements attributed to her. If you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant herself, and the circumstances under which the statement was made.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

You have heard evidence of acts of defendant other than those charged in the indictment. Specifically, you have heard evidence that \_\_\_\_\_ . You may consider this evidence only on the question \_\_\_\_\_ . You should consider this evidence only for these limited purposes.

You have heard evidence that \_\_\_\_\_ have been convicted of crimes. You may consider this evidence only in deciding whether the testimony of any of these witnesses is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard evidence about the character trait of \_\_\_\_\_ for untruthfulness. You should consider this evidence in deciding the weight that you will give to their testimony.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

You have heard evidence about a number of the witnesses that may affect your evaluation of their testimony:

\_\_\_\_\_ has admitted lying under oath.

You have heard testimony that \_\_\_\_\_ have

received benefits from the government in connection with this case. Specifically, \_\_\_\_\_.

You have heard testimony from \_\_\_\_\_, who each stated that he or she was involved in the commission of the alleged crimes charged against the defendant.

The witnesses \_\_\_\_\_ have pleaded guilty to crimes arising out of the same allegations for which the defendant is now on trial.

The witness \_\_\_\_\_ has received immunity; that is, a promise from the government that any testimony or other information she provided would not be used against her in a criminal case.

You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care. Moreover, the guilty pleas of witnesses \_\_\_\_\_ cannot be considered as evidence against the defendants on trial now.

Certain summaries are in evidence. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same way as all other evidence in the case.

Certain summaries are in evidence. Their accuracy has been challenged by [the government] [the defendant]. Thus, the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the summaries are accurate.

The witnesses \_\_\_\_\_ gave opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that

such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications and all of the other evidence in the case.

## THE INDICTMENT

The defendant is charged in the indictment as follows:

*[court reads the indictment].*

The indictment in this case is the formal method of accusing the defendant of crimes and placing the defendant on trial. It is not evidence against the defendant and does not create any implication of guilt.

The defendant is not on trial for any act or any conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove her innocence or to produce any evidence at all.

The indictment charges that the offenses were committed "on or about" certain dates. The government must prove that the offenses happened reasonably close to those dates but it is not required to prove that the alleged offenses happened on those exact dates.

## ELEMENTS OF THE CHARGES: BANK FRAUD

The defendant is charged in Counts 1 through 5 with bank fraud. To sustain any of these charges, the government must establish the following elements:

(1) There was a scheme to defraud Countrywide Bank, Simi, California, by means of false representations or statements as charged in the count that you are considering;

(2) The defendant executed this scheme in the manner stated in the count that you are considering;

(3) The defendant did so knowingly and with the intent to defraud; and

(4) At the time of the charged offense the deposits of Countrywide Bank were insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the count that you are considering, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the count that you are considering, then you must find the defendant not guilty of that count.

As used in these instructions, to act “knowingly” means that the defendant realized what she was doing and was aware of the nature of her conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by a defendant's conduct and by all the facts and circumstances surrounding the case.

As used throughout these instructions, the term "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat the victim in order to cause a gain of money to the defendant.

The government is not required to produce direct evidence to establish the defendant's intent. The government may prove the defendant's intent by means of

circumstantial evidence alone. In determining the defendant's intent, you may consider all of his statements, acts and omissions, as well as all other facts and circumstances in evidence that indicate the defendant's state of mind.

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud means a plan or course of action intended to deceive or cheat a person or business and to obtain money or property from that person or business. A scheme to defraud need not involve any false statement or misrepresentations of fact.

In order to prove the existence of a scheme to defraud, the government must prove at least one of the acts charged in paragraphs 3 through 6 of Count 1, which describe the alleged scheme. The government is not required to prove all of the acts charged. However, before you may find that the government has met its burden of proof regarding the existence of a scheme to defraud, you must unanimously agree on at least one such act. It is not enough for some of you to agree that the government has proved one act in furtherance of the fraud scheme and the rest of you to agree that the government has proved a different one. You must all agree on at least one of the charged acts before you may find that the government has proved the existence of the charged scheme.

The bank fraud statute can be violated regardless whether there has been any loss or damage to the bank. Conversely, evidence that a bank lost money, without more, does not show a scheme to defraud.

#### ELEMENTS OF THE CHARGES: COUNTS 6 AND 7

The defendant is charged in Count 6 and in Count 7 with fraudulently using unauthorized access devices. To sustain either of these charge against the defendant, the government must establish these elements beyond a reasonable doubt:

- (1) The defendant knowingly used an unauthorized access device as specified in the

count that you are considering;

(2) This use of an unauthorized access device affected interstate commerce;

(3) This conduct resulted in defendant obtaining goods with a combined value greater than \$1,000; and

(4) The defendant acted with the intent to defraud.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt as to the count that you are considering, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the count that you are considering, then you must find the defendant not guilty of that count.

A credit card is an “access device.”

[*See Committee Comments, 7<sup>th</sup> Cir. Pat. Instr., at 254.*]

A credit card is unauthorized if it has been lost, stolen, expired, revoked, cancelled or obtained with intent to defraud.

Interstate commerce involves business, trade, travel, transportation or communication between any place in a state and any place outside that state, or any two places within a state but through any place outside that state. A defendant’s conduct affects commerce if the natural consequences of the defendant’s actions were some effect on commerce, however minimal.

The government is not required to produce direct evidence to establish the defendant’s intent. The government may prove the defendant’s intent by means of circumstantial evidence alone. In determining the defendant’s intent, you may consider all of his statements, acts and omissions, as well as all other facts and circumstances in evidence

that indicate the defendant's state of mind.

In Count 7, the government has charged three different unauthorized uses of credit cards, as set forth in Paragraphs A, B and C. The government is not required to prove all three of these unauthorized uses. However, before you may find that the government has met its burden of proof regarding Count 7, you must unanimously agree on at least one such use. For instance, it is not enough for some of you to agree that the government has proved the use charged in Paragraph A and the rest of you to agree that the government has proved the use charged in Paragraph B. You must all agree on at least one of the charged uses in Count 7 you may find that the government has met its burden of proof.

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

If the defendant knowingly caused the acts of another, the defendant is responsible for those acts as though she personally committed them.

Any person who knowingly aids, counsels, commands, induces or procures the commission of an offense may be found guilty of that offense. However, that person must knowingly associate herself with the criminal activity, participate in the activity, and try to make it succeed.

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court. A verdict form has been prepared for you.

*[Court reads the verdict form.]*

Take this form to the jury room, and when you have reached unanimous agreement



on the verdict, your foreperson will fill in, date and sign the form.

Each count of the indictment charges the defendant with having committed a separate offense. You must consider each count and the evidence relating to it separate and apart from the other count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of

the jury on any subject touching the merits of the case.

You must not reveal to any person, including the court, your numerical split on any verdict question until you have reached a unanimous verdict on every defendant and every count.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

UNITED STATES OF AMERICA,

Plaintiff,

VERDICT

v.

06-CR-184-C

THERESA A. WINGER,

Defendant.

---

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Theresa A. Winger,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Theresa A. Winger,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

COUNT 3

We, the Jury in the above-entitled cause, find the defendant, Theresa A. Winger,

---

("Guilty" or "Not Guilty")

of the offense charged in Count 3 of the indictment.

COUNT 4

We, the Jury in the above-entitled cause, find the defendant, Theresa A. Winger,

---

("Guilty" or "Not Guilty")

of the offense charged in Count 4 of the indictment.

COUNT 5

We, the Jury in the above-entitled cause, find the defendant, Theresa A. Winger,

---

("Guilty" or "Not Guilty")

of the offense charged in Count 5 of the indictment.

COUNT 6

We, the Jury in the above-entitled cause, find the defendant, Theresa A. Winger,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 6 of the indictment.

COUNT 7

We, the Jury in the above-entitled cause, find the defendant, Theresa A. Winger,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 7 of the indictment.

\_\_\_\_\_  
Presiding Juror

Madison, Wisconsin

Date: \_\_\_\_\_