

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY G. WHITEAGLE and
DEBORAH ATHERTON,

Defendants.

POST TRIAL
JURY INSTRUCTIONS

11-cr-65-wmc

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.

CONSIDERATION OF THE EVIDENCE

All of the introductory instructions that I gave you at the beginning of this trial still are in effect. I will give you copies of those instructions to take back to the jury room with you.

You have received evidence of a statement said to be made by the defendant _____ to _____. You must decide whether the defendant did make the statement. 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.

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

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

You have heard evidence of acts of the defendant _____ other than those charged in the indictment. Specifically, _____. You may consider this evidence only on the questions of _____. You should consider this evidence only for this limited purpose.

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 that the defendant _____ has been convicted of crimes. You may consider this evidence only in deciding whether the defendant's testimony is truthful in whole, in part, or not at all. You may not consider it for any other purpose. A conviction of another crime is not evidence of the defendant's guilt of the crime for which the defendant now is charged.

You have heard [reputation/opinion] evidence about the character trait of _____ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to _____'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc]. You should consider character evidence together with all the other evidence in the case and in the same way.

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.

A statement made by a defendant before trial that is inconsistent with that defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of that defendant's testimony in this trial.

_____ has admitted lying under oath. You may give his testimony such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony that _____ have received benefits from the government in connection with this case. Specifically, _____. 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.

You have heard testimony from _____ who each stated that he or she was involved in the commission of the alleged crime charged against the defendant. 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.

The witnesses _____ have pleaded guilty to a crime arising out of the same allegations for which the defendant is now on trial. 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 these defendants cannot be considered as evidence against the defendant[s] on trial now.

The witnesses _____ have received immunity; that is, a promise from the government that any testimony or other information he or she provided would not be used against him 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.

You must consider with caution and great care the testimony of any witness who is currently addicted to drugs. It is up to you to determine whether the testimony of a drug addict has been affected by drug use or the need for drugs.

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.

You have heard evidence relating to Counts "10", "11" and "12", which charge only defendant Whiteagle with making false statements on tax returns and with unlawfully attempting to influence a witness. Defendant Atherton is not charged in

Counts 10, 11 or 12. Therefore, you must not consider any evidence that relates only to one of these three counts as evidence against Defendant Atherton for any purpose.

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 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.

You have heard recorded conversations. These recorded conversations are proper evidence and you may consider them, just as any other evidence. When the recordings were played during the trial, you were furnished transcripts of the recorded conversations prepared by government agents. The recordings are the evidence, and the transcripts were provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it. It is up to you to decide whether the transcripts correctly reflect what was said and who said it. If you noticed any difference between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if after careful listening, you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

THE INDICTMENT

The indictment in this case is the formal method of accusing the defendants of offenses and placing the defendants on trial. It is not evidence against either defendant and it does not create any inference of guilt.

The defendants are charged in the indictment as follows:

[Court reads the indictment]

***[Note well: not later than April 30, 2012 the government must submit
its draft of the redacted indictment]***

Each defendant has entered a plea of not guilty to these charges against him or her.

The defendants are not on trial for any act or any conduct not charged in the indictment.

Each defendant is presumed to be innocent of the charges against him or her. 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 a defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. A defendant is never required to prove that he or she is innocent, 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 COUNT 1: CONSPIRACY

Count 1 charges each defendant with conspiracy. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain this charge against a defendant, the government must prove these elements:

- 1) That the conspiracy charged in Count 1 existed;
- 2) That the defendant knowingly became a member of this conspiracy with an intention to further the conspiracy;
- 3) That a member of the conspiracy committed an overt act in furtherance of the conspiracy.

If you find from your consideration of all the evidence that each of these propositions have been proved beyond a reasonable doubt as to the defendant whom you are considering, then you should find that defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the defendant whom you are considering, then you must find that defendant not guilty of Count 1.

As used throughout these instructions, all versions of the word **knowingly** mean that the defendant realized what he or she was doing and was aware of the nature of his or 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.

For the purposes of Counts 1 through 9, the government is not required to prove that a defendant knew that his or her conduct was unlawful. For the purposes of Counts 10, 11, and 12, there are additional instructions below that are specific to those counts

telling you that the government must prove that the defendant knew the conduct charged in those counts was unlawful.

CONSPIRACY INSTRUCTIONS

A conspiracy may be established even if its purpose was not accomplished.

To be a member of the conspiracy, a defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.

As to the first element of Count 1, in deciding whether the charged conspiracy existed, you may consider the actions and statements of every one of the alleged participants. An agreement may be proved from all the circumstances and the words and conduct of all of the alleged participants which are shown by the evidence.

As to the second element of Count 1, in deciding whether a defendant joined the charged conspiracy, you must base your decision solely on what that defendant personally did or said. In determining what that defendant personally did or said, you may consider that defendant's own words and acts. You also may consider the words and acts of other people to help you determine what the defendant personally did or said, and you may use the words and acts of other people to help you understand and interpret the defendant's own words and acts. Keep in mind, however, that the defendant's membership in the charged conspiracy can only be proved by his or her own words or acts.

By themselves, a defendant's presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish the defendant's guilt.

A defendant's association with conspirators is not by itself sufficient to prove his or her participation or membership in a conspiracy.

If a defendant performed acts that advanced a criminal activity but he or she had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish that defendant's guilt.

The government must prove that a defendant knowingly and intentionally joined the charged conspiracy, knowing the conspiracy's aim and intending to achieve it.

SINGLE OR MULTIPLE CONSPIRACIES

Although Count 1 charges a single conspiracy, it might be possible to find additional, separate conspiracies regarding distinct parts of this case.

Whether there was one conspiracy, two conspiracies, multiple conspiracies or no conspiracy at all is a fact for you to determine in accordance with these instructions.

If you do not find beyond a reasonable doubt that the defendant whom you are considering was a member of any conspiracy, then you must find that defendant not guilty of Count 1.

If you find beyond a reasonable doubt that there was one overall conspiracy as alleged in Count 1 and that the defendant whom you are considering was a member of that conspiracy, then you should find that defendant guilty of Count 1.

If you find that there was more than one conspiracy and also find that the defendant whom you are considering was a member of one or more of these additional conspiracies, then you may find that defendant guilty of Count 1 only if you further find beyond a reasonable doubt that the proven conspiracy of which that defendant was a member is included within the conspiracy charged in Count 1.

On the other hand, if you find that the proven conspiracy of which the defendant whom you are considering was a member is not included within the conspiracy alleged in Count 1, then you must find that defendant not guilty of this count.

**ELEMENTS OF COUNTS 2, 3 4, 6, 9 AND 10: MAKING AN UNLAWFUL
PAYMENT CONCERNING FEDERALLY FUNDED PROGRAMS**

Defendant Whiteagle is charged in Counts 2, 3, 4, 6, 9 and 10, and defendant Atherton is charged in Counts 4 and 10 with making unlawful payments concerning a federally funded program. To sustain any of these charges against either defendant, the government must prove these elements:

1) The defendant whom you are considering gave, caused to be given, agreed to give, or caused another to agree to give to another person the thing of value specified in the count that you are considering;

2) The defendant did so corruptly with intent to influence or reward Clarence P. Pettibone connection with some business, transaction or series of transactions of the Ho-Chunk Nation as specified in the count that you are considering;

3) That at the time charged in the count that you are considering, Clarence P. Pettibone was an agent of an Indian tribal government, namely the Ho-Chunk Nation;

4) The business, transaction or series of transactions specified in the count that you are considering involved any thing of value of \$5000 or more; and

5) The Ho-Chunk nation, in a one year period, received benefits of more than \$10,000 under any Federal program involving a grant or other federal assistance.

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 defendant you are

considering in the count that you are considering , then you should find that defendant guilty of that count.

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

**ELEMENTS OF COUNTS "6" AND "7": AIDING AND ABETTING
CLARENCE PETTIBONE'S RECEIPT OF UNLAWFUL PAYMENTS
CONCERNING FEDERALLY FUNDED PROGRAMS**

Counts 6 and 7 charge that defendant Whiteagle aided and abetted Clarence Pettibone (an unindicted coconspirator) commit the offense of receiving an unlawful payment concerning federally funded programs. The elements of receiving an unlawful payment concerning federally funded programs would require the government to prove beyond a reasonable doubt that: 1) Clarence Pettibone was an agent of an Indian tribal government, namely the Ho-Chunk Nation; 2) Clarence Pettibone accepted or agreed to accept from another person a specified thing of value; 3) Clarence Pettibone did so corruptly with intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the Ho-Chunk Nation; 4) This specific business, transaction or series of transactions involved any thing of value of \$5000 or more; and 5) The Ho-Chunk nation, in a one year period, received benefits of more than \$10,000 under any Federal program involving a grant or other federal assistance.

To establish either of the charges against defendant Whiteagle in Counts 6 or 7, the government must prove these elements:

1) The defendant associated with Clarence P. Pettibone in the acts charged in the count that you are considering;

2) The defendant knowingly participated in the acts charged against Clarence P. Pettibone in this count; and,

3) The defendant actively contributed toward the success of the acts taken by Clarence P. Pettibone as alleged in this count.

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 defendant Whiteagle guilty of that count.

If, on the other hand, you find from your consideration of all of 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 defendant Whiteagle not guilty of that count.

For the purposes of Counts 2 through 9, the term **corruptly** means that a defendant acted with the understanding that something of value is to be offered or given to reward or influence defendant Pettibone in connection with his official duties.

Good faith on the part of a defendant is inconsistent with . . . [*Defendant Atherton is to provide a tailored version of Pattern Instruction 6.10 not later than April 30*]

For the purposes of Counts 2 through 9, the term **one year period** means a continuous period that commences no earlier than twelve months before the date the offense is alleged to have occurred or that ends no later than twelve months after the date the offense is alleged to have occurred.

**CONSPIRATOR LIABILITY FOR
SUBSTANTIVE CRIMES COMMITTED
BY COCONSPIRATORS**

A conspirator is responsible for offenses committed by fellow conspirators if the defendant was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Therefore, if you find a defendant guilty of the conspiracy charged in Count 1, and if, in considering a particular unlawful payment count against that defendant, you find beyond a reasonable doubt that while that defendant was a member of the conspiracy a fellow conspirator committed that bribery offense charged against the defendant in furtherance of and as a foreseeable consequence of that conspiracy, then you should find that defendant guilty of that count.

*[Note well: the government is not asking for
verdict forms that account for Pinkerton liability]*

**ELEMENTS OF COUNTS "10" AND "11"
FALSE STATEMENT ON A TAX FORM**

Defendant Whiteagle is charged in Counts 10 and 11 with make a false statement on a tax return. To sustain either of these charges, the government must prove these elements:

- 1) The defendant made the income tax return described in the count that you are considering;
- 2) The defendant signed the income tax return, which contained a written declaration that it was made under penalties of perjury;
- 3) The defendant filed the income tax return with the Internal Revenue Service;

4) This income tax return was false as to a material matter, as charged in the count that you are considering; and

5) When the defendant made and signed the tax return, the defendant did so willfully and did not believe that the tax return was true, correct and complete as to every material matter.

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 of 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.

For the purposes of Counts 10 and 11, the word **willfully** means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. The defendant acted willfully if he knew that it was his legal duty to file truthful individual tax returns and intentionally filed a false return.

For the purposes of Counts 10 and 11, a line on a tax return is a **material matter** if the information required to be reported on that line is capable of influencing the correct computation of the amount of tax liability of the individual or the verification of the accuracy of the return.

If you find that the defendant willfully understated the amount of gross income on his individual tax return, and if you find that the amount of gross income is essential to a correct computation of the amount of taxable income, then you may find that the false and fraudulent statements were false as to a material matter.

ELEMENTS OF COUNT "12"
UNLAWFULLY ATTEMPTING TO INFLUENCE A WITNESS

To sustain the charge in Count 12 against defendant Whiteagle, the government must prove these elements:

1) The defendant attempted to persuade another person to lie to the FBI as charged in Count 12;

2) The defendant made this attempt to persuade with intent to hinder and prevent the communication by that employee to the FBI of information relating to the commission or possible commission of federal offenses as charged in Count 12;

3) The defendant made this attempt knowingly and corruptly.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty of Count 12.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt,, then you must find the defendant not guilty of Count 12.

For the purposes of Count 12, **corruptly** means that the defendant acted with the purpose to secure an unlawful benefit for himself or another by obstructing the FBI's investigation.

**ADDITIONAL INSTRUCTIONS ON AIDING AND ABETTING,
RESPONSIBILITY, AND CAUSATION**

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself with the criminal venture, participate in it and try to make it succeed.

Whatever a person is legally capable of doing he or she can do through another person by causing that person to perform the act. If a defendant willfully ordered, directed or authorized the acts of another, then she is responsible for such acts as though she personally committed them.

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

A defendant need not personally perform every act constituting the crime charged. Every person who willfully participates in the commission of a crime may be found guilty.

By themselves, a defendant's presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that defendant's guilt.

If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish that defendant's guilt.

DELIBERATIONS

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.

Verdict forms have been prepared for you. [*Court reads the verdict forms.*]

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.

Although you have seen that the trial is being recorded by a court reporter, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.

Each count of the indictment charges each defendant with having committed a separate offense. You must give separate consideration both to each count and to each defendant. You must consider each count and the evidence related to it separate from the other count.

You should return a separate verdict as to each defendant and as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to that defendant as to the other count.

Each verdict must represent the considered judgment of each juror. Whether your verdict as to a defendant 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 count.