CHARGE

THE COURT: OK. You folks are about to perform your final function as jurors. My instructions to you are in four parts. First, I am going to describe the law to be applied to the facts as you find the facts to have been established by the proof; second, I will instruct you about the trial process; third, I will speak to you concerning your evaluation of evidence; and, finally, I'll speak to you about the conduct of your deliberations.

You are welcome to take notes. I alert you also, however, that you will all have typewritten copies of these instructions in the jury room.

The defendants, James Gatto, Merl Code, and Christian Dawkins, are formally charged in what's called an indictment. An indictment is merely an accusation. It's not evidence. It's not proof of anybody's guilt. It doesn't create any presumption. It doesn't permit any inference that the defendants are guilty.

Each count in the indictment charges a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each defendant on each count in which the defendant is charged. Whether you find a defendant guilty or not guilty as to one offense should not affect your verdict as to the other offenses. Similarly, whether you find one defendant guilty or not guilty to one of

1 the charges should not affect your verdict as to the other
2 defendants charged with the same offense.
3 There are three counts in this indictment. Count One
4 charges all three defendants with participating in a conspiracy
5 to commit mail fraud. Count Two charges all the defendants
6 with wire fraud in connection with an alleged scheme to defraud
7 the University of Louisville. Count Three charges James Gatto
8 with wire fraud in connection with an alleged scheme to defraud
9 the University of Kansas.
10 My law clerk, Rachel, hands me a note saying I said
11 "mail fraud" instead of "wire fraud." I do it again. Anytime
12 I say mail fraud, it is a mistake. It is wire fraud. The two
13 statutes are substantially identical except one involves
14 telephones and wires, one involves mail, and we probably try
15 more mail frauds than wire frauds. What can I say? It is a
16 habit.
17 With any criminal charge, there are certain basic
18 facts that the government must prove beyond a reasonable doubt
19 before a defendant may be found guilty. Those basic, necessary
20 facts are called the essential elements of the charge.
21 The defendants have pleaded not guilty to the charges
22 in the indictment. The burden is on the prosecution to prove
23 guilt beyond a reasonable doubt. That burden never shifts to
24 the defendants.
25 The law presumes each of the defendants to be innocent

of the charges against him. I therefore instruct you that each defendant is presumed innocent throughout your deliberations until such time, if ever, that you as a jury are satisfied that the government has proved that defendant guilty beyond a reasonable doubt. If the government does not sustain its burden on one or more counts, you must find the defendant not guilty on that count or counts.

I have said that the government must prove the defendant guilty beyond a reasonable doubt -- each defendant, of course. A reasonable doubt is a doubt based on reason and common sense. It is a doubt that a reasonable person would have after carefully weighing all the evidence, or lack of evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her own personal life. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

If, after fair and impartial consideration of all the evidence, you have a reasonable doubt about a defendant's guilt with respect to a charge in the indictment, it is your duty to acquit the defendant on that charge. On the other hand, if after fair and impartial consideration of all the evidence or lack of evidence, you are satisfied of a defendant's guilt on a particular charge beyond a reasonable doubt, you should vote to

1 convict on that charge.
2 Let me turn to the indictment.
3 As I have told you, Count One of the indictment
4 charges the defendants with the crime of conspiracy. The other
5 two counts charge what we call substantive crimes.
6 As I explained to you a couple of weeks ago now, a
7 conspiracy is a little different from a substantive count. A
8 conspiracy charge, generally speaking, alleges that two or more
9 persons agreed together to accomplish some unlawful objective.
10 The focus of a conspiracy count, therefore, is on whether there
11 was an unlawful agreement. A substantive count, on the other
12 hand, charges a defendant with the actual commission, or with
13 causing someone else to engage in certain actions necessary for
14 the actual commission, of an offense. A substantive offense
15 therefore can be committed by a single person. It need not
16 involve any agreement with anyone else.
17 A conspiracy to commit a crime is an entirely separate
18 and different offense from a substantive crime, the commission
19 of which may be an objective of a conspiracy. And since the
20 essence of the crime of conspiracy is an agreement or an
21 understanding to commit a crime, it doesn't matter if the
22 crime, the commission of which was the objective of the
23 conspiracy, ever was actually committed. In other words, if a
24 conspiracy exists and certain other requirements are met, the
25 conspiracy is punishable as a crime even if its purpose is not

1 established or accomplished. Consequently, in a conspiracy
2 charge, there is no need to prove that the crime or crimes that
3 were the objective or objectives of the conspiracy actually
4 were committed.
5 By contrast, conviction on a substantive count
6 requires proof that the crime charged actually was committed or
7 attempted, but it does not require proof of an agreement.
8 With respect to the substantive counts, you should be
9 aware also that there are three alternative theories on the
10 basis of which you may find a defendant guilty. While I am
11 going to explain these three theories in more detail, I want to
12 take a very brief moment to outline them briefly.
13 The government's first theory is that one or more of
14 the defendants committed a substantive crime charged in the
15 indictment. The second theory is that one or more of the
16 defendants, with criminal intent, willfully caused someone else
17 to engage in certain actions that resulted in the commission of
18 a substantive crime charged in the indictment. I am going to
19 refer to both of those two theories that I just outlined for
20 you as involving a claim that a defendant is guilty of a crime
21 as a principal.
22 The third theory is that someone other than a
23 defendant charged in the indictment with a particular
24 substantive crime committed that crime and the defendant you
25 are considering aided and abetted the commission of that crime.

1 I will refer to that theory as a claim that the defendant is
2 guilty of a crime as an aider and abettor.
3 Now, for the sake of convenience, in organizing my
4 instructions to you, I'm going to instruct you first with
5 respect to the two counts that charge substantive crimes,
6 Counts Two and Three. I'll instruct you initially on the first
7 two theories of liability, namely, that the defendants are
8 guilty as principals of the substantive crimes charged in the
9 indictment (as the counts apply to each defendant) either
10 because they themselves committed the substantive crimes or
11 because they, with criminal intent, caused someone else to
12 commit the substantive crimes. I then will instruct you on the
13 third theory of liability -- that is, the alternative theory
14 that the defendants are guilty as aiders and abettors.
15 Finally, I will instruct you on the conspiracy count.
16 Now, as I instructed you at the beginning of this
17 trial, certain of the conduct at issue here allegedly violated
18 rules of the NCAA, including rules on amateurism. So, you have
19 heard testimony and were shown exhibits regarding NCAA rules,
20 and you in fact have the whole NCAA Division I manual in
21 evidence.
22 Now, the purpose of this trial is not to determine
23 whether the NCAA amateurism and recruiting rules are good or
24 bad. During your deliberations, you must apply my instructions
25 on the law to the facts that you find the government has proved

1 beyond a reasonable doubt. Any views or opinions you might
2 have about the wisdom or the fairness of any NCAA rules have no
3 bearing on this case whatsoever and should not be considered by
4 you in any respect during your deliberations. You should
5 disregard also any arguments made by the lawyers about the
6 wisdom or fairness of those rules.
7 In addition, I instruct you that a violation of an
8 NCAA rule, by itself, is not a violation of the law. This
9 case, however, is not about whether violations of NCAA rules
10 occurred. There is no dispute that NCAA rules were violated.
11 Rather, this case essentially is about whether the universities
12 that are alleged to have been victims or intended victims of
13 the crimes that are charged in the indictment were fraudulently
14 misled about whether violations of NCAA rules had occurred. I
15 will give you more detailed instructions on this point in a
16 moment, which you will follow in all respects.
17 Now, let me make one final point before I begin my
18 specific instructions on the counts charged in the indictment.
19 Each of the alleged victims and intended victims of the crimes
20 charged in the indictment is a university. Universities, of
21 course, are not human beings. They can think or act only
22 through their agents -- that is to say, their officers, their
23 employees, and their other authorized representatives. So, the
24 knowledge, the intentions, the statements, and the actions of a
25 university officer, employee, or other representative -- and

1 that includes basketball coaches -- are considered to be those
2 of the university to the extent, but only to the extent, that
3 the officer, employee, or other representative is, first of
4 all, acting within the scope of the authority of that officer,
5 agent, or representative and, second of all, without any
6 purpose to profit personally or otherwise benefit him or
7 herself in a manner that is not fully aligned with the
8 interests of the university.
9 Now, we come to Counts Two and Three, the two
10 substantive wire fraud counts.
11 Count Two charges that from at least in or about
12 May 2017, up to and including in or about September 2017,
13 Messrs. Gatto, Code, and Dawkins each participated in a scheme
14 to defraud the University of Louisville of athletic scholarship
15 funds and of the right to control the use of its assets,
16 including the ability to decide how to allocate a limited
17 number of athletic scholarships, by making, or causing to be
18 made, material misrepresentations, using interstate wires, in
19 connection with obtaining a scholarship from the University of
20 Louisville for Brian Bowen, Jr. to play basketball for the
21 University of Louisville.
22 Count Three charges that from at least in or about
23 October 2016, up to and including in or about November 2017,
24 Mr. Gatto participated in a scheme to defraud the University of
25 Kansas of athletic scholarship funds and of the right to

control the use of its assets, including the ability to decide how to allocate a limited number of athletic scholarships, by making, or causing to be made, material false representations, using interstate wires, in connection with obtaining a scholarship from the University of Kansas for [redacted] to play basketball for that school.

For each of these two counts the government must prove the following three elements:

First, it must prove that there was a device, scheme, or artifice to defraud the relevant university of money or property by false or fraudulent pretenses, representations or promises. It must prove, second, that the defendant you are considering knowingly and willfully participated in the device, scheme, or artifice to defraud, with knowledge of its fraudulent nature, and with specific intent to defraud. It must prove, third, that is in the execution of that device, scheme, or artifice, the defendant you are considering used, or caused to be used, interstate wires.

The first element the government must prove beyond a reasonable doubt is the existence of a device, scheme, or artifice to defraud the victim of money or property by false or fraudulent pretenses, representations or promises. In Count Two, the alleged victim is the University of Louisville. In Count Three, the alleged victim is the University of Kansas. The instructions on the elements that the government must prove

1 beyond a reasonable doubt to establish wire fraud are the same
2 on both counts. The only difference is the victim.
3 Now, let me define some of the terms specific to wire
4 fraud that I have used.
5 "Fraud" is a general term. It is a term that includes
6 all of the possible means by which a person seeks to gain some
7 unfair advantage over the victim by intentional
8 misrepresentation or false pretenses.
9 A "device, scheme, or artifice to defraud" is any
10 plan, device, or course of action to deprive another of money
11 or property by means of false or fraudulent pretenses,
12 representations, or promises. It is, in other words, a plan to
13 deprive another of money or property by trick, deceit,
14 deception, swindle, or overreaching.
15 A representation is false if it is true at the time
16 when it was made. A statement also may be false if it is
17 ambiguous or incomplete in a manner that makes what is said, or
18 represented, misleading or deceptive. A representation or
19 statement is fraudulent if it was made falsely and with the
20 intent to deceive.
21 Now, the government in this case says that the
22 fraudulent scheme, charged in each of Count Two and Count
23 Three, was carried out by two different means. The first
24 means, that the government argues, is that the student-athletes
25 who received athletic scholarships from the University of

1 Louisville or the University of Kansas, as the case may be,
2 made false representations in the form of certifications to
3 those universities. The second means is that the parents of
4 the student-athletes who got athletic scholarships from the
5 universities in question made false representations, also in
6 the form of certifications to the universities. Now, the
7 instructions here are a little bit different depending on your
8 consideration of whether a false statement was made by a
9 student-athlete or by a parent of a student-athlete.
10 As to the student-athletes, there is no contention in
11 this case that the student-athletes knew that any
12 certifications they signed and submitted to the universities
13 were false at the time that they were signed and submitted. In
14 other words, there is no contention that the student-athletes
15 themselves were trying to deceive the universities because they
16 didn't know that they were making any false statements.
17 Instead, the government alleges that the alleged false
18 certifications submitted by the student-athletes served as the
19 means for a scheme to defraud because of the defendants' roles
20 in causing those false statement to be made. I therefore
21 instruct you that, to the extent the existence of an alleged
22 scheme to defraud is based on an allegedly false certification,
23 signed and submitted by a student-athlete, the government must
24 prove beyond a reasonable doubt that the defendant you are
25 considering, with the specific intent to defraud the university

in question, willfully caused the making of the false certification by the student-athlete. I will explain the concepts of "intent to defraud" and "willful causation" to you in a few minutes.

My instructions are the same for any allegedly false certification submitted by a parent if you find beyond a reasonable doubt that the parent did not know that the certification was false at the time that the parent signed and submitted it. To the extent the existence of a scheme to defraud is based on such a false certification, the government must prove beyond a reasonable doubt that the defendant you are considering, with the specific intent to defraud the university in question, willfully caused the parent of the student-athlete to make the false certification.

Now, a different instruction applies, however, if the existence of a scheme to defraud is based on an allegedly false certification signed by a parent who knew that the certification was false when the parent signed and submitted it. In that case, you may find that a scheme to defraud existed on the basis of that certification -- provided that the government has proved beyond a reasonable doubt each of the other requirements on which I instruct you in respect of the first element of wire fraud; that is to say, if the government proves beyond a reasonable doubt either, first, that the defendant you are considering, with the specific intent to

1 defraud the university in question, willfully caused the parent
2 to make the false certification or, secondly, that the parent
3 who signed and submitted the certification knew that the
4 certification was false when the parent signed and submitted
5 it.
6 But the existence of a false statement is not the end
7 of your inquiry. For any false or fraudulent representation to
8 be a basis for a scheme to defraud, the government must prove
9 beyond a reasonable doubt also that the false or fraudulent
10 representation relates to a material fact or matter. A
11 material fact is one that would reasonably be expected to
12 influence, or that is capable of influencing, the decision of
13 the decision-making person or entity to which it was directed.
14 Now, in this case, the "decision-making entity" to
15 which false or fraudulent representations allegedly were
16 directed is the University of Louisville in Count Two and the
17 University of Kansas in Count Three. I previously instructed
18 you that universities can think and act only through their
19 authorized agents who are acting without any purpose to profit
20 personally or otherwise to benefit him- or herself in a manner
21 that is not fully aligned with the interests of the university.
22 You should apply that instruction here.
23 This mean that, for purposes of Count Two, if you find
24 beyond a reasonable doubt that a false or fraudulent
25 representation was made, you must determine whether that

1 representation was one that was capable of influencing the
2 appropriately authorized and unconflicted officers or employees
3 of the University of Louisville in deciding whether to provide
4 a scholarship to Brian Bowen, Jr. For purposes of Count Three,
5 if you find beyond a reasonable doubt that a false or
6 fraudulent representation was made, you must determine whether
7 that representation was one that was capable of influencing the
8 appropriately authorized and unconflicted officers or employees
9 of the University of Kansas in deciding whether to provide a
10 scholarship to [redacted]. The same principle applies to
11 statements that are misleadingly or deceptively ambiguous or
12 incomplete.
13 Now, it is not necessary for the government to prove
14 that any particular person actually relied upon, or actually
15 suffered damages as a consequence of, any false or fraudulent
16 representation. Nor do you need to find that the defendant you
17 are considering profited from the fraud. Here again my
18 instructions differ somewhat depending on whether the
19 individual who made a false representation (to the extent you
20 find that any such false representation actually was made) knew
21 that the representation was false at the time they made it. If
22 you find beyond a reasonable doubt that a false representation
23 was made by an individual who did not know that the
24 representation was false, you must find that the defendant you
25 are considering willfully caused the false representation to be

1 made as part of a fraudulent scheme in the expectation that it
2 would be relied upon by the university in question. If you
3 find beyond a reasonable doubt that a false representation was
4 made by an individual who did not know that the representation
5 was false, you must find that the individual made that false
6 representation as part of a fraudulent scheme in the
7 expectation that it would be relied upon by the university in
8 question. In either case, you must concentrate on whether
9 there was such a scheme, not on the consequences of the scheme.
10 I instruct you further that in determining whether a
11 scheme to defraud existed, it is irrelevant whether you believe
12 that the university in question might have discovered the fraud
13 if it had looked more closely or probed more extensively. A
14 victim's negligence or gullibility in failing to discover a
15 fraudulent scheme is not a defense to wire fraud. On the other
16 hand, a finding that a university intentionally turned a blind
17 eye to certain kinds of representations when making decisions
18 about scholarships may be relevant to the materiality of the
19 representations.
20 Finally, the government, in order to satisfy this
21 first element of substantive wire fraud, must prove beyond a
22 reasonable doubt that the alleged scheme contemplated depriving
23 the victim -- that is to say, the University of Louisville in
24 Count Two and the University of Kansas in Count Three -- of
25 money or property. It is no doubt obvious that property

1 includes tangible property interests, such as physical
2 possession of an object or of money. But a victim can be
3 deprived of money or property also when it is deprived of the
4 ability to make an informed economic decision about what to do
5 with its money or property -- in other words, when it is
6 deprived of the right to control the use of its assets. I
7 instruct you that a victim's loss of the right to control the
8 use of its assets constitutes deprivation of money or property
9 if, and only if, the scheme could have caused or did cause
10 tangible economic harm to the victim.
11 A scheme to defraud does not have to be shown by
12 direct evidence. It can be established by all the facts and
13 circumstances in a case.
14 Now we move on to the second element of substantive
15 wire fraud. It is a lot shorter.
16 The second element that the government must prove
17 beyond a reasonable doubt to establish substantive wire fraud
18 is that the defendant you are considering knowingly and
19 willfully participated in the scheme, device, or artifice to
20 defraud, with knowledge of its fraudulent nature and with
21 specific intent to defraud.
22 To act "knowingly" means to act intentionally and
23 voluntarily, and not because of ignorance, mistake, accident or
24 carelessness.
25 To act "willfully" means to act with knowledge that

one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with the bad purpose to disobey or disregard the law. "Unlawfully" simply means contrary to law. In order to know of an unlawful purpose, a defendant does not have to know that he was breaking any particular law or any particular rules. He needs to have been aware only of the generally unlawful nature of his actions.

To prove that the defendant you are considering acted with specific intent to defraud, the government must prove that he acted with intent to deceive for the purpose of depriving the relevant University of something of value. As I mentioned earlier, that may include the right to control money or property if the loss of the right to control money or property could have resulted or did result in tangible economic harm to the university. The government doesn't have to prove that the university actually was harmed, only that the defendant you are considering contemplated some actual harm or injury to the university in question. In addition, the government need not prove that the intent to defraud was the only intent of the defendant you are considering. A defendant may have the required intent to defraud even if the defendant was motivated by other lawful purposes as well.

To participate in a scheme means to engage in it by taking some affirmative step to help it succeed. Merely associating with people who are participating in a scheme --

1 even if the defendant you are considering knew what they were
2 doing -- is not participation.
3 It is not necessary for the government to establish
4 that the government -- excuse me -- that the defendant you are
5 considering originated the scheme to defraud. It is sufficient
6 if you find that a scheme to defraud existed, even if someone
7 else originated it, and that the defendant, while aware of the
8 scheme's existence, knowingly and willfully participated in it
9 with intent to defraud. Nor is it required that the defendant
10 you are considering participated in or had knowledge of all of
11 the operations of the scheme. The responsibility of the
12 defendant is not governed by the extent of his participation.
13 For example, it is not necessary that the defendant have
14 participated in the alleged scheme from the beginning. A
15 person who comes in at a later point with knowledge of the
16 scheme's general operation, although not necessarily all of its
17 details, and who intentionally acts in a way to further the
18 unlawful goals, becomes a participant in the scheme and is
19 legally responsible for all that may have been done in the past
20 in furtherance of the criminal objective and all that is done
21 subsequently.
22 Even if the defendant you are considering participated
23 in the scheme to a degree less than others, he nevertheless is
24 equally guilty as long as the defendant knowingly and willfully
25 participated in the scheme to defraud with knowledge of its

1 general scope and purpose and with specific intent to defraud.
2 Now, because an essential element of the crime
3 charged, both in Count Two and Count Three, is intent to
4 defraud, it follows that good faith on the part of a defendant
5 that you are considering is a complete defense to the charge of
6 wire fraud. An honest belief in the truth of the
7 representations made or caused to be made by a defendant is a
8 complete defense, however inaccurate the statements may turn
9 out to be. Similarly, it is a complete defense if a defendant
10 held an honest belief that the universities were not being
11 deprived of the ability to make an informed economic decision
12 in such a way as to expose them to a risk of tangible economic
13 harm. Likewise, if you determine that a defendant held an
14 honest belief that he could facilitate a payment to a family of
15 a student-athlete without affecting the eligibility of that
16 student-athlete to play in basketball games sponsored by the
17 NCAA, you may find that such defendant lacked intent to
18 defraud.
19 A defendant has no burden to establish a defense of
20 good faith; it remains the government's burden to prove
21 fraudulent intent and the consequent lack of good faith beyond
22 a reasonable doubt. However, in considering whether or not a
23 defendant acted in good faith, you are instructed that an
24 honest belief on the part of the defendant, if such a belief
25 existed, that ultimately everything would work out to the

1 benefit of the universities does not necessarily mean that the
2 defendant acted in good faith. If the defendant you are
3 considering knowingly and willfully participated in the scheme
4 with the intent to deceive the university in question for the
5 purpose of depriving it of money or property (including the
6 right to control money or property if such loss of the right to
7 control could have resulted in tangible economic harm), even if
8 only for a period of time, then no amount of honest belief on
9 the part of the defendant that the university ultimately would
10 be benefited will excuse false representations that a defendant
11 willfully caused to be made.
12 Now, as to certain of the universities, one or more of
13 the defendants contends that they lacked intent to defraud
14 because they acted in good faith at the request of one or more
15 university basketball coaches. An individual who does not work
16 for a university and who engages in (otherwise legal) conduct
17 to mislead the university lacks an intent to defraud the
18 university if three things are true: First, he or she was
19 acting at the request of an agent of the alleged victim
20 university; second, the agent had apparent authority to make
21 that request; and, third, the agent appeared to be unconflicted
22 and acting in good faith for the benefit of the victim
23 university and not to serve his or her own interests in a
24 manner that was not fully aligned with the interests of the
25 university. I am now going to discuss each of these concepts

1 in more detail.
2 As to the first point, it is for you to determine
3 whether the defendant that you are considering reasonably
4 understood that one or more university coaches had requested
5 that the defendant facilitate a payment to a student-athlete or
6 his family.
7 As to the second point, an agent of a university
8 generally has apparent authority to make a request of an
9 outside party on behalf of that university if actions taken by
10 other authorized representatives of the university caused the
11 outside party reasonably to believe that the agent who made the
12 request had the authority to make that request on behalf of the
13 university. Again, because the burden to prove each
14 defendant's guilt lies with the government, assuming you find
15 that a defendant reasonably believed that a coach or another
16 agent requested that defendant to make or cause the making of a
17 payment to a student-athlete or his family, you then must
18 determine whether the government has proved beyond a reasonable
19 doubt that the defendant knew or should have known that the
20 university had not authorized the coach to ask the defendant to
21 make that payment or payments of that kind.
22 As to the third point, to the extent that you find
23 that a defendant reasonably understood a university coach to
24 have requested that the defendant make or cause the making of a
25 payment to a student-athlete or his family, you must determine

1 also whether the government has proved beyond a reasonable
2 doubt that the defendant did not honestly believe that the
3 coach was unconflicted and acting in good faith. The question
4 of what a defendant believed about a university coach's
5 interests and intent is a question of fact for you to decide.
6 However, it might be helpful if I elaborate briefly on what it
7 means for an agent of a university to be unconflicted.
8 An agent of a university is unconflicted if his or her
9 actions are fully aligned with the interests of the university.
10 Anytime an agent takes an action, the agent might
11 simultaneously be acting for the benefit of the university for
12 whom the agent works and have an additional interest in
13 profiting personally or otherwise benefiting him or herself.
14 The agent's personal interests might be financial, they might
15 being nonfinancial in nature. To be unconflicted, the agent's
16 personal interests, to the extent the agent has any personal
17 interests, must be completely aligned with the interests of the
18 university. The agent may not sacrifice the interests of the
19 university in favor of his or her personal interests to any
20 extent.
21 (Continued on next page)
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1 THE COURT: Now, the question of whether a person
2 acted knowingly, willfully and with intent to defraud is a
3 question of fact for you to determine, like any other fact
4 question. Direct proof of knowledge and fraudulent intent
5 almost never is available. Nor is it required. It would be a
6 rare case where it could be shown that a person wrote or stated
7 that as of a given time in the past he or she committed some
8 act with fraudulent intent. The ultimate facts of knowledge
9 and criminal intent, though subjective, may be established by
10 circumstantial evidence, based upon a person's outward
11 manifestations, his or her words, his or her conduct, his or
12 her acts, and all the surrounding circumstances disclosed by
13 the evidence and the rational or logical inferences that may be
14 drawn from it. You may also infer, but are not required to
15 infer, that people intend the natural and probable consequences
16 of their actions. Accordingly, when the necessary result of a
17 scheme is to injure others, fraudulent intent may be inferred
18 from the scheme itself. As I instructed you earlier,
19 circumstantial evidence, if believed, is of no less value than
20 direct evidence.
21 The third and final element that the government must
22 prove beyond a reasonable doubt is that the defendant you are
23 considering used, or caused to be used, interstate wires (for
24 example, phone calls, e-mail communications, or text messages)
25 in furtherance of the scheme to defraud the University of

1 Louisville, in the case of Count Two, and the University of
2 Kansas, in the case of Count Three.
3 The wire communication must be an interstate wire --
4 that is, it must pass between two or more states. The use of
5 the wire need not itself be a fraudulent representation. It
6 must, however, further or assist in some way in carrying out
7 the scheme to defraud.
8 It is not necessary for the defendant you are
9 considering to have been directly or personally involved in a
10 wire communication, as long as the communication was reasonably
11 foreseeable in the execution of the alleged scheme to defraud
12 in which the defendant is accused of participating. In this
13 regard, it is sufficient to establish this element of the crime
14 if the evidence justifies a finding that the defendant caused
15 the wires to be used by others. This does not mean that the
16 defendant must specifically have authorized others to make the
17 communication. When one does an act with knowledge that the
18 use of the wires will follow in the ordinary course of business
19 or where such use of the wires reasonably can be foreseen, even
20 though not actually intended, then he causes the wires to be
21 used.
22 Finally, if you find that a wire communication was
23 reasonably foreseeable and that the interstate wire
24 communication charged in the indictment took place, then this
25 element is satisfied even if it was not foreseeable that the

1 wire communication would cross state lines.
2 As to each scheme alleged in Count Two and Count
3 Three, if you find that the government has failed to prove any
4 of the three elements of either count beyond a reasonable doubt
5 as to a particular defendant, then you must find that defendant
6 not guilty on that count. On the other hand, if you find that
7 the government has proved each element beyond a reasonable
8 doubt as to a particular defendant, then you should find that
9 defendant guilty on that count.
10 Now, as I instructed you earlier, the government's
11 second theory of liability on the substantive mail fraud
12 counts, Count Two and Count Three, is that the defendants are
13 guilty of the substantive crimes charged in those counts as
14 principals because they possessed the requisite criminal intent
15 and willfully caused someone else to engage in actions
16 necessary to commit the crimes. So I am now going to take a
17 minute to discuss what it means for a defendant to be guilty as
18 a principal through willful causation in the context of this
19 case.
20 It is the law of the United States -- and I quote --
21 "that whoever willfully causes an act to be done which, if
22 directly performed by that person, would be an offense against
23 the United States, is punishable as a principal."
24 So what does the term "willfully caused" mean? It
25 does not mean that the defendant you are considering must

1 physically have committed the crime or supervised or
2 participated in the actual criminal conduct charged in the
3 indictment. Rather, anyone who causes the doing of an act
4 which if done by him directly would render him guilty of an
5 offense against the United States is guilty as a principal.
6 Accordingly, one who intentionally causes someone else to make
7 a material false statement in connection with depriving a
8 university of money or property, as I have defined that term
9 previously, is guilty as a principal if the government proves
10 that the person who causes the making of that false statement
11 acted knowingly, willfully, and with the specific intent to
12 defraud the university in question and satisfies the other
13 elements of wire fraud that I have described to you. This is
14 so even if the individual that was caused to make the false
15 statement had no criminal intent.
16 Now, the defendants in this case maintain that the
17 government has not proved beyond a reasonable doubt that the
18 defendants knew that the false representations that are alleged
19 to have been made to the universities pursuant to the alleged
20 schemes to defraud would in fact be made to the universities.
21 In some circumstances, however, you may find that a
22 defendant acted with the necessary knowledge as to particular
23 facts on the basis that the defendant consciously avoided
24 learning those facts by deliberately closing his eyes to what
25 otherwise would have been clear.

1 probability that a false certification would be made to the
2 university in question, and that the defendant you are
3 considering deliberately avoided learning or confirming that
4 fact, you may find that that defendant knew that the false
5 certification would be made. However, if you do not so find,
6 then the defendant did not know that the false certification
7 would be made.
8 That concludes my instructions on the government's
9 burden of proof with respect to the first two of the three
10 theories of liability in respect of the two wire fraud counts
11 charged in the indictment. If you all agree that the
12 government has proved a defendant guilty as a principal beyond
13 a reasonable doubt on a substantive count in which that
14 defendant is charged, you need not consider the third theory of
15 liability as to that count and that defendant. But if you do
16 not convict a defendant as a principal on a substantive count
17 in which that defendant is charged, you then will consider
18 whether the government has proved that defendant guilty on that
19 count on the third theory, which is called aiding and abetting.
20 Now, I think this would be a good time to take a few
21 minutes' rest before we get into aiding and abetting. So we
22 will take ten minutes and return.
23 (Jury exits courtroom)
24 (Recess)
25 THE COURT: I am told that the jury is willing to stay

1 late tonight, although I have a limit on how late I can stay,
2 and they are prepared to stay every night this week.
3 (Jury present)
4 THE COURT: Jurors and defendants are all present.
5 So we will continue.
6 I will now explain this third theory, this aiding and
7 abetting theory, in greater detail.
8 It is unlawful for a person to aid, abet, counsel,
9 command, induce, or procure someone else to commit an offense.
10 A person who does that is just as guilty of the offense as
11 someone who actually commits it. Accordingly, if a defendant
12 is charged with a substantive count in the indictment, you may
13 find that defendant guilty on that count if you find that the
14 government has proved beyond a reasonable doubt that another
15 person actually committed the crime and that the defendant you
16 are considering aided, abetted, counseled, commanded, induced,
17 or procured the commission of that crime.
18 In order to convict a defendant as an aider and
19 abettor, the government must prove beyond a reasonable doubt
20 two elements.
21 First, it must prove that a person other than the
22 defendant whom you are considering, and other than a person the
23 defendant willfully caused to take actions necessary for the
24 commission of the crime, as I have described that concept to
25 you previously, committed the crime charged. Obviously, no one

can be convicted of aiding or abetting the criminal acts of someone else if no crime was committed by the other person in the first place. Accordingly, if the government has not proved beyond a reasonable doubt that a person other than the defendant committed the substantive crime charged in the indictment, either count, then you need not consider the second element under this theory of aiding and abetting. But if you do find that a crime was committed by someone other than the defendant you considering, or someone he willfully caused to take actions necessary for the commission of the crime, then you must consider whether the defendant you are considering aided or abetted the commission of that crime.

Second, in order to convict on an aiding and abetting theory, the government must prove that the defendant you are considering willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly engaged in some affirmative conduct or some overt act for the specific purpose of bringing about that crime. Participation in a crime is willful if done voluntarily and intentionally, and with the specific intent to do something that the law forbids.

The mere presence of a defendant you are considering in a place where a crime is being committed, even coupled with knowledge that a crime is being committed, is not enough to make the defendant an aider and abettor. Similarly, a defendant's acquiescence in the criminal conduct of others,

even with guilty knowledge, is not enough to establish aiding and abetting. An aider and abettor must know that the crime is being committed and act in a way that is intended to bring about the success of the criminal venture.

To determine whether the defendant you are considering aided and abetted the commission of the crime, ask yourself these questions:

Did the defendant you are considering participate in the crime charged as something that the defendant wished to bring about?

Did he knowingly associate himself with the criminal venture?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor. If, on the other hand, your answer to any of these questions is no, then the defendant is not an aider and abettor.

Now, I understand that, depending on your view of the evidence, there may be a subtle distinction with respect to whether a defendant is guilty, if at all, as a principal or as an aider and abettor. The question is what is the difference between a defendant willfully causing someone else to take actions necessary for the commission of a crime as opposed to aiding and abetting someone else to commit a crime.

If this question comes up in your deliberations, you

1 should think of it in terms of the difference between causing
2 someone to do something versus facilitating or helping someone
3 to do it. If you are persuaded beyond a reasonable doubt that
4 the defendant you are considering willfully caused someone else
5 to take actions necessary for the commission of either of the
6 substantive wire frauds charged in the indictment, you should
7 convict him as a principal on that count. If, on the other
8 hand, you are persuaded beyond a reasonable doubt that the
9 defendant you are considering, with the knowledge and intent
10 that I described, sought by his actions to facilitate or assist
11 that other person in committing the crime, then he is guilty as
12 an aider and abettor. One important difference between
13 willfully causing and aiding and abetting another person to
14 commit a crime, as I instructed you earlier, is that with
15 respect to willful causation, the government need not prove
16 that the defendant you are considering acted through a guilty
17 person. With respect to aiding and abetting, however, the
18 government must prove beyond a reasonable doubt that someone
19 else committed the crime charged with the requisite intent.
20 If you find beyond a reasonable doubt that the
21 government has proved that another person actually committed
22 one or more of the substantive crimes charged in Count Two and
23 Count Three and that the defendant you are considering aided or
24 abetted that person in the commission of that offense, you
25 should find that defendant guilty of that substantive crime on

1 an aiding and abetting theory. If, however, you do not so
2 find, you must find the defendant you are considering not
3 guilty of that substantive crime.
4 You may be happy to know that we are now done with the
5 two substantive counts of the indictment.
6 So I turn to Count One, the conspiracy charge.
7 As I told you, a conspiracy is a kind of a criminal
8 partnership -- a combination or agreement of two or more
9 persons to join together to accomplish some unlawful objective.
10 Count One charges that from at least in or about 2015,
11 up to and including in or about November 2017, Messrs. Gatto,
12 Code, and Dawkins conspired with others, including, but not
13 limited to, parents of certain student-athletes and certain
14 basketball coaches, to commit wire fraud against one or more
15 universities.
16 In order to sustain its burden of proof with respect
17 to the conspiracy charged in Count One, the government must
18 prove beyond a reasonable doubt each of two elements:
19 First, it must prove the existence of the conspiracy
20 charged in Count One.
21 Second, it must prove that the defendant you are
22 considering knowingly and willfully became a member of, and
23 joined in, the conspiracy.
24 Starting with the first element, a conspiracy is a
25 combination, an agreement or an understanding of two or more

1 people to accomplish by concerted action a criminal or unlawful
2 purpose. Count One charges that the criminal or unlawful
3 purpose was to commit wire fraud.
4 To establish a conspiracy, the government is not
5 required to show that two or more persons sat down around a
6 table and entered into a solemn pact stating that they had
7 formed a conspiracy to violate the law and setting forth the
8 details of the plans and the means by which the unlawful
9 project is to be carried out, or the part to be played by each
10 conspirator. It is sufficient if two or more persons come to a
11 common understanding to violate the law. Since conspiracy by
12 its very nature is characterized by secrecy, it is rare that a
13 conspiracy can be proved by direct evidence of that explicit
14 agreement. You may infer the existence of a conspiracy from
15 the circumstances of this case and the conduct of the parties
16 involved.
17 The adage "actions speak louder than words" may be
18 applicable here. Usually, the only evidence available with
19 respect to the existence of a conspiracy is that of
20 disconnected acts on the part of the alleged individual
21 co-conspirators. When taken together and considered as a
22 whole, however, such acts may show a conspiracy or agreement as
23 conclusively as would direct proof. In determining whether the
24 conspiracy charged in Count One actually existed, you may
25 consider all the evidence of the acts, conduct, and statements

of the alleged conspirators and the reasonable inferences to be drawn from those matters.

As I instructed you earlier, the essence of the crime of conspiracy is an agreement or an understanding to commit a crime. So it does not matter if the crime, the commission of which was the objective of the conspiracy, ever was committed. A conspiracy to commit a crime is an entirely separate and distinct offense from the actual commission of the illegal act that is the object of the conspiracy. The success or failure of a conspiracy is not material to the question of guilt or innocence of an alleged conspirator.

There are no one-man conspiracies. The crime of conspiracy has not been committed unless one conspires with at least one true co-conspirator. It is not enough for the government to show that the defendant you are considering agreed only with an undercover agent or a government informant to commit the underlying offense. In a case like that, there is no common understanding between two or more persons to violate the law.

Now, the conspiracy charged in Count One allegedly had one objective -- that is, it had a single illegal purpose, according to the allegations of the indictment, that the conspirators are alleged to have hoped to accomplish -- that was to commit wire fraud against one or more universities. I explained the elements of wire fraud to you already in charging

you on Counts One and Three. You will apply those instructions when you consider whether the government has proved beyond a reasonable doubt that the conspiracy charged in Count One existed. However, because Count One charges a conspiracy, the government does not need to prove that anyone committed the substantive crime of wire fraud. It need not prove beyond a reasonable doubt -- I misspoke. It need prove beyond a reasonable doubt only that there was an agreement to do so.

The indictment charges that the conspiracy charged in Count One lasted from at least in or about 2015 through at least in or about November 2017. It is not necessary for the government to prove that the conspiracy lasted throughout the entire period alleged, but only that it existed for some time within that time frame.

In sum, in order to find that the conspiracy charged in Count One existed, the government must prove beyond a reasonable doubt that there was a mutual understanding, either spoken or unspoken, between two or more people to commit wire fraud.

If you conclude that the government has proved beyond a reasonable doubt that the conspiracy charged in Count One existed, you next must determine whether the defendant you are considering willfully joined and participated in the conspiracy with knowledge of its unlawful purpose, and with an intent to aid in the accomplishment of its unlawful objective -- that is,

1 the commission of wire fraud. The government must prove beyond
2 a reasonable doubt by evidence of each defendant's own actions
3 and conduct that he unlawfully, willfully, knowingly, and with
4 specific intent to defraud entered into the conspiracy.
5 "Knowingly" and "willfully" have the same meanings
6 here, as I described earlier with respect to the second element
7 of substantive wire fraud.
8 A defendant's participation in the conspiracy must be
9 established by independent evidence of his own acts or
10 statements, as well as those of the other alleged conspirators,
11 and the reasonable inferences that may be drawn from it.
12 Now, science has not yet devised a manner of looking
13 into a person's mind and knowing what the person is thinking.
14 To make that determination, you may look to the evidence of
15 certain acts alleged to have taken place by or with the
16 defendant or in his presence. As I instructed you earlier with
17 respect to determining a defendant's knowledge and intent, you
18 may consider circumstantial evidence based upon the defendant's
19 outward manifestations, his words, his conduct, his acts, and
20 all of the surrounding circumstances disclosed by the evidence
21 and the rational or logical inferences that may be drawn
22 therefrom.
23 To become a member of the conspiracy, the defendant
24 you are considering need not have known the identities of each
25 and every other member, nor need he have known of all of their

activities. In fact, the defendant may know only one other member of the conspiracy and still be a co-conspirator.

Moreover, the defendant you are considering need tot not been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on his part. Proof of a financial interest in the outcome or another motive is not essential, but if you find that a defendant had such an interest or other motive, that's a factor you may consider in determining whether the defendant was a member of the conspiracy. The presence or absence of motive is, however, a circumstance that you may consider as bearing on the intent of the defendant you are considering.

The duration and extent of a defendant's participation has no bearing on the issue of a defendant's guilt. Each member of a conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, others play only minor parts in a conspiracy. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the ambit of a conspiracy. Moreover, the defendant need not have joined the conspiracy at the outset. He may have joined at any time, and if he joined, still will be held responsible for the acts done before or after he joined.

I want to caution you, however, that the mere association by one person with another does not make that

1 person a member of the conspiracy even when coupled with
2 knowledge that a conspiracy is taking place. Similarly, mere
3 presence at the scene of a crime, even coupled with knowledge
4 that a crime is taking place, is not sufficient to support a
5 conviction. A person may know, or be friendly with, a criminal
6 without being a criminal himself. Mere similarity of conduct
7 or the fact that they may have assembled together and discussed
8 common aims and interests does not necessarily establish
9 membership in a conspiracy.
10 I further instruct that mere knowledge of or
11 acquiescence without participation in an unlawful plan is also
12 not sufficient. The fact that the acts of a defendant, without
13 knowledge, merely happen to further the purposes or objectives
14 of the conspiracy does not make the defendant a member. What
15 is necessary is that the defendant you are considering must
16 have participated with knowledge of the unlawful purpose of the
17 conspiracy, in this case, to commit wire fraud.
18 In sum, the government must prove beyond a reasonable
19 doubt that the defendant you are considering, with an
20 understanding of the unlawful nature of the conspiracy,
21 intentionally engaged advised, advised or assisted the
22 conspiracy in order knowingly and willfully to promote its
23 unlawful goal. The defendant thereby becomes a conspirator.
24 A conspiracy, once formed, is presumed to continue
25 until either its objectives are accomplished or there is some

1 affirmative act of termination by its members. So, too, once a
2 person is found to be a member of a conspiracy, that person is
3 presumed to continue being a member in the venture until the
4 venture is terminated, unless it is shown by some affirmative
5 proof that the person withdrew and disassociated himself from
6 it.
7 Certain evidence was admitted during trial concerning
8 acts and statements of others because such acts were committed
9 and such statements were made by a person who, the government
10 claims, was also a co-conspirator of the defendants.
11 The reason for allowing this evidence to be received
12 against the defendants has to do with the nature of the crime
13 of conspiracy. A conspiracy is often referred to as a
14 partnership in crime. Thus, as in other types of partnerships,
15 when people enter into a conspiracy to accomplish an unlawful
16 end, each and every member becomes an agent of the other
17 conspirators in carrying out the conspiracy.
18 In determining the factual issues before you, you may
19 consider against the defendants any acts or statements made by
20 any of the people that you find, under the standards I have
21 already described, to have been co-conspirators, even though
22 such acts or statements were not made in his presence, or were
23 made without his knowledge.
24 Now, in this case, the defendants contend that the
25 government's proof fails to show the existence of only one

1 overall conspiracy. Rather, they claim, there was no
2 conspiracy at all or, alternatively, there was one or more
3 conspiracy separate and apart from the conspiracy charged in
4 Count One. Whether there existed a single unlawful agreement,
5 or many such agreements, or indeed, no agreement at all, is a
6 question of fact for you to determine in accordance with my
7 instructions. So let me talk to you for a moment about how to
8 approach that question.
9 In order to prove a single conspiracy, the government
10 must prove beyond a reasonable doubt that each alleged member
11 agreed to participate in what he knew to be a collective
12 venture directed toward a common goal. By way of contrast,
13 multiple conspiracies exist when there are separate unlawful
14 agreements to achieve distinct purposes. If the evidence shows
15 that more than one conspiracy existed, you may still find that
16 the conspiracy charged in Count One existed if it happens to be
17 one of those conspiracies.
18 You may find that the conspiracy charged in Count One
19 existed even if there were changes in personnel or activities
20 over time, so long as you find that at least two of the
21 conspirators continued to act for the duration of the
22 conspiracy for the purpose charged in Count One -- that is,
23 committing wire fraud.
24 If you are not convinced that the conspiracy charged
25 in Count One existed, you cannot find any defendant guilty on

1 Count One. That is so even if you find that some conspiracy
2 other than the one charged in Count One existed. Similarly,
3 even if you find that a particular defendant was a member of
4 another conspiracy, but not the one charged in Count One, then
5 you must acquit the defendant on Count One.
6 Therefore, what you must do is determine whether the
7 conspiracy charged in Count One existed. If it did, then you
8 must determine the nature of the conspiracy and who were its
9 members.
10 In sum, for each defendant, if you find that the
11 government has met its burden on each of the two elements
12 described above, then you should find that defendant guilty on
13 Count One. If you find that the government has not met its
14 burden with respect to either element as to the defendant you
15 are considering, then you must find that defendant not guilty.
16 Now, you are going to have, in all likelihood, a
17 redacted version of the indictment in the jury room. In any
18 case, you have been told the substance of parts of it, and you
19 will note that the indictment alleges that certain acts
20 occurred on or about various dates. It doesn't matter if the
21 evidence you heard at trial indicates that a particular act
22 occurred on a different date. The law requires only a
23 substantial similarity between the dates alleged in the
24 indictment and the dates established by the evidence.
25 Now, those are the instructions on the law. I am now

1 going to talk to you a little bit about the trial process,
2 about your evaluation of the evidence, and about the conduct of
3 your deliberation.
4 You folks are the sole and exclusive judges of the
5 facts. I certainly do not mean to indicate any opinion as to
6 the facts or as to what your verdict ought to be. The rulings
7 I have made during the trial, the questions I asked -- if in
8 fact I asked any -- and any comments I may have made to the
9 lawyers in managing the trial are not any indication of any
10 views I might have about what your decision ought to be or as
11 to whether or not the government has proved its case.
12 It is your duty to accept these instructions on the
13 law and to apply them to the facts as you determine the facts
14 to be, regardless of whether or not you agree with the
15 instructions. You are to show no prejudice against an
16 attorney, or the attorney's client, because the attorney
17 objected to the admissibility of evidence, asked for a sidebar,
18 or asked me to rule on questions of law. In addition, the fact
19 that I asked questions or made comments is not intended to
20 suggest that I believed or disbelieved witnesses or have any
21 view about how you should decide the case. You are to
22 disregard any of that entirely. You of course, however, may
23 consider the answers to any questions I asked. Those are
24 evidence. But any comments I may have made to counsel are to
25 be disregarded.

1 You are to find the facts in this case without
2 prejudice as to any party. The fact that the case is brought
3 in the name of the United States does not entitle the
4 government to any greater consideration than that accorded to
5 the defendants. By the same token, the government is entitled
6 to no less consideration. All the parties stand absolutely
7 equal before the law.
8 Let me talk to you about evaluation of evidence. As I
9 am sure I told you when you were selected, the evidence in this
10 case is the sworn testimony of the witnesses, the exhibits
11 received in evidence, and the stipulations among counsel.
12 The indictment is not evidence. Not question,
13 argument, or objection by a lawyer is evidence. You are not to
14 consider any statements that I struck or told you to disregard,
15 but it is up to you, and you alone, to decide the weight, if
16 any, to be given to the testimony you heard and the exhibits
17 you have seen.
18 There are two kinds of evidence you may use in
19 reaching your verdict.
20 One type of evidence is called direct evidence.
21 Direct evidence is when a witness testifies to something that
22 the witness knows because the witness perceived it with his or
23 her own senses. It is something the witness saw or felt or
24 touched or heard, and if this were some other kind of case,
25 tasted, I suppose. Direct evidence also may be in the form of

1 an exhibit. If this little styrofoam cup were an exhibit in
2 this case, that would be direct evidence of what the
3 characteristics of the cup are. You could look at it. You
4 would have direct evidence that it is a white styrofoam cup.
5 Circumstantial evidence is evidence that tends to
6 prove a disputed fact by proof of other facts. It refers to
7 the process of inferring, on the basis of reason and experience
8 and common sense, from one established fact the existence or
9 nonexistence of some other fact, quite possibly a fact that you
10 can't observe directly. Circumstantial evidence, whatever you
11 may have heard on television, whatever you may have seen in the
12 movies, is of no less value than direct evidence. It is a
13 general rule that the law makes no distinction between direct
14 and circumstantial evidence.
15 I have talked to you before about stipulations. There
16 are two kinds. There are stipulations of fact, which you are
17 obliged to accept. There are stipulations as to what
18 particular witnesses would have said if they testified here.
19 As to those, you must accept that the witnesses would so have
20 testified. Whether you credit that testimony or not, whether
21 you think it is important or material or believable or not,
22 that's up to you.
23 You have had the opportunity to observe all of the
24 witnesses. It is now going to be your job to decide, to the
25 extent it is important to your decision, how believable each

1 witness was in the testimony that was given. You are the sole
2 judges of the credibility of the witnesses and of the
3 importance of their testimony. In doing that, you will use
4 your common sense; you will apply all of the tests for
5 truthfulness and accuracy that you would apply with respect to
6 important matters in your own everyday lives.
7 Your decision whether or not to believe a witness may
8 depend on how the witness impressed you. Was the witness
9 candid, frank, forthright? Or, did the witness seem as if the
10 witness was hiding something, being evasive or suspect in some
11 way? How did the witness testify on direct compared with how
12 the witness testified on cross-examination? Was the witness
13 consistent in his or her own testimony or did the witness
14 contradict himself or herself? Did the witness seem to know
15 what he or she was talking about? Did the witness strike you
16 as someone who was trying to report his or her knowledge
17 accurately?
18 If you find that a witness deliberately or willfully
19 lied to you about an important matter, you may either disregard
20 everything the witness said or you may accept whatever part of
21 it you choose to believe. In other words, if you find that a
22 witness lied under oath about a material fact, you may treat
23 the testimony as a slice of toast that's been partially burned.
24 You can either throw the whole piece of toast out, or you can
25 scrape off the burned part and eat the rest. It is up to you.

1 Ultimately, the determination of whether and to what extent you
2 accept the testimony of a witness is entirely up to you.
3 You should, in evaluating credibility of witnesses,
4 consider whether the witness stands to benefit in some way from
5 the outcome of the case. An interest in the outcome can create
6 a motive to testify falsely. It can sway a witness to testify
7 in a way that the witness perceives as likely to advance the
8 witness's own interests. Keep in mind, though, that it does
9 not automatically follow that testimony from an interested
10 witness is to be disbelieved. It is for you to decide, based
11 on your own perceptions and your own common sense, to what
12 extent, if at all, a witness's interest has affected the
13 testimony.
14 You have heard some testimony from a couple of law
15 enforcement officers, two I believe. The fact that a witness
16 may be, or may formerly have been, employed by the government
17 in law enforcement doesn't mean that his or her testimony is
18 necessarily deserving of more or less consideration or greater
19 or lesser weight than that of an ordinary witness. At the same
20 time, in considering the credibility of such a witness, you are
21 entitled to consider whether the testimony may be colored by a
22 personal or a professional interest in the outcome.
23 It is your decision, after reviewing all the evidence,
24 whether to accept the testimony of those witnesses, and if so,
25 to give the testimony whatever weight you think it deserves.

1 You have heard testimony from certain government
2 witnesses who testified that they were actually involved in
3 planning and carrying out the crimes charged in the indictment.
4 There has been a fair amount said about these cooperating or
5 accomplice witnesses in the summations of counsel and whether
6 or not you should believe them.
7 Experience will probably tell you that the government
8 frequently must rely on the testimony of witnesses who
9 participated in the criminal activity about which they testify
10 in a trial. For those reasons, the law allows the use of the
11 testimony of cooperating or accomplice witnesses. In fact, in
12 federal courts, the law is that the testimony of a cooperating
13 or accomplice witness in itself may be enough for conviction if
14 the jury believes that it proves the defendant guilty beyond a
15 reasonable doubt.
16 So the testimony of accomplice witnesses is entirely
17 appropriate for your consideration. The government argues, as
18 it is entitled to do, that if such testimony couldn't be used,
19 there would be many cases in which there was real guilt and
20 conviction could not be had; it simply would be unattainable.
21 However, the testimony of accomplice witnesses should
22 be scrutinized with special care and caution because such
23 witnesses may believe that it is in their interest to give
24 testimony favorable to the government. The fact that a witness
25 is an accomplice can be considered by you as bearing on

1 credibility. As I said, however, it doesn't follow that simply
2 because a person has admitted to participating in one or more
3 crimes the person is incapable of giving a truthful account of
4 what happened.
5 Like the testimony of any other witness, accomplice
6 witness testimony should be given the weight you think it
7 deserves, in light of the facts and circumstances in front of
8 you, taking into account the witness's demeanor, candor, the
9 strength and accuracy of recollection, their background, and
10 the extent to which the testimony is corroborated or not
11 corroborated by other evidence. You may consider whether an
12 accomplice witness, like anybody else, has an interest in the
13 outcome in deciding whether it has affected that witness's
14 testimony.
15 You have heard testimony about various agreements
16 between the government and accomplice witnesses. I must
17 caution you it is of no concern of yours why the government
18 made such agreements. Your sole concern is whether a witness
19 has given truthful testimony in this courtroom before you.
20 In evaluating the testimony of accomplice witnesses,
21 you should ask yourselves whether these witnesses would benefit
22 more by lying or by telling the truth. Was their testimony
23 made up in any way because they believed or hoped that they
24 would somehow receive favorable treatment by testifying
25 falsely? Or did they believe that their interests would be

1 best served by testifying truthfully? If you believe that a
2 witness was motivated by hopes personal gain, was the
3 motivation one that would cause him to lie, or was it one that
4 would cause him to tell the truth? Did that motivation color
5 the witness's testimony?
6 If you find that the testimony was false, you should
7 of course reject it. If, however, after a cautious and careful
8 examination of an accomplice witness's testimony and demeanor,
9 you are satisfied that the witness told the truth, you should
10 accept it as credible and act upon it accordingly.
11 As with any witness, let me emphasize that the issue
12 of credibility does not have to be decided on an all-or-nothing
13 basis. Even if you find that a witness testified falsely in
14 some part, you still may accept their testimony in other parts,
15 or you may disregard all of it. That's up to you.
16 You have heard testimony from one or more government
17 witnesses who pled guilty to charges arising out of the same
18 facts at issue in this case. I instruct you that you are to
19 draw no conclusions or inferences of any kind about the guilt
20 of the defendants on trial here from the fact that one or more
21 prosecution witnesses pled guilty to similar charges. The
22 decision of those witnesses to plead guilty was a personal
23 decision those witnesses made about their own guilt. It may
24 not used by you in any way as evidence against or unfavorable
25 to the defendants on trial here.

1 You have heard evidence during the trial that some
2 witnesses have discussed the facts of the case and their
3 testimony with lawyers before the witnesses appeared in court.
4 Although you may consider that fact when you evaluate
5 a witness's credibility, I should tell you that there is
6 nothing unusual or improper about a witness meeting with
7 lawyers before testifying so that the witness can be aware of
8 the subjects he or she will be questioned about, focus on those
9 subjects, and have the opportunity to review relevant exhibits
10 before being questioned about them. Such consultation helps
11 conserve your time and the Court's time. In fact, it would be
12 unusual for a lawyer to call a witness without such
13 consultation.
14 Again, the weight you give to the fact or the nature
15 of the witness's preparation for his or her testimony and what
16 inferences you draw from such preparation are matters
17 completely within your discretion.
18 There are several persons whose names you have heard
19 during the course of this trial but who did not appear here to
20 testify. I instruct you that both sides had an equal
21 opportunity, or lack of opportunity, to call any of those
22 witnesses. Therefore, you should not draw any inferences or
23 reach any conclusions as to what they would have testified to
24 had they been called. Their absence should not affect your
25 judgment in any way.

1 You should, however, remember my instruction that the
2 law does not impose on a defendant in a criminal case the
3 burden or duty of calling any witnesses or producing any
4 evidence.
5 (Continued on next page)
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1 THE COURT: You've heard reference in the testimony,
2 and in the arguments of defense counsel, to the fact that
3 certain investigative or other techniques were not used by the
4 government. There is no legal requirement that the government
5 prove its case through any particular means. While you are to
6 consider carefully the evidence adduced by the government, you
7 need not speculate as to why it used the techniques it did or
8 why it did not use other techniques. The choice of law
9 enforcement techniques is not your concern.
10 You have heard testimony about evidence that was
11 seized in connection with searches conducted by law
12 enforcement, for example, email evidence obtained pursuant to
13 court-approved search warrants. You've heard also of recorded
14 calls and conversations that were offered into evidence during
15 the trial. I instruct you that all of the evidence in this
16 case, including evidence obtained pursuant to searches and the
17 recorded meetings and conversations played during the trial,
18 properly was admitted in this case and properly is considered
19 by you. Whether you approve or disapprove of the recordings of
20 calls or conversations, or the uses of searches to obtain
21 evidence, should not enter into your deliberations because I
22 now instruct you that the government's use of that evidence is
23 entirely lawful.
24 You must, therefore, regardless of any personal
25 opinions, give that evidence full consideration along with all

1 the other evidence in the case in determining whether the
2 government has proved each defendant's guilt beyond a
3 reasonable doubt.
4 The defendants you now understand did not testify in
5 this case. Under our Constitution, a defendant never is
6 required to testify or to present any evidence because it is
7 always the government's burden to prove a defendant guilty
8 beyond a reason doubt. A defendant never is required to prove
9 that he is innocent. You may not attach any significance to
10 the fact that the defendants did not testify. You may not draw
11 any adverse inference against a defendant because that
12 defendant didn't take the witness stand. You may not consider
13 this in any way in your deliberations.
14 Some of the people who may have been involved in the
15 events leading to this case are not on trial here. You may not
16 draw any inference, favorable or unfavorable, towards the
17 government or the defendants, from the fact that any person
18 other than the defendants is not on trial here. You may not
19 speculate as to the reasons why that is so. Those matters are
20 wholly outside the jury's concern. You may not consider them
21 in any way in reaching your verdict as to these defendants.
22 Your job is limited to considering the charges contained in the
23 indictment and the three defendants before you.
24 The question of possible punishment of the defendants
25 is of no concern to you and it should not, in any way, enter

1 into or influence your deliberations. The job of imposing
2 sentence, should there be a conviction, rests entirely upon the
3 Court. Under your oath as jurors, you cannot properly allow
4 consideration of any punishment that may be imposed, in the
5 event of a conviction, to allow that -- you may not allow that
6 to influence your verdict in any way.
7 Now, you are going to retire to decide this case in
8 just a couple of minutes. It is your duty as jurors to consult
9 with one another and to deliberate with a view to coming to an
10 agreement. Each of you must decide the case for yourself, but
11 you should do so only after considering the case with your
12 fellow jurors, and you should not hesitate to change an opinion
13 if you are convinced that it is erroneous. Your verdict,
14 whether guilty or not guilty, must be unanimous, but you are
15 not bound to surrender your honest convictions concerning the
16 effect or the weight of the evidence merely for the purpose of
17 returning a verdict or solely because of the opinion of other
18 jurors. Discuss and weigh your respective opinions
19 dispassionately, without regard to sympathy, without regard to
20 prejudice or favor for either party, and come to the conclusion
21 which in your good conscience appears from the evidence to be
22 in accordance with the truth.
23 A word about your notes.
24 Any notes you may have taken during the trial are for
25 your personal use only. Each of you may consult your own notes

1 during deliberations, but any notes you may have taken are not
2 to be relied upon during deliberations as a substitute for the
3 collective memory of all of you. Your notes should be used as
4 memory aids but should not be given precedence over your
5 independent recollection of the evidence. If you didn't take
6 notes, you should rely on your own independent recollection of
7 the proceedings, and you should not be influenced by the notes
8 of other jurors. I emphasize that the notes are not entitled
9 to any greater weight than the recollection or impression of
10 each juror as to what the testimony and the evidence was.
11 As I mentioned at the start, you will be receiving
12 copies of my written instructions in the jury room shortly
13 after you retire. You will find that they contain what I think
14 will strike most or probably all of you as hieroglyphics.
15 There are legal citations after every paragraph or so. You are
16 to pay them no mind. The chances are you won't understand what
17 they refer to anyway because they are in lawyer code. They are
18 worst than doctors' prescriptions. But they are my audit trail
19 about where various legal principles come from. They are for
20 the convenience of myself and counsel. You are to disregard
21 all of them.
22 You are also certainly well aware by now that many of
23 the exhibits have redactions, that is, parts that are blacked
24 out, and the copy of the indictment that you are likely to
25 receive also has parts that are blacked out. You are just to

1 disregard the redactions altogether. That was done for the
2 sake of fairness and efficiency. You are not to speculate
3 about what was blacked or why. Just deal with what you have in
4 front of you that is legible.
5 You are not to discuss the case unless all twelve
6 jurors are present. Ten or eleven of you are what I trust by
7 now are a group of congenial friends, but you are not a jury
8 unless all 12 of you are there.
9 When you retire, you should select one of the twelve
10 of you as foreperson. That person will preside over
11 deliberations and speak for you here in open court. If it
12 becomes necessary to send in a note, the foreperson will write
13 the note and send it in in a sealed envelope. When you have
14 come to the verdict, should you do so, and I trust you will,
15 the foreperson will notify the officer that there is a
16 verdict -- not what the verdict is. You will just say, "We
17 have a verdict."
18 I will be submitting to you, along with the written
19 instructions, a verdict form on which to record the verdict.
20 When you have reached a unanimous verdict, you will record your
21 answers on one copy of the verdict form. Please do not add
22 anything that is not called for by the verdict form. You will
23 see the verdict form has a place to check "guilty" or "not
24 guilty" as to each defendant on each count on which that
25 defendant is named. Just put whatever the checkmarks are that

1 you find unanimously to be appropriate. No commentary.
2 Please, no commentary. And then each of you will sign at the
3 bottom, and the foreperson will tell the officer that there is
4 a verdict. Don't give the verdict form to the officer. Put it
5 in an envelope. The foreperson will bring it into court. You
6 will hold on to it until I ask for it.
7 You should each be in agreement with the verdict.
8 When the verdict is announced in open court, once it is
9 announced in open court and officially recorded, it ordinarily
10 cannot be changed or revoked.
11 A couple of other practical details here.
12 If during your deliberations you want me to discuss
13 any further any of the instructions on the law that I have
14 given you, the foreperson should compose a note, put it in a
15 sealed envelope, give it to the officer, and the officer will
16 pass it on to me.
17 Now, when you get the written instructions in the jury
18 room, you will find that every page and line is numbered. And
19 if the question relates to a particular part or parts of the
20 charge, it would be very helpful if the foreperson's note
21 indicates the page and line numbers that the question relates
22 to. The process that happens when a note comes in is that I
23 show the note to the lawyers. The lawyers have an opportunity
24 to suggest to me what they think the right answer is. If
25 everybody agrees, it is no problem. If everybody doesn't

1 agree, I ultimately decide what the right answer is. And the
2 point of being specific about your questions is that the more
3 precise your questions are, the more likely it is we can give
4 you the answer you want and do it quickly. The more ambiguous
5 it is, the longer we will discuss what you really mean and in
6 all likelihood have some discussion about what the right answer
7 is.
8 During the course of the deliberations, we will send
9 the exhibits that are in evidence into the jury room. Now, we
10 have not yet discussed how we will deal with the tapes should
11 you want a tape played, played out loud. If you need a tape
12 played out loud, you will let us know in a note unless we make
13 other arrangements before then.
14 If you need to have testimony read back to you, the
15 foreperson -- ah, I'm told the parties have apparently worked
16 out what we do with the tapes. Is that right? Everybody is
17 agreed on this or no?
18 MR. DISKANT: Yes, your Honor.
19 THE COURT: A clean laptop, that's all agreed? Yes?
20 MR. DISKANT: Yes.
21 MR. MOORE: Yes.
22 MR. HANEY: Yes, your Honor.
23 MS. DONNELLY: Yes.
24 THE COURT: So, we have a procedure for the tapes.
25 You will have the tapes -- I think they are CDs -- I'm sure

1 they are CDs, and you will have a clean laptop by which I mean
2 a laptop with nothing else on it. And so if you want to listen
3 to a particular exhibit, you will have the CD, you will have
4 the laptop, just play it to your heart's content. You also
5 have the T exhibits. Right? So, you will have the transcripts
6 as well.
7 OK. With respect to readbacks, if you need to have
8 any of the testimony read back to you, the procedure is to send
9 in a note telling us as precisely as you can what exactly you
10 want to hear. Now, that could be with any level of
11 specificity -- which witness, direct or cross, what subject.
12 Just be as specific as you can, because we then have to figure
13 out what you really want. You don't want to have a vague note
14 and wind up listening to two hours of testimony for one
15 paragraph, so it is in everybody's interest to be specific, but
16 whatever you need we will get for you. It sometimes takes some
17 time to organize a read back. Just bear that in mind because
18 there are sidebars that have to be edited out and stuff like
19 that, just practical considerations.
20 I will respond to questions, in respect, just as fast
21 as I can.
22 The lawyers will be -- I normally have them wait in
23 the courtrooms or right around the courtroom so that we can
24 respond to notes instantly. The exception to that will be
25 between 12:45 and 2, we will not respond to notes. And if we

are here during a dinner hour, we will not respond to notes during a dinner hour, but we'll keep those short, should that occur.

Now, one last thing about notes. If you communicate with the Court before there is a verdict, whether in the courtroom or by a note, you are never to indicate how the vote stands, if there is a division, unless I specifically ask you to tell me that, and I haven't done it yet in 24 years. So, no vote.

I remind you folks that you took an oath to render judgment fairly and impartially, without prejudice or sympathy, and without fear, based solely on the evidence in this case and the applicable law. It would be improper for you to consider, in reaching your decision as to whether the government has sustained its burden of proof, any personal feelings you may have about the race, religion, national origin, gender, or age of a defendant. If you let prejudice or sympathy interfere with your clear thinking, there is a risk that you will not arrive at a just verdict. All parties to this case are entitled to a fair trial. You must make a fair and impartial decision so that you'll come to a just verdict.

If you have a reasonable doubt as to a defendant's guilt, you should not hesitate for any reason to return a verdict of not guilty. On the other hand, if you should find that the government has met its burden of proving a defendant's

1 guilt beyond a reasonable doubt, you should not hesitate,
2 because of sympathy or any other reason, to find that defendant
3 guilty.
4 Now, does any counsel have any objection to the charge
5 as delivered that I haven't ruled on previously? If so, come
6 to the sidebar.
7 (Pause)
8 No indication.
9 OK. I'm told that there are two audio exhibits that
10 are not yet on CDs. They will just come into the jury room
11 later.
12 OK. Now we have to address the question the
13 alternates asked on Thursday afternoon. If the twelve jurors
14 try the case to a verdict, the alternates will be released and
15 you will not deliberate with the jurors. And you will be able
16 to go home, or about your affairs, in just a few minutes, but
17 you are still alternates on this jury. You are subject to
18 recall in the event, for example, that something happened to
19 one of the jurors, or more than one of the jurors, God forbid.
20 You will be recalled in order. It is essential that you not
21 read or be exposed to any conversation or publication or
22 anything else about this case until you know that the jury has
23 returned a verdict or has been discharged. Andy will make sure
24 he has your contact information. And while the chances are
25 that you will not be recalled, there are no guarantees and

jurors have been recalled in the recent past because of some juror becoming ill or some other problem.

So you need to adhere to my instruction, but we may not see you again, and, therefore, on behalf of the defendants, their lawyers, the government, and myself, we thank you for your very attentive consideration of this case and for the time investment you have put into it. It's obviously very important in every case and this one is not an exception. So, you may now, the six of you, go into the jury room with Andy. Leave your notes with him and collect your other effects.

And I ask you, Alternate No. 1, you are still an alternate, but I'm going to ask you to remain for one minute while the other five jurors go inside.

So if Alternates No. 2 through 6 would now go into the jury room. And if everyone else will remain seated, I will see Mr. Peterson and lead counsel in the robing room.

And the courtroom remains locked.

OK. Mr. Peterson, counsel, lead counsel, in the robing room, Vinny.

(Continued on next page)

(In the robing room)

THE COURT: Have a seat.

OK. Counsel are all present. Mr. Peterson is present.

Mr. Peterson, previously you said you hadn't heard the instructions yet.

JUROR: Mm-hmm.

THE COURT: So you've now heard the instructions. Are you able to fairly and impartially judge this case based solely on the instructions and the evidence you have heard?

JUROR: Yes.

THE COURT: Counsel, any other inquiry?

MR. HANEY: No, your Honor.

MR. SCHACHTER: No, your Honor.

THE COURT: OK, you remain an alternate.

MR. DISKANT: And, to be clear, that would include putting out of his mind anything that would not impact --

JUROR: Yes.

THE COURT: Are you able to put out of your mind anything else you have read?

JUROR: Mm-hmm.

THE COURT: I need a word.

JUROR: Yes.

THE COURT: OK. Thank you, Mr. Peterson. You may rejoin the other alternates.

(Juror not present)

MR. MOORE: Your Honor, could I quickly raise one issue? And I thought about raising it, but I hate raising this in front of the jury. On page 47 of your charge where you address the issue of uncalled witnesses equally available, that is generally true with the exception of agents, like the undercovers. Those undercovers were not available to us. Your Honor ruled against us in our motion in limine with regards to their testimony, and the government has the ability to control them through the Touhy regulations and the like. So I just raise that point for the record.

MR. DISKANT: Your Honor, I disagree with that. Had Mr. Moore sought to call one of the agents, he did in fact submit the required certification under Touhy. We forwarded it to the FBI. There was never a time when any party sought to call any of these witness.

MR. MOORE: Well, I never received a response from the FBI to my request under Touhy. My understanding of the way --

THE COURT: And, Mr. Moore, if you had said to me, "Judge, they haven't responded and I want them," you'd have had them.

MR. MOORE: OK. All right. Yes, sir.

THE COURT: And this ship sailed last week, anyway.

MR. MOORE: I understand.

THE COURT: OK.

MR. MOORE: I thought about it while I was sitting there.

THE COURT: I understand. That is what good lawyers do.

OK. Let's go.

MR. MOORE: Good lawyers think about it early. Better lawyers think about it early.

(Continued on next page)

(In open court)

THE COURT: OK. As soon as we get the officer in, we are ready to go.

(Pause)

All right. The deputy will swear the officer.

(The court security officer was sworn)

THE COURT: Ladies and gentlemen, you will now retire to deliberate upon your verdict.

THE CLERK: Will the jury please come this way.

(Time noted at 12 noon, the jury began deliberations)

THE COURT: OK. Anything further?

MR. DISKANT: Your Honor, is it sufficient if one attorney for each side generally remains in the courtroom, or do you need all of them?

THE COURT: I don't need all of you as long as whoever remains is fully authorized to act.

MR. DISKANT: Very good.

THE COURT: OK. All right. Thank you.

Before you go, we will mark as Court Exhibit next in order one of the copies of the charge that will go in. If there is no objection, Andy will just take the charge in, take the verdict form in.

And then I was given a note that there are two audio exhibits that the government does not yet have on CDs. If everybody agrees, we will show the CDs to the defense and we