UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. CR No. 13-159 ML

KENNETH M. DELASHMUTT

JURY INSTRUCTIONS

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PART I: GENERAL INSTRUCTIONS

1. INTRODUCTION

Members of the jury, we have now come to the end of this trial. This case, like all criminal cases, is a serious one. I say this because the defendant and the United States have a deep concern for your mature consideration of the evidence as presented and the law which I am about to give you.

Although you as the jury are the sole judges of the facts, you are duty bound to follow the law as I instruct you, and to apply that law to the facts as you find them to be from the evidence which has been presented during this trial. You are not to single out any one instruction as stating the law. Rather, you must consider these instructions in their entirety. You are not to be concerned with the wisdom of any rule of law, regardless of any opinion which you might have as to what the law ought to be. It would be a violation of your sworn duty to base your verdict upon any version of the law other than that which I am about to give to you.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" plea of the defendant. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the government are entitled to an impartial consideration of all the evidence. Moreover, the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a

litigation. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals at the bar of justice.

2. FUNCTION OF A JURY

Ladies and gentlemen, you are the trier of facts; you alone must determine what the facts are in this particular case. My function and duty is to instruct you on the law that applies to this case. It is your duty to accept the law as I give it to you—whether or not you agree with it—and to apply that law to the facts as you find them.

3. JURY'S RECOLLECTION CONTROLS

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

4. CONSIDER ONLY THE OFFENSE CHARGED

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

5. PRESUMPTION OF INNOCENCE

In all criminal cases, there is a presumption of innocence. Every defendant under our system of law is presumed to be innocent of the accusation which is filed against him or her, and this presumption of innocence must remain with the defendant from the moment the charge is brought, throughout the trial, through the arguments of counsel, throughout the instructions of the

Court, and throughout your deliberations when you retire to consider your verdict in the secrecy of the jury room.

The presumption of innocence remains unless and until you find that the defendant is guilty beyond a reasonable doubt of a charge as stated in the indictment. If you find, however, that the defendant is guilty beyond a reasonable doubt of each and every element of the crime with which he is charged, the presumption of innocence disappears and is of no further avail to him.

6. BURDEN OF PROOF

In criminal cases, the law places the burden of proof upon the government. The government has the burden of proving each and every element of the offense as charged beyond a reasonable doubt.

What is meant by the term "beyond a reasonable doubt?" Obviously, the obligation resting upon the government to prove a defendant's guilt beyond a reasonable doubt does not mean that it must do so beyond all conceivable doubts. Nor does it require the government to prove a defendant's guilt to a mathematical or scientific certainty. Reasonable doubt means that the government must adduce evidence which, on examination, is found to be so convincing and compelling as to leave in your minds no reasonable doubt about the defendant's guilt. We know from experience what a doubt is, just as we know when something is reasonable or unreasonable. Reasonable doubt by definition means a doubt founded upon reason and not speculation, that is, a doubt for which you can give some reason.

If, therefore, after reviewing all the evidence, there remains in your mind a doubt about

the defendant's guilt, and this doubt appears in the light of the evidence to be reasonable, your duty is to find the defendant not guilty. If, however, at the end of your deliberations, you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty, your duty would be to return a verdict against him.

7. DEFENDANT'S RIGHT NOT TO TESTIFY OR INTRODUCE EVIDENCE

A defendant does not have to testify or introduce any evidence at all. This principle is related to the fact that the burden of proof is upon the government and not on the defendant.

A defendant in a criminal case need not say anything. It is the right of every defendant not to testify. This right is guaranteed by the Constitution. If the defendant chooses not to testify, you may not draw any adverse inference from that fact. By that I mean you may not say, "Well, he must have something to hide, otherwise he would have testified," or, "He must be guilty because he did not get up on the stand and tell me that he was not guilty." It is absolutely prohibited for you to draw such inferences in this case.

PART II: THE OFFENSES CHARGED

8. INDICTMENT – DEFINED

An indictment is not evidence. This case, like most criminal cases, began with the filing of an indictment. You will have the indictment before you in the course of your deliberations in the jury room. The fact that the defendant has had an indictment filed against him is no evidence whatsoever of guilt. An indictment is nothing more than an accusation. It is a piece of paper filed with the Court to bring a criminal charge against a defendant. The indictment simply brings this matter before you for determination. Beyond that, it has no significance whatsoever. Here, the defendant has pleaded not guilty and has put in issue the charge alleged in the indictment. The government therefore has the burden of proving the allegations made against the defendant.

9. "ON OR ABOUT" – DEFINED

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient that the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the indictment.

10. COUNT ONE – THREATENING A FEDERAL OFFICIAL

Count one of the indictment charges that "[o]n or about May 2, 2013 in the District of Rhode Island, the defendant . . . did knowingly and intentionally threaten to assault and murder Agents of the Internal Revenue Service, whose identities are known to the Grand Jury and who are officials as defined in 18 U.S.C. § 1114, in violation of 18 U.S.C. § 115(a)(1)(B)."

11. 18 U.S.C. § 115(a)(1)(B)

Section 115(a)(1)(B) of Title 18 of the United States Code provides in relevant part:

"Whoever . . . threatens to assault . . . or murder . . . a United States official . . . with intent to impede, intimidate, or interfere with such official . . . while engaged in the performance of official duties, or with the intent to retaliate against such official . . . on account of the performance of official duties . . . " is guilty of a crime against the United States.

12. 18 U.S.C. § 115(a)(1)(B) – ESSENTIAL ELEMENTS

The defendant is charged with threatening a federal official. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of the following three elements beyond a reasonable doubt:

First, that the defendant knowingly threatened to assault or murder Kim Kay and/or Kenneth Cournoyer;

Second, that at the time of the alleged threat Kim Kay and Kenneth Cournoyer were federal officials; and

Third, that the defendant acted with the intent to impede, intimidate, or interfere with Kim Kay and/or Kenneth Cournoyer while engaged in the performance of his/her official duties or with the intent to retaliate against him/her on account of the performance of his/her official duties.

13. "KNOWINGLY" – DEFINED

To prove that the defendant committed this crime, the government must prove that the defendant knowingly threatened a federal official. The term "knowingly," as used in these instructions to describe the alleged state of mind of the defendant, means that he was conscious and aware of his action, realized what he was doing or what was happening around him and did not act because of ignorance, mistake or accident.

14. THREAT TO ASSAULT OR MURDER

Now, what is a threat for purposes of the statute? A threat is a statement that expresses an intent to inflict bodily harm on someone. To be a threat, a statement must be of such a nature as can reasonably induce fear. You must determine whether a statement was a true threat when judged in its context.

Among other things, you should consider whether on its face in the circumstances in which the statement is made, a reasonable person would foresee that the statement would convey to the recipient a seriousness of purpose and the apparent prospect of execution. Whether a particular statement is a threat is governed by an objective standard whether a reasonable person in the circumstances of the defendant would foresee that the statement would be interpreted by the person to whom it is made as a serious expression of an intent to harm or assault.

This means that you should consider the statement in light of its entire factual context, including the surrounding events and the manner and tone in which it was made. Sometimes the tone or the way something is expressed can make a difference between a threat and something that is not a threat.

Keep in mind that the government must prove its case beyond a reasonable doubt. So if there is something ambiguous about the way the statement is made and you think that the statement can be reasonably interpreted under the circumstances, either as threatening or nonthreatening, the case has not been proven. However, the fact that a threat is subtle or lacks explicitly threatening language does not make it less of a threat.

A threat can be made in person, in a phone call, or in a letter. To be a threat, it is not necessary that the statement be made face to face. The government does not have to prove that the defendant actually intended to carry out the threat or that he was able to. That is not a part of the definition of a threat.

If the government proves that a threat was made by the defendant, then you must decide whether the person threatened was a federal official and whether at the time the threat was made, the officer was engaged in the performance of his/her official duties.

15. "FEDERAL OFFICIAL" – DEFINED

A federal official includes any officer or employee of the United States, or of any agency in any branch of the United States government, while such officer/employee is engaged in the performance of official duties, or when an action is taken on account of performance of official duties. The government does not have to prove that defendant knew that Kim Kay and Kenneth Cournoyer were federal officials.

16. ACTING WITH INTENT TO IMPEDE, INTIMIDATE, OR INTERFERE WITH FEDERAL OFFICIAL WHILE ENGAGED IN THE PERFORMANCE OF HIS/HER OFFICIAL DUTIES OR ACTING WITH THE INTENT TO RETALIATE AGAINST A FEDERAL OFFICIAL ON ACCOUNT OF THE PERFORMANCE OF HIS/HER DUTIES

If you find that a threat to assault or murder a federal official was made, then you must consider the next element of the offense. You must determine whether the defendant made the threat with the intent to impede or intimidate or interfere with the federal official's performance of his/her official duties or whether the defendant made the threat with the intent to retaliate against the federal official because of the performance of his/her official duties.

The government may satisfy this element of the offense by proving any of these intentions. It is not necessary that the government prove that the defendant intended all of these things. If you find that the government has proven any of these intentions beyond a reasonable doubt and you agree unanimously as which one it is, then the government has proven the element of intent. You must also agree unanimously as to which federal official(s) was/were threatened.

When we speak of the defendant's intent, we are talking about what he meant to do and what was in his mind. This is difficult to prove directly, because there is no way directly to scrutinize the workings of someone else's mind or his state of mind. But you may infer the defendant's intent from the surrounding circumstances, that is to say, you may rely on circumstantial evidence in determining the defendant's intent. You may consider any statement made, act done, or omitted by the defendant and all other facts and circumstances in evidence which indicate his intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

PART III: CONSIDERATION OF THE EVIDENCE

17. EVIDENCE RECEIVED IN THIS CASE

For the purpose of determining whether or not the government has sustained its burden of proof, you must evaluate all of the evidence. The evidence in this case consists of the sworn testimony of the witnesses and all exhibits received in evidence, and any facts to which the parties have stipulated.

Any proposed testimony or proposed exhibit to which an objection was sustained by the Court, as well as any testimony ordered stricken by the Court, must be entirely disregarded.

Anything you may have seen or heard outside the courtroom is not proper evidence and must be entirely disregarded.

18. INFERENCES—DEFINED

In determining whether the government has sustained its burden of proof, you are to consider only the evidence. But in your consideration of the evidence, you are not limited to the statements of witnesses, or solely to what you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been proven, such reasonable inferences as seem justified in light of your experiences.

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in the case.

19. EVIDENCE—DIRECT AND CIRCUMSTANTIAL

There are, generally speaking, two types of evidence. One is direct evidence, such as the

testimony of an eyewitness. The other is indirect or circumstantial evidence, which is a chain of circumstances pointing to certain facts.

The law makes no distinction at all between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. In determining whether the government has sustained its burden of proof you can and should weigh all the evidence, both direct and circumstantial.

20. OBJECTIONS AND WEIGHT OF THE EVIDENCE

The fact that the Court may have admitted evidence over objection should not influence you in determining the weight that you will give such evidence. Nor should statements made by counsel, either for or against the admission of offered evidence, influence your determination of the weight that you will give the evidence if admitted. In other words, you should determine the weight that you will give such evidence on the basis of your own consideration of it and without regard to the statements of counsel concerning the admissibility of such evidence.

21. EXHIBITS

Exhibits admitted into evidence by the Court are properly before you, and will be available to you during your deliberations. An exhibit marked by the Court for identification is not evidence in the case unless or until it was admitted by the Court as a full exhibit. If it has not been admitted as a full exhibit, you may not consider it. If it was admitted, however, it is just as much a part of the evidence in the case as the testimony which you have heard from the witness stand.

22. STIPULATIONS

The evidence in this case includes facts to which the parties have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You may accept the stipulation as fact and give it whatever weight you choose.

23. REMARKS OF COUNSEL

Remarks, statements, or questions by counsel are not evidence and are not to be considered by you as evidence during your deliberations. Neither should you permit objections by counsel to the admission of evidence, or the rulings of the Court, create any bias or prejudice toward counsel or the party whom he represents. It is the duty of counsel for both sides to represent their clients vigorously and to defend their client's rights and interests. In the performance of that duty, counsel freely may make objection to the admission of offered evidence, or to any other ruling of the Court, and should not be penalized for doing so.

24. CONDUCT OF COURT AND COUNSEL

If during trial, or in instructing you, I have said or done anything that has caused you to believe that I was indicating an opinion as to what the facts are in this case, you should put that belief out of your mind. I did not intend to indicate any such opinion. In fact, I try not to have an opinion about the case because you are the sole and exclusive judges of the facts.

In determining the facts, you are to consider only that evidence which has properly been

placed before you. It is the Court's duty to pass upon the admissibility of the offered evidence, that is, to decide whether or not offered evidence should be considered by you. Evidence admitted by the Court is properly before you for your consideration; evidence which the Court has refused to admit, or may have stricken from the record after you heard it, is not proper subject for your deliberations and is not to be considered by you.

25. TESTIMONY OF WITNESSES

The law does not require you to accept or credit the evidence I have admitted. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses, and the weight you choose to give to his or her testimony.

In evaluating the testimony of witnesses you may consider several facts-the opportunity of the witnesses to have acquired knowledge of that to which they testified; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the outcome of the case; their intelligence or lack thereof; and the probability or improbability of the truth of their testimony.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.

The testimony of a witness may be discredited or impeached by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. These statements may be used to impeach the credibility of that witness. It is within your province to assess the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

From these circumstances, and from all of the other facts and circumstances proved at the trial, you may determine whether or not the government has sustained its burden of proof.

PART IV: DELIBERATIONS AND VERDICT

26. UNANIMOUS VERDICT -- JURY CONDUCT

To render a verdict, all twelve of you must agree, that is, your verdict must be unanimous. Therefore, during your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your view simply because a majority holds to the contrary view, but in pursuing your deliberations, you should keep your minds reasonably open with respect to any point in dispute so that you will not be prevented from achieving a unanimous verdict due to mere stubbornness. It is your right, however, to maintain your view. The vote of each juror is as important as the vote of any other juror, and you need not give up your view, sincerely held, simply because a majority holds to the contrary view.

Do not approach your consideration of the case in an intellectual vacuum. You are not required to disregard your experiences and observations in the ordinary everyday affairs of life. Indeed, your experiences and observations are essential to your exercise of sound judgment and discretion, and it is your right and duty to consider the evidence in light of such experiences and observations. It is hoped and anticipated that you will sift all of the evidence in this case through maturity and common sense.

Of course, prejudice, sympathy or compassion should not be permitted to influence you. All that any party is entitled to, or expects, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence and an application of the law to that evidence as I have instructed you.

27. COMMUNICATIONS BETWEEN COURT AND JURY DURING DELIBERATIONS

If it becomes necessary during your deliberations to communicate with the Court, you may send a note signed by your foreperson, or by one or more members of the jury. The foreperson may then hand such written request or question to the marshal in whose charge you will be placed. The marshal will bring any written questions or requests to me. I will have you brought into the courtroom and will attempt to fulfill your request or answer your question. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Bear in mind also that you are never to reveal to any person-not even to the Court-how the jury stands, numerically or otherwise, on the question of whether the accused is guilty or not guilty, until after you have reached a unanimous verdict.