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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

\* \* \* \* \* C.R. NO. 03-081ML  
\*  
UNITED STATES OF AMERICA \*  
\*  
VS. \* FEBRUARY 17, 2005  
\* 9:30 A.M.  
\*  
NIGEL POTTER, ET AL \*  
\*  
\* \* \* \* \* PROVIDENCE, RI

BEFORE THE HONORABLE MARY M. LISI,  
DISTRICT JUDGE  
(Jury Charge)

APPEARANCES:  
FOR THE GOVERNMENT: CRAIG N. MOORE, ESQ.  
PETER F. NERONHA, ESQ.  
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Providence, RI 02903  
  
FOR THE DEFENDANT,  
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B. JEAN ROSIELLO, ESQ.  
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FOR THE DEFENDANT,  
DANIEL BUCCI: ANTHONY M. TRAINI, ESQ.  
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Providence, RI 02903  
  
FOR THE DEFENDANT,  
BURRILLVILLE: JOHN A. TARANTINO, ESQ.  
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25

Court Reporter:

Karen M. Zinni, RPR-RMR-CRR  
One Exchange Terrace  
Providence, RI 02903

KAREN M. ZINNI, RPR-RMR-CRR

1 17 FEBRUARY 2005 -- 9:30 A.M.

2 (The jury is present for the following)

3 THE COURT: For the benefit of those in the  
4 gallery today, I am about to instruct this jury on the  
5 law which they must apply in deliberating and deciding  
6 this case.

7 You are certainly welcome to remain in the  
8 courtroom during the Court's issuance of its  
9 instructions. However, I do ask that if you decide to  
10 stay that you stay for the entire time and not get up  
11 and leave. So if anyone wishes to leave now, now is a  
12 good time to go. If you wish to remain, please  
13 understand that you will be here for 45 minutes to one  
14 hour.

15 Members of the jury, you will recall that at the  
16 beginning of this case I told you that after the  
17 presentation of all evidence and after the arguments of  
18 counsel, I would come back to you to give you those  
19 detailed instructions on the law which you must apply  
20 as you consider the evidence and deliberate on your  
21 verdict.

22 You've already heard me tell everyone in the  
23 courtroom that it takes a good 45 minutes to one hour  
24 for me to give you those instructions; and I ask that  
25 you give me your close and careful attention, as I know

1 you have throughout this trial.

2 I also know, however, that some people learn  
3 better by listening, some learn better by reading. And  
4 so in addition to my giving you these instructions  
5 orally now, each of you will also be provided with a  
6 written copy of the instructions. And I see the  
7 notebooks folding up, and usually that's the reaction I  
8 get. So that if you need to refer to them, you may do  
9 so during your deliberations.

10 And as I said, again, because I know some people  
11 learn better by listening, you will also receive an  
12 audio tape with a tape player so that if you choose to  
13 play them, you may do that during the course of your  
14 deliberations; but for now I do ask that you give me  
15 your undivided attention.

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

22 Although you, as the jury, are the sole judges  
23 of the facts, you are duty-bound to follow the law as I  
24 instruct you and to apply that law to the facts as you  
25 find them to be from the evidence which has been

1 presented during this trial.

2 You are not to single out any one instruction as  
3 stating the law. Rather, you must consider these  
4 instructions in their entirety.

5 You are not to be concerned with the wisdom of  
6 any rule of law regardless of any opinion which you  
7 might have as to what the law ought to be.

8 It would be a violation of your sworn duty to  
9 base your verdict upon any version of the law other  
10 than that which I am about to give to you.

11 You have been chosen and sworn as jurors in this  
12 case to try the issues of fact presented by the  
13 allegations of the Indictment and the denials made by  
14 the not guilty pleas of the Defendants.

15 You are to perform this duty without bias or  
16 prejudice as to any party. The law does not permit  
17 jurors to be governed by sympathy, prejudice or public  
18 opinion. The accused and the Government are entitled  
19 to an impartial consideration of all the evidence.

20 Moreover, the parties and the public expect that  
21 you will carefully and impartially consider all the  
22 evidence in the case, follow the law as stated by the  
23 Court and reach a just verdict regardless of the  
24 consequences.

25 The fact that the prosecution is brought in the

1 name of the United States of America entitles the  
2 Government to no greater consideration than that  
3 accorded to any other party to a litigation.

4 By the same token, it is entitled to no less  
5 consideration. All parties, whether Government,  
6 individuals or corporations, stand as equals at the bar  
7 of justice.

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

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

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

21 An Indictment is not evidence. This case, like  
22 most criminal cases, began with an Indictment. You  
23 will have that Indictment before you in the course of  
24 your deliberations in the jury room. The Indictment  
25 was returned by a grand jury which heard only the

1 Government's side of the case.

2 The fact that the Defendants have had an  
3 Indictment filed against them is no evidence whatsoever  
4 of the guilt of any Defendant. An Indictment is  
5 nothing more than an accusation. It is a piece of  
6 paper filed with the Court to bring a criminal charge  
7 against a Defendant.

8 Here, the Defendants have pleaded not guilty and  
9 have put in issue the charges alleged in the  
10 Indictment. The Government, therefore, has the burden  
11 of proving the allegations made against the Defendants.

12 The fact that an Indictment has been filed in  
13 this case does not give rise to a presumption of guilt.  
14 It does not even lead to an inference of guilt. The  
15 Indictment simply brings this matter before you for  
16 determination. Beyond that, it has no significance  
17 whatsoever.

18 In determining whether the Government has  
19 sustained its burden of proof, you are to consider only  
20 the evidence; but in your consideration of the  
21 evidence, you are not limited to the statements of  
22 witnesses or solely to what you see and hear as the  
23 witnesses testify.

24 You are permitted to draw, from the facts which  
25 you find have been proven, such reasonable inferences

1 as seem justified in light of your experiences.

2 Inferences are simply deductions or conclusions  
3 which reason and common sense lead you to draw from  
4 facts which have been established by the evidence in  
5 the case. You may not, however, draw an inference from  
6 another inference.

7 As I told you at the beginning of the case,  
8 there are two kinds of evidence from which you may find  
9 the facts in a case -- direct and circumstantial  
10 evidence. Direct evidence is direct proof of a fact,  
11 such as the testimony of an eyewitness that the witness  
12 saw something.

13 Circumstantial evidence is indirect evidence,  
14 that is, proof of a fact, or facts, from which you  
15 could draw the inference by reason and common sense  
16 that another fact exists even though it has not been  
17 proven directly.

18 You are entitled to consider both kinds of  
19 evidence. The law permits you to give equal weight to  
20 both, but it is for you to decide how much weight to  
21 give any evidence.

22 The fact that the Court may have admitted  
23 evidence over objection should not influence you in  
24 determining the weight that you will give such  
25 evidence, nor should statements made by counsel either



1 for or against the admission of offered evidence  
2 influence your determination of the weight that you  
3 will give the evidence if admitted.

4 In other words, you should determine the weight  
5 that you will give such evidence on the basis of your  
6 own consideration of it and without regard to the  
7 statements of counsel concerning the admissibility of  
8 such evidence.

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

13 In all criminal cases, there is a presumption of  
14 innocence. All Defendants under our system of law are  
15 presumed to be innocent of the accusation which is  
16 filed against them; and this presumption of innocence  
17 must remain with each Defendant from the moment the  
18 charge is brought, throughout the trial, through the  
19 arguments of counsel, throughout the instructions of  
20 the Court and throughout your deliberations when you  
21 retire to consider your verdict in the secrecy of the  
22 jury room.

23 The presumption of innocence remains unless and  
24 until you find that a Defendant is guilty beyond a  
25 reasonable doubt of a charge as stated in the

1 Indictment.

2 If you find, however, that a Defendant is guilty  
3 beyond a reasonable doubt of each and every element of  
4 a crime with which the Defendant is charged, the  
5 presumption of innocence disappears and is of no  
6 further avail to that Defendant.

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

11 Now, what is meant by the term "beyond a  
12 reasonable doubt." Obviously, the obligation resting  
13 upon the Government to prove a Defendant's guilt beyond  
14 a reasonable doubt does not mean that it must do so  
15 beyond all conceivable doubts, nor does it require the  
16 Government to prove a Defendant's guilt to a  
17 mathematical or scientific certainty.

18 "Beyond a reasonable doubt" means that the  
19 Government must present evidence which, on examination,  
20 is found to be so convincing and compelling as to leave  
21 in your minds no reasonable doubt about a Defendant's  
22 guilt.

23 We know from experience what a doubt is, just as  
24 we know when something is reasonable or unreasonable.  
25 Reasonable doubt, by definition, means a doubt founded

1 upon reason and not speculation, that is, a doubt for  
2 which you can give some reason.

3 If, therefore, after reviewing all the evidence  
4 there remains in your mind a doubt about the  
5 Defendant's guilt and this doubt appears in the light  
6 of the evidence to be reasonable, your duty is to find  
7 that Defendant not guilty.

8 If, however, at the end of your deliberations  
9 you are convinced by the evidence beyond a reasonable  
10 doubt that a Defendant is guilty, your duty is to  
11 return a verdict against that Defendant.

12 A Defendant has a constitutional right not to  
13 testify, and no inference of guilt or of anything else  
14 may be drawn from the fact that a Defendant did not  
15 testify. For any of you to draw such an inference  
16 would be wrong. Indeed, it would be a violation of  
17 your oath as a juror. Further, a Defendant does not  
18 have the burden of calling any witnesses or producing  
19 any evidence.

20 It is your duty to give separate and personal  
21 consideration to the case of each Defendant. When you  
22 do so, you should analyze what the evidence in the case  
23 shows with respect to that particular Defendant,  
24 leaving out of consideration entirely any evidence  
25 admitted solely against some other Defendant or

1 Defendants.

2 The fact that you return a verdict of guilty or  
3 not guilty as to one Defendant on any count of the  
4 Indictment should not in any way affect your verdict  
5 regarding any other Defendant.

6 You must consider each charge separately. The  
7 fact that you find a Defendant guilty or not guilty on  
8 one count does not mean that you should find the same  
9 Defendant guilty or not guilty on any other count.

10 You will note that the Indictment charges that  
11 the offenses were committed in or about or on or about  
12 certain dates. The proof need not establish with  
13 certainty the exact date of the alleged offense. It is  
14 sufficient that the evidence in the case establishes  
15 beyond a reasonable doubt that the offenses were  
16 committed on dates reasonably near the dates alleged in  
17 the Indictment.

18 The Indictment in this case contains 15 counts  
19 or charges. The Defendants in this case are Nigel  
20 Potter, Daniel Bucci and Burrillville Racing  
21 Association.

22 Burrillville Racing Association is also known as  
23 Lincoln Park, Lincoln Greyhound Park and Lincoln Park,  
24 Incorporated. Throughout these instructions, the Court  
25 will refer to that Defendant as Lincoln Park.

1           Count I of the Indictment charges that the  
2 Defendants, Nigel Potter, Daniel Bucci and Lincoln  
3 Park, conspired to commit an offense against the United  
4 States in violation of Title 18 of the United States  
5 Code, Section 371.

6           Specifically, Count I charges that beginning in  
7 or about March 2000 and continuing to at least until in  
8 or about April 2001, the Defendants Potter, Bucci and  
9 Lincoln Park conspired to commit honest services wire  
10 fraud, an offense prohibited by Title 18 of the United  
11 States Code, Sections 1343 and 1346.

12           Counts II through XV charge one or more of the  
13 Defendants with the commission of specific acts of  
14 honest services wire fraud.

15           Counts II through XV pertain to facsimile  
16 transmissions allegedly made or caused to be made by  
17 one or more of the Defendants in interstate or foreign  
18 commerce.

19           Counts II, III, V, VII, IX, XII, XIV and XV are  
20 directed against Defendants Bucci and Lincoln Park.  
21 Counts IV, VI, VIII, X, XI and XIII are directed  
22 against Defendant Potter.

23           Again, I remind you that a separate crime is  
24 alleged against one or more of the Defendants in each  
25 count of the Indictment, and you must consider each

1       alleged offense and any evidence pertaining to it  
2       separately.

3               The fact that you find one Defendant guilty or  
4       not guilty as to one of the offenses charged should not  
5       control your verdict as to the other offenses charged  
6       against that Defendant or any other Defendant.

7               One of the Defendants, Lincoln Park, is a  
8       corporation. A corporation is a legal entity that may  
9       act only through its agents. The agents of a  
10      corporation are its officers, directors, employees and  
11      certain others who are authorized by the corporation to  
12      act for it.

13              A corporate Defendant is entitled to the same  
14      individual and impartial consideration of the evidence  
15      that the jury gives to a person who is named as a  
16      Defendant.

17              In order to sustain its burden of proof against  
18      the corporate Defendant on any of the charges contained  
19      in the Indictment, the Government must prove beyond a  
20      reasonable doubt that each of the essential elements of  
21      the offense charged was committed by an officer,  
22      director, employee or agent of the corporation, Lincoln  
23      Park.

24              In addition, the Government must also establish  
25      the following three elements: First, that each of the

1 acts committed by the officer, director, employee or  
2 agent were within the course and scope of the  
3 employment or agency given to him by the corporate  
4 Defendant or, if not within the course and scope of  
5 such employment or agency, that the act of the officer,  
6 director, employee or agent was later approved or  
7 adopted by the corporation; .

8 Second, that each of the acts committed by the  
9 officer, director, employee or agent were of the kind  
10 which he is authorized by the corporation to perform; .

11 And third, that the officer, director, employee  
12 or agent committed each of the essential elements of  
13 the offense with the intent to benefit the corporation  
14 as opposed to himself or someone else.

15 In order to establish that an act was committed  
16 within the course and scope of employment, the evidence  
17 must show that the act related directly to the general  
18 duties that the officer, director, employee or agent  
19 was expected to perform by the Defendant corporation.

20 It is not necessary for the Government to prove  
21 that the act was authorized by the corporation formally  
22 or in writing.

23 An officer, director, employee or agent does not  
24 act within the course and scope of his employment if  
25 that person performs an act which the corporation has,

1 in good faith, forbidden its officers, directors,  
2 employees or agents to perform. Similarly, a corporate  
3 Defendant may not be held responsible for actions which  
4 it tries to prevent.

5 Count I of the Indictment alleges that the  
6 Defendants Potter, Bucci and Lincoln Park, in violation  
7 of Title 18, Section 371, engaged in a conspiracy to  
8 commit a federal offense, specifically that the  
9 Defendants conspired to commit honest services wire  
10 fraud.

11 The Indictment alleges that, beginning in or  
12 about March 2000 and continuing at least until in or  
13 about April 2001, in the Districts of Rhode Island and  
14 Colorado and in the United Kingdom and elsewhere, the  
15 Defendants Nigel Potter, Daniel Bucci and Lincoln Park  
16 knowingly, willfully and unlawfully combined,  
17 conspired, confederated and agreed with each other to  
18 commit an act against the United States, specifically  
19 having devised and intending to devise a scheme and  
20 artifice to defraud the State of Rhode Island and its  
21 citizens of their intangible right of the honest  
22 services of John B. Harwood and for the purpose of  
23 executing that scheme and artifice to transmit and  
24 cause to be transmitted in interstate and foreign  
25 commerce by means of wire communication certain



1 writings, signs and signals according to the directions  
2 thereon, that is, by facsimile transmission, in  
3 violation of Title 18 of the United States Code,  
4 Sections 1343 and 1346.

5 Title 18, Section 371, provides in pertinent  
6 part if two or more persons conspire to commit any  
7 offense against the United States and one or more of  
8 such persons do any act to effect the object of the  
9 conspiracy, each is guilty of a violation of Title 18  
10 of the United States Code, Section 371.

11 To sustain its burden of proof as to the offense  
12 charged in Count I, the Government must prove each of  
13 the following elements beyond a reasonable doubt as to  
14 each Defendant:

15 One, that the agreement as set forth in the  
16 Indictment, and not some other agreement, existed  
17 between two or more persons;

18 Two, that the Defendant willfully joined in that  
19 agreement;

20 And three, that one of the conspirators  
21 committed at least one of the overt acts set forth in  
22 the Indictment in an effort to further the purpose of  
23 the conspiracy.

24 A conspiracy is an agreement or combination of  
25 two or more persons to violate the law. It is a kind

1 of partnership in which each member of the conspiracy,  
2 just by being a member of the conspiracy, becomes an  
3 agent of every other member of the conspiracy.

4 What this means is that each conspirator not  
5 only acts for himself but also acts for the other  
6 conspirators. In other words, a conspiracy is a  
7 combination or an agreement to disregard the law to  
8 achieve the unlawful purpose.

9 In this case, the conspiracy alleged is an  
10 agreement between the Defendants to commit wire fraud.  
11 It is not necessary that the Government prove that the  
12 unlawful purpose of the conspiracy actually was  
13 achieved in order to prove that the conspiracy existed.

14 It must prove, however, that the members in some  
15 way or manner, or through some means, came to a mutual  
16 understanding to accomplish their common, unlawful  
17 purpose and that they did so knowingly, willfully and  
18 intentionally.

19 A corporate officer, employee or agent, acting  
20 alone on behalf of the corporation, cannot be convicted  
21 of conspiring with the corporation. Conversely, the  
22 corporation cannot be convicted of conspiring with its  
23 officer, employee or agent.

24 Consequently, Daniel Bucci may not be convicted  
25 of conspiring solely with Lincoln Park, and Lincoln

1 Park may not be convicted solely of conspiring with  
2 Daniel Bucci.

3 The Indictment charges that the conspiracy  
4 existed from in or about March 2000 to in or about  
5 April 2001. In determining whether the Defendants  
6 conspired as charged, you need not find the precise  
7 time frame in which the conspiracy was in existence.

8 Instead, it is sufficient that you find that a  
9 conspiracy was in existence for any period of time  
10 reasonably described by the period alleged in the  
11 Indictment and that the Defendant was a member of that  
12 conspiracy during that period.

13 In your consideration of the conspiracy offense  
14 alleged in Count I, you should first determine, from  
15 all of the testimony and evidence in the case, whether  
16 or not a conspiracy existed as charged.

17 A conspiracy is an agreement, spoken or  
18 unspoken. To establish the existence of a conspiracy,  
19 the Government need not show that the conspirators  
20 entered into any express or formal agreement or plan in  
21 which everyone involved sat down together and worked  
22 out all the details.

23 However, the Government must prove beyond a  
24 reasonable doubt that those who were involved shared a  
25 general understanding about the crime.

1           Mere similarity of conduct among various people,  
2           or the fact that they may have been associated with  
3           each other or discussed common aims and interests, does  
4           not necessarily establish proof of the existence of a  
5           conspiracy; but you may consider such factors.

6           Since a conspiracy, by its very nature, is often  
7           secret, neither the existence of the common agreement  
8           or scheme, nor the fact of a Defendant's participation  
9           in it, need be proven by direct evidence.

10          Both may be inferred from the circumstances of  
11          the case and course of dealings between the Defendant  
12          and other conspirators.

13          In addition to proving that the conspiracy  
14          charged in the Indictment existed, the Government must  
15          also prove beyond a reasonable doubt that the Defendant  
16          willfully joined in that agreement.

17          To act willfully means to act voluntarily and  
18          intelligently and with the specific intention that the  
19          underlying crime, here honest services wire fraud, be  
20          committed.

21          In other words, to act willfully means to act  
22          with bad purpose, either to disobey or disregard the  
23          law, not to act by ignorance, accident or mistake.

24          Proof that a Defendant willfully joined in the  
25          agreement must be based upon evidence of his own words

1 and/or actions. You need not find that the Defendant  
2 agreed specifically to or knew about all of the details  
3 or scope of the conspiracy or that he participated in  
4 each act of the agreement or played a major role.

5           However, the Government must prove beyond a  
6 reasonable doubt that the Defendant knew the essential  
7 features and general aims of the venture.

8           On the other hand, a person who has no knowledge  
9 of the conspiracy but happens to act in a way that  
10 futhers some object or purpose of the conspiracy does  
11 not thereby become a conspirator.

12           Mere knowledge of or acquiescence in an unlawful  
13 plan, without participation in it, is not sufficient.  
14 More is required under the law.

15           What is necessary is that a Defendant  
16 participated with knowledge of the purposes or  
17 objectives of the conspiracy and with the intention of  
18 aiding in the accomplishment of those objectives. The  
19 extent of a Defendant's participation in a conspiracy  
20 has no bearing on the issue of his guilt.

21           A conspirator's liability is not measured by the  
22 extent or duration of his participation. Each  
23 conspirator may perform separate and distinct acts and  
24 may perform them at different times.

25           Some conspirators play major roles, while others

1 play minor parts in the scheme. An equal role is not  
2 what the law requires. Even a single act may be  
3 sufficient to draw a Defendant within the ambit of a  
4 conspiracy if the act is done with the intention of  
5 agreeing to join the conspiracy and the intention of  
6 accomplishing the conspiracy's unlawful purpose.

7 To establish that a Defendant willfully joined  
8 in a conspiracy, the Government must prove two types of  
9 intent beyond a reasonable doubt: One, an intent to  
10 agree; and two, an intent that the underlying crime, in  
11 this case honest services wire fraud, be committed.

12 It is not necessary that the Government prove  
13 that the Defendant agreed to commit the underlying  
14 offense personally. It is sufficient that the  
15 Defendant intended that the offense be committed, if  
16 not by himself, then by a co-conspirator. An  
17 individual's intent may be inferred from all of the  
18 surrounding circumstances.

19 In deciding whether a Defendant was a member of  
20 the conspiracy, you should first consider the evidence  
21 of that particular Defendant's own acts and statements.  
22 You may also consider any other evidence in the case as  
23 it bears on the issue of a Defendant's membership.

24 Specifically, you may consider the acts and  
25 statements of the other alleged co-conspirators even if

1 the Defendant was not present at the time the acts were  
2 done or the statements were made, but you may do so  
3 only if you find that the Defendant was a member of the  
4 conspiracy at the time that the acts were done or the  
5 statements made and only if you find that the acts were  
6 done and the statements were made by a person whom you  
7 find to be a member of the conspiracy during the  
8 conspiracy's existence and in furtherance of one of its  
9 purposes.

10 If the acts were performed or the statements  
11 were made at a time when the Defendant you are  
12 considering was not a member of the conspiracy or were  
13 performed or made by someone who you do not find to  
14 have been a member of the conspiracy, or if they were  
15 not done or said in furtherance of the conspiracy, then  
16 they may be considered as evidence only against the  
17 conspiracy member who did or said them and not against  
18 any other Defendant.

19 In order to prove a conspiracy, the Government  
20 must prove that, after the conspiracy was entered, one  
21 of the members of the conspiracy committed an overt act  
22 in an effort to accomplish some purpose of the  
23 conspiracy.

24 In this case, paragraphs 14 through 30 of the  
25 Indictment set forth the overt acts alleged to have

1       been committed in furtherance of the conspiracy  
2       charged.

3               An overt act is any act knowingly committed by  
4       one or more of the conspirators in an effort to  
5       accomplish some purpose of the conspiracy. Only one  
6       overt act has to be proven. The overt act need not  
7       itself be a crime.

8               The Government is not required to prove that the  
9       Defendant personally committed or knew about the overt  
10      act. It is sufficient if one conspirator committed one  
11      overt act at some time during the period of the  
12      conspiracy.

13              However, you must unanimously agree as to which  
14      overt act alleged in the Indictment has been proven  
15      beyond a reasonable doubt.

16              The Government does not have to prove that the  
17      conspiracy succeeded or that its object was achieved.  
18      The crime of conspiracy is complete upon the agreement  
19      to commit the underlying crime and the commission of  
20      one overt act.

21              Counts II through XV of the Indictment each  
22      charge that one or more of the Defendants committed  
23      honest services wire fraud in violation of Title 18 of  
24      the United States Code, Sections 1343 and 1346, by  
25      transmitting or causing the transmission of certain



1 facsimile communication.

2 Eight counts, that is Counts II, III, V, VII,  
3 IX, XII, XIV and XV, allege that the Defendants Daniel  
4 Bucci and Lincoln Park committed wire fraud by  
5 transmitting or causing the transmission of the  
6 facsimile communications described in those counts.

7 Six counts, that is, Counts IV, VI, VIII, X, XI  
8 and XIII, allege that the Defendant Nigel Potter  
9 committed honest services wire fraud by transmitting or  
10 causing the transmission of the facsimile  
11 communications described in the Indictment.

12 As I instructed you previously, you must  
13 consider each count and the evidence pertaining to it  
14 separately. The fact that you may find a Defendant  
15 guilty or not guilty on any one count must not affect  
16 your verdict as to any other Defendant or any other  
17 count.

18 A violation of Section 1343 occurs when a  
19 Defendant, having devised or intending to devise any  
20 scheme or artifice to defraud, transmits or causes to  
21 be transmitted by means of wire communication in  
22 interstate or foreign commerce any writings, signs,  
23 signals, pictures or sounds for the purpose of  
24 executing such scheme or artifice.

25 Title 18, Section 1346, defines a scheme or

1       artifice to defraud as including a scheme or artifice  
2       to deprive another of the intangible right of honest  
3       services.

4               To sustain its burden of proof on a charge of  
5       wire fraud, the Government must prove each of the  
6       following elements beyond a reasonable doubt as to each  
7       Defendant so charged:

8               One, that a scheme to defraud existed  
9       substantially as charged in the Indictment;.

10              Two, that the Defendant knowingly and willfully  
11       participated in the scheme to defraud with the intent  
12       to defraud;.

13              And three, that in furtherance of that scheme,  
14       the Defendant used or caused the use of interstate or  
15       foreign wire communications on or about the date  
16       alleged in the Indictment.

17              The first element of wire fraud is the existence  
18       of a scheme to defraud. A scheme includes any plan,  
19       pattern or course of action. The term "defraud" means  
20       to deprive another of something of value by  
21       misrepresenting or concealing a material fact.

22              A scheme to defraud is ordinarily accompanied by  
23       a desire or purpose to bring about some gain or benefit  
24       to one's self or some other person or entity or by a  
25       desire or purpose to cause some loss to some person.

1           It includes a scheme to deprive another of the  
2           intangible right of honest services. Public officials  
3           have a duty to act in the public's interest. A scheme  
4           to deprive the public of the honest services of a  
5           public official is a scheme intended to cause a public  
6           official to act based upon his or her own personal  
7           interests rather than for the benefit of the public.

8           In this case, the Indictment charges the  
9           existence of a scheme to deprive the citizens of Rhode  
10          Island of the honest services of John B. Harwood.

11          The second element of the offense of wire fraud  
12          requires proof that the Defendant knowingly and  
13          willfully participated in the scheme with the intent to  
14          defraud.

15          A Defendant acts knowingly if he was conscious  
16          and aware of his action, realized what he was doing or  
17          what was happening around him and did not act because  
18          of ignorance, mistake or accident.

19          As I have previously instructed you, an act is  
20          done willfully if it is done voluntarily and  
21          intentionally and with the specific intent to do  
22          something the law forbids, that is to say, with bad  
23          purpose either to disobey or disregard the law.

24          Thus, if a Defendant acted in good faith, he  
25          cannot be guilty of the crime alleged.

1           To act with intent to defraud means to act  
2 willfully and with the specific intent to deceive or  
3 cheat. Thus, if the Defendant acted in good faith, he  
4 cannot be guilty of the crime. The burden of proving  
5 intent, as with all other elements of the offense,  
6 rests with the Government.

7           The Government must prove both of the following  
8 types of intent beyond a reasonable doubt: One, that  
9 the Defendant intended to cause the public official to  
10 deviate from the honest performance of his or her  
11 public duties; and two, that the Defendant intended to  
12 deceive the public about the deprivation.

13           In order to prove a intention on the part of any  
14 Defendant that a public official deviate from the  
15 honest performance of his or her public duties, the  
16 Government must prove beyond a reasonable doubt that  
17 the Defendant intended the payment to cause a public  
18 official to alter his or her official acts, to change a  
19 position which he or she would otherwise have taken or  
20 to take actions that he or she would not have taken but  
21 for the payment.

22           A Defendant is guilty of honest services fraud  
23 only if the Government proves beyond a reasonable doubt  
24 that the Defendant intended to influence or otherwise  
25 improperly affect a public official's performance of

1 his or her duties and thereby to deprive the public of  
2 that official's honest services.

3 As I have instructed you, in addition to proving  
4 that the Defendant intended to deprive the public of  
5 the honest services of a public official, the  
6 Government must also prove that the Defendant intended  
7 to deceive the public.

8 A person who intends to bribe a public official  
9 and, thus, to deprive the public of the official's  
10 honest services, does not necessarily also intend to  
11 deceive the public.

12 The Government bears the burden of proving  
13 beyond a reasonable doubt that the Defendant intended  
14 to conceal the payment itself from the public or  
15 intended to conceal or misrepresent the nature of the  
16 payment to the public.

17 The use of interstate or foreign wire  
18 communications in furtherance of the scheme is an  
19 essential element of the offense of wire fraud. The  
20 use of the wires itself need not be false or  
21 fraudulent.

22 It is not necessary that the Government prove  
23 all of the details alleged in the Indictment concerning  
24 the precise nature and purpose of this scheme, or that  
25 the material transmitted by wire was itself false or

1 fraudulent, or that the alleged scheme actually  
2 succeeded in defrauding anyone, or that the use of wire  
3 communications facilities in interstate or foreign  
4 commerce was intended as the specific or exclusive  
5 means of accomplishing the alleged fraud.

6           What must be proved beyond a reasonable doubt is  
7 that the Defendant knowingly devised or intended to  
8 devise a scheme to defraud that was substantially the  
9 same as the one alleged in the Indictment and that the  
10 use of wire communications facilities in interstate or  
11 foreign commerce on or about the dates alleged was  
12 closely related to the scheme because the Defendant  
13 either made or caused an interstate or foreign wire  
14 communication to be made in an attempt to execute or  
15 carry out the scheme.

16           To cause an interstate or foreign wire  
17 communication to be made is to do an act with knowledge  
18 that an interstate or foreign wire communication will  
19 follow in the ordinary course of business or where such  
20 a communication can reasonably be foreseen.

21           Interstate wire communications include facsimile  
22 communications from one state to another. Foreign wire  
23 communications include facsimile communications from  
24 the United States to another country or from another  
25 country to the United States.

1           The Indictment alleges that the Defendants  
2           committed wire fraud by sending or causing the sending  
3           of certain interstate or foreign wire transmissions.  
4           It does not allege that any Defendant committed wire  
5           fraud by receiving a wire transmission.

6           Thus, even though the Indictment alleges that  
7           Nigel Potter was the recipient of some of the  
8           facsimiles sent by Daniel Bucci and Lincoln Park and  
9           that Daniel Bucci was the recipient of facsimiles sent  
10          by Nigel Potter, you may find a Defendant guilty of  
11          wire fraud based only upon proof beyond a reasonable  
12          doubt that the Defendant sent or caused a facsimile to  
13          be sent as charged in the Indictment and not based upon  
14          proof that the Defendant received a facsimile from  
15          anyone.

16          Exhibits admitted into evidence by the Court are  
17          properly before you and will be available to you during  
18          your deliberations. An exhibit marked by the Court for  
19          identification is not evidence in the case unless or  
20          until it was admitted by the Court as a full exhibit.

21          If it has not been admitted as a full exhibit,  
22          you may not consider it. If it was admitted, however,  
23          it is just as much a part of the evidence in the case  
24          as the testimony which you have heard from the witness  
25          stand.

1           Now, as I said, you will have copies of all of  
2           the paper exhibits that were admitted into evidence,  
3           and you're free to look through them as you wish. What  
4           I ask, however, because they are the official exhibits  
5           and record of this case, is that you not mark them in  
6           any way.

7           The evidence in this case includes facts to  
8           which the lawyers have agreed or stipulated. A  
9           stipulation means simply that the Government and the  
10          Defendant accept the truth of a particular proposition  
11          or fact. Since there is no disagreement, there is no  
12          need for evidence apart from the stipulation. You may  
13          accept the stipulation as fact and give it whatever  
14          weight you choose.

15          Under Rhode Island law, senators and  
16          representatives in the Rhode Island General Assembly  
17          hold their offices for two years and until their  
18          successors are elected and qualified.

19          At all times relevant to this case, Rhode Island  
20          law provided for the establishment of a state Lottery  
21          Commission that consisted of nine members, all of whom  
22          must be citizens and residents of this state. Three of  
23          the members of the Lottery Commission were from the  
24          Senate, and not more than two of them were to be from  
25          the same political party.



1           The Senate members were appointed by the Senate  
2 Majority Leader. Three members of the Lottery  
3 Commission were members of the House of  
4 Representatives, and not more than two of them were to  
5 be from the same political party. The House members  
6 were appointed by the Speaker of the House.

7           Three members of the Lottery Commission were  
8 representatives of the general public. Those members  
9 were appointed by the Governor. All Lottery Commission  
10 members had three-year terms.

11           The remarks, statements and questions by counsel  
12 are not evidence, and you are not to consider them as  
13 evidence during your deliberations. Neither should you  
14 permit objections by counsel to the admission of  
15 evidence or the rulings of the Court to create any bias  
16 or prejudice toward counsel or the party whom he  
17 represents.

18           It is the duty of counsel for both sides to  
19 represent their clients vigorously and to defend their  
20 clients' rights and interests. In the performance of  
21 that duty, counsel freely may make objection to the  
22 admission of offered evidence or to any other ruling of  
23 the Court and should not be penalized for doing so.

24           If during trial or in instructing you I have  
25 said or done anything that has caused you to believe

1 that I was indicating an opinion as to what the facts  
2 are in this case, you should put that belief out of  
3 your mind. I did not intend to indicate any such  
4 opinion.

5 In fact, I try not to have an opinion about the  
6 case because you are the sole and exclusive judges of  
7 the facts.

8 In determining the facts, you are to consider  
9 only that evidence which has properly been placed  
10 before you. It is the Court's duty to pass upon the  
11 admissibility of offered evidence, that is, to decide  
12 whether or not offered evidence should be considered by  
13 you.

14 Evidence admitted by the Court is properly  
15 before you for your consideration. Evidence which the  
16 Court has refused to admit, or may have stricken from  
17 the record after you heard it, is not a proper subject  
18 for your deliberations and you should not consider it.

19 As you may recall, in some instances evidence  
20 has been admitted for a limited purpose or against  
21 fewer than all Defendants. You must consider such  
22 evidence only in the manner which I have instructed you  
23 and not for any other purpose.

24 Exhibits Number 11, 17, 58, 59, 60 and 110 may  
25 be considered by you only as to Daniel Bucci and

1 Lincoln Park. You are not to consider them as to Nigel  
2 Potter.

3 Exhibits 20 and 111 may be considered by you as  
4 to Nigel Potter only. You may not consider those  
5 exhibits as to Lincoln Park or Daniel Bucci.

6 In addition to the instructions which I  
7 previously have given to you, I instruct you that any  
8 statements you find were made by Nigel Potter or Daniel  
9 Bucci prior to September 13, 2000, may be considered by  
10 you only as to the Defendant who made the statement.

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

16 In deciding what the facts are, you may have to  
17 decide what testimony you believe and what testimony  
18 you do not believe. You may believe everything a  
19 witness says, or only part of it, or none of it.

20 In deciding what to believe, you may consider a  
21 number of factors, including the following: The  
22 witness's ability to see or hear or know the things the  
23 witness testifies to; the quality of the witness's  
24 memory; the witness's manner while testifying; whether  
25 the witness has an interest in the outcome of the case

1 or any motive, bias or prejudice; whether the witness  
2 is contradicted by anything the witness said or wrote  
3 before trial or by other evidence; and how reasonable  
4 the witness's testimony is when considered in light of  
5 other evidence which you believe.

6 Inconsistencies or discrepancies in the  
7 testimony of a witness, or between the testimony of  
8 different witnesses, may or may not cause you to  
9 disbelieve or discredit such testimony.

10 Two or more persons witnessing an incident or  
11 transaction may simply see or hear it differently.  
12 Innocent misrecollection, like failure of recollection,  
13 is not an uncommon experience.

14 In weighing the effect of a discrepancy,  
15 however, always consider whether it pertains to a  
16 matter of importance or an insignificant detail, and  
17 consider whether the discrepancy results from innocent  
18 error or from intentional falsehood.

19 The testimony of a witness may be discredited or  
20 impeached by showing that he or she previously made  
21 statements which are different than, or inconsistent  
22 with, his or her testimony here in court. These  
23 statements may be used to impeach the credibility of  
24 that witness.

25 It is within your province to assess the

1 credibility, if any, to be given the testimony of a  
2 witness who has made prior inconsistent or  
3 contradictory statements.

4 Now, members of the jury, I do have a few more  
5 things I need to say. However, before I do that, I  
6 will need to do a number of things, one of which is to  
7 meet with counsel out of your hearing. Again, it's  
8 what the rules require; and because I think it may take  
9 a few minutes for us to do that, I'm actually going to  
10 give you a break.

11 Before I do, however, I must caution all of you  
12 that you must not talk about the case. You have not  
13 yet received all of the Court's instructions.

14 At this time, I also am excusing our alternate  
15 jurors, Mr. Fontaine, Ms. O'Neill, Ms. Mullen, Ms.  
16 Kogut, Ms. Schmidt and Ms. Quackenbush. You were  
17 impaneled in this case and selected as alternate  
18 jurors. I know you didn't know that; and I know that  
19 each of you has come here every day, has participated  
20 fully and has given all of your attention to what's  
21 been going on in the courtroom with a view toward  
22 perhaps eventually deliberating on a verdict.

23 The rules, however, permit only 12 jurors to  
24 deliberate on a verdict; and so today effectively your  
25 participation in the trial has come to an end.

1           On the outside chance, however, that the 12 who  
2           remain for some reason, someone gets sick or whatever,  
3           I'm going to ask that until you receive notification  
4           from the Court, that you continue to refrain from  
5           reading or listening to any news accounts about the  
6           case, that you not talk to anyone about the case  
7           because, as I say, we may need to bring you back.

8           So I will ask that you leave your notebooks on  
9           your seats, they will be collected and locked away, and  
10          that you refrain from talking about the case even with  
11          your fellow jurors and with anyone else, that you not  
12          read or listen to anything about the case until you  
13          receive notification from the Court.

14          What I will say is this. I know that all of you  
15          have been together now for about three weeks, and I  
16          know that some friendships have formed; and so over the  
17          next 20 minutes or so, if you want to say your  
18          good-byes, now would be the time to do it.

19          Jim, would you see the jury out, please.

20          (The jury is not present for the following)

21          THE COURT: What I would like counsel to do with  
22          respect to any objections you may have to the charge,  
23          rather than have you here, since the jury's out of the  
24          room, you can just come right up to the podium and  
25          place your objections on the record. I'll start with

1 the Government.

2 MR. NERONHA: Your Honor, the United States has  
3 no objection to the charge.

4 MR. TRAINI: Your Honor, as we discussed  
5 yesterday afternoon, there are a couple of matters that  
6 we needed to do for the record.

7 One was that I recalled that I had not joined in  
8 the objections that Ms. Rosiello made at the charge  
9 conference, and I just want to do that, other than of  
10 course to the withdrawal instruction, because that  
11 becomes relevant later on with respect to the  
12 differences between the charge you gave and the  
13 instructions that we asked for that you didn't give;  
14 and I do that on behalf of Mr. Bucci and Lincoln Park.

15 MR. TARANTINO: Yes, your Honor, on behalf of --  
16 Mr. Traini is speaking on behalf of Lincoln Park as  
17 well as for purposes of these objections.

18 MR. TRAINI: And I believe that it's also  
19 necessary for preservation of the record, your Honor,  
20 for us to reincorporate now after the charge the  
21 objections we made at the charge conference.

22 THE COURT: And since that charge conference was  
23 also on the record, I think you can simply do that by  
24 making reference to them.

25 MR. TRAINI: And that's what I intend to do,

1 your Honor. I can't do it more specifically than to do  
2 it by incorporation because I haven't yet seen the  
3 transcript of the charge conference, so I won't try to  
4 do that.

5 With respect to the instructions that the Court  
6 has just concluded, I was working from your Honor's  
7 draft. Again, the record should reflect that we didn't  
8 have a copy of exactly what you were reading from. We  
9 were working from the last draft.

10 THE COURT: So the record is clear, the Court  
11 distributed to all counsel a draft set of instructions,  
12 I think it was two days ago, and that formed the basis  
13 of the charge conference.

14 Certain amendments were made during that  
15 conference. Certain amendments were made by the Court  
16 subsequent to that conference. Certain of them were  
17 made even this morning by the Court, and that's why  
18 counsel doesn't have a final draft.

19 MR. TRAINI: Thank you, your Honor. One thing,  
20 and I don't know whether there actually is an objection  
21 to this, but I think I heard when your Honor gave your  
22 Instruction Number 9 that somewhere in the middle of  
23 the second paragraph, you inserted some additional  
24 language that was not in the draft that we had.

25 It sounded to me like it came from the First



1 Circuit pattern instruction, but I'm not sure.

2 THE COURT: This was the reasonable doubt  
3 instruction?

4 MR. TRAINI: Yes, your Honor.

5 THE COURT: It was put in there at the request  
6 of Ms. Rosiello, and that was the pattern instruction.

7 MR. TRAINI: It was. Okay. That was just a  
8 point of clarification.

9 THE COURT: Which hopefully is going to pass  
10 muster.

11 MR. TRAINI: Yes, your Honor. With respect to  
12 your Instruction Number 18 --

13 THE COURT: You may need to just tell me what  
14 the title of it is because some of those have changed.

15 MR. TRAINI: All right. The one I'm looking at,  
16 your Honor, is entitled 18 U.S.C., Section 371,  
17 Elements of the Offense.

18 THE COURT: I have it.

19 MR. TRAINI: Your Honor will recall that when I  
20 questioned this instruction at the charge conference,  
21 it was based upon the fact that at that time the motion  
22 to strike relative to the unindicted co-conspirators  
23 hadn't been allowed, and it now has been.

24 To the extent that this instruction is  
25 inconsistent with that in that it doesn't basically

1 limit the conspiracy offense to the two individual  
2 Defendants, that's the objection to the instruction,  
3 your Honor.

4 THE COURT: Well, the problem you have, of  
5 course, is that there are three Defendants.

6 MR. TRAINI: I understand.

7 THE COURT: And so --

8 MR. TRAINI: But only two of them can actually  
9 inspire.

10 THE COURT: But you have a third Defendant in  
11 there, and so Mr. Potter could have conspired --

12 MR. TRAINI: I realize that, your Honor.

13 THE COURT: -- with two, which gives you two or  
14 more.

15 MR. TRAINI: Just so the objection's clear, your  
16 Honor, I don't want to argue the appellate issue, just  
17 to make sure that the objection's clear, the reason for  
18 what I did at the charge conference and the reason for  
19 the objection is simply that when you reduce Lincoln  
20 Park and Daniel Bucci into one, you now only have two,  
21 and essentially the only people that can conspire with  
22 each other are the two individual Defendants.

23 With respect to --

24 THE COURT: Maybe before you go on, so that the  
25 record is clear, there has been discussion amongst

1 counsel as to whether or not the words in the  
2 Indictment "others, known and unknown to the grand  
3 jury" should be stricken.

4 After counsel argued yesterday, the Government  
5 agreed to strike those words from the Indictment, and  
6 that has been done.

7 MR. TRAINI: That's correct.

8 THE COURT: Accordingly, the Court took it out  
9 of the instructions wherever it appeared.

10 MR. TRAINI: I noticed that, your Honor, and I  
11 appreciate it. Thank you. One thing that -- again,  
12 this may be a question more than an objection. If your  
13 Honor looks at what at least used to be your  
14 Instruction Number 16, which is entitled Count I,  
15 Conspiracy, you read from the conspiracy paragraph of  
16 the Indictment.

17 In approximately the middle of that paragraph,  
18 your Honor, in the instruction and also in the Amended  
19 Superseding Indictment, it says, "the Defendants agreed  
20 with each other to commit an offense against the United  
21 States."

22 Unless I misheard you, I think you used the word  
23 "act" and not the word "offense" when you instructed  
24 the jury.

25 MR. TARANTINO: I heard the same thing, your

1 Honor.

2 MS. ROSIELLO: I heard the same thing.

3 MR. NERONHA: Same, your Honor.

4 THE COURT: Well, I'm glad you were all  
5 listening. Would you like me to read it again to the  
6 jury?

7 MR. TRAINI: Well, actually, it's not a  
8 particularly nice thing to keep reading to the jury;  
9 but my only concern, your Honor, is that "offense" has  
10 a particular connotation in the sense that it means an  
11 illegal act as opposed to any act, and I don't know how  
12 to clarify it. I'm afraid I can't give you a  
13 suggestion, but that's my concern.

14 MR. TARANTINO: Your Honor, I have a suggestion.  
15 The jury's going to have your instructions; and I would  
16 simply assume that if the jury has any issue or  
17 question, it will go to your written instructions which  
18 say "offense."

19 THE COURT: The jury will not only have the  
20 instructions which read, I can assure you, "offense,"  
21 they will also have a copy of the Indictment which  
22 reads "offense."

23 MR. TRAINI: In that case, your Honor, maybe we  
24 don't have to give them the tape unless they ask for  
25 it.

1 THE COURT: Usually I think we wait, don't we,  
2 John?

3 THE CLERK: They hardly ever use it.

4 MR. TRAINI: That's fine, your Honor. With  
5 respect to instruction -- this is probably not the same  
6 number now, your Honor, but it used to be Instruction  
7 Number 32, which was entitled 18 U.S.C., Section 1343,  
8 Elements of the Offense.

9 THE COURT: Let me find it.

10 MR. TRAINI: I think we did this before; but now  
11 that the instruction's been given, your Honor, I just  
12 want to reiterate the objection in the first element to  
13 the "substantially" language and in the second element  
14 to the lack of the "with intent to deceive" language.

15 What used to be Instruction Number 36, which was  
16 called -- it's still called Intent to Deprive of Honest  
17 Services, your Honor --

18 THE COURT: Just a minute. Okay.

19 MR. TRAINI: There was some language that was in  
20 your original draft which you deleted at the charge  
21 conference which appears in the draft in the middle of  
22 the language; and when you gave the instruction,  
23 obviously that language was not in there. I wanted to  
24 reiterate the objection to having it removed.

25 THE COURT: I think you need to say specifically

1 what the language is that you want.

2 MR. TRAINI: I will do that, your Honor. It  
3 was -- there was a sentence that originally was  
4 included that said, and I quote, "It is not enough for  
5 the Government to prove that a Defendant intended to  
6 make a payment as a reward for past services or in  
7 order to ensure future services but without intending  
8 that the public official receiving the payment would  
9 deviate from the honest performance of his or her  
10 duties. In other words, it is not enough if the  
11 payment is intended to be made without strings  
12 attached."

13 That language was originally in the instruction.  
14 It was deleted. It was not given to the jury. I think  
15 we covered this at the charge conference, but I just  
16 wanted to make sure I reiterated that objection; and I  
17 think there was one other point on that one, your  
18 Honor.

19 I think you deleted another word at the very end  
20 of that instruction, and -- I'm sorry, I might be  
21 looking at the wrong one. Let me go on to another one,  
22 your Honor.

23 In what was your Number 37 on intent to deceive,  
24 we had a discussion about this at the charge  
25 conference, your Honor, about deleting the

1 "deprivation" language, if you will; and your Honor  
2 indicated that you would, and in your charge you did  
3 delete the "deprivation" language.

4 However, the same language was in Instruction  
5 Number 35, or two before this one, which is probably  
6 not 35 anymore, under Intent to Defraud Defined. And  
7 in subsection 2, the paragraph about what the  
8 Government must prove, it does say about the  
9 deprivation, and you did instruct the jury that way.

10 So the instructions are not consistent by  
11 leaving that language out, and I think our original  
12 position was that we wanted it in.

13 In what was Instruction Number 38, your Honor,  
14 Use of Interstate Wire Communications in Furtherance of  
15 the Scheme, in the third paragraph, I just want to  
16 reiterate the objection to the "substantially the same"  
17 language and also object again to the inclusion a few  
18 lines further down of the "attempt" language for the  
19 reasons that I stated on the record at the charge  
20 conference.

21 Also, with respect to Instruction Number 46,  
22 your Honor ask that I remind you that I was objecting  
23 to those specific limitations being highlighted to the  
24 jury on the question of which evidence is admissible  
25 against which Defendant, and I wanted to make sure

1 that --

2 THE COURT: That is not 46 in these  
3 instructions. That is -- it's 45, and it is entitled  
4 Evidence Admitted for a Limited Purpose.

5 MR. TRAINI: And I believe that your Honor in  
6 the instruction to the jury enumerated specific exhibit  
7 numbers, and my objection before and now was to the  
8 highlighting of that to the jury.

9 THE COURT: And obviously the purpose of that  
10 instruction was because of the Petrozziello  
11 determination the Court made at the conclusion of all  
12 the evidence, having admitted conditionally some of  
13 those exhibits as against all Defendants.

14 MR. TRAINI: Yes, your Honor. In order to just  
15 have the record complete, with respect to the  
16 instructions that we had originally submitted, I think  
17 what you also wanted us to do was just identify which  
18 ones we were objecting to not having been given as we  
19 gave them.

20 THE COURT: And those have been filed in the  
21 court file.

22 MR. TARANTINO: Yes, your Honor.

23 MR. TRAINI: They have. One of them was Defense  
24 Instruction Number 3, particularly with respect, your  
25 Honor, to the language in the defense version that is



1 taken from First Circuit Pattern Instruction 3.02 that  
2 the presumption of innocence alone is sufficient to  
3 raise the reasonable doubt and require an acquittal.

4 Defense Instruction Number 4, which we objected  
5 to original -- I'm sorry, we asked for based on the  
6 "more than a probability" language from United  
7 States v. Cleveland that Ms. Rosiello put on the record  
8 at the charge conference.

9 Defense Instruction Number 5, which included the  
10 language about lack of intent to deceive. Also, your  
11 Honor, with respect to Defense Instruction Number 5,  
12 there are a number of defense instructions, but it  
13 starts with Number 5. The fourth element of what's  
14 included in Defense Instruction Number 5 was the one  
15 that had to do with the purpose for which the offending  
16 wire communications are being offered in that we've  
17 taken the position, I think, starting with one of the  
18 motions to dismiss and throughout the case, that the  
19 offending faxes are only for the purpose of executing  
20 the scheme as opposed to for any purpose associated  
21 with developing the scheme.

22 And I think Sawyer sort of defines without  
23 calling it a definition that "in furtherance" means in  
24 execution of, and we've always taken that position.

25 So there are a number of instructions. One of

1       them is Number 5, and I'll mention the other ones as I  
2       get to them, that were offered for that specific  
3       purpose.

4               We also asked, your Honor, in our Instruction  
5       Number 15, that's the one that your Honor deleted the  
6       language in your -- one of your instructions had the  
7       financial crime language in it that the Government  
8       objected to at the charge conference.

9               THE COURT:   And that's out.

10              MR. TRAINI:   And that's out.   Our original  
11       Instruction Number 15 I believe had that language in  
12       it; and the language was in there because it was our  
13       view that no matter which way you classify whatever  
14       happened in the case, it was a financial crime in the  
15       sense that any deprivation of honest services was  
16       directed to some financial aspect of something.

17              The financial crime language I believe is in the  
18       pattern instruction, and that's why it was in in the  
19       first place.

20              On that subject, you will recall that we had a  
21       series of honest services instructions that we had  
22       requested, 15 through 20, I think, of the Defendants'  
23       instructions; and those, we obviously reiterate our  
24       objection to their not having been given as they were  
25       requested.

1           With respect to our 21, your Honor, that was the  
2           defense instruction that asked for the "intent to  
3           deceive" language to be in the same place as the  
4           "intent to defraud" language. Our position on that,  
5           for purposes of the objection, was that the deception  
6           element has to be relevant to the deprivation at issue.

7           So in order for the deceit prompt to have an  
8           effect, it has to be connected to the -- in other  
9           words, you can't have an intent to defraud but have the  
10          deceit element be related to something else. It's got  
11          to be part of the deprivation.

12          I think 25 and 26 of the Defendants'  
13          instructions, your Honor, that -- and also Number 10,  
14          those all relate back to our objection to the Court's  
15          failure to give Number 5.

16          And with respect to the Court's not giving our  
17          Instruction Number 27, that is for the same reason as  
18          5, 10, 25 and 26.

19          Defendants' Instruction Number 28, your Honor,  
20          was one of the ones that Ms. Rosiello had mentioned at  
21          the charge conference. It had to do with adding the  
22          "knowingly" language I think pursuant to Yefsky and  
23          Richardson, and the Court did not do that. We ask that  
24          instruction be given the way we wrote it.

25          With respect to our Instruction Number 32, your

1 Honor, we object to that not being given as it was  
2 submitted because it has a more specific explanation of  
3 the second level of intent that needs to be proven in  
4 the conspiracy.

5 With respect to Number 33, we ask that that one  
6 be given because it is directed specifically to the  
7 conspiracy count. I believe it has to do with  
8 individual liability.

9 Some of these, I'm only going through them  
10 because some of them are not applicable anymore because  
11 your Honor took care of them during the charge. I just  
12 need a second.

13 We also object, your Honor, to the Court's  
14 failure to give number -- Defense Number 45 as written.  
15 That was an instruction that applied specifically to  
16 truthfulness of witness testimony. And I think there's  
17 just one other, your Honor.

18 I think that that covers the objections based on  
19 instructions that we had asked for that the Court  
20 either did not give at all or did not give as we  
21 requested them, as well as at least all of the  
22 objections I can think of to the charge as it was  
23 given, your Honor.

24 I don't necessarily speak entirely for  
25 Mr. O'Brien. I don't know if he has anything else.

1           THE COURT: Let me just find out if  
2 Mr. Tarantino has any others above and beyond those  
3 which Mr. Traini spoke.

4           MR. TARANTINO: Ms. Rocha and I concur in  
5 Mr. Traini's, and we have nothing further, your Honor.

6           THE COURT: Mr. O'Brien?

7           MR. O'BRIEN: Ms. Rosiello's going to respond,  
8 your Honor.

9           MS. ROSIELLO: Your Honor, I just have a few  
10 beyond Mr. Traini. We would like to join in all of his  
11 objections with the exception of his objection to the  
12 limiting instruction.

13           I have for the Court a written copy of the --  
14 the portions of our submission made earlier, and I'm  
15 filing it right now. It has been filed downstairs.

16           THE COURT: Oh, that's all I care about, is if  
17 it's been filed downstairs. That's the important place  
18 to make sure it is.

19           MS. ROSIELLO: It arrived during your  
20 instructions, so I'll take a moment to give it to  
21 counsel who haven't seen it yet.

22           (Pause)

23           THE COURT: Just for the record, I haven't seen  
24 it either. I'm assuming it's a copy or there are  
25 copies in there of things that were submitted to the

1 Court before today.

2 MS. ROSIELLO: That's right. Those are the ones  
3 that we are maintaining an objection to that were not  
4 included in toto in your charge.

5 I would like to incorporate by reference all of  
6 the objections that we made at the charge conference  
7 and the grounds stated at that time, as well as the  
8 objections of co-counsel and their grounds, with the  
9 exception of the two withdrawal instructions.

10 I just wanted to mention in what I just gave  
11 you, they don't require much -- any explanation. The  
12 only ones I wanted to draw your attention to are  
13 Number 17 and 19, which are necessary in context in  
14 this case under Sawyer because of the ease with which  
15 the jury might confuse appropriate effort to gain  
16 political influence and inappropriate ones and then  
17 criminal ones. So that's why we're asking for those.

18 In addition, we do object to not giving a  
19 withdrawal instruction. We asked for Number 38, which  
20 is the position of two panels of the First Circuit; and  
21 in the alternative, we asked for 39, which is the  
22 position of two other panels of the First Circuit.

23 THE COURT: For the record, the Court considered  
24 giving a withdrawal instruction in this case; but upon  
25 review of the relevant case law and, more particularly,

1       upon review of the evidence that was presented on that  
2       subject, the Court came to the conclusion that there  
3       was insufficient evidence in this record upon which the  
4       jury could make a determination that as a matter of law  
5       there was a withdrawal by Mr. Potter.

6               MS. ROSIELLO: Among the ones in that packet, I  
7       just would like to draw the Court's attention to  
8       Number 45, which is a First Circuit pattern  
9       instruction, I think it's Number 1.06, concerning  
10      assessment of the truthfulness of testimony.

11             And finally, we did tender a theory of the  
12      defense instruction, which is Number 52, and that's in  
13      that packet.

14             THE COURT: I saw that one when we met at the  
15      charge conference, but my recollection is that you did  
16      not raise it at the charge conference. I assumed that  
17      you were waiving that one.

18             MS. ROSIELLO: I think what I said was the ones  
19      that were in the packet that came that day I was asking  
20      the Court to deliver.

21             THE COURT: Well, in any event, I think it's  
22      inappropriate, and I wouldn't have given it.

23             MS. ROSIELLO: Mr. Traini mentioned on the  
24      reasonable doubt instruction your draft Instruction  
25      Number 9. I join in his, and I also -- he asked for

1 the "more than a probability" instruction. I'm also  
2 asking in addition for the language about a settled and  
3 abiding conviction of the truth of the Government's  
4 charges.

5 In Number 18 of your draft, we object to what  
6 are the elements of a conspiracy, object to the second  
7 and third element, not including the element  
8 "knowingly."

9 Number 20, I have the same -- Number 20 of your  
10 draft, I have the same objection that I raised at the  
11 conference about the word "reasonably" rather than the  
12 word "substantially" to describe the time period.

13 THE COURT: Aren't these the same points  
14 Mr. Traini just made? And I thought you joined in all  
15 of his objections.

16 MS. ROSIELLO: They are, your Honor. I'm pretty  
17 sure I know exactly what Mr. Traini did, so I was in an  
18 excess of caution. I'm sorry if I'm repeating  
19 anything. I don't believe he mentioned Number 20.

20 Number 22 of your draft is another occasion when  
21 the word "knowingly" -- the language "not on the basis  
22 of mere knowledge of wrongdoing" was not included and  
23 the definition of "knowingly" was not included, and we  
24 object to that.

25 Number 23, we object. That's on your draft.



1 It's the execution question, and Mr. Traini did raise  
2 that. I just wanted to be clear about the ground for  
3 the objection, that the Government must prove that the  
4 faxes were sent for the purposes of executing and not  
5 for the purpose of devising, discussing or trying to  
6 understand.

7 THE COURT: That's not 23.

8 MS. ROSIELLO: You're right.

9 THE COURT: That's 37 and 38, as it will be in  
10 this record.

11 MS. ROSIELLO: If you give me a minute, your  
12 Honor.

13 (Pause)

14 MS. ROSIELLO: Your Honor, I believe what I  
15 should have been referring to was your draft Number 32.

16 THE COURT: And that number doesn't mean  
17 anything anymore because the final is different.  
18 That's what I'm telling you. It's probably 34 or  
19 thereabouts.

20 MS. ROSIELLO: Maybe I could be clear if I --

21 THE COURT: Just tell me the title of it.

22 MS. ROSIELLO: Okay.

23 THE COURT: The titles didn't change. The  
24 numbers did.

25 MS. ROSIELLO: As to your instruction on

1 consideration of acts and statements of  
2 co-conspirators.

3 THE COURT: That's 25.

4 MS. ROSIELLO: We object to the failure to  
5 include the language that the jury may not consider  
6 acts of any alleged co-conspirator after he has  
7 withdrawn from the conspiracy.

8 Overt act requirement, Mr. Traini may have said  
9 this. I'm not sure whether he included his objection  
10 to the omission of "knowingly" from the overt act  
11 requirement language. We included a definition of  
12 "knowingly" in our submission on that.

13 As to the elements of the offense of wire fraud,  
14 Mr. Traini talked about adding "to deceive" to  
15 Element 2. We are also objecting to not including a  
16 fourth element that it must be for the purpose of  
17 executing.

18 As to the "knowingly" and "willfully" defined,  
19 we raise the same objection as at the charge conference  
20 that our Alternatives B and C defining "knowingly" were  
21 not used.

22 As to the definition of "intent to defraud," we  
23 ask that the Court instruct that it has four elements  
24 rather than two, knowingly, willfully, intent to  
25 defraud and intent to deceive.

1           As to the intent to deprive of honest services,  
2           I join in Mr. Traini's; and in addition, I add the  
3           request for two other statements which we included in  
4           our request at the charge conference, and they are  
5           included in our Request Number 16 concerning business  
6           or political ties or the impression of such and  
7           concerning access or the impression of access, that  
8           neither one of those is considered deprivation of  
9           honest services.

10           And as to use of interstate wire communications,  
11           I join in what Mr. Traini said and I ask -- it's an  
12           execution question. It must be for the purpose of  
13           executing a scheme already devised or intended.

14           As to the Number 46, the limiting instruction,  
15           based on our Petrozziello position, we would be asking  
16           that you limit the jury on all of the submissions by --  
17           all the statements submitted that purport to come from  
18           Dan Bucci and, in addition, at the very least, that you  
19           limit the jury as to any statements by Dan Bucci prior  
20           to November 29 and 30.

21           The last thing is that as to the word "act" in  
22           the definition, I suggest the possibility of giving the  
23           jury a written instruction that makes the correction so  
24           that in the jury room they have an accurate statement  
25           of the Indictment.

1 THE COURT: Maybe you didn't understand. Each  
2 member of the jury will receive a written copy of the  
3 final instructions which contain the correct language.  
4 I misstated it. In 30 pages, I guess I messed up on  
5 one word. Thank you all for catching it.

6 But the jury will get the correct statement as  
7 well as Mr. Neronha's perfect Revised Amended  
8 Superseding Indictment.

9 The record should reflect -- I'm sorry,  
10 Mr. Traini, did you think of something else?

11 MR. TRAINI: Well, I just wanted to close the  
12 loop on the record, your Honor. I just wanted to adopt  
13 Ms. Rosiello's remarks except with respect to --

14 THE COURT: Withdrawal.

15 MR. TRAINI: -- a couple of things. Her  
16 requests on the filing that she just gave the Court  
17 today, Number 38, Number 39 and Number 52 we'll opt out  
18 of. Those are all related to either Mr. Potter's  
19 theory of defense or withdrawal, and her objection with  
20 respect to what used to be your Instruction 24 as it  
21 related to withdrawal. Other than that, we'll adopt  
22 her objections. Thank you, your Honor.

23 MR. TARANTINO: And we join in that as well,  
24 your Honor.

25 THE COURT: Okay. Before you all get to think

1 of something else, I also want to make sure that the  
2 record reflects other actions taken by the Court with  
3 the acquiescence of counsel.

4 The overt act that alleged an August 21st  
5 facsimile transmission was also stricken from the  
6 record based on the Government's position on  
7 Petrozziello and the Court's determination under  
8 Petrozziello.

9 And so that has been eliminated as an overt act  
10 in the Revised Amended Superseding Indictment that the  
11 jury will have.

12 In addition, at the charge conference, the  
13 record should reflect that the Government agreed to  
14 strike references to 18 U.S.C., Section 2, that is,  
15 aiding and abetting charges; and so all of those  
16 references have likewise been stricken from the Amended  
17 Superseding Indictment that the jury will get, and  
18 obviously the Court has an instruction -- has not  
19 instructed on that separate offense because of the  
20 Government's position on it.

21 We're going to take about 10 more minutes to  
22 give Karen a rest, and then I'll bring the jury back;  
23 but Mr. Traini thought of something else.

24 MR. TRAINI: Just one last thing, your Honor.  
25 With respect to my acquiescence and the Government's

1       having stricken the overt act about the August 21st  
2       fax, I just didn't want that to reflect -- I wanted the  
3       Court to remember that I also asked that the fax itself  
4       be stricken and that Count II be stricken, and I did  
5       not acquiesce in your Honor's not doing that.

6               THE COURT: Oh, I think the record was pretty  
7       clear on that; and Count II, insofar as it charges that  
8       the August 21 fax transmission was an act of wire  
9       fraud, remains.

10              All right. Take about 10 minutes, and then  
11       we'll bring the jury back for the Court to conclude its  
12       instructions.

13              (Recess)

14              (The jury is present for the following)

15              THE COURT: I have just a few more remarks. To  
16       render a verdict, all 12 of you must agree. That is,  
17       your verdict must be unanimous.

18              Therefore, during your deliberations and in your  
19       consideration of the evidence, you should exercise  
20       reasonable and intelligent judgment.

21              It is not required that you yield your views  
22       simply because a majority holds to the contrary view;  
23       but in pursuing your deliberations, you should keep  
24       your minds reasonably open with respect to any point in  
25       dispute so that you will not be prevented from

1 achieving a unanimous verdict due to mere stubbornness.

2 It is your right, however, to maintain your view.

3 The vote of each juror is as important as the  
4 vote of any other juror; and you need not give up your  
5 view, sincerely held, simply because a majority holds  
6 to the contrary.

7 Do not approach your consideration of the case  
8 in an intellectual vacuum. You are not required to  
9 disregard your experiences and observations in the  
10 ordinary, everyday affairs of life.

11 Indeed, your experiences and observations are  
12 essential to your exercise of sound judgment and  
13 discretion, and it is your right and duty to consider  
14 the evidence in light of such experiences and  
15 observations.

16 It is hoped and anticipated that you will sift  
17 all of the evidence in this case through maturity and  
18 common sense. Of course, you should not permit  
19 prejudice, sympathy or compassion to influence you.

20 All that any party is entitled to or expects is  
21 a verdict based upon your fair, scrupulous and  
22 conscientious examination of the evidence and an  
23 application of the law as I have instructed you to that  
24 evidence.

25 If it becomes necessary during your

1 deliberations to communicate with the Court, you may  
2 send a note signed by your foreperson or by one or more  
3 members of the jury. The foreperson may then hand such  
4 written request or question to the marshal in whose  
5 charge you will be placed. The marshal will bring any  
6 written questions or requests to me. I will attempt to  
7 fulfill your request or answer your question.

8 Other than the method outlined, please do not  
9 attempt to communicate privately or in any other way  
10 with the Court.

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

16 Mr. French, I am asking you to serve as  
17 foreperson of this jury. It will be your  
18 responsibility to moderate the discussion, to ensure  
19 that each and every one of your fellow jurors has an  
20 equal and ample opportunity to voice his or her  
21 opinion.

22 It will also be your responsibility, once the  
23 jury has completed its deliberations and reached a  
24 unanimous verdict, to fill out the verdict sheets.  
25 You'll see that they're very simple, pose simple



1 questions. Once you fill them out, you should sign and  
2 date those sheets; and we'll provide you with a pen for  
3 that purpose.

4 In addition, should the jury have any requests  
5 or questions, you can send a note to the Court to that  
6 effect.

7 Jim.

8 (Court Security Officer Savage sworn)

9 THE COURT: Members of the jury, you may now  
10 retire to deliberate on your verdict. You may take  
11 your notebooks with you at this time; and you may  
12 refer, if you've taken notes, to your notes.

13 However, I must remind you that if you took  
14 notes, they are for your personal use only. They are  
15 not to be considered an unofficial record of what  
16 occurred here in the courtroom. You may follow Jim out  
17 and go across to the jury room.

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