

Jury Instructions:

**United States of America v. John J. Fall
(13-135M)**

I intend to give you a copy of these instructions for use in the jury room, so please simply listen and do not worry about note taking.

Introduction

Ladies and gentlemen, you are the trier of facts. You alone must determine what the facts are in this particular case. It is my duty to instruct you on the law applicable to this case. You must consider the instructions as a whole. You should not choose one part and disregard another. You must accept and apply the law as I give it to you in its entirety, and this is true whether you personally agree with the law or not. It would be a violation of the oath you took as jurors to base a decision on any version of the law other than that contained in my instructions, just as it would be a violation of that oath to return a decision upon anything but the evidence in this case. It is not up to you to decide what the law is or should be. Your duty is to apply the law as I explain it to you.

Presumption of Innocence

As I told you at the start of this trial, Mr. Fall is presumed to be innocent of the accusations against him.

It is a fundamental principle of our system of justice that every person accused of a crime is presumed to be innocent unless and until his guilt is established beyond a reasonable doubt. The presumption is not a mere formality. It is a matter of the most important substance.

The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant. The defendant before you, Mr. Fall, has the benefit of that presumption throughout the trial, and you are not to convict him of a particular charge unless you are persuaded of his guilt of that charge beyond a reasonable doubt. Each charge carries its own presumption of innocence and even if you find the evidence has overcome that presumption on one charge, you must still apply it to the other charges unless and until the evidence persuades you otherwise.

The “presumption of innocence unless and until proven guilty” means that the burden of proof is always on the government to satisfy you that Mr. Fall is guilty beyond a reasonable doubt of the crime with which he is charged. This burden never shifts to Mr. Fall. It is always the government’s burden to prove each of the elements of the crimes charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence. Mr. Fall has the right to rely upon the failure or inability of the government to establish beyond a reasonable doubt any essential element of a crime charged against him.

If, after fair and impartial consideration of all the evidence, you have a reasonable doubt as to Mr. Fall’s guilt of a particular crime, it is your duty to acquit him of that crime. On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of Mr. Fall’s guilt of a particular crime, you should vote to convict him.

Defendant's Constitutional Right Not to Testify

In light of the fact that the Court struck Mr. Fall's testimony, I remind you that a defendant has an absolute right not to testify, since the entire burden of proof in this case is on the government to prove that Mr. Fall is guilty. No inference of guilt, or anything else, may be drawn from the absence of testimony from Mr. Fall.

It is not up to Mr. Fall to prove that he is innocent.

Under our system of law, any defendant has a perfect right to say to the government, "You have the burden of proving your case against me beyond a reasonable doubt. I do not have to say a word." You must determine whether the government has proved its case against Mr. Fall based solely on the testimony of the witnesses who did testify and the exhibits that were introduced.

The Government as a Party

The mere fact that this case is brought in the name of the United States of America does not entitle the prosecution to any greater consideration than that accorded to Mr. Fall. By the same token, it does not mean that the prosecution is entitled to any less consideration. All parties, whether government or individuals, stand as equals at the bar of justice.

Proof of All Elements

I will shortly explain the offenses with which Mr. Fall is charged and the elements the government must prove in order to establish that Mr. Fall is guilty of any of those four offenses.

In order for the government to prove Mr. Fall guilty of an offense, it must convince you, beyond a reasonable doubt, that it has proven each and every element of that offense. Possibilities or even probabilities are not sufficient.

If the government fails to prove any one or more elements of an offense beyond a reasonable doubt, then you must find Mr. Fall not guilty of that particular offense.

On the other hand, if you are convinced, beyond a reasonable doubt, that all elements of an offense with which Mr. Fall has been charged have been proven to you beyond a reasonable doubt, then you should find him guilty of that offense.

Reasonable Doubt

As I have said, the burden is upon the government to prove beyond a reasonable doubt that Mr. Fall is guilty of the charges made against him. It is a strict and heavy burden, but it does not mean that Mr. Fall's guilt must be proven beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning Mr. Fall's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge

Of course, Mr. Fall should not be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions — one that Mr. Fall is guilty as charged, the other that Mr. Fall is not guilty — then you must find Mr. Fall not guilty.

It is not sufficient for the government to establish a probability, even a strong one, that a

fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every conceivable doubt, but it requires proof that overcomes every reasonable doubt.

Concluding my instructions on the burden, then, I instruct you that what the government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against Mr. Fall, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether Mr. Fall is guilty of a particular offense, then you must give Mr. Fall the benefit of the doubt and find Mr. Fall not guilty of that offense.

Consider Each Count Separately

The indictment in this case charges Mr. Fall with four separate counts – Counts 1, 2, 3 and 4. There are no other charges before you. You must consider each of the four counts separately. The fact that you find the Mr. Fall guilty or not guilty on one count does not mean that you should find him guilty or not guilty on any other count.

“On or About”

When I explain the charges in detail, you will hear that the government alleges certain offenses were committed “on or about” or “in or about” certain dates. The proof need not

establish with certainty the exact date of an alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Overview of the Indictment

I am going to describe each charge for you, then tell you the elements of each offense, then define some terms for you. The four charges against Mr. Fall were charged in an indictment, which is simply the description of the charges against the defendant. An indictment is an appropriate method for the government to use in order to assert charges against an individual.

In Count I, Mr. Fall is accused of Corruptly Endeavoring to Obstruct and Impede the IRS concerning his and Carmen Sanchez's individual taxes, as well as Comfort Dental's corporate income taxes, in violation of 26 U.S.C. §7212(a).

In Count 2, Mr. Fall is accused of Tax Evasion, specifically that he did willfully attempt to evade or defeat the payment of a substantial part of the taxes due for the tax years 1998 through 2000, in violation of 26 U.S.C. §7201.

In Counts 3 and 4, Mr. Fall is accused of Aiding and Assisting in the Filing of False Tax Returns for Comfort Dental for the years 2006 and 2007, specifically with respect to business expense deductions, for "Advertising" expenses, totaling \$133,222 for 2006 and \$95,544 for 2007, while knowing and believing that the expenses had not been incurred, in violation of 26 U.S.C. §7206(2).

Other Names Mentioned

You have heard in this trial, and you will see in many of the exhibits, the name of Carmen Sanchez and the names of many businesses, including Comfort Dental and although you may wonder what, if anything, happened to that individual and those entities, you should not concern yourself with them, nor should you speculate about them.

Tax Laws are Legal

The legality of the tax laws is not an issue in this case. Congress unquestionably has the authority to tax and to require the filing of tax returns, such as for income taxes. Likewise, the Internal Revenue Service is authorized by law, as an agency of the United States, to assess and collect taxes.

All citizens of the United States are subject to federal tax laws. Compliance with the tax laws is not voluntary in the sense that it is optional.

The Law Relevant to the Charges

I will now turn to a discussion of the law applicable to Counts 1 through 4.

COUNT ONE: Attempt to Interfere with Administration of Internal Revenue Laws

Count One charges the defendant John J. Fall with corruptly trying to obstruct or impede the administration of Internal Revenue Laws from in or about February 1999, to in or about November 2010.

It is against federal law to corruptly endeavor to obstruct or impede the administration of Internal Revenue laws. For you to find Mr. Fall guilty of this crime, the government must prove the following beyond a reasonable doubt:

(1) First, that in or about the dates charged, Mr. Fall did something in an effort to obstruct or impede the due administration of the Internal Revenue laws in the manner charged; and

(2) Second, that Mr. Fall did so corruptly.

To act "corruptly" means to act with the intent to secure an unlawful advantage or benefit or financial gain either for oneself or for another.

To "obstruct or impede" means to hinder, interfere with, create obstacles, or make difficult.

The government does not have to prove that the effort succeeded.

The government does not have to prove that the United States suffered a tax loss. The crime is complete upon the commission of one corrupt act. The jury must unanimously agree on a specific corrupt act.

The act need not be criminal in character. An act, even if lawful in-and-of-itself, can serve as a corrupt act if it is done with the requisite intent.

COUNT TWO: Attempting Income Tax Evasion

Count Two charges the defendant John J. Fall with attempting to evade and defeat the payment of his federal income taxes for 1998, 1999, and 2000. It is against federal law to try to evade or defeat the payment of federal income tax. For you to find Mr. Fall guilty of attempting to evade taxes, the government must prove the following beyond a reasonable doubt:

(1) First, that Mr. Fall owed substantially more federal income tax than zero for the years 1998 through 2000;

- (2) Second, that Mr. Fall willfully attempted to evade or defeat the assessment or payment of this tax; and
- (3) Third, that Mr. Fall committed an affirmative act in furtherance of this willful attempt.

A person acts “willfully” if the law imposed a duty on him, he knew of the duty, and he voluntarily and intentionally violated that duty. If Mr. Fall acted in good faith, he did not act willfully. A good faith belief is one that is genuinely and honestly held. The burden to prove Mr. Fall’s state of mind, as with all other elements of the crime, rests with the government. This is a subjective standard: what did Mr. Fall actually believe, not what a reasonable person should have believed. However, you may consider the reasonableness of Mr. Fall’s belief in deciding whether he actually held the belief. Innocent mistakes caused by the complexity of the Internal Revenue Code or negligence, even gross negligence, are not enough to meet the “willfulness” requirement. But philosophical disagreement with the law or a belief that the tax laws are invalid or unconstitutional does not satisfy good faith and does not prevent a finding of willfulness. It is the duty of every person to obey the law.

A person may not be convicted of federal tax evasion on the basis of a willful *omission* alone. He also must have undertaken an affirmative act of evasion. The affirmative act requirement can be met by the filing of a false or fraudulent tax return that substantially understates taxable income or by making false entries or invoices or documents.

The affirmative act requirement can be met by the filing of a frivolous tax return that substantially understates taxable income, by the filing of a false Form W-4, or by other affirmative acts of concealment of taxable income such as keeping a double set of books, making false entries or alterations or false invoices or documents, destroying books or records, concealing assets or covering up sources of income, handling one’s affairs so as to avoid keeping

customary records, and/or other conduct whose likely effect would be to mislead the Internal Revenue Service or conceal income. The jury must agree on a specific affirmative act.

If a motive to evade or defeat the tax assessment or payment plays any part in an affirmative act, you may consider it even if the affirmative act serves other purposes as well, such as privacy or concealment from parties other than the IRS.

Willful intent or guilty knowledge may be inferred from the secretive or irregular manner in which a transaction is carried out.

In deciding whether Mr. Fall knew of a duty, you may infer that he had knowledge of it if you find that he deliberately closed his eyes to something that otherwise would have been obvious to him. In order to infer knowledge, you must find that two things have been established. First, that Mr. Fall was aware of a high probability that the duty existed. Second, that Mr. Fall consciously and deliberately avoided learning of the duty; that is to say, that Mr. Fall willfully made himself blind to the existence of the duty. Mere recklessness, negligence or mistake in failing to learn of the duty is not sufficient. There must be a deliberate effort to remain ignorant of the duty. But you may not find that Mr. Fall acted willfully if you find that he actually believed that he had no duty and that his belief was not based on philosophical disagreement with the tax laws or a belief that the tax laws are invalid or unconstitutional.

Mr. Fall's attitude toward the Internal Revenue Service or the reporting and payment of taxes generally may also be considered by you in determining his or her intent with respect to each of the allegations contained in the indictment.

The government does not have to prove the exact amount of federal income tax due and owing. The government is required to establish only that Mr. Fall owed a substantial amount during the year or years in question and at the time he committed an affirmative act. Whether or

not the amount owed is substantial is a question for the jury to decide based on the facts and circumstances in the case.

**COUNTS THREE AND FOUR: Aiding and Assisting
in the Filing Of False Returns for Comfort Dental**

Counts 3 and 4 charge the defendant John J. Fall with aiding and assisting in the preparation and filing of false corporate tax returns by Comfort Dental for the tax years 2006 and 2007.

Counts 3 and 4 charge the same offense for different tax years. Count 3 concerns tax year 2006, and Count 4 concerns tax year 2007. You must consider each count separately.

In order to prove Mr. Fall guilty of Counts Three and Four as charged in the indictment, the government must prove each of the following beyond a reasonable doubt:

- (1) First, that Mr. Fall advised or assisted in the preparation of a tax return which was subsequently filed;
- (2) Second, that the return was false or fraudulent as to any material matter; and
- (3) Third, that Mr. Fall acted willfully.

The first element that the government must prove beyond a reasonable doubt is that Mr. Fall advised or assisted in the preparation of a tax return which was subsequently filed with the Internal Revenue Service. It is not required that the government prove that Mr. Fall actually prepared or signed the return in order to prove that he aided in its preparation. Proof that Mr. Fall knowingly provided false information or directions with the expectation that the information he provided would be used to file a tax return is sufficient to satisfy this element.

The second element that the government must prove beyond a reasonable doubt is that the return was false as to a material matter. An income tax return may be false not only by reason

of understatement of income, but also because of an overstatement of lawful deductions or because deductible expenses are mischaracterized on the return.

The false statement in the return must be material. This means that it must be essential to an accurate determination of Comfort Dental's tax liability.

The third element is that Mr. Fall acted willfully. I have already defined "willfully" for you. A person acts "willfully" if the law imposed a duty on him, he knew of the duty, and he voluntarily and intentionally violated that duty.

It does not matter, and you should not consider, whether anyone other than Mr. Fall knew or did not know of any falsity on the return.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

Method of Assessing Evidence

Now that you know what it is that the government must prove and the standard of proof to be applied, the next question is how do you determine whether the government has proven any or all of the charges beyond a reasonable doubt?

Obviously, you must make your determination solely from the evidence properly before you and from all reasonable and legitimate inferences to be drawn from that evidence.

The evidence that is properly before you consists of:

1. The testimony of the witnesses; and
2. The exhibits that I have admitted into evidence.

From that evidence, you may draw whatever conclusions are reasonable under the circumstances.

The evidence that is properly before you does not include:

1. Comments or statements by the attorneys;
2. Documents, photographs or other items which may have been referred to but have not been admitted into evidence; or
3. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.
4. Anything I have instructed you to disregard, including the defendant's testimony.

Witnesses - Credibility - General Factors

As to the testimony of witnesses, your principal task is to determine the credibility of the witnesses and the weight you will give to the testimony of each.

In making that determination, there are a number of factors that you may consider:

1. The opportunity or lack of opportunity the witness had to acquire knowledge of the facts about which the witness testified. In other words, was the witness in a position to have accurately perceived the facts that the witness related to you.
2. The reliability or unreliability of the witness's memory. In other words, did the witness have a clear recollection of what happened or was the witness's memory uncertain or unclear.
3. The witness's appearance on the stand. Did the witness appear to be a person who was telling the complete and unadulterated truth, or did it appear that the witness was slanting things one way or another either consciously or unconsciously.

4. The probability or improbability of the witness's testimony. Did what the witness had to say sound reasonable or plausible or did it appear to be highly unlikely or impossible.
5. Whether the witness had anything to gain or lose from the outcome of this case. In other words, was the witness totally impartial or did the witness have some stake in the outcome or some reason to favor one side or the other.

Government Agents

The fact that a witness may be employed by a government or law enforcement agency does not, by itself, mean that you should give that witness's testimony any greater or any lesser weight simply because of that fact. You should assess the credibility and testimony of such a witness by applying the same factors as you would with respect to any other witness.

Witnesses - Number - Weight of Testimony

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness's testimony even in the absence of any contradictory evidence. You must decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your common sense and personal experience.

Just because there may be more witnesses testifying on one side of an issue than on the other does not mean that the weight of the evidence lies in favor of the greater number of witnesses. Once again, it is the credibility or quality of the testimony that determines where the weight of the evidence lies.

Exhibits

In addition to assessing the credibility of the witnesses and the weight to be given to their testimony, you should also evaluate the exhibits that you will have with you in the jury room. Examine them and consider them carefully.

However, bear in mind that merely because an exhibit has been admitted into evidence does not mean that you are required to accept it at face value. Like the testimony of a witness, the significance of an exhibit or the weight you attach to it will depend upon your evaluation of that exhibit in light of all the facts and circumstances of the case.

Direct and Circumstantial Evidence/Inferences

As I mentioned previously, you may consider only the evidence that is properly before you. However, that does not mean that, in determining the facts, you are limited to the statements of the witnesses or the contents of the exhibits.

In reaching your conclusions, you are permitted to draw, from facts that you find have been proven, such reasonable inferences as seem justified in the light of your experience. 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.

Such evidence is sometimes called circumstantial evidence. To put it another way, a fact may be proved either by direct evidence or by circumstantial evidence. Direct evidence includes such things as the testimony of an eyewitness who personally observed the fact in question or a photograph or document showing the actual thing described.

Circumstantial evidence consists of proof of a series of facts or circumstances from which the existence or nonexistence of another fact may be reasonably inferred. For example, if you go to bed on a clear and dry night, and you awake to find that the pavement outside is wet, you may infer that it rained during the night even though you did not see the rain fall.

The law makes no distinction between direct and circumstantial evidence concerning the weight to be given each. It is for you to decide how much weight to give any evidence. However, the law does require that any fact required to convict Mr. Fall be proven beyond a reasonable doubt.

Conduct of Court - General

As I have said before, it is up to you to determine the facts in this case. You should not interpret anything I have said or done during this trial as expressing an opinion on my part as to what the facts in this case are. I have not intended to express any such opinion and you should not be concerned about what my opinions might be regarding the facts. That is a matter for you to decide.

Objections by Counsel

During this trial, there have been occasions when the attorneys have objected to a question that was asked of a witness. You should not penalize an attorney, or more importantly, his client, for objecting. It is the attorney's right and duty to protect the client's interests by

objecting to what the attorney may believe is evidence that does not satisfy the requirements of the rules of evidence.

If I sustained the objection, it is important that you not speculate about what the answer to the objected-to question might have been. By sustaining the objection, the Court has determined that the evidence should not be considered by you.

Bias and Prejudice

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence. Neither bias in favor of any person or cause, prejudice against any person or cause, nor sympathy of any kind should be permitted to influence you in the course of your deliberations. You may not consider any personal feelings you may have about the race, religion, national origin, sex or age of Mr. Fall or any witness. It would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process.

All that Mr. Fall and the government are entitled to, or, for that matter expect, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence before you and your application of the law as I have explained it to you.

Punishment

The question of possible punishment of Mr. Fall is of no concern to the jury and should not, in any sense, enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon me. Your function is to weigh the evidence in the case and to determine whether or not Mr. Fall is guilty beyond a reasonable doubt, solely upon the basis of the evidence.

Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon Mr. Fall, if he is convicted, to influence your verdict in any way, or in any sense, enter into your deliberations

Verdict - Unanimity Required

In order to return a verdict in this case, all twelve of you must agree as to what that verdict will be. You cannot return a verdict of either guilty or not guilty with respect to any charge against Mr. Fall unless your decision is unanimous.

Therefore, there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

Foreperson and Duty to Deliberate

Juror # 1, Ms. Hurd, will be the foreperson. She will preside over the deliberations and speak for you here in court.

You will discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous, meaning all of you must agree. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through Court Security Officer Palumbo, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

Return of Verdict

The Court has prepared a verdict form for you. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign it and date it, and advise the Court that you are ready to return to the courtroom.

Copy of Instructions

I have instructed you on the law that governs your deliberations. I will send into the jury room a written copy of my instructions.