

Jury Instructions

**United States of America v. Gerald J. Silva
(Cr. 13-043-S)**

Introduction

At this time, it is my duty to instruct you on the law applicable to this case. You must accept the rules of law that I give you and apply them to the facts in this case as you find those facts to be.

In applying the law that I am about to explain to you in these instructions, 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.

You must accept and apply the rules of law that I give to you whether you agree with them 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, the Defendant is presumed to be innocent of the accusations against him. This presumption of innocence remains with the Defendant unless and until the Government presents evidence satisfying you beyond a reasonable doubt that the Defendant is guilty.

The presumption of innocence is sufficient to require a not guilty verdict unless you find that such evidence has been presented.

If you find that the Government has proven the Defendant guilty beyond a reasonable doubt, the presumption of innocence disappears and is of no further avail to him. However, until that time, the presumption remains with the Defendant.

Proof of All Elements

I will shortly explain the offenses with which the Defendant is charged and the elements the Government must prove in order to establish that the Defendant is guilty of these offenses.

In order for the Government to prove the Defendant guilty of an offense, it must convince you, beyond a reasonable doubt, that it has proved 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 the offense beyond a reasonable doubt, you must find the Defendant not guilty of that particular offense.

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

Bear in mind that the requirement that the Government prove every element of the offense with which the Defendant is charged does not mean that the Government is required to prove every statement contained in the indictment.

What it means is that the Government must prove facts sufficient to prove all of the elements of the offense with which the Defendant is charged as I have explained them.

Reasonable Doubt

As I have said, the burden is upon the Government to prove beyond a reasonable doubt that the Defendant is guilty of the charges made against him. It is a strict and heavy burden, but it does not mean that the Defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning the Defendant'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, a Defendant is never to 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 the Defendant is guilty as charged, the other that the Defendant is not guilty—you will find the Defendant not guilty.

It is not sufficient for the Government to establish a probability, though 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 possible 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 the offenses 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 the charges against the Defendant, you will return a verdict of guilty on those charges. If, on the other hand, you think there is a reasonable doubt about whether the Defendant is guilty of the offense, you must give the Defendant the benefit of the doubt and find the Defendant not guilty of that offense.

Indictment - Effect

You will have the indictment with you in the jury room to help you remember the precise nature of the charges against the Defendant.

I remind you, once again, that an indictment is nothing more than an accusation. It should not be considered as evidence of guilt. It may not even be the basis of an inference of guilt. All that it does is to bring this matter before you for determination. Beyond that, it has no significance, whatever. It merely sets forth the elements of the offenses which the Government must prove beyond a reasonable doubt.

Definition of "In or About"

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

Summary of the Charges

The indictment in this case charges the Defendant, Gerald J. Silva, with seven counts.

Counts One through Six charge the Defendant with Receipt of Child Pornography: that the Defendant knowingly received child pornography.

Count Seven charges the Defendant with Possession of Child Pornography: that the Defendant knowingly possessed child pornography.

As I have told you, each of these offenses has essential elements. To find the Defendant guilty of an offense, you must all find that the government has proven each of the essential elements of that offense beyond a reasonable doubt. I will explain the elements of each offense and specific definitions in more detail shortly.

Multiple Counts - One Defendant

As you consider the charges against the Defendant, keep in mind, a separate offense is charged in each of the counts of the Indictment. Each offense, and the evidence which applies to it, should be considered separately, and you should return separate verdicts as to each count.

Counts One through Six - Receipt of Child Pornography

I will now instruct you about the law governing the charges in the indictment. Counts 1 through 6 of the indictment charge the Defendant with Receipt of Child Pornography. It is a federal crime for anyone to receive child pornography that has been mailed or moved in interstate or foreign commerce. Title 18, United States Code Section 2252(a)(2) provides in relevant part:

Any person who - knowingly receives . . . any visual depiction using any means or facility of interstate or foreign commerce, . . . if such visual depiction [involves the use of a minor engaging in sexually explicit conduct] . . . [shall be guilty of an offense].

In order for the Defendant to be found guilty of Receiving Child Pornography, the Government must prove each of the following elements beyond a reasonable doubt:

First: the Defendant knowingly received a visual depiction by mail, or in interstate or foreign commerce, by any means;

Second: such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Third: the Defendant knew that such visual depiction was of sexually explicit conduct; and

Fourth: the Defendant knew that at least one of the persons engaged in sexually explicit conduct in such visual depiction was a minor.

Definition of "Knowingly"

I am now going to instruct you as to the specific meaning of some of the words and phrases used in these instructions. In these instructions, the word "knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident. You may consider evidence of the Defendant's words, acts, or omissions, along with all other evidence in deciding whether the Defendant acted knowingly.

The offenses of Receipt of Child Pornography, charged in Counts One through Six; and Possession of Child Pornography, charged in Count Seven, require that the Government prove that the Defendant acted with knowledge. This means that the Government must prove beyond a reasonable doubt that the Defendant was conscious and aware of the nature of his actions and of the surrounding facts and circumstances, as specified in the elements of those offenses, as I have outlined them, and that he did not act because of ignorance, mistake, or accident.

In deciding whether the Defendant acted with knowledge, you may consider evidence about what he said, what he did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in the Defendant's mind at that time.

It is for you the jury to decide whether the material received and possessed by the Defendant meets the definition of "sexually explicit conduct." If the Defendant incorrectly believed what does and does not constitute child pornography, that does not relieve him of responsibility as long as the government has proven the elements I outlined above.

Definition of "Received"

To "receive" something simply means knowingly to accept or take possession of something.

Definition of "Visual Depiction"

The term "Visual Depiction" includes data stored on a disk, such as a DVD, which is capable of conversion into a visual image.

Definition of "Interstate or Foreign Commerce"

"Interstate or Foreign Commerce" is the movement of property between different states or between the United States and any place outside of the United States.

Definition of "Minor"

The term "minor" means any person under the age of eighteen years.

Definition of "Sexually Explicit Conduct"

The term "sexually explicit conduct," as that term is used in Counts One through Seven of the indictment, includes any one of the five categories of conduct, whether actual or simulated, including lascivious exhibition of the genitals of any person. As I have told you, this case does not involve categories 1-4; it involves category 5, "lascivious exhibition of the genitals of any person."

Nudity alone is not enough to make an image child pornography. The law requires lascivious exhibition of the genitals. Whether an image of the genitals constitutes a "lascivious exhibition" requires a consideration of the overall content of the material. In considering the overall content of the image, you may, but are not required to, consider the following factors: (1) whether the genitals are the focal point of the image; (2) whether the setting of the image is sexually suggestive, for example, a location generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the image appears intended or designed to elicit a sexual response in the viewer. An image need not involve all of these factors to

constitute a "lascivious exhibition." It is for you to decide the weight, or lack of weight, to be given to any of the factors I just listed. You may conclude that they are not applicable given the facts of this case. This list of factors is not comprehensive, and you may consider other factors specific to this case from the evidence presented at trial that you find relevant.

Count Seven - Possession of Child Pornography

Title 18, United States Code, Section 2252(a)(4)(B), makes it a federal crime for any person to knowingly possess any material that contains a visual depiction that has been shipped or transported in interstate or foreign commerce, by any means, if the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct.

To find the Defendant guilty of Count Seven, the Government must prove the following elements beyond a reasonable doubt:

First: that the Defendant knowingly possessed any materials that the Defendant knew contained a visual depiction of a minor engaged in sexually explicit conduct;

Second: the Defendant knew the visual depiction contained in the materials showed a minor engaged in sexually explicit conduct;

Third: The Defendant knew that production of such visual depiction involved use of a minor engaging in sexually explicit conduct; and;

Fourth: that the visual depiction had been either: (a) mailed, shipped, or transported in interstate or foreign commerce, or (b) produced using material that had been mailed, shipped, or transported in interstate or foreign commerce.

The Government is not required to prove that each of the previously stated elements has been proved beyond a reasonable doubt as to each and every image or video that was introduced into evidence. The Government is only required to make this showing with respect to one image or video.

Definition of "Possession"

I have already instructed you on the meaning of several terms in connection with Counts One through Six which are also applicable to Count Seven. Those terms are "knowingly," "visual depiction," "interstate or foreign commerce," "minor," and "sexually explicit conduct." Those terms have the same meanings as applied to Count Seven as they do to Counts One through Six. I will now instruct you on the meaning of the term "possession."

For purposes of this case, "Possess" means to exercise authority, dominion or control over something.

Single Image

Although you have heard evidence that the Defendant had multiple images or videos of what the government charges is child pornography, as I have defined for you in these instructions, the Government is not required to prove that all of the images in evidence constitute child pornography. Rather, the Government will have proved what is necessary for a finding of guilty if it proves, beyond a reasonable doubt, that the Defendant acted as charged with respect to any one depiction of child pornography, so long as you the jury agree unanimously as to which depiction or depictions meet the required elements. Therefore, as long as you find beyond a reasonable doubt that the Defendant knowingly acted with respect to at least one image or video, and that the other elements of the offense have been proved beyond a reasonable doubt, you may find the Defendant guilty.

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 proved these things 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;
2. The exhibits that I have admitted into evidence; and
3. Any stipulations among the attorneys in which they agree as to what the facts are.

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. Answers given by witnesses which I ordered stricken and instructed you to disregard;
3. Documents, photographs or other items which may have been referred to but have not been admitted into evidence. Since they are not proper evidence, you should not speculate or guess as to what they might say or show and you may not consider them except to the

extent that, and for the purpose that, they may have been read or shown to you during the course of the trial; or

4. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.

Notetaking

You were permitted to take notes in this case. However, please remember that not everything you write down is necessarily what was said and that your notes are not "evidence." Thus, when you return to the jury room to discuss the case, do not assume simply because something appears in somebody's notes that it necessarily took place in court. Instead, it is your collective memory that must control as you deliberate upon the verdict.

Statements by Defendant

You have heard evidence that the Defendant made statements in which the government claims he admitted certain facts.

It is for you to decide (1) whether the Defendant actually made the statement, and (2) if so, how much weight to give the statement. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which it may have been made and any facts or circumstances tending to corroborate or contradict the version of events described in the statement.

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.

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 or she 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 should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses' testimony that counts.

Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, 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.

Witnesses - Credibility - Government Agents

The fact that a witness may be employed by a 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.

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 the Defendant. 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.

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 which 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.

Nature of Certain Videos and Images

Certain videos that may have been of a disturbing nature have been admitted into evidence. You may feel these are not pleasant images to look at. You should not let these images affect your emotions to the prejudice of the Defendant. Your verdict must be based on a rational and fair consideration of all the evidence and not on passion or prejudice against the Defendant, the government, or anyone else connected with this case.

Circumstantial Evidence

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 which you find have been proved, 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.

The law makes no distinction between the weight to be given to direct and circumstantial evidence. However, it does require that any fact required to convict the Defendant be proved beyond a reasonable doubt.

Not All Evidence, Not All Witnesses Needed

Although the Government is required to prove the Defendant guilty beyond a reasonable doubt, the Government is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case.

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.

Bias and Prejudice

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.

All that any party here is entitled to, or, for that matter expects, 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.

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 against the Defendant 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 you 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.

Selection of Foreperson and Duty to Deliberate

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. 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 the marshal, 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.

Jury Recollection Controls - Rehearing Testimony

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

Occasionally, juries want to rehear testimony. Understand that in a relatively short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

Return of Verdict

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign 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. You are reminded, however, that the law is as I have given it to you from the bench; the written copy is merely a guide to assist you.