

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
JUDGE WILLIAM B. SHUBB

FILED

MAR 14 2006

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Case Number: CR03-00095-01-WBS

Plaintiff,

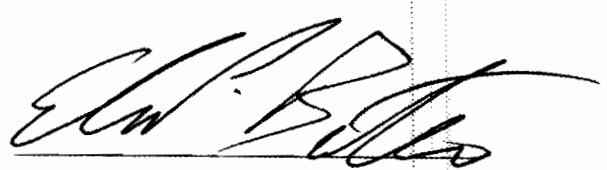
v.

AMR MOHSEN,

Defendant.

JURY INSTRUCTIONS GIVEN [PHASE TWO OF BIFURCATED TRIAL]

Dated: 3/14/06


Courtroom Deputy

INSTRUCTION NO. 1

1
2 Members of the jury, now that you have heard all the
3 evidence and the arguments of counsel on phase two of this trial,
4 it is my duty to instruct you on the law which applies to this
5 phase. Some of the instructions that you were given on phase one
6 are applicable to this phase as well, but some are not. In order
7 to simplify the process for you, I will repeat here those
8 instructions which I gave on the first phase which are applicable
9 to this phase. The fact that I have repeated certain
10 instructions, however, does not mean that they are more important
11 than the others. It is done just so you may have all of the
12 instructions applicable to this phase of the trial together in
13 one place. A copy of these instructions will be available in the
14 jury room for you to consult if you should find it necessary.

15 It is your duty to find the facts from all the evidence in
16 the case. To those facts you will apply the law as I give it to
17 you. You must follow the law as I give it to you whether you
18 agree with it or not. And you must not be influenced by any
19 personal likes or dislikes, opinions, prejudices, or sympathy.
20 That means that you must decide the case solely on the evidence
21 before you. You will recall that you took an oath promising to
22 do so at the beginning of the case.

23 In following these instructions, you must follow all of them
24 and not single out some and ignore others; they are all equally
25 important. You must not read into these instructions or into
26 anything the court may have said or done any suggestion as to
27 what verdict you should return - that is a matter entirely up to
28 you.

INSTRUCTION NO. 2

The indictment is not evidence. The defendant has pleaded not guilty to the charges. The defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charges beyond a reasonable doubt.

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INSTRUCTION NO. 3

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A defendant in a criminal case has a constitutional right not to testify. No presumption of guilt may be raised, and no inference of any kind may be drawn, from the fact that the defendant did not testify.

INSTRUCTION NO. 4

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

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INSTRUCTION NO. 5

The evidence from which you are to decide what the facts are consists of:

(1) the sworn testimony of any witness in phase one or phase two of this trial;

(2) the exhibits which have been received into evidence in both phases; and

(3) any facts to which all the lawyers have stipulated in both phases of the trial.

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INSTRUCTION NO. 6

In reaching your verdict you may consider only the testimony and exhibits received into evidence and the facts to which both sides have stipulated. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the question, the objection, or the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

INSTRUCTION NO. 7

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

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INSTRUCTION NO. 8

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In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

INSTRUCTION NO. 9

A separate crime is charged against the defendant in each count of the indictment. You must decide each count separately. Your verdict on any count in this phase of the trial should not be controlled by your verdict on any other count in either this phase or the first phase of the trial.

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INSTRUCTION NO. 10

You have heard evidence that two witnesses, Manuel Primas and Michael Silva, have been convicted of a felony. You may consider this evidence, along with other pertinent evidence, in deciding whether or not to believe these witnesses and how much weight to give to the testimony of the witnesses.

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INSTRUCTION NO. 11

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2 You have heard testimony from witnesses Manuel Primas,
3 Mohamed Ali Moussa, and Magda Metwally who received immunity.
4 That testimony was given in exchange for a promise by the
5 government that the testimony of those witnesses would not be
6 used in any case against them. Mr. Primas also received, or may
7 have received, other benefits from the government in connection
8 with this case.
9

10 For these reasons, in evaluating the testimony of those
11 witnesses, you should consider the extent to which or whether
12 their testimony may have been influenced by any of these factors.
13 In addition, you should examine the testimony of those witnesses
14 with greater caution than that of other witnesses.
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INSTRUCTION NO. 12

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2 You have also heard testimony from an informant and an
3 undercover FBI agent who were involved in the government's
4 investigation in this case. Law enforcement officials are not
5 precluded from engaging in stealth and deception, such as the use
6 of informants and undercover agents, in order to apprehend
7 persons engaged in criminal activities. Undercover agents and
8 informants may properly make use of false names and appearances
9 and may properly assume the roles of members in criminal
10 organizations. The government may utilize a broad range of
11 schemes and ploys to ferret out criminal activity.
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INSTRUCTION NO. 13

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2 The defendant is charged in Count Twenty-One of the
3 Indictment with attempted witness tampering in violation of 18
4 U.S.C. § 1512(b)(1). In order for the defendant to be found
5 guilty of that charge, the government must prove each of the
6 following elements beyond a reasonable doubt:

7
8 First, the defendant intended to use intimidation, threaten,
9 or corruptly persuade persons who were witnesses in an official
10 proceeding for the purpose of influencing, delaying, or
11 preventing the testimony of such person or persons; and

12 Second, the defendant did something which was a substantial
13 step toward intimidating, threatening, or corruptly persuading
14 such person or persons for the purpose of influencing, delaying
15 or preventing their testimony, with all of you agreeing as to
16 what constituted the substantial step; and

17 Third, the defendant was not entrapped into attempting to
18 commit the crime.

19
20 Mere preparation is not a substantial step toward the
21 commission of witness tampering.

22 "Corruptly persuade" means to be motivated by an improper or
23 inappropriate purpose to convince person another to engage in a
24 course of behavior, for example, to interfere with trial
25 testimony, and encompasses non-coercive attempts by a defendant
26 to tamper with prospective witnesses.

27 To act with "intent to influence delay or prevent" includes
28

1 an act which intends to cause any person to withhold testimony.

2 The government need not prove that the defendant actually
3 influenced, delayed or prevented any person from testifying; the
4 question is whether the defendant attempted to do so.

5 An "official proceeding" includes this trial, any other
6 trial or hearing conducted before this Court in this case, any
7 trial or hearing before a federal magistrate judge in this case,
8 or any proceeding before a federal grand jury in this case. The
9 government need not prove that the testimony at issue be
10 admissible in evidence in the official proceeding.
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INSTRUCTION NO. 14

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2 The defendant Amr Mohsen is charged in Count Twenty-Two
3 of the Indictment with solicitation to commit a crime of
4 violence, specifically the crime of arson, in violation of 18
5 U.S.C. § 373. In order for the defendant to be found guilty of
6 that charge, the government must prove each of the following
7 elements beyond a reasonable doubt:
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9 First, the defendant solicited, commanded, induced, or
10 otherwise endeavored to persuade another person to engage in
11 felonious conduct, specifically the burning a witness's car in
12 order to influence, delay and prevent the testimony of that
13 witness in this case; and

14 Second, the defendant intended that the other person engage
15 in the felonious conduct; and

16 Third, the solicitation, commanding, inducing or endeavoring
17 occurred under circumstances strongly corroborative of that
18 intent; and

19 Fourth, the defendant was not entrapped into soliciting the
20 crime.
21

22 For purposes of Count Twenty-Two, you are instructed as a
23 matter of law that burning a witness's car in order to influence,
24 delay and prevent the testimony of that witness in this case is a
25 violent felony that may be prosecuted in a court of the United
26 States.
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INSTRUCTION NO. 15

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2 The defendant Amr Mohsen is charged in Count Twenty-Three of
3 the Indictment with solicitation to commit a crime of violence,
4 specifically the crime of murder, in violation of 18 U.S.C. §
5 373. In order for the defendant to be found guilty of that
6 charge, the government must prove each of the following elements
7 beyond a reasonable doubt:
8

9 First, the defendant solicited, commanded, induced, or
10 otherwise endeavored to persuade another person to engage in
11 felonious conduct, specifically killing or attempting to kill a
12 federal judge on account of that judge's performance of his
13 official duties; and

14 Second, the defendant intended that the other person engage
15 in the felonious conduct; and

16 Third, the solicitation, commanding, inducing or endeavoring
17 occurred under circumstances strongly corroborative of that
18 intent; and

19 Fourth, the defendant was not entrapped into soliciting the
20 crime.
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22 For purposes of Count Twenty-Three, you are instructed as a
23 matter of law that killing or attempting to kill a federal judge
24 on account of a that judge's performance of official duties is a
25 violent felony that may be prosecuted in a court of the United
26 States.
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INSTRUCTION NO. 16

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2 "Circumstances strongly corroborative of intent" can consist
3 of discussions or planning between the defendant and the person
4 solicited regarding the crime to be committed; offering or
5 promising payment or some other benefit to the person solicited
6 if he would cause the offense to be committed; threatening harm
7 or some other detriment to the person solicited if he would not
8 cause the offense to be committed; providing of information
9 regarding the description or location of the proposed victim;
10 repeatedly soliciting the commission of the offense; believing or
11 being aware that the person solicited had previously been
12 involved in the commission of similar offenses; arranging for the
13 acquisition of tools or information suited for use in the
14 commission of the offense; or making other apparent preparations
15 for the commission of the offense.
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17 These factors are not exclusive factors for consideration,
18 nor are these factors exclusive indicators of intent. The
19 surrounding circumstances in general must indicate that the
20 defendant was serious when he solicited the criminal conduct.
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INSTRUCTION NO. 17

In order to prove that defendant was not entrapped, the government must prove beyond a reasonable doubt either:

1. the defendant was predisposed to commit the crime before being contacted by government agents, or

2. the defendant was not induced by the government agents to commit the crime.

Where a person, independent of and before government contact, is predisposed to commit the crime, it is not entrapment if government agents merely provide an opportunity to commit the crime.

In determining whether the defendant was predisposed to commit the crime before being approached by the government agent you may consider the following:

1. Whether the defendant demonstrated reluctance to commit the crime;
2. the defendant's character and reputation;
3. whether the government initially suggested criminal activity;
4. whether the defendant engaged in the criminal activity for profit;
5. the nature of any government inducement; and
6. any other factors related to predisposition.

1 Inducement is conduct by a government agent that creates a
2 substantial risk that a person who was not otherwise predisposed
3 would commit the charged crime. Inducement may consist of
4 persuasion, fraudulent representations, threats, coercive
5 tactics, harassment, promises or rewards, or pleas based on need,
6 sympathy or friendship. However, mere suggestions or the
7 offering of an opportunity to commit a crime is not conduct
8 amounting to inducement. Moreover, even if there is government
9 inducement, if a defendant is predisposed to commit the crime,
10 there is no government entrapment.
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INSTRUCTION NO. 18

Someone becomes a government agent when the government authorizes, directs, and supervises that person's activities and is aware of those activities.

In this case, Manuel Primas first became a government agent on May 19, 2004. Any conduct between Manuel Primas and the defendant that occurred before May 19, 2004 cannot be attributed to the government as an inducement to the defendant to commit a crime. Such conduct may be considered, however, in determining whether Mr. Primas' conduct after May 19, 2004 amounted to entrapment.

INSTRUCTION NO. 19

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2 You have heard evidence in the second phase of this trial
3 regarding efforts to vandalize cars belonging to Tom Huang and
4 his wife. The solicitation to vandalize the Huangs' cars is not
5 charged in this case. You may consider the evidence of any such
6 efforts only insofar as such evidence relates to the charges in
7 Counts Twenty-One through Twenty-Three of the Indictment.
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INSTRUCTION NO. 20

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2 When you begin your deliberations, you should select one
3 member of the jury as your foreperson. You may keep the same
4 foreperson as in phase one of the trial, or you may elect a
5 different one. That person will preside over the deliberations
6 and speak for you here in court.

7
8 You will then discuss the case with your fellow jurors to
9 reach agreement if you can do so. Your verdict, whether guilty
10 or not guilty, must be unanimous.

11 Each of you must decide the case for yourself, but you
12 should do so only after you have considered all the evidence,
13 discussed it fully with the other jurors, and listened to the
14 views of your fellow jurors.

15 Do not be afraid to change your opinion if the discussion
16 persuades you that you should. But do not come to a decision
17 simply because other jurors think it is right.

18 It is important that you attempt to reach a unanimous
19 verdict but, of course, only if each of you can do so after
20 having made your own conscientious decision. Do not change an
21 honest belief about the weight and effect of the evidence simply
22 to reach a verdict.
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INSTRUCTION NO. 21

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

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INSTRUCTION NO. 22

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

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INSTRUCTION NO. 23

The punishment provided by law for these crimes is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

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INSTRUCTION NO. 24

A verdict form has been prepared 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 and date it and advise the bailiff that you are ready to return to the courtroom.

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INSTRUCTION NO. 25

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2 If it becomes necessary during your deliberations to
3 communicate with me, you may send a note through the Court
4 Security Officer, signed by your foreperson or by one or more
5 members of the jury. No member of the jury should ever attempt
6 to communicate with me except by a signed writing, and I will
7 respond to the jury concerning the case only in writing, or here
8 in open court. If you send out a question, I will consult with
9 the lawyers before answering it, which may take some time. You
10 may continue your deliberations while waiting for the answer to
11 any question. Remember that you are not to tell anyone—including
12 me—how the jury stands, numerically or otherwise, on the question
13 of the guilt of the defendant, until after you have reached a
14 unanimous verdict or have been discharged.
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