

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §
 §
vs. § NO. 4:03-CR-188-A
 §
RICHARD MICHAEL SIMKANIN §

CHARGE OF THE COURT

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

You, as jurors, are the judges of the facts. But in determining what actually happened--that is, in reaching your decision as to the facts--it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence received during the trial and the law as given and explained to you by the court, without prejudice or sympathy for or against the defendant. That was the promise you made and the oath you took upon being selected as jurors, and the court and the parties have the right to expect nothing less.

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the

law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make from the facts established by the evidence; and, you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness.

"Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's

testimony. An important part of your job will be making judgments about the testimony of the witnesses, including the defendant, who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

You are to give the testimony of each witness such credibility, if any, as you may think it deserves.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. Except for statements by the defendant, the earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached. Earlier statements by the defendant can be evidence against the defendant of the truth of the statements. If you believe that a witness has been discredited, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves. I remind you that a defendant has the right not to testify. When the defendant does testify, however, his testimony should be weighed and his credibility evaluated in the same way as that of any other witness.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think

about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

Counts One through Twelve of the indictment charge that defendant, **RICHARD MICHAEL SIMKANIN**, willfully failed to collect, account for, and pay over taxes due and owing to the United States of America from the wages of employees of Arrow Custom Plastics for certain tax quarters. Title 26, United States Code, Section 7202 makes it a crime for any person who is required to collect, to account for, or to pay over any tax to willfully fail to do so. Within the meaning of this law, during the years 2000, 2001, and 2002, Arrow Custom Plastics, through its responsible officials, had a legal duty to collect, by withholding from the wages of its employees, the employees' share of social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay the withheld amounts to the United States of America. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt as to the tax quarter mentioned in the count of the indictment under consideration:

First: That Arrow Custom Plastics was an employer that paid wages to its employees;

Second: That defendant was an official of Arrow Custom Plastics who had responsibility for decisions of Arrow Custom

Plastics regarding the withholding from its employees' wages of Medicare taxes, social security taxes, and federal income taxes, the accounting for such taxes, and the payment of such taxes over to the Internal Revenue Service;

Third: That defendant caused Arrow Custom Plastics not to withhold and not to truthfully account for and pay over such taxes; and

Fourth: That defendant's conduct in causing Arrow Custom Plastics not to withhold and not to truthfully account for and pay over such taxes was willful.

With respect to the requirement that the government prove beyond a reasonable doubt that the defendant's failure was "willful," you are instructed: To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. For the government to establish willfulness as to Counts One through Twelve of the indictment, it must prove beyond a reasonable doubt as to the count under consideration that defendant knew of the requirements of federal law that Arrow Custom Plastics collect, by withholding from its employees' wages, Medicare taxes, social security taxes, and federal income taxes, and to account for such taxes and pay them over to the Internal Revenue Service, and that he voluntarily and intentionally caused Arrow Custom Plastics to fail to comply with those requirements. A defendant's views about the validity of

the tax laws is irrelevant to the issue of willfulness; and, you are not to consider any claim that the tax laws are unconstitutional.

Counts Thirteen through Twenty-Seven of the indictment allege that defendant, **RICHARD MICHAEL SIMKANIN**, made false claims to the United States. Title 18, United States Code, Section 287, makes it a crime to knowingly make a false or fraudulent claim against any department or agency of the United States. The Internal Revenue Service is a department or agency of the United States within the meaning of that law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt as to the count of the indictment under consideration:

First: That the defendant knowingly presented to an agency of the United States a false or fraudulent claim against the United States;

Second: That the defendant knew that the claim was false or fraudulent; and

Third: That the false or fraudulent claim was material.

A claim is "material" if it has a natural tendency to influence, or is capable of influencing, the agency to which it was addressed. It is not necessary to show, however, that the government agency was in fact deceived or misled.

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

Counts Twenty-eight through Thirty-one of the indictment charge that defendant, **RICHARD MICHAEL SIMKANIN**, failed to file an income tax return for the years 1998, 1999, 2000, and 2001. Title 26, United States Code, Section 7203, makes it a crime for a person to fail to file a required federal income tax return. The receipt of a specified amount of gross income during a calendar year determines whether a person must file a federal income tax return. A married person who individually earned at least \$2,700 in gross income and, together with his or her spouse, earned at least \$12,500 in gross income during calendar year 1998 was required to file a federal tax return. A married person who individually earned at least \$2,750 in gross income and, together with his or her spouse, earned at least \$12,700 in gross income during calendar year 1999 was required to file a federal tax return. A married person who individually earned at least \$2,800 in gross income and, together with his or her spouse, earned at least \$12,950 in gross income during calendar year 2000 was required to file a federal tax return. A married person who individually earned at least \$2,900 in gross income and, together with his or her spouse, earned at least \$13,400 in gross income during calendar year 2001 was required to file a

federal tax return. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt as to the count of the indictment under consideration:

First: That the defendant received gross income in the amount stated in the indictment during the year in question;

Second: That the defendant failed to file an income tax return, as required, by the date stated in the indictment;

Third: That the defendant knew he was required to file a return; and

Fourth: That the defendant's failure to file was willful.

I remind you of my instruction that to act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. For the government to establish willfulness as to Counts Twenty-eight through Thirty-One of the indictment, it must prove beyond a reasonable doubt as to the count under consideration that defendant knew of the requirement of federal law that he file an income tax return, and that he voluntarily and intentionally failed to do so. The court repeats that a defendant's views about the validity of the tax laws is irrelevant to the issue of willfulness; and, you are not to consider any claim that the tax laws are unconstitutional.

For the willful crime of failure to file a tax return, the government is not required to show that a tax is due and owing

from the defendant. Nor is the government required to prove an intent to evade or defeat any taxes.

You are instructed as to all counts of the indictment that, as a matter of law, the Internal Revenue Code has been Constitutionally enacted and is binding law in all the States of the United States. The legality of the tax laws of the United States is not an issue to be decided in this case. Congress has, and has had, the authority to tax income and to require the filing of tax returns and the reporting of income; and, likewise, the Internal Revenue Service is, and has been, authorized by law to assess and collect income taxes.

You are to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment.

A separate crime is charged against the defendant in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime charged.

If the defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned

with punishment in any way. It should not enter your consideration or discussion.

To reach a verdict, all of you must agree. Your verdict must be unanimous on each count of the indictment. Other than the possibility that the court could make an inquiry into whether deliberations were conducted properly, your deliberations will be secret, and you will never have to explain your verdict to anyone. You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as defendant in this case.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges--judges of the facts. Your sole interest is to seek the truth from the evidence in the

case, to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

You are entitled to use your common sense. You are entitled to draw deductions from the evidence by the use of your common sense, and to try to arrive at the truth of the situation in the light of the Court's instructions as a whole, and particularly the one as to the burden of proof. The trial of a case is not a game. The outcome of this case is important to the public and it is important to the defendant. Both sides are entitled to have you make your best effort to decide what the truth is in this situation in light of the evidence that you have heard, by the use of your common sense. If you are considering a matter that is favorable to the government and you are satisfied that it is true beyond a reasonable doubt, then that is the truth in this case. If you are considering a matter that is favorable to the defendant and you believe that it is true, or if you have a reasonable doubt as to whether it is true, then that is the truth as far as this case is concerned. In other words, we are getting back to the proposition that you must arrive at the facts from the evidence that you have heard here and draw whatever deductions you think are logical and reasonable, but that you must weigh the evidence and evaluate it in the light of the Court's instructions on the burden of proof.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

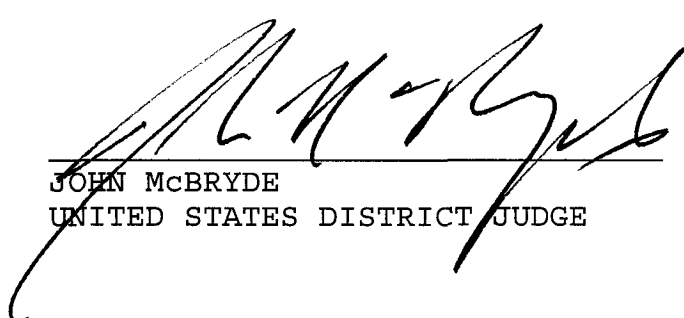
[Explain verdict form.]

The foreperson will write the unanimous answer of the jury in the space provided for ^{as to} ~~in~~ each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict. u

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security officer. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

SIGNED January 6, 2004.



JOHN MCBRYDE
UNITED STATES DISTRICT JUDGE