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

UNITED STATES OF AMERICA . CRIMINAL ACTION NO.  
. 4:03-CR-188-A  
VS. .  
. .  
RICHARD MICHAEL SIMKANIN . January 7, 2004  
. 9:00 a.m.  
. . . . .

VOLUME IV  
TRIAL TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN H. McBRYDE  
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the United States: Mr. David L. Jarvis  
Assistant United States Attorney  
801 Cherry Street, Suite 1700  
Fort Worth, Texas 76102  
(817) 252-5200  
  
Mr. Robert A. Kemins  
U.S. Department of Justice  
717 North Harwood, Suite 400  
Dallas, Texas 75201  
(214) 880-9781  
  
For Defendant Simkanin: Mr. Arch C. McColl, III  
McColl & McColloch  
1601 Elm Street, Suite 2000  
Dallas, Texas 75201-4761  
(214) 979-0999  
  
Official Court Reporter: Eileen M. Brewer  
424 United States Courthouse  
501 West Tenth Street  
Fort Worth, Texas 76102-3637  
(817) 850-6661

Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.

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P R O C E E D I N G S ,

(Jury deliberating, 9:00 a.m.)  
(Jury notes, 9:25 a.m.)  
(On record, defendant present, 10:15 a.m.:)

THE COURT: Good morning.  
MR. JARVIS: Good morning, Your Honor.

THE COURT: Okay. We have two more notes from the jury. What I'm referring to as the second note, which is the first one we received this morning, is: Please give us the full wording of the law, and then it has a parenthesis and an "S" after that, that the defendant allegedly broke for the first 12 indictments.

And then the third note, which is the second we received this morning, is: What are the three points that must be met for Counts 13 through 27?

I've prepared a proposed response and I've given it to the attorneys. Does the government have any objection to the proposed response?

MR. JARVIS: No, Your Honor.

THE COURT: Does the defendant have any objection to the proposed response?

MR. McCOLL: Yes, Your Honor, we do.

THE COURT: Okay.

MR. McCOLL: We would respectfully request the Court to define "material," because that was part of the explanation

1 to the jury, and without that definition of material on page 2,  
2 they have no juror guidance as to what material is, and I doubt  
3 they can remember from 15 pages of oral instruction, with all  
4 due respect.

5       Secondly, Your Honor, based on these piecemeal requests  
6 for different instructions, we would again urge the Court to  
7 submit the entire written instruction to the jury, and we  
8 believe that would be appropriate to ask the Court to do that  
9 in light of these three notes. And the failure to do so, we  
10 believe, denies him the Sixth Amendment right to fair trial and  
11 the Fifth Amendment right to due process.

12               THE COURT: Okay. I'm going to grant your first  
13 request. I'll add the words that were used on page 9 of the  
14 charge relative to "material" on page 2 of my response  
15 following the elements of the offenses charged by Counts 13  
16 through 27 of the indictment. I deny the second request.

17       Now, I received a -- it was delivered to Chambers a few  
18 minutes ago -- well, about half an hour ago. Something filed  
19 by the defendant called motion for reconsideration and request  
20 for pattern jury instruction regarding mistake, ignorance, and  
21 negligence, or gross negligence, and good faith instructions  
22 under Cheek versus U.S.

23       Mr. McColl, I couldn't find in the Pattern Jury Charge --  
24 you didn't give me a reference to the section of the Pattern  
25 Jury Charge that you're referring to. Would you tell me what

1 section that is.

2 MR. McCOLL: I was actually referencing your earlier  
3 instruction you gave the jury.

4 THE COURT: I'm wanting to know what section of the  
5 Pattern Jury Charge you're telling me in this motion I have  
6 failed to comply with.

7 MR. McCOLL: I'm referencing your instruction -- I  
8 assumed, Your Honor, that because --

9 THE COURT: You made reference to the Pattern Jury  
10 Charge, Mr. McColl, and told me that it said a certain thing,  
11 and I want you to tell me the section you were referring to, if  
12 you were.

13 MR. McCOLL: I was, and --

14 THE COURT: And what section in the Pattern Jury  
15 Charge were you referring to?

16 MR. McCOLL: Your Honor, I assumed the Court knew  
17 that, because you put it in your instruction in the previous  
18 case.

19 THE COURT: Is there a section in the Pattern Jury  
20 Charge you were referring to, Mr. McColl?

21 MR. McCOLL: There is and I --

22 THE COURT: Would you please tell me what it is?

23 MR. McCOLL: I can go find out, Judge. I thought the  
24 Court knew that, based on your giving it to the jury --

25 THE COURT: Here's the Pattern Jury Charge,

1 Mr. McColl -- Mr. McColl, we're not going to take up the time  
2 for that now. When you represent something to the Court, be  
3 prepared to back up your representation.

4 MR. McCOLL: Yes, sir.

5 THE COURT: I have searched the Pattern Jury Charge,  
6 based on your representation to me that the Pattern Jury Charge  
7 required a certain thing. I cannot find anything in the  
8 Pattern Jury Charge that backs up what you say. In Section 296  
9 of the Pattern Jury Charge, the word "willful" is written in  
10 the context of an income tax violation, or is defined in the  
11 context of an income tax violation, that -- with intent to  
12 violate a known legal duty, which is basically what we have.

13 Mr. McColl, you do need to remember your duties as an  
14 officer of the Court not to make misrepresentations to the  
15 Court, or if you do make representations to the Court, be  
16 prepared to back them up.

17 MR. McCOLL: Yes, sir.

18 THE COURT: You can be seated. I deny your request.

19 Okay. Now, my plan, unless there's an objection, would be  
20 to have the response that we have just discussed, the second  
21 and third notes, delivered to the jury by handing it to the  
22 foreperson at the jury room door, having the court security  
23 officer do that. Does the government have any objection to  
24 that?

25 MR. JARVIS: No, Your Honor.

1 THE COURT: Does the defendant have any objection to  
2 that?

3 MR. McCOLL: Your Honor, the defendant would like the  
4 instruction read to the jury in open court.

5 THE COURT: Pardon?

6 MR. McCOLL: The defendant would like the instruction  
7 to the jury read in open court.

8 THE COURT: The defendant would like me to bring the  
9 jury into the courtroom and read the response to the jury at  
10 that time?

11 MR. McCOLL: Yes, sir.

12 THE COURT: Okay. We'll do that.

13 MR. McCOLL: And, Your Honor, I may have  
14 misunderstood the Court. Did you deny my motion this morning  
15 that was filed for reconsideration?

16 THE COURT: I denied the motion we've talked about.

17 MR. McCOLL: Yes, sir. Thank you.

18 THE COURT: Okay. I'll be making the change that  
19 we've discussed in the response while the jury is being brought  
20 into the courtroom.

21 (Court in recess, 10:21 a.m.)

22 (On record, jury and defendant present, 10:24 a.m.:)

23 THE COURT: Good morning. Okay. I have your second  
24 and third notes, and I brought you into the courtroom so I can  
25 read the responses to those notes while you're in the

1 courtroom.

2           Members of the jury, I have your second and third notes,  
3 which are worded as follows: The second note, please give us  
4 the full wording of the law, and then it has a parentheses  
5 after it with an "S" in it, that the defendant allegedly broke  
6 for the first 12 indictments. Signed by the foreperson.

7           And then a third note: What are the three points that  
8 must be met for Counts 13 through 27. Signed by the  
9 foreperson. Both of them dated today.

10           Now, in answer to your second note, I'm reminding you of  
11 the following instructions I gave you earlier. Counts 1  
12 through 12 of the indictment charge the Defendant, Richard  
13 Michael Simkanin, willfully failed to collect, account for, and  
14 pay over taxes due and owing to the United States of America  
15 from the wages of employees of Arrow Custom Plastics for  
16 certain tax quarters. Title 26, United States Code, Section  
17 7202, makes it a crime for any person who is required to  
18 collect, to account for, or to pay over any tax to willfully  
19 fail to do so.

20           The exact wording of the part of Title 26, United States  
21 Code, Section 7202, that is pertinent to your decision is as  
22 follows: "Any person required under this title to collect,  
23 account for, and pay over any tax imposed by Title 26, United  
24 States Code, who willfully fails to collect or truthfully  
25 account for and pay over such tax shall be guilty of a crime."

1           Now, in answer to your third note: You're reminded of my  
2 instruction that, and then this is the wording I previously  
3 instructed you.

4           For you to find the defendant guilty of the crimes charged  
5 by Counts 13 through 28 (sic) of the indictment, you must be  
6 convinced that the government has proved each of the following  
7 beyond a reasonable doubt as to the count of the indictment  
8 under consideration.

9           First, that the defendant knowingly presented to an agency  
10 of the United States a false or fraudulent claim against the  
11 United States;

12           Second, that the defendant knew that the claim was false  
13 or fraudulent; and

14           Third, that the false or fraudulent claim was material.

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

19           Of course, you will bear in mind in your deliberations all  
20 other instructions the Court has given you concerning the law  
21 applicable to this case.

22           I am returning herewith to you the originals of the notes  
23 to which this responds, and you are to retain to be delivered  
24 to the Court at the conclusion of your deliberations all of  
25 your communications with the Court and all of the Court's

1 communications to you, including, of course, this response, if,  
2 in fact, it is delivered to the jury room.

3 Let me ask the government: Does the government oppose  
4 having the written version of this response delivered to the  
5 jury room?

6 MR. JARVIS: No, Your Honor. And I believe on the  
7 elements, the Court may have misspoke. It's 13 through 27.  
8 I think the Court said 13 through 28 on the counts.

9 THE COURT: Okay. If I did, it's 13 through 27.  
10 That's what your note said, and if I did, I correct that. I'm  
11 sorry I misspoke.

12 MR. JARVIS: We have no objection, Your Honor.

13 THE COURT: Does the defendant have any objection to  
14 the jury receiving what I just told them in writing?

15 MR. McCOLL: No objection, Your Honor.

16 THE COURT: Okay. I haven't put it in final form,  
17 but I will put it in writing and have it delivered to the jury  
18 room with the court security officer handing it to the  
19 foreperson.

20 Okay. You can retire to resume your deliberations.

21 (Jury out, 10:29 a.m.)

22 (Jury note, 11:00 a.m.)

23 (On record, defendant present, 11:17 a.m.:)

24 THE COURT: Okay. We have what the juror has  
25 designated as its number four note, which reads -- the jury,

1 which reads: Since no proof has been made that the defendant  
2 and his employees are in an occupation listed in those 7,000,  
3 are we to conclude that they are, in fact, not in that 7,000,  
4 or do we need to read all 7,000 to see what the defendant was  
5 referring to, and, in fact, wasn't listed in the 7,000.

6       The attorneys have my proposed response, which gives the  
7 text of the note. And the proposed response is: In answer to  
8 your note, you're instructed that you do not need to concern  
9 yourself with whether defendant's employees are in an  
10 occupation listed in those 7,000. And I put in quotes "listed  
11 in those 7,000." The Court has made the legal determination  
12 that within the meaning of Title 26, United States Code,  
13 Section 7202, "during the years 2000, 2001, 2002, Arrow Custom  
14 Plastics, through its responsible officials, had a legal duty  
15 to collect by withholding from the wages of its employees, the  
16 employees' share of social security taxes, Medicare taxes, and  
17 federal income taxes, and to account for those taxes and pay  
18 the withheld amounts to the United States of America." You  
19 are to follow that legal instruction without being concerned  
20 whether there might be certain employers who are not required  
21 to collect and withhold taxes from the wages of their  
22 employees.

23       And then I go on: Of course, you will bear in mind that  
24 your deliberations -- bear in mind in your deliberations all  
25 other instructions the Court has given you concerning the law

1 applicable to this case.

2 I'm returning herewith the original of the note to which  
3 this responds. You're to retain to be delivered to the Court  
4 at the conclusion of your deliberations all of your  
5 communications to the Court and all the Court's communications  
6 to you, including, of course, this communication to you and the  
7 note from you to which this communication responds.

8 Does the government have any objection to my proposed  
9 response?

10 MR. JARVIS: Your Honor, we would request that the  
11 years listed, you have 2000, 2001, and 2002, be expanded to  
12 include 1997, 1998, and 1999 to cover Counts 13 through 27 of  
13 the indictment. That's the only request we have, Your Honor,  
14 to make it clear it covers that six-year period since those six  
15 years are covered in the indictment.

16 THE COURT: Okay. I'll grant that request. That's  
17 1997, 1998, and 1999?

18 MR. JARVIS: Yes, Your Honor. In addition to the  
19 2000, 2001, and 2002.

20 THE COURT: And I'll take out the quotation marks,  
21 since that will not be literally what I put in the charge.

22 MR. JARVIS: Other than that, no objection, Your  
23 Honor.

24 THE COURT: Okay. Does the defendant have any  
25 objection to the proposed response?

1           MR. McCOLL: Yes, Your Honor, we do. We would, first  
2 of all, object that there was insufficient evidence to prove  
3 the Court's legal statement beginning with "the Court has made  
4 a legal determination that," et cetera, down through the word  
5 "America."

6           And, secondly -- and it amounts to an instructed verdict  
7 of guilty by instructing them on that point since that is the  
8 disputed issue and the basis for his defense.

9           Third, we would object to expanding the years as requested  
10 by the government because that was not in response and not  
11 requested by the jury in their note. It goes beyond that and  
12 is therefore not responsive.

13           THE COURT: Okay. I'll overrule those objections.

14           Does the government have any -- unless there's an  
15 objection, my plan would be to have this delivered to the jury  
16 by having the court security officer hand the response to the  
17 jury foreperson at the jury room door.

18           Does the government have any objection to that?

19           MR. JARVIS: No, Your Honor.

20           THE COURT: Does the defendant have any objection to  
21 that?

22           MR. McCOLL: Yes, Your Honor. The defendant has  
23 asked that it be read in open court, and we do have one  
24 additional objection I forgot to mention to the Court.

25           THE COURT: Okay.

1           MR. McCOLL: At the bottom it says, "You are to  
2 follow that legal instruction without about being concerned  
3 whether there might be certain employers who are not required  
4 to collect and withhold the taxes." We would ask the Court,  
5 under Rule 201 of the Federal Rules of Evidence, that the  
6 evidence show that there are certain employers. It was  
7 unrebutted in the evidence that there are certain employers who  
8 are not required to collect and withhold. So that would be a  
9 misstatement under the evidence in this case, and we  
10 respectfully request the Court to change "might be" to "are,"  
11 A-R-E.

12           THE COURT: Does the government have any objection to  
13 that?

14           MR. JARVIS: I wasn't real clear on which --

15           THE COURT: He wants it to read: You are to follow  
16 that legal instruction without being concerned whether there  
17 "are" certain employers, instead of "might be." I'm going to  
18 make that change whether the government likes it or not.

19           (Court in recess, 11:23 a.m.)

20           (On record, jury and defendant present, 11:26 a.m.:)

21           THE COURT: Okay. I have the number four note from  
22 the jury, and I have a response that I'm going to read to you  
23 at this time.

24           Members of the jury, I have your note which is worded as  
25 follows: Four. Since no proof was given that the defendant

1 and his employees were in an occupation listed in those 7,000,  
2 are we to conclude that they are in fact not in that 7,000, or  
3 do we need to read all 7,000 to see what the defendant was  
4 referring to and, in fact, wasn't listed in that 7,000. Signed  
5 by the foreperson and dated today.

6       Now, in answer to your note: You are instructed that you  
7 do not need to concern yourself with whether defendant's  
8 employees are in an occupation "listed in those 7,000." The  
9 Court has made the legal determination that within the meaning  
10 of Title 26, United States Code, Section 7202, during the years  
11 1997, 1998, 1999, 2000, 2001, and 2002, Arrow Custom Plastics,  
12 through its responsible officials, had a legal duty to collect,  
13 by withholding from the wages of its employees, the employees'  
14 share of the social security taxes, Medicare taxes, and federal  
15 income taxes, and to account for those taxes and pay the  
16 withheld amounts to the United States of America. You are to  
17 follow that legal instruction without being concerned whether  
18 there are certain employers who are not required to collect and  
19 withhold taxes from the wages of their employees.

20       Of course, you will bear in mind in your deliberations all  
21 other instructions the Court has given you concerning the law  
22 applicable to the case. I'm returning herewith the original of  
23 the note to which this responds, at least I think that's what  
24 we'll do, and you're to retain the original -- retained to be  
25 delivered to the Court at the conclusion of your deliberations

1 all of your communications to the Court and all the Court's  
2 communications to you, including, of course, this communication  
3 to you and the note from you to which this communication  
4 responds.

5 Okay. Does the government have any objection if I  
6 actually deliver the response in written form to the jury?

7 MR. JARVIS: No, Your Honor.

8 THE COURT: Does the defendant?

9 MR. McCOLL: No objection, Your Honor.

10 THE COURT: Okay. I'll ask the court security  
11 officer to just hand this to juror number one. And y'all can  
12 retire back to the jury room to resume your deliberations.

13 (Jury out, 11:29 a.m.)

14 (Lunch break, 12:00 p.m. until 12:30 p.m.)

15 (Jury note.)

16 (On record, defendant present, 1:54 p.m.:)

17 THE COURT: Okay. We've received note number five  
18 from the jury, and I've given the attorneys a proposed  
19 response, which contains the text of the note. The note is:  
20 Can a juror change their mind after a vote is taken that was  
21 unanimous? That's signed by the foreperson.

22 In response, the response I propose to make is: In answer  
23 to your question -- Well, it says too much. I'm going to take  
24 out the second "in answer to your question." It will be simply  
25 that the answer to your question is yes. And then I'll give my

1 usual instructions, the last two paragraphs that I've always  
2 given about bearing in mind the other instructions and  
3 returning the note and so on.

4 Does the government have any objection to my proposed  
5 response?

6 MR. JARVIS: No, Your Honor.

7 THE COURT: Does the defendant have any objection to  
8 my proposed response?

9 MR. McCOLL: No, Your Honor.

10 THE COURT: Okay. Does the defendant want me to  
11 bring the jury in to read this response to them?

12 MR. McCOLL: He does, Your Honor.

13 THE COURT: Okay. Why don't you get the jury in.

14 (Jury in, 1:57 p.m.)

15 THE COURT: Okay. I have the fifth note from the  
16 jury, which reads: Can a juror change their mind after a vote  
17 is taken that was unanimous? And the answer to your question  
18 is yes.

19 Now, the formal response I prepared goes on to say that,  
20 of course, you will bear in mind in your deliberations all  
21 other instructions the Court has given you concerning the law  
22 applicable to the case. And then the usual instructions about  
23 returning with the response the original of your note, and both  
24 of them, along with all other communications, should be kept  
25 and returned.

1 Does the government have any objection to the text of the  
2 response itself being delivered to the jury?

3 MR. JARVIS: No, Your Honor.

4 THE COURT: Does the defendant?

5 MR. McCOLL: No, Your Honor.

6 THE COURT: Okay. We'll deliver the text of the  
7 response. I have to make a correction. I made a typographical  
8 error. I do that every now and then. I've got to make a  
9 correction. Once I make the correction, I'll have it delivered  
10 to the jury room.

11 (Jury out, 1:58 p.m.)

12 MR. McCOLL: Your Honor, I filed a motion and  
13 memorandum regarding that citation you wanted.

14 THE COURT: Okay. We'll study it.

15 MR. McCOLL: Thank you.

16 THE COURT: When was it filed?

17 MR. McCOLL: About 30 minutes ago.

18 THE COURT: Okay. We'll study it.

19 (Court in recess, 1:59 p.m.)

20 (Jury note, 3:17 p.m.)

21 (On record, no jury, no defendant present, 3:26 p.m.:)

22 THE COURT: Where is the audience?

23 MR. McCOLL: Well, we asked them to not come in.

24 THE COURT: Mr. McColl, who instructed somebody to  
25 take the audience out of the courtroom?

1 MR. McCOLL: Nobody did.

2 THE COURT: Well, who instructed them not to be in  
3 here?

4 MR. McCOLL: I didn't instruct anybody to do  
5 anything.

6 MR. JARVIS: I didn't talk to anybody either, Judge.

7 THE COURT: Do you know why there's nobody in the  
8 audience?

9 MR. KEMINS: The courtroom has been locked for  
10 security reasons.

11 THE COURT: Okay. Y'all wanted to meet with me about  
12 something?

13 MR. McCOLL: Yes, Your Honor. To avoid trying this  
14 case a third time, even in the event of a --

15 THE COURT: Pardon?

16 MR. McCOLL: We wanted to approach the Court and ask  
17 if you could rule on the defendant's motion for judgment of  
18 acquittal so that even if there is a conviction in the case  
19 there would not be further litigation.

20 THE COURT: You mean if I grant the judgment of  
21 acquittal?

22 MR. McCOLL: No, sir.

23 THE COURT: I'm not sure I understand what you're  
24 talking about.

25 MR. McCOLL: Well, we just thought in terms of

1 orderly procedure that we would ask the Court to grant the  
2 motion -- I mean, rule on the motion. We presume -- I presume  
3 it's going to be denied, but just to have it in the record that  
4 it was denied.

5 THE COURT: Okay. Well, I'm going to deny the motion  
6 for acquittal that I received, what, about an hour ago?

7 MR. McCOLL: Yes, sir.

8 THE COURT: I don't know whether it's timely or  
9 whether it's properly filed or properly worded or anything  
10 else. I'm just going to deny it because --

11 MR. McCOLL: Yes, sir.

12 THE COURT: -- there's nothing in it that would cause  
13 me to think that it should be granted.

14 MR. McCOLL: Yes, sir.

15 THE COURT: I also have a motion you asked about the  
16 last time we were in here, the one you filed at 1:07, and that  
17 has to do -- it's a motion and memorandum regarding citation  
18 for mistake, negligence, et cetera. And I'm denying that  
19 motion.

20 MR. McCOLL: Yes, sir.

21 THE COURT: Now, it so happens -- and do stand at the  
22 door and don't let anybody in until we finish discussing this.  
23 It so happens that the jury had wrote a note that I got about  
24 the time I started to walk in here, and here's a copy for each  
25 of you.

1 (Brief pause.)

2 THE COURT: Okay. I think both of you have had time  
3 to read it. It appears to me the options the Court has at this  
4 time in response to this is -- one option is to give the jury a  
5 modified Allen charge, telling them to try to reach a verdict  
6 as to Counts 1 through 12 and that they can, even though  
7 they've already marked in the blank spaces on that, they can  
8 use those same blank spaces to enter whatever verdict they do  
9 reach, if they unanimously reach a verdict. That's one option.

10 The other option is to inform the jury of their right to  
11 return a partial verdict and give them whatever instructions we  
12 need to give them relative to that. And then instruct them,  
13 once they return their partial verdict, we would like for them  
14 to resume their deliberations as to Counts 1 through 12 in an  
15 attempt to reach a verdict as to those counts.

16 Mr. Jarvis, do you have any thoughts as to what might be  
17 the most appropriate approach?

18 MR. JARVIS: Could I just have a moment, Your Honor?

19 THE COURT: Okay.

20 (Government counsel confer.)

21 THE COURT: So the record will reflect, the  
22 foreperson didn't sign this, nor did he date it, nor did he  
23 indicate which note it is. Using his numbering system, I  
24 assume it's the sixth --

25 MR. JARVIS: Six, I believe, Your Honor.

1 THE COURT: Fifth note.

2 MR. JARVIS: Number six, I believe.

3 THE COURT: And from the spelling, he made the same  
4 spelling errors he made on another one, so I assume it is the  
5 foreperson.

6 MR. JARVIS: I believe it should be number six, yes,  
7 Your Honor. I believe the one you just handed us, I believe  
8 should be note six.

9 THE COURT: Okay. Well, I'll --

10 MR. JARVIS: The last one was five about the --

11 THE COURT: I'm going to put a number six at the top  
12 so we can keep track of them that way. By the way, they gave  
13 me a note saying they were going to take -- have an overnight  
14 break. When they were doing that, I didn't tell y'all about  
15 that because -- last night. And I put a number two on that  
16 one. It simply said we're going to take an overnight break.  
17 We'll be back at 9:00 o'clock in the morning. So there may be  
18 two number twos, that number two plus the one that the  
19 foreperson numbered two.

20 Okay. Do you have any comments, Mr. Jarvis?

21 MR. JARVIS: Yes, Your Honor. Is there any way the  
22 Court could do both, receive a partial verdict and ask them to  
23 continue to deliberate?

24 THE COURT: I think I could do both. I think I could  
25 give them that option. I could give them an option of -- I

1 think. I'll have to do a little double-checking, but I think I  
2 can give them an option of continuing to deliberate and do  
3 nothing else at this time. Or at this time if they want to, to  
4 return a partial verdict and then to continue to deliberate.

5 MR. JARVIS: Yes, Your Honor. Right. I think the  
6 second option is what we would like.

7 MR. KEMINS: And, Your Honor, if I could. We don't  
8 know if you can, we'll do some research, too, about the  
9 instruction about continuing to deliberate. Would that be the  
10 modified Allen charge?

11 THE COURT: I would give them a modified Allen charge  
12 as to continue to deliberate.

13 Okay. Do you have any thoughts, Mr. McColl?

14 MR. McCOLL: Only, Your Honor, that I think that both  
15 the United States Attorney and the defense the last time, on a  
16 research in this similar situation about the choice, reached  
17 the conclusion that any instruction that they're given should  
18 not be coercive as to their choice. In other words --

19 THE COURT: I understand that, and I think you're  
20 right on that. But do you agree that we ought to give them the  
21 choice to return a partial verdict, or, if they wanted to, to  
22 just continue to deliberate without returning a partial  
23 verdict?

24 MR. McCOLL: Probably give them a choice.

25 THE COURT: Okay. Well, let me try to work up

1 something. And in the meantime, if either one of you wants --  
2 if either one of you wants to do some research without getting  
3 out of reach here where we'll have to find you. Apparently you  
4 have somebody helping you on your research, Mr. McColl?

5 MR. McCOLL: Yes, sir.

6 THE COURT: And if the government can be doing some  
7 research on what would be required -- I'll do my own, and let  
8 me give you some cases to start with. United States versus  
9 Ross.

10 MR. KEMINS: Is that Ross, Your Honor? I'm sorry.

11 THE COURT: Ross, R-O-S-S.

12 MR. KEMINS: Thank you.

13 THE COURT: 626 F.2d 77. United States versus  
14 Benedict, 95 F.3d 17. United States versus Dilapi,  
15 D-I-L-A-P-I, 651 F.2d 140. None of these are Fifth Circuit. I  
16 haven't conducted enough research to know whether there are any  
17 Fifth Circuit or not.

18 The next one is United States versus Dakins, D-A-K-I-N-S,  
19 872 F.2d 1061. That will get you your headnotes, I think, and  
20 get you started.

21 MR. KEMINS: That was 1061, the page number, sir?

22 THE COURT: On the last one?

23 MR. KEMINS: Yes, sir.

24 THE COURT: 1061.

25 MR. KEMINS: Thank you.

1 THE COURT: Now, I'm going to ask that you return  
2 those notes to me, because I don't want copies of those notes  
3 to be disclosed to anyone else for the time being.

4 MR. McCOLL: Your Honor, what was the volume number,  
5 please, on the last citation, Dakins?

6 THE COURT: The volume number was 872 F.2d.

7 MR. McCOLL: Thank you.

8 THE COURT: Let me double-check and see if I have any  
9 others here.

10 (Brief pause.)

11 THE COURT: And my thought is -- I want your comments  
12 -- I think it would be inappropriate for the contents of this  
13 note to be disclosed to other persons.

14 What is your thought on that, Mr. Jarvis?

15 MR. JARVIS: Yes, Your Honor, I agree.

16 THE COURT: What's your thought on that?

17 MR. McCOLL: Well, I don't understand why. I mean --

18 THE COURT: Well, do you want it in the newspaper in  
19 the morning what this note said, if the jury is still  
20 deliberating?

21 MR. McCOLL: Not if the jury is still deliberating.

22 THE COURT: We don't know whether it will be or not,  
23 and presumably the jury will follow my instructions and  
24 wouldn't read the newspaper anyway. But if you don't have a  
25 concern --

1 MR. McCOLL: Well, I'm concerned --

2 THE COURT: I assume you'll tell your client.

3 MR. McCOLL: Well, I certainly want to tell my  
4 client, and I guess my question would be --

5 THE COURT: Well, I'm going to give you back your  
6 copies of this, and then I won't make any restriction on it.

7 Do you see any problem with that, Mr. Jarvis, not making  
8 any restrictions on it?

9 MR. JARVIS: Well, I'm just -- I am concerned about  
10 any -- this being public. I mean, it's contrary to the Court's  
11 instructions not to mention in open court where they are on  
12 numbers or anything. I'm very concerned about this.

13 THE COURT: Well, I thought about whether or not  
14 they violated the Court's instructions, and I don't think they  
15 did because they really didn't -- I guess in a sense they told  
16 me where they stand numerically. They did in the sense of  
17 telling me they've reached a verdict, but they didn't tell me  
18 which way it was.

19 MR. JARVIS: Well, they said 1 through 12 is guilty,  
20 Your Honor. They had a unanimous verdict of guilty on Counts 1  
21 through 12.

22 THE COURT: Well, they haven't told me what they have  
23 a unanimous verdict on, and they haven't told me what the count  
24 is on 1 through 12. They told me what it was at one point in  
25 time, but they haven't told me what it is now.

1 MR. JARVIS: Yes, sir.

2 THE COURT: They've come pretty close saying "one or  
3 more."

4 MR. JARVIS: Right.

5 THE COURT: But one or more could be eleven, I  
6 suppose.

7 MR. JARVIS: That's correct.

8 THE COURT: So I don't think the jury has violated my  
9 instructions. Does anybody have any second thoughts about not  
10 being prohibited from making a disclosure of the contents of  
11 this note for the time being, at least.

12 (No response.)

13 THE COURT: Okay. Apparently not. We'll just leave  
14 it like it is, then.

15 MR. JARVIS: Your Honor, one other -- May I speak on  
16 another matter?

17 THE COURT: Yes.

18 MR. JARVIS: Your Honor, if we do get a verdict  
19 today, and the Court has probably already considered this, but  
20 we would request that the Court instruct the audience before  
21 the jury is brought in that there will not be any kind of  
22 outburst, celebration, booing, or whatever. And I'm just  
23 concerned about the jury.

24 THE COURT: Okay. I'll give them some kind of  
25 instruction along that line.

1           Okay. Y'all be doing some research, and in the meantime  
2 I'll be doing some.

3           (Court in recess, 3:40 p.m.)

4           (On record, no jury, no defendant present, 3:50 p.m.:)

5           THE COURT: This is again on the note asking about --  
6 what we're calling the sixth note. It's going to take a while  
7 for us to be sure that we have this right. I'm planning to  
8 give the jury an interim response which would say, "I'm in the  
9 process of doing the research I will need to conduct before I  
10 respond to your note. However, you can be assured that I'm  
11 working on a response and that I will inform you as soon as I  
12 have formulated one."

13          My thought would be that in the meantime -- I haven't put  
14 that here. I would say, "In the meantime, you will continue  
15 your deliberations, bearing in mind the following additional  
16 instructions," and then give them the modified Allen charge  
17 instructions at that point.

18          Does the government have any problem with that?

19                 MR. JARVIS: No, Your Honor.

20                 THE COURT: Does the defendant?

21                 MR. McCOLL: Despite the case law being well settled,  
22 we would respectfully object to the Allen charge, because I  
23 think that it injects an issue of money and expense as a  
24 rationale for the jury to reach a verdict, and we think that  
25 that is not a proper basis to ask the jury to reach a verdict

1 and therefore denies him due process and a right to a fair  
2 trial under the Fifth and Sixth Amendments.

3 THE COURT: Okay. I overrule that objection.

4 Now, the next question is -- I'll let y'all see what I do  
5 before I actually inform the jury of it. Do you want the jury  
6 to be brought up for me to give them the kind of response I'm  
7 talking about?

8 MR. McCOLL: Judge, my client has asked every time  
9 that there is an exchange --

10 THE COURT: Okay. Well, let me get the response  
11 prepared. It will be prepared consistent with what I just  
12 said.

13 And be getting the defendant up here.

14 Oh, one other thing. This means I'll be reading aloud in  
15 open court the jury's note, and I want to be sure both of you  
16 are in agreement that you want that to be publicly disclosed at  
17 this time. What is --

18 MR. McCOLL: Well, it's a little late, Judge. You  
19 sent us out here a while ago saying that there was no  
20 limitation, so I think it's --

21 THE COURT: Have you already --

22 MR. McCOLL: Sure.

23 THE COURT: -- published it?

24 MR. McCOLL: Judge, it was 15 -- ten minutes ago.

25 THE COURT: Well, then it's a moot question.

1 MR. McCOLL: Yes, sir.

2 THE COURT: Who have you given it to?

3 MR. McCOLL: My legal assistants, and I'm sure  
4 they've shared it with others.

5 THE COURT: Did you make copies of it?

6 MR. McCOLL: No, sir.

7 THE COURT: Well, it is too late.

8 (Court in recess, 3:53 p.m.)

9 (On record, defendant present, 4:19 p.m.):

10 THE COURT: Okay. I've given each of the attorneys a  
11 copy of the proposed interim response to what we're calling  
12 note number six, which is drawn consistent with the discussions  
13 we had when I was in the courtroom last.

14 Mr. Jarvis, you indicated that perhaps some agreement had  
15 been reached between the attorneys?

16 MR. JARVIS: I believe so, Your Honor. What we would  
17 like the Court to do is delete paragraph one on the proposed  
18 note, as well as the first three words of paragraph two, and  
19 just give the jury a modified Allen charge. And also delete on  
20 page 3 the second to last complete paragraph, which starts --

21 THE COURT: Let me get back to the first page.

22 MR. JARVIS: Yes, sir.

23 THE COURT: You want the paragraph, "I'm in the  
24 process of doing the research I will need to conduct"?

25 MR. JARVIS: Yes, Your Honor. Neither side desires a

1 partial verdict. We would like the jury just to continue  
2 deliberating.

3 THE COURT: Neither side does what?

4 MR. JARVIS: Neither side desires that the jury be  
5 informed that they have the option of returning a partial  
6 verdict. We would just like them to continue deliberating.

7 THE COURT: You mean at no point do you want them, in  
8 response to this note, to have that knowledge?

9 MR. JARVIS: Not at this time, Your Honor, and  
10 perhaps never. But we certainly think that would be premature  
11 at this time.

12 THE COURT: So you want me to take out the first  
13 paragraph below the text of the note.

14 MR. JARVIS: Yes, Your Honor.

15 THE COURT: And then --

16 MR. JARVIS: The first three words of the next  
17 paragraph.

18 THE COURT: So it will start out, "I'm going to ask."

19 MR. JARVIS: Yes, sir. And, also, page 3, the second  
20 to last complete paragraph, which begins with the words, "If  
21 you have not announced."

22 THE COURT: Take that out?

23 MR. JARVIS: Yes, Your Honor. And --

24 THE COURT: Go ahead.

25 MR. JARVIS: And we have not discussed this with

1 Mr. McColl, but it just appeared to me that on page 3, the  
2 paragraph right above that, that says, "So long as you mark  
3 through any previous notations," it might be appropriate to put  
4 that at the very beginning of your response before you get into  
5 the modified Allen. It seems like it would flow better that  
6 way.

7 THE COURT: You mean put it as the second paragraph  
8 of the response?

9 MR. JARVIS: No, the very first paragraph. The first  
10 part of your response will be, "So long as you mark through any  
11 previous notations, you may still use the verdict form."

12 THE COURT: You would like that to be immediately  
13 below the text of the note?

14 MR. JARVIS: Of the question, yes, Your Honor.

15 THE COURT: As opposed to the second paragraph?

16 MR. McCOLL: I think it would be smoother as the  
17 second paragraph.

18 THE COURT: I think it should be the second  
19 paragraph.

20 MR. McCOLL: Your Honor, this --

21 THE COURT: Let me be sure Mr. Jarvis is -- Are you  
22 through, Mr. Jarvis?

23 MR. JARVIS: Could I have just one moment, please?

24 (Government counsel confer.)

25 MR. JARVIS: Your Honor, just to recap, you did get

1 the second to last paragraph on page 3, we requested that be  
2 deleted.

3 THE COURT: I'm taking out the second -- Your  
4 suggestion is I take out, "If you have not announced a  
5 unanimous verdict."

6 MR. JARVIS: Yes, Your Honor. Wholly delete that,  
7 yes, sir.

8 THE COURT: I'm going to recap what I plan to do once  
9 we get everybody in agreement.

10 Now, Mr. McColl, you have expressed disagreement with the  
11 Allen charge concept generally, and I will assume that you  
12 still have that disagreement.

13 MR. McCOLL: Thank you, Your Honor. Subject to that  
14 disagreement, and without waiving that, I have no objections to  
15 the suggestions made by Mr. Jarvis, although I do agree with  
16 the Court about switching. In other words, which one should go  
17 first and second. And I think the Court's suggestion, it will  
18 be smoother to have the order that you suggested in that  
19 regard. So with those remarks, I think that we're in  
20 agreement.

21 THE COURT: Okay. We'll get this and get the jury up  
22 and read it to them.

23 (Court in recess, 4:24 p.m.)

24 (On record, jury and defendant present, 4:29 p.m.:)

25 THE COURT: Okay. Members of the jury, I have your

1 most recent note, which I've numbered number six. You didn't  
2 have a number on it so I've added a number. And the note as  
3 worded: Cannot reach verdict in Counts 1-12. Reached verdict  
4 in Counts 13-27, reached verdict in Counts 28-31. On the  
5 verdict form, had marked the Count 1 through 12 as "guilty."  
6 One or more jurors changed their mind. I mark an "X" and  
7 initialed each Count 1 through 12. Will this be a problem?  
8 How will this be announced?

9 Now, I'm going to respond to that, which may not be  
10 exactly what you had in mind, but I think it's an appropriate  
11 response.

12 In response to your note, I'm going to ask that you  
13 continue your deliberations in an effort to reach an agreement  
14 as to all counts and dispose of this case; and I have a few  
15 additional comments I would like for you to consider as you do  
16 so.

17 First, so long as you mark through any previous notations  
18 you have made in the blank spaces for the jury's verdict as to  
19 any of the counts, you can still use those blank spaces for  
20 entry of any verdict the jury unanimously reaches as to any of  
21 those counts.

22 Now, this is an important case. The trial has been  
23 expensive in time, effort, and money to both the defense and  
24 the prosecution. If you should fail to agree on a verdict, the  
25 case is left open and must be tried again. Obviously, another

1 trial would only serve to increase the cost to both sides, and  
2 there's no reason to believe that the case can be tried again  
3 by either side better or more exhaustively than it has been  
4 tried before you.

5 Any future jury will be selected in the same manner and  
6 from the same source as you were chosen, and there is no reason  
7 to believe that the case could ever be submitted to 12 men and  
8 women more conscientious, more impartial, or more competent to  
9 decide, and that more or clearer evidence could be produced.

10 Those of you who believe the government has proved the  
11 defendant guilty beyond a reasonable doubt should stop and ask  
12 yourselves if the evidence is really convincing enough, given  
13 that other members of the jury are not convinced. And those of  
14 you who believe that the government has not proved the  
15 defendant beyond a reasonable doubt should stop and ask  
16 yourselves if the doubt you have is a reasonable one, given the  
17 other members of the jury do not share your doubt.

18 Remember at all times that no juror is expected to yield a  
19 conscientious objection (sic) he or she may have as to the  
20 weight or effect of the evidence. But remember also that after  
21 full deliberation and consideration of the evidence in the  
22 case, it is your duty to agree upon a verdict as to all counts,  
23 if you can do so, without surrendering your conscientious  
24 opinion. You must also remember that if the evidence in the  
25 case fails to establish guilt beyond a reasonable doubt as to

1 one or more of the counts, the accused should have your  
2 unanimous verdict of not guilty as to that count or those  
3 counts.

4       You may be as leisurely in your deliberations as the  
5 occasion may require and should take all the time which you may  
6 feel is necessary. I will now ask that you retire once again  
7 and continue your deliberations with these additional comments  
8 in mind to be applied, of course, in conjunction with all of  
9 the instructions I previously have given you.

10       And then I have the usual language about returning the  
11 note.

12       Does the government have any objection to the text of the  
13 note being delivered to the jury?

14               MR. JARVIS: No, Your Honor.

15               THE COURT: I mean, the text of the response. I'm  
16 sorry.

17               MR. JARVIS: No objection.

18               THE COURT: Does the defendant?

19               MR. McCOLL: Your Honor, may we approach the bench?

20               THE COURT: Yes.

21       (Bench conference with lead attorneys:)

22               MR. McCOLL: I know it's a bit unorthodox, but I  
23 would like to make some new law on the basis of the Sixth  
24 Amendment right to effective counsel. I would like to ask the  
25 Court the opportunity for three or four minutes, because

1 there's been given a new instruction, to be able for the  
2 prosecution and the defense to argue.

3 THE COURT: No, we're not going to do that.

4 MR. McCOLL: Yes, sir.

5 THE COURT: Well, first of all, what is your reaction  
6 to it?

7 MR. JARVIS: I don't think that's appropriate, Your  
8 Honor.

9 THE COURT: I don't think it is at this point in  
10 time.

11 MR. McCOLL: Okay.

12 THE COURT: Okay. Do you object to the jury getting  
13 the note?

14 MR. McCOLL: No, sir.

15 (End of bench conference.)

16 THE COURT: Okay. You'll retire to the jury room,  
17 and we'll stay here as long as you want us to stay here. Your  
18 schedule will determine how long we're here. We work until  
19 8:00 or 9:00 at night if we have to, so that's up to you. I'm  
20 going to ask that you go back and work consistent with these  
21 instructions I've given you.

22 Did you hear what I said? My microphone is off.

23 (The jury nods heads.)

24 THE COURT: And I'll have the court security officer  
25 give this to the number one juror.

1 (Jury out, 4:35 p.m.)

2 THE COURT: Sit back down a minute. In case we do  
3 revisit the partial verdict issue, I found two Fifth Circuit  
4 cases. You probably already found them. United States versus  
5 White, 972 F.2d 890, and United States versus Wheeler, 802 F.2d  
6 778.

7 MR. JARVIS: Your Honor, would you repeat the first  
8 cite on White?

9 THE COURT: 972 F.2d 890.

10 MR. JARVIS: Yes, Your Honor. Thank you.

11 (Court in recess, 4:36 p.m.)

12 (Jury note, 7:32 p.m.)

13 (On record, defendant present, 7:45 p.m.:)

14 THE COURT: Okay. I have what the jury foreperson  
15 has identified as note number seven, another note from the jury  
16 saying that we have reached a verdict on Counts 3 through 31,  
17 3-31. We are still deadlocked on Counts 1 and 2. Signed by  
18 the foreperson.

19 I've given the attorneys a proposed response to that. The  
20 proposed response is: In response, I inform you that you are  
21 at liberty to return a partial verdict as to Counts 3 through  
22 31, if you like. But you do not have an obligation to do so.  
23 If you wish to return a partial verdict, you should be certain  
24 that your foreperson accurately records the unanimous verdict  
25 of the jury on the verdict form as to each count of the

1 indictment on which you have unanimously agreed. Your  
2 foreperson should then send the Court a note that the jury  
3 wishes to return a partial verdict.

4 And then I have the usual language about keeping this note  
5 and my response -- or their note and my response to be  
6 delivered to the Court at the end of the case.

7 What is the government's -- Does the government object to  
8 my proposed response?

9 MR. JARVIS: Could I just have a moment for us to  
10 discuss it?

11 THE COURT: Yes.

12 (Government counsel confer.)

13 MR. JARVIS: We have no objection, Your Honor.

14 THE COURT: Does the defendant have any objection to  
15 the proposed response?

16 MR. McCOLL: Yes, Your Honor. We would object to the  
17 instruction and ask that they be asked to deliberate further.

18 THE COURT: Okay. Well, I'm going to overrule that  
19 objection, because I think they've -- I think -- well, of  
20 course, that remains a possibility after we receive the partial  
21 verdict. So I'm not going to foreclose the possibility that  
22 they will be required to deliberate further, but I am going to  
23 give them an opportunity to return a partial verdict if they  
24 choose to do so. And then decide, if they do, what to do about  
25 the remaining two counts of the indictment.

1           Okay. Get the jury in.

2           (Brief pause.)

3           (Jury in, 7:50 p.m.)

4                   THE COURT: Okay. I have your most recent note  
5 saying that we have reached a verdict on Counts 3 through 31  
6 and we're still deadlocked on Counts 1 and 2.

7           Now, in response to that, I inform you that you are at  
8 liberty to return a partial verdict as to Counts 3 through 31  
9 if you like, but you do not have an obligation to do so. If  
10 you wish to return a partial verdict, you should be certain  
11 that your foreperson accurately records the unanimous verdict  
12 of the jury on the verdict form as to each count of the  
13 indictment on which you have unanimously agreed. Your  
14 foreperson should then send the Court a note that the jury  
15 wishes to return a partial verdict, and I have the usual  
16 language in my response about keeping the response and make  
17 sure that it and the note come back to me.

18           Does the government have any objection to the jury having  
19 the response in written form?

20                   MR. JARVIS: No, Your Honor.

21                   THE COURT: Does the defendant?

22                   MR. McCOLL: No, Your Honor.

23                   THE COURT: Okay. I'm going to have the court  
24 security officer have the written response handed to juror  
25 number one.

1           Hand it to juror number one, and y'all will retire to make  
2 whatever decision you want to make in response to that note or  
3 to continue to deliberate. That's your choice.

4           (Court in recess, 7:52 p.m.)

5           (Partial verdict, 8:00 p.m.)

6           (On record, no jury, defendant present, 8:09 p.m.:)

7           THE COURT: Okay. We have a note from the jury that  
8 states that the jury wishes to return a partial verdict, signed  
9 by the foreperson. I'm going to respond in writing rather than  
10 bring them directly into the courtroom, and my response I've  
11 given to the attorneys is: In response to this note, I will  
12 have you brought into the courtroom. The foreperson should  
13 have with him when you come into the courtroom the verdict form  
14 showing the partial verdict you wish to return. And then the  
15 usual language about returning the note and so on.

16           Then my plan will be, after this has been delivered --  
17 Well, let's see, I failed to think this out. The defendant is  
18 requiring the jury to be in the courtroom to read this note to  
19 them, so they'll have that partial verdict with them,  
20 presumably.

21           So I'm going to change my thinking a little bit. My plan  
22 is to just have the jury come into the courtroom and tell them  
23 that we'll accept their partial verdict, without any separate  
24 note.

25           Does the government have any objection to that?

1           MR. JARVIS: No, Your Honor. May we approach,  
2 please?

3           THE COURT: No. I don't know of anything you need to  
4 approach about.

5           MR. JARVIS: Your Honor, I just wanted to remind the  
6 Court --

7           THE COURT: I remember. I've been reminded a half  
8 dozen times.

9           MR. JARVIS: Thank you, Your Honor.

10          THE COURT: And my -- let me take this another step.  
11 My plan will be to, once the partial verdict is returned,  
12 assuming that they don't change their mind between now and the  
13 time they get in here, my plan would be to question the members  
14 of the panel about whether there's any possibility that further  
15 deliberations could result in a verdict as to Counts 1 and 2,  
16 unless I'm told by counsel for both sides that they're  
17 satisfied not to pursue that line any further.

18          Does the defendant have any objection to my proposed  
19 course of action as I've outlined it?

20          (No response.)

21          THE COURT: Does the defendant have any objection to  
22 my proposed course of action as I've outlined it?

23          MR. McCOLL: No, Your Honor.

24          THE COURT: Okay. Have the jury -- Oh, one more  
25 thing, what I've been reminded of. This is to everybody in the

1 courtroom. There is a possibility that the jury will be  
2 returning a verdict at this time, and it could well be a  
3 partial verdict but it will be a verdict.

4 I'm telling everyone in the courtroom that if there's any  
5 noise made, outcry, clapping, or any sound whatsoever out of  
6 the audience section, I'm going to have the audience section  
7 cleared immediately when that occurs.

8 (Jury in, 8:12 p.m.)

9 THE COURT: Okay. I have the jury's note that the  
10 jury wishes to return a partial verdict, the note written by  
11 the foreperson. And I'll ask juror number one: I understand  
12 you are the foreperson of the jury?

13 JUROR NO. 1: Yes, Your Honor.

14 THE COURT: Does the jury still wish to return a  
15 partial verdict?

16 JUROR NO. 1: Yes, Your Honor.

17 THE COURT: And has that verdict been recorded on the  
18 verdict form?

19 JUROR NO. 1: Yes, Your Honor.

20 THE COURT: And does the verdict form have the  
21 verdict of the jury as to each count that a partial verdict is  
22 to be returned on?

23 JUROR NO. 1: Yes, Your Honor.

24 THE COURT: And is that the unanimous verdict of the  
25 jury as to each of those counts?

1 JUROR NO. 1: Yes, Your Honor.

2 THE COURT: Okay. If you would, hand it to the court  
3 security officer.

4 Okay. I'll ask that the defendant stand while the partial  
5 verdict of the jury is read by the court coordinator.

6 THE COURT COORDINATOR: United States of America  
7 versus Richard Michael Simkanin. Verdict of the jury. We, the  
8 jury, find the defendant, Richard Michael Simkanin, guilty as  
9 to Count 3 of the indictment. We, the jury, find the  
10 defendant, Richard Michael Simkanin, guilty as to Count 4 of  
11 the indictment.

12 We, the jury, find the defendant, Richard Michael  
13 Simkanin, guilty as to Count 5 of the indictment. We, the  
14 jury, find the defendant, Richard Michael Simkanin, guilty as  
15 to Count 6 of the indictment. We, the jury, find the  
16 defendant, Richard Michael Simkanin, guilty as to Count 7 of  
17 the indictment.

18 We, the jury, find the defendant, Richard Michael  
19 Simkanin, guilty as to Count 8 of the indictment. We, the  
20 jury, find the defendant, Richard Michael Simkanin, guilty as  
21 to Count 9 of the indictment. We, the jury, find the  
22 defendant, Richard Michael Simkanin, guilty as to Count 10 of  
23 the indictment.

24 We, the jury, find the defendant, Richard Michael  
25 Simkanin, guilty as to Count 11 of the indictment. We, the

1 jury, find the defendant, Richard Michael Simkanin, guilty as  
2 to Count 12 of the indictment. We, the jury, find the  
3 defendant, Richard Michael Simkanin, guilty as to Count 13 of  
4 the indictment.

5 We, the jury, find the defendant, Richard Michael  
6 Simkanin, guilty as to Count 14 of the indictment. We, the  
7 jury, find the defendant, Richard Michael Simkanin, guilty as  
8 to Count 15 of the indictment. We, the jury, find the  
9 defendant, Richard Michael Simkanin, guilty as to Count 16 of  
10 the indictment.

11 We, the jury, find the defendant, Richard Michael  
12 Simkanin, guilty as to Count 17 of the indictment. We, the  
13 jury, find the defendant, Richard Michael Simkanin, guilty as  
14 to Count 18 of the indictment. We, the jury, find the  
15 defendant, Richard Michael Simkanin, guilty as to Count 19 of  
16 the indictment.

17 We, the jury, find the defendant, Richard Michael  
18 Simkanin, guilty as to Count 20 of the indictment. We, the  
19 jury, find the defendant, Richard Michael Simkanin, guilty as  
20 to Count 21 of the indictment. We, the jury, find the  
21 defendant, Richard Michael Simkanin, guilty as to Count 22 of  
22 the indictment.

23 We, the jury, find the defendant, Richard Michael  
24 Simkanin, guilty as to Count 23 of the indictment. We, the  
25 jury, find the defendant, Richard Michael Simkanin, guilty as

1 to Count 24 of the indictment. We, the jury, find the  
2 defendant, Richard Michael Simkanin, guilty as to Count 25 of  
3 the indictment.

4 We, the jury, find the defendant, Richard Michael  
5 Simkanin, guilty as to Count 26 of the indictment. We, the  
6 jury, find the defendant, Richard Michael Simkanin, guilty as  
7 to Count 27 of the indictment. We, the jury, find the  
8 defendant, Richard Michael Simkanin, guilty as to Count 28 of  
9 the indictment.

10 We, the jury, find the defendant, Richard Michael  
11 Simkanin, guilty as to Count 29 of the indictment. We, the  
12 jury, find the defendant, Richard Michael Simkanin, guilty as  
13 to Count 30 of the indictment. We, the jury, find the  
14 defendant, Richard Michael Simkanin, guilty as to Count 31 of  
15 the indictment.

16 THE COURT: Okay. You can be seated. You can be  
17 seated, Mr. McColl, you and your client.

18 Since the law does require the verdict of the jury on any  
19 count of the indictment to be a unanimous verdict, my practice  
20 is, after the verdict has been read, to call on each juror by  
21 number to stand and ask if the verdict that was read is your  
22 verdict, so there won't be any issue later on as to whether or  
23 not it actually was a unanimous verdict. So I'm going to do  
24 that now.

25 And when I call, if you would stand, and then I'll ask you

1 what I'm going to ask you.

2 Juror number one, is the verdict of guilty as to each of  
3 the counts of the indictment, except Counts 1 and 2, your  
4 verdict?

5 JUROR NO. 1: Yes, Your Honor.

6 THE COURT: Thank you.

7 Juror number two, is the verdict of guilty as to each of  
8 the counts of the indictment, except 1 and 2, your verdict?

9 JUROR NO. 2: Yes, Your Honor.

10 THE COURT: Thank you.

11 Juror number three, is the verdict of guilty as to each of  
12 the counts of the indictment, except 1 and 2, your verdict?

13 JUROR NO. 3: Yes, Your Honor.

14 THE COURT: Thank you.

15 Juror number four, is the verdict of guilty as to each of  
16 the counts of the indictment, except 1 and 2, your verdict?

17 JUROR NO. 4: Yes, Your Honor.

18 THE COURT: Thank you.

19 Juror number five, is the verdict of guilty as to each of  
20 the counts of the indictment, except 1 and 2, your verdict?

21 JUROR NO. 5: Yes, Your Honor.

22 THE COURT: Thank you.

23 Juror number six, is the verdict of guilty as to each of  
24 the counts of the indictment, except Counts 1 and 2, your  
25 verdict?

1 JUROR NO. 6: Yes, sir.

2 THE COURT: Juror number seven, is the verdict of  
3 guilty as to each of the counts of the indictment, except 1 and  
4 2, your verdict?

5 JUROR NO. 7: Yes, it is, Your Honor.

6 THE COURT: Thank you.

7 Juror number eight, is the verdict of guilty as to each of  
8 the counts of the indictment, except 1 and 2, your verdict?

9 JUROR NO. 8: Yes, Your Honor.

10 THE COURT: Thank you.

11 Juror number nine, is the verdict of guilty as to each of  
12 the counts of the indictment, except 1 and 2, your verdict?

13 JUROR NO. 9: Yes, sir.

14 THE COURT: Thank you.

15 Juror number ten, is the verdict of guilty as to each of  
16 the counts of the indictment, except 1 and 2, your verdict?

17 JUROR NO. 10: Yes, it is, Your Honor.

18 THE COURT: Thank you.

19 Juror number eleven, is the verdict of guilty as to each  
20 of the counts of the indictment, except 1 and 2, your verdict?

21 JUROR NO. 11: Yes, it is.

22 THE COURT: Thank you.

23 And, juror number twelve, is the verdict of guilty as to  
24 each of the counts of the indictment, except 1 and 2, your  
25 verdict?

1 JUROR NO. 12: Yes, Your Honor.

2 THE COURT: Okay. I'm satisfied that the verdict of  
3 the jury as to Counts 3 through 31 is the unanimous verdict of  
4 the jury as to each of those counts, a verdict of guilty.  
5 Therefore, the Court is accepting the verdict as to those  
6 counts as a partial verdict of the jury, and I'm signing the  
7 verdict form to indicate my acceptance of the jury's verdict as  
8 to Counts 3 through 31 as a partial verdict of the jury.

9 Now, the question is: Is there anything to gain -- and  
10 I'll direct this to juror number one, is there anything to gain  
11 whatsoever by any further deliberations, in your opinion?

12 JUROR NO. 1: No, Your Honor.

13 THE COURT: As to Counts 1 and 2?

14 JUROR NO. 1: No, Your Honor.

15 THE COURT: Are you satisfied that y'all have  
16 exhausted every line of reasoning between you?

17 JUROR NO. 1: Yes, Your Honor.

18 THE COURT: I'm just going to pick one other person  
19 at random and ask that person. I'll -- and I'm going to pick  
20 one at random. It's number seven. Are you satisfied that  
21 further deliberations would not accomplish anything by way of  
22 reaching a verdict as to Counts 1 and 2?

23 JUROR NO. 7: Yes, sir.

24 THE COURT: You don't think you could talk and talk  
25 and talk and reason and reason and reason and possibly reach a

1 verdict as to either of those counts?

2 JUROR NO. 7: No.

3 THE COURT: Okay. I'm going to pull another one out  
4 of the air. Number eleven, who's number eleven? Juror number  
5 eleven, do you think there's any possibility that further  
6 discussions and reasoning with each other could result in a  
7 verdict as to Counts 1 and 2, a unanimous verdict?

8 JUROR NO. 11: No, Your Honor.

9 THE COURT: Okay. You can be seated.

10 My inclination is to declare a mistrial as to Counts 1 and  
11 2. Does the government have any thought that anything other  
12 than that should be done?

13 MR. JARVIS: No, Your Honor.

14 THE COURT: Does the defendant?

15 MR. McCOLL: No, Your Honor.

16 THE COURT: Okay. I'm declaring a mistrial as to  
17 Counts 1 and 2, which means that your job is over. I'm  
18 ordering -- I'm accepting the verdict, as I've indicated, as a  
19 partial verdict as to Counts 3 through 31. I'm ordering it  
20 filed as a partial verdict as to those counts.

21 Now, I need to go over some things with the jury that  
22 don't really relate to the -- they're not trial activities but  
23 things I need to discuss with the jury, and I would prefer to  
24 have that discussion without the audience being in the  
25 courtroom. So I'm going to ask that the audience leave the

1 courtroom. As a matter of fact, it's appropriate for us to  
2 close the courthouse anyway except for the participants, so  
3 we'll just go ahead and close the courthouse.

4 THE U.S. MARSHAL: Yes, sir.

5 (Audience section cleared, 8:26 p.m.)

6 (COURT REPORTER'S NOTE: Transcript continues in Volume V  
7 (under seal). There have been no deletions or  
8 additions.)

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10 CERTIFICATE

11 I certify that the foregoing is a correct transcript from  
12 the record of proceedings in the above-entitled matter. I  
13 further certify that the transcript fees format comply with the  
14 those prescribed by the Court and the Judicial Conference of  
15 the United States.

14

15 \_\_\_\_\_  
16 Eileen M. Brewer  
17 Official Court Reporter  
18 Texas CSR No. 3016

\_\_\_\_\_ Date

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