

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

HON. NANCY G. EDMUNDS

Plaintiff,

v.

D-1 KWAME M. KILPATRICK,
D-2 BOBBY W. FERGUSON, and
D-3 BERNARD N. KILPATRICK,

VIOLATIONS:

18 U.S.C. § 1962(d) (RICO conspiracy)
18 U.S.C. § 666(a) (bribery)
18 U.S.C. § 1951 (extortion)
18 U.S.C. §§ 1341, 1343 (mail/wire fraud)
26 U.S.C. § 7206(1) (false tax return)
26 U.S.C. § 7201 (tax evasion)
18 U.S.C. § 2 (aiding & abetting)

Defendants.

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GOVERNMENT'S PROPOSED JURY INSTRUCTIONS FOR COURT REVIEW

The United States of America, by and through United States Attorney Barbara McQuade for the Eastern District of Michigan, Southern Division, and Assistant United States Attorneys Mark Chutkow, Michael Bullotta, Jennifer Blackwell, and Eric Doeh, pursuant to Rule 30 of the Federal Rules of Criminal Procedure, hereby request the Court to give the following jury instructions during the Court's charge at the end of the trial, and to review those specific separate government and defense instructions with the noted objections. The parties respectfully reserve the right to propose any additional instructions at the conclusion of the case that may be warranted based on the evidence.

Respectfully submitted,

BARBARA MCQUADE
United States Attorney
Eastern District of Michigan

s/Mark Chutkow
MARK CHUTKOW
R. MICHAEL BULLOTTA
JENNIFER BLACKWELL
ERIC DOEH
Assistant United States Attorneys

Dated: January 31, 2013

PART ONE:
GENERAL PRINCIPLES

COURT’S INSTRUCTION NO. _____

INTRODUCTION

(1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

(2) I will start by explaining your duties and the general rules that apply in every criminal case.

(3) Then I will explain the elements, or parts, of the crimes that the defendants are accused of committing.

(4) Then I will explain the defendants’ theory of the defense.

(5) Then I will explain some rules that you must use in evaluating particular testimony and evidence.

(6) And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

(7) Please listen very carefully to everything I say.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 1.01

COURT'S INSTRUCTION NO. _____

JURORS DUTIES

(1) You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

(2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved a defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

(3) The lawyers will talk about the law during their arguments. But if what they say is different from what I say, you must follow what I say. What I say about the law controls.

(4) Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

COURT'S INSTRUCTION NO. _____

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

(1) As you know, the defendants have pleaded not guilty to the crimes charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendants what crimes they are accused of committing. It does not even raise any suspicion of guilt.

(2) Instead, the defendants start the trial with a clean slate, with no evidence at all against them, and the law presumes that they are innocent. This presumption of innocence stays with them unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that any of them is guilty.

(3) This means that the defendants have no obligation to present any evidence at all, or to prove to you in any way that they are innocent. It is up to the government to prove that they are guilty, and this burden stays on the government from start to finish. You must find the defendants not guilty unless the government convinces you beyond a reasonable doubt that one or more of them is guilty.

(4) The government must prove every element of the crimes charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

(5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

COURT'S INSTRUCTION NO. _____

EVIDENCE DEFINED

(1) You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

(2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; the stipulations that the lawyers agreed to; [and the facts that I have judicially noticed].

(3) Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

(4) During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

(5) Make your decision based only on the evidence, as I have defined it here, and nothing else.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 1.04

COURT'S INSTRUCTION NO. _____

CONSIDERATION OF EVIDENCE

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 1.05

COURT'S INSTRUCTION NO. _____

DIRECT AND CIRCUMSTANTIAL EVIDENCE

(1) Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

(2) Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

(3) Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

(4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 1.06

COURT'S INSTRUCTION NO. _____

CREDIBILITY OF WITNESSES

(1) Another part of your job as jurors is to decide how credible or believable each witness was.

This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

(2) Let me suggest some things for you to consider in evaluating each witness's testimony.

(A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

(C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

(D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

(F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the

witness said or did something (or failed to say or do something) at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.

(G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

COURT'S INSTRUCTION NO. _____

NUMBER OF WITNESSES

(1) One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

(2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 1.08

COURT'S INSTRUCTION NO. _____

LAWYERS' OBJECTIONS

(1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

(2) The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

(3) And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

COURT'S INSTRUCTION NO. _____

INTRODUCTION

(1) That concludes the part of my instructions explaining your duties and the general rules that apply in every criminal case. In a moment, I will explain the elements of the crimes that the defendants are accused of committing.

(2) But before I do that, I want to emphasize that the defendants are only on trial for the particular crimes charged in the indictment. Your job is limited to deciding whether the government has proved the crimes charged.

(3) Also keep in mind that whether anyone else should be prosecuted and convicted for these crimes is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved the defendant or defendants guilty. Do not let the possible guilt of others influence your decision in any way.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 2.01

COURT'S INSTRUCTION NO. _____

SEPARATE CONSIDERATION--MULTIPLE DEFENDANTS CHARGED WITH DIFFERENT CRIMES

(1) The defendants have been charged with different crimes. I will explain to you in more detail shortly which defendants have been charged with which crimes. But before I do that, I want to emphasize several things.

(2) The number of charges is no evidence of guilt, and this should not influence your decision in any way. And in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant on each charge, and to return a separate verdict for each one of them. For each one, you must decide whether the government has presented proof beyond a reasonable doubt that a particular defendant is guilty of a particular charge.

(3) With the exception of Count One, your decision on any one defendant or one charge, whether it is guilty or not guilty, should not influence your decision on any of the other defendants or charges.

For Count One, as I will explain in a minute, your decision will depend, in part, on whether each defendant agreed that he or another person would commit other crimes, including other crimes charged in the indictment.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 2.01D & committee commentary (2009).

COURT'S INSTRUCTION NO. _____

ON OR ABOUT

(1) Next, I want to say a word about the dates mentioned in the indictment.

(2) The indictment charges that certain crimes happened "on or about" or "in and about" certain dates. The government does not have to prove that these crimes happened on those exact dates.

But the government must prove that the crimes happened reasonably close to those dates.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 2.04

COURT'S INSTRUCTION NO. _____

INFERRING REQUIRED MENTAL STATE

(1) Next, I want to explain something about proving a defendant's state of mind.

(2) Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

(3) But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

(4) You may also consider the natural and probable results of any acts that a defendant knowingly did or did not do, and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 2.08

COURT'S INSTRUCTION NO. _____

IMPARTIALITY

You may recall being instructed at the beginning of this case about your duty as a juror. Whatever opinions, biases or prejudice you had towards the defendants or about this case must not enter into your deliberations.

You must decide this case solely on the evidence you heard in the courtroom. Your personal opinions that were formed prior to this trial must not factor into your decision whatsoever.¹

¹**NOTE TO COURT:** The government incorporated part of the proposed instruction by the defendants at defendants' request. The government notes, however, that it objects to the third paragraph of the defendants' proffered instruction and is not including it herein. The government also objects to the defendants' proposed instruction regarding substance abuse.

PART TWO:

18 U.S.C. §1951: EXTORTION

**(COUNTS TWO THROUGH FIVE;
SEVEN THROUGH TEN; FIFTEEN)**

COURT'S INSTRUCTION NO. _____

INTRODUCTION

Counts Two through Four, and Seven through Ten, each charge Kwame Kilpatrick and Bobby Ferguson with extortion in two ways: first, through wrongful use of fear of economic harm, and second, under color of official right. To find a defendant guilty of one or more of the extortion charges, the evidence need only prove that the defendant committed one of these types of extortion, or aided and abetted someone else in doing so. It is not necessary that the evidence show that the defendant committed both types of extortion.

The defendants are charged with extortion, in violation of 18 U.S.C. § 1951, in the following counts:

2	sewer lining contract	K. Kilpatrick, Ferguson
3	amendment to sewer lining contract	K. Kilpatrick, Ferguson
4	Baby Creek/Patton Park	K. Kilpatrick, Ferguson
7	outfalls contract	K. Kilpatrick, Ferguson
8	asbestos abatement	K. Kilpatrick, Ferguson
9	repair of eastside water mains	K. Kilpatrick, Ferguson
10	eastside sewer repairs	K. Kilpatrick, Ferguson

ELEMENTS OF EXTORTION²

To find Kwame Kilpatrick or Bobby Ferguson guilty of one of the extortion counts discussed above, Counts Two, Three, Four, Seven, Eight, Nine, or Ten, the government must prove each and every one of the following things, or elements, beyond a reasonable doubt:

² Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 1951; First Circuit Pattern Criminal Jury Instruction 4.16; United States v. Kelley, 461 F.3d 817, 826-827 (6th Cir. 2006).

First, that the defendant or a person whom he aided and abetted knowingly and wrongfully obtained money or other property from another person or persons;

Second, that the defendant or person whom he aided and abetted did so by means of extortion, either under color of official right or by wrongful fear of economic harm, as I will define those phrases;

Third, that the defendant knew that the person or persons who were the subjects of the extortion gave the money or property because of the extortion; and

Fourth, that as a result of the defendant's actions, interstate commerce was, or had the potential to be, affected in some way, no matter how small.³

Extortion under Color of Official Right⁴

(1) Extortion under color of official right occurs when a public official, or someone acting with the public official, receives money or property to which the public official is not entitled, knowing or believing that the money or property is being given to the public official in return for the taking, withholding or otherwise influencing of an official action.

(2) Although the official or someone acting with him must obtain the money or property, the government does not have to prove that the public official, or person acting with him, asked

³**NOTE TO COURT:** The government notes that the government's proposed elements for Part Two are in agreement with the defendants' proposed elements. With the exception of the pattern language from the Sixth Circuit instructions on aiding and abetting and attempt, the government and defendants offer different definitions for Part Two. The government's proposed definitions are set forth herein with supporting authority.

⁴ Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 1951; Evans v. United States, 504 U.S. 255, 268 (1992); United States v. Abbey, 560 F.3d 513, 519 (6th Cir. 2009); United States v. Ganim, 510 F.3d 134, 145, 147 (2d Cir. 2007); United States v. Carmichael, 232 F.3d 510, 519 (6th Cir. 2000).

for or first suggested the giving of money or property. In addition, the payment can occur either before or after the expected official action.

(3) While the official, or someone acting on behalf of the public official, must obtain the money or property in return for the expectation of an official action, the government does not have to prove that the official actually took, or even intended to take, that action, or that the official was in a position to take the action in return for which payment was made, or that the official would have acted differently or have taken the same action even without payment.

(4) The government does not have to prove an explicit promise to perform a particular act made at the time of the payment. Rather, it is sufficient if the public official understands that he is expected as a result of the payment to exercise particular kinds of influence as specific opportunities arise.

(5) The public official need not have any intention of actually exerting his influence on the payor's behalf. The question is whether the official, or someone with whom he was acting, obtained money through implicit or explicit promises that the public official would use his public influence in return.

Extortion Through Wrongful Use of Economic Harm⁵

Extortion through wrongful use of fear of economic harm is the obtaining of money or property from another person, with that person's consent, when the consent is brought about

⁵Modern Federal Jury Instructions Criminal 50-9, 50-12, 50-13 (2011); United States v. Collins, 78 F.3d 1021, 1030 (6th Cir. 1996); United States v. Clemente, 640 F.2d 1069, 1077 (2d Cir. 1981); United States v. Stodala, 953 F.2d 266, 270 (7th Cir. 1992).

through the wrongful use of fear of economic harm to the person or his business unless the person turns over the money or property.

Fear exists if the person experiences anxiety or concern over expected business loss, financial or job security, or the ability to keep work or obtain future work.

Your decision whether the defendant used or threatened fear of economic harm requires you to determine the state of mind of the person who gave the money or property, at the time of the defendant's actions. You cannot look into a person's mind to see what his state of mind is or was. But a careful consideration of the circumstances and evidence should enable you to decide whether fear of economic harm would reasonably have been a part of the victim's state of mind.

You have heard the testimony of some witnesses describing their state of mind--that is, how they felt--when they provided money or property. This testimony was allowed to help you decide whether the property was obtained by fear of economic harm. You should consider this testimony for that purpose only.

You may consider the relationship between the defendant and the alleged victim in deciding whether fear existed. Fear may exist even if a relationship was otherwise friendly, while there may be no fear even if a relationship was otherwise unfriendly.

Interstate Commerce

The parties have agreed that interstate commerce was affected for purposes of this instruction.

AIDING AND ABETTING⁶

The defendants who are named in the extortion counts are charged with aiding and abetting each other to commit the crimes. Specifically, Kwame Kilpatrick and Bobby Ferguson are charged with aiding and abetting each other in Counts 2, 3, 4, 7, 8, 9, and 10.

For you to find Kwame Kilpatrick or Bobby Ferguson guilty of extortion, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped or encouraged someone else to commit the crime. A person who does this is called an aider and abettor.

But for you to find a defendant guilty of extortion as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

- (A) First, that the crime of extortion was committed;
- (B) Second, that the defendant helped to commit the crime;
- (C) And third, that the defendant intended to help commit the crime.

You may only find that Bobby Ferguson aided and abetted the crime of extortion under color of official right if you also conclude that Kwame Kilpatrick committed that crime. That is because the crime of extortion under color of official right requires the criminal involvement of a public official. On the other hand, you may conclude that Bobby Ferguson aided and abetted a crime of extortion by fear of economic harm even if you are not convinced that Kwame Kilpatrick also committed that crime. The crime of extortion by fear of economic harm does not require the involvement of a public official.

⁶Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 4.01 (as modified).

Proof that a defendant knew about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider the defendant's knowledge and presence in deciding whether the evidence proves that he was an aider and abettor, but without more, knowledge and presence alone are not enough.

What the evidence must prove is that the defendant did something to help or encourage the crime with the intent that the crime be committed.

ATTEMPT⁷

Count Five of the Indictment charges that Kwame Kilpatrick and Bobby Ferguson attempted to extort another by fear of economic harm and under color of official right, in violation of 18 U.S.C. § 1951.

5	Oakwood pump station	K. Kilpatrick, Ferguson
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Count Fifteen of the Indictment charges that Bernard Kilpatrick attempted to extort another person by fear of economic harm and under color of official right in violation of 18 U.S.C. § 1951.

15	sludge contract	B. Kilpatrick
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For you to find any of these defendants guilty of attempting either type of extortion charged in Counts Five and Fifteen, you must be convinced that the government has proved both of the following elements beyond a reasonable doubt:

First, that the defendant intended to commit the crime of extortion.

⁷Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 5.01 (as modified).

Second, that the defendant did some overt act that was a substantial step towards committing the crime of extortion.

In deciding whether a defendant attempted to extort another person, you should review the instructions I have given you which define the elements of the crime of extortion, and you should determine whether that defendant took an act which was a substantial step toward the things described by those elements.

Merely preparing to commit a crime is not a substantial step. The defendant's conduct must go beyond mere preparation, and must strongly confirm that he intended to commit extortion. But the government does not have to prove that any defendant did everything except the last act necessary to complete the crime. A substantial step beyond mere preparation is enough.

PART THREE:

18 U.S.C. § 666(A): BRIBERY

COUNTS SIXTEEN AND SEVENTEEN

COURT'S INSTRUCTION NO. _____

Counts Sixteen and Seventeen of the indictment charge the defendants Kwame Kilpatrick and Bobby Ferguson with bribery relating to a government entity which receives federal funds, or aiding and abetting in that crime, in violation of 18 U.S.C. § 666(a).

16	\$90,000 bribe	K. Kilpatrick, Ferguson
17	\$75,000 bribe	K. Kilpatrick, Ferguson

ELEMENTS⁸

In order to prove Kwame Kilpatrick guilty of bribery, or defendant Bobby Ferguson guilty of aiding and abetting in bribery, the government must prove each of the following elements beyond a reasonable doubt:

First, that Kwame Kilpatrick was the Mayor of the City of Detroit;

Second, that the defendant solicited, demanded, accepted, or agreed to accept anything of value from another person;

Third, that the defendant did so corruptly with the intent to be influenced or rewarded in connection with a transaction of the City of Detroit;

Fourth, that this transaction involved any thing of a value of \$5,000 or more; and

⁸Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 666(a)(1)(B).

Fifth, that the City of Detroit, in a one-year period, received benefits of more than \$10,000 under any federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance.⁹

Definitions

The parties have agreed that Kwame Kilpatrick was the Mayor of Detroit during the time alleged in the indictment. The parties have also agreed that during each relevant calendar year, the City of Detroit received more than \$10,000 under federal programs.

A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him in connection with his official duties.¹⁰

In considering the third element, you should determine whether it was Kwame Kilpatrick's intent at least in part to be influenced or rewarded; you need not determine the subsequent actions of Kwame Kilpatrick or the City of Detroit. In other words, the government does not have to prove that Kwame Kilpatrick received the bribe or that the bribe actually influenced the City of Detroit. It is not even necessary that Kwame Kilpatrick had the authority to perform the act sought. Also, if you find that Kwame Kilpatrick accepted something with the intent to be rewarded for a decision already made, the third element is satisfied even though the payment was accepted or solicited after the decision had been made. An illegal bribe may be

⁹**NOTE TO COURT:** The government and the defendants are in agreement with respect to the elements of the crime. The parties are not in agreement with respect to the definitions associated with those elements. The government's proposed definitions with supporting citations are enclosed herein.

¹⁰Seventh Circuit Pattern Criminal Jury Instruction for 18 U.S.C. § 666(a)(1)(B).

paid with the intent to influence a general course of conduct. It is not necessary for the government to link any particular payment to any particular action undertaken by the defendant.¹¹

Finally, the government must prove that Kwame Kilpatrick intended to be influenced or rewarded in connection with business of the City of Detroit involving anything of value of \$5,000 or more. If you find that the business in question had a value of at least \$5,000, this element is satisfied. The government is not required to prove that Kwame Kilpatrick or anyone else personally received at least \$5,000. It is the value of the business or transaction that the bribe was intended to influence or reward that is important for the purposes of this fifth element.¹²

Aiding and Abetting¹³

For you to find Bobby Ferguson guilty of aiding and abetting bribery as charged in Counts Sixteen and Seventeen you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of bribery concerning programs receiving federal funds was committed.

(B) Second, that Bobby Ferguson helped to commit the crime.

(C) And third, that Bobby Ferguson intended to help commit or encourage the crime.

¹¹Modern Federal Jury Instructions Criminal 27A-13; Third Circuit Pattern Jury Instructions 6.18.666A1B-2; United States v. Abbey, 560 F.3d 513, 519 (6th Cir. 2009); United States v. Coyne, 4 F.3d 100, 113 (2d Cir. 1993).

¹²Modern Federal Jury Instructions Criminal 27A-14; Third Circuit Pattern Jury Instruction 6.18.666A1B-3.

¹³Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 4.01

Proof that Bobby Ferguson may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

What the government must prove is that Bobby Ferguson did something to help or encourage the crime with the intent that the crime be committed.

PART FOUR:
18 U.S.C. § 1341: MAIL FRAUD
18 U.S.C. § 1343: WIRE FRAUD
COUNTS EIGHTEEN THROUGH THIRTY

COURT INSTRUCTION NO. _____

Counts 18 through 27 charge the defendant Kwame Kilpatrick with mail fraud. The counts are charged as follows:

Count	Date and Item Sent via U.S. Mail or Federal Express
18	June 22, 2006, donor check for \$10,000 payable to the Civic Fund sent via Federal Express.
19	February 13, 2007, letter explaining the Civic Fund to donor sent via U.S. mail.
20	September 26, 2007, donor check for \$5,000 payable to the Civic Fund sent via U.S. mail.
21	April 3, 2008, Civic Fund check in the amount of \$4,500 for summer camp sent via Federal Express.
22	May 23, 2008, letter soliciting a donation and explaining the Civic Fund to donor sent via U.S. mail
23	June 4, 2008, Civic Fund check in the amount of \$2,640 for summer camp sent via Federal Express.
24	June 4, 2008, donor check for \$10,000 payable to the Civic Fund sent via Federal Express.
25	June 25, 2008, donor check for \$1,000 payable to the Civic Fund sent via U.S. mail.
26	June 30, 2008, donor check for \$4,000 payable to the Civic Fund sent via Federal Express.
27	July 23, 2008, letter explaining the Civic Fund to donor sent via U.S. mail.

Counts 28 through 30 charge the Defendant Kwame Kilpatrick with wire fraud.

The counts are charged as follows:

Count	Date and Description of Wire Communication
28	August 24, 2007, letter soliciting a donation and explaining the Civic Fund sent to donor via fax.
29	April 3, 2008, letter explaining the Civic Fund sent to donor via fax.
30	June 20, 2008, letter soliciting a donation and explaining the Civic Fund sent to donor via fax.

For you to find Kwame Kilpatrick guilty of mail or wire fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that Kwame Kilpatrick knowingly devised a scheme to defraud in order to obtain money or property, that is Kwame Kilpatrick intended to claim to the Internal Revenue Service and to public and potential donors that the Civic Fund was a social welfare organization that spent its funds consistent with the purposes stated in its application for tax exempt status, when in fact, Kwame Kilpatrick intended to use the monies donated to the Civic Fund for personal expenses and for his political campaigns;

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that Kwame Kilpatrick had the intent to defraud; and

(D) Fourth, if charged as a mail fraud count, that Kwame Kilpatrick caused another to use the mail in furtherance of the scheme. If charged as a wire fraud count, that Kwame Kilpatrick caused another to use a wire communication in interstate commerce in connection with the scheme.

(2) Now I will explain some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

(B) The term "false or fraudulent pretenses, representations or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(C) An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself or to another person.

(F) To "cause" the mail or wire communications to be used is to do an act with knowledge that the use of the mail or wire communication will follow in the ordinary course of business or where such use can reasonably be foreseen.

(G) The term "interstate commerce" includes wire communications which crossed a state line.

(3) It is not necessary that the government prove all of the details that are in the indictment concerning the precise nature and purpose of the scheme, or prove that the use of the mail or wire communications was intended as the specific or exclusive means of accomplishing the alleged fraud.

(4) For each count, if you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on that count. If you have a reasonable doubt about any one of the elements, then you must find Kwame Kilpatrick not guilty of that count.¹⁴

¹⁴Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 10.01, 10.02.

PART FIVE:
RACKETEER INFLUENCED AND CORRUPT
ORGANIZATION (RICO)
COUNT ONE

COURT'S INSTRUCTION NO. _____**ELEMENTS OF THE OFFENSE - COUNT ONE¹⁵**

Count One charges that from about 2000 until 2009, Kwame Kilpatrick, Bobby Ferguson, and Bernard Kilpatrick knowingly agreed to conduct the affairs of an association of persons called the Kilpatrick Enterprise through a pattern of racketeering. The law of the United States is that whoever conspires to conduct the affairs of any enterprise through a pattern of racketeering activity commits a crime, if the enterprise affects interstate commerce.

In order to convict a defendant of the crime charged in Count One, the evidence must prove each of the following five elements beyond a reasonable doubt:

- One:** The Kilpatrick Enterprise that is described in the indictment existed;
- Two:** The defendant was associated with the Kilpatrick Enterprise;
- Three:** The defendant knowingly agreed to participate in the conduct of the Kilpatrick Enterprise;
- Four:** The defendant and at least one other conspirator agreed that the defendant or a conspirator would commit at least two acts of racketeering, of the type I will describe shortly, in furtherance of the Kilpatrick Enterprise
- Five:** The activities of the Kilpatrick Enterprise affected interstate commerce.

¹⁵United States v. Applins, 637 F.3d 59, 80-81 (2d Cir. 2011); Pattern Criminal Federal Jury Instructions for the Seventh Circuit 266 (1999 ed.); Eleventh Circuit Pattern Jury Instructions § 75.1 (2010 ed.).

NOTE TO THE COURT: The parties do not agree on the proposed RICO instructions. The instructions used herein are derived from model instructions proposed by the Department of Justice, Organized Crime and Racketeering Section, which has approved these instructions.

DEFINITION**“Enterprise” (Association-in-fact)¹⁶**

As I just said, for you to find a defendant guilty of the crime charged in Count One, the evidence must prove beyond a reasonable doubt that the Kilpatrick Enterprise existed as alleged in the indictment.

An “enterprise” is any group of individuals who associate with each other for a common purpose. It need not be a formal business entity such as a corporation.

For you to find that the Kilpatrick Enterprise existed, you must find beyond a reasonable doubt that there was an ongoing organization, formal or informal, in which the persons associated with it functioned as a continuing unit. To be an “enterprise,” the evidence must show that (1) there is an ongoing association of people; (2) the members of the association work as a continuing unit to achieve a common purpose and have some sort of framework for making or carrying out decisions; and (3) the enterprise is separate and apart from the pattern of racketeering activity in which it engages.

You may find that the Kilpatrick Enterprise existed even if it had no particular or formal structure, so long as it had enough organization that its members operated in a coordinated manner in order to carry out the alleged common purposes of the group. You may find that the enterprise existed even if the group had no hierarchical structure or “chain of command”; decisions may have been made on an *ad hoc* basis, or by any number of methods. Members of the group need not have had fixed roles; different members may have performed different roles at

¹⁶18 U.S.C. §1961(4); United States v. Turkette, 452 U.S. 576, 583 (1981); Boyle v. United States, 556 U.S. 938, 944 (2009); United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000); 2B O’Malley, Grenig, and Lee, Federal Jury Practice and Instructions § 56.04 (5th ed. 2009).

different times. The group need not have had a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies.

In order to find that the Kilpatrick Enterprise existed, you must find that the group functioned as a continuing unit long enough to pursue a course of conduct. That course of conduct need not have been continuous. That is, you may find that the Kilpatrick Enterprise existed if you find that it consisted of a group whose associates engaged in spurts of activity for a common purpose, punctuated by periods of inactivity. An enterprise is not required to be “business-like” in any way.

The existence of an enterprise may be proven by what the group of individuals did. This means that you may consider evidence about the alleged racketeering acts to determine whether that evidence also establishes the existence of the Kilpatrick Enterprise.

It is not necessary that the evidence prove every allegation about the Kilpatrick Enterprise that is in the indictment. It is only necessary that the evidence show that the enterprise existed according to the rules I just gave you.

“Associated with the Enterprise”¹⁷

The second element the evidence must prove beyond a reasonable doubt, for you to find a defendant guilty of Count One, is that the defendant was “associated with” the Kilpatrick Enterprise. To “associate” means to join, often in a loose relationship, as a partner, fellow worker, colleague, friend, companion, or ally. A person is “associated with” an enterprise when, for example, he joins with other members of the enterprise and he knowingly aids or furthers the

¹⁷United States v. Zichetello, 208 F.3d 72, 100 (2d Cir. 2000); United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998); Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 1962.

activities of the enterprise, or he conducts business with or through the enterprise. The evidence is not required to prove that any defendant had a formal position in the enterprise, or participated in *all* the activities of the enterprise, or had full knowledge of all the activities of the enterprise.

“To Agree to Participate Directly or Indirectly in the Affairs of the Enterprise”¹⁸

The third element the evidence must show beyond a reasonable doubt for you to convict a defendant of the crime charged in Count One is that the defendant agreed to conduct, or participate in the conduct of, the affairs of the Kilpatrick Enterprise.

One way to show that is with evidence that the defendant agreed that he or another conspirator would intentionally perform acts, functions or duties which were necessary to, or helpful in, the operation of the Kilpatrick Enterprise. Another way to show it is with evidence that the defendant agreed that he or one of the other conspirators would have some part in directing the enterprise’s affairs. However, it is not necessary for the evidence to show that the defendant you are considering exercised significant control over or within the Kilpatrick Enterprise, or that he had a formal position in the enterprise, or that he had primary responsibility for the enterprise’s affairs.

“Agree to Engage in a Pattern of Racketeering Activity”¹⁹

The fourth element the evidence must prove beyond a reasonable doubt for you to find a defendant guilty of Count One is that the defendant you are considering agreed that he or one or

¹⁸Adapted from 2B O’Malley, Grenig, and Lee, Federal Jury Practice and Instructions § 56.08 (5th ed. 2000); Reves v. Ernst & Young, 507 U.S. 170, 179-86 (1993); United States v. Lawson, 535 F.3d 434, 443 (6th Cir. 2008).

¹⁹ Adapted from Seventh Circuit Pattern Criminal Jury Instruction to 18 U.S.C. § 1962; H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 242-43 (1989); United States v. Lawson, 535 F.3d 434, 444 (6th Cir. 2008); United States v. Fowler, 535 F.3d 408, 419-20 (6th Cir. 2008).

more of the conspirators who were associated with the Kilpatrick Enterprise would intentionally commit, or cause, or help the commission of two or more racketeering acts of the type I will describe to you, and that those acts made a pattern of racketeering activity.

The evidence must show three things beyond a reasonable doubt to establish a “pattern of racketeering activity”:

One: The defendant agreed that he or one or more of the conspirators would commit at least two acts of extortion, or mail or wire fraud, or obstruction of justice, or bribery in violation of Michigan law, or malicious threats to extort money in violation of Michigan law, or any combination of two of these acts.²⁰ I will describe each of these acts in more detail below.

Two: The racketeering acts on which you agree had a meaningful connection to the Kilpatrick Enterprise, and were related to each other. The racketeering acts were related to each other if they had the same or similar purposes, results, participants, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics. That is, the acts of racketeering cannot merely be isolated events.

You may find that two of the racketeering acts were “related” even though they are not similar to each other, so long as they both related to the activities of the Kilpatrick Enterprise. For example, two racketeering acts are related to each other, and have a meaningful connection to the Kilpatrick Enterprise, if the evidence shows that both acts were possible solely by virtue of a conspirator’s position in the enterprise or his involvement in or control over its affairs, or by evidence that a defendant’s position in the enterprise facilitated his commission of the

²⁰ See, e.g., United States v. Randall, 661 F.3d 1291, 1296-1298 (10th Cir. 2011); United States v. Applins, 637 F.3d 59, 81-83 (2d Cir. 2011); United States v. Glecier, 923 F.2d 496, 499-500 (7th Cir. 1991); United States v. Phillips, 874 F.2d 123, 125-28 (3d Cir. 1989).

rackeering acts, or by evidence that both of the rackeering acts benefitted the enterprise, or were authorized by the enterprise or promoted or furthered the purposes of the enterprise.

Three: The rackeering activity must have extended over a substantial period of time, or posed a threat of continued criminal activity. The threat of continued unlawful activity is established when the evidence shows that the rackeering activity is part of a long-term association that exists for criminal purposes, or when the rackeering activity is shown to be the regular way of conducting the affairs of the enterprise.

In determining whether the evidence shows the threat of continued unlawful activity, you may consider more than just the specific type or types of rackeering activity charged against the defendant; you also may consider the nature of the enterprise, and other lawful and unlawful activities of the enterprise and its members viewed in their entirety.²¹

The types of rackeering acts that are charged in Count One of the Indictment are all, themselves, violations of either Michigan or United States law. I have described for you already the elements of federal extortion, and mail and wire fraud, in Parts Two and Four of the instructions. You should apply those instructions when you consider whether the evidence shows beyond a reasonable doubt that one or more defendants agreed that the rackeering acts of federal extortion or mail or wire fraud would be committed to further the Kilpatrick Enterprise.

In addition to extortion and mail and wire fraud, the indictment also charges that the defendants agreed that rackeering acts that violated federal obstruction of justice laws would be

²¹ See H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 242-43 (1989); United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991).

committed to further the Kilpatrick Enterprise. To prove a racketeering act of obstruction of justice, the government must prove each of the following elements beyond a reasonable doubt:

Obstruction of Justice:²²

- 1) The defendant [or a co-conspirator] knowingly intimidated, threatened, or corruptly persuaded, a person identified as a witness, or attempted to do so; and
- 2) They did so intending to influence, delay, or prevent the testimony of that person in an official proceeding.

The government is not required to prove that the defendant (or a co-conspirator) succeeded in the effort to tamper with the witness; the government need not prove that the witness actually changed or withheld his or her testimony.²³ An official proceeding means a proceeding before a judge or court of the United States or a federal grand jury.

As I said, the indictment also charges racketeering acts that violate two Michigan laws: first, making malicious threats to extort money, and second, bribery by a public official.

Michigan Law: Malicious Threats to Extort Money²⁴

There are three elements to the Michigan crime of making malicious threats to extort money. They are that:

- a. The defendant [or a conspirator] threatened to injure another's property;
- b. The threat was made by saying it or writing it down; and

²²2A Fed. Jury Prac. & Instru. 49.03 (6th ed. 2012); United States v. Burns, 298 F.3d 523, 539 (6th Cir. 2002).

²³United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999).

²⁴Michigan Jury Instructions CJI2d 21.1; People v. Krist, 97 Mich. App. 669, 675, 296 N.W. 2d 139, 143 (Mich. App. 1980).

c. The threat was made wilfully, without just cause or excuse, and with the intent to get money or property.

For example, a communication that threatens to harm a business unless the business provides money or other property to either the person making the communication or to someone else has violated this Michigan law.

Michigan Law: Act of a Public Official Accepting Bribes

There are also three elements to the Michigan law of bribery by a public official. As applied to this case, they are:

- a. Kwame Kilpatrick was a public official;
- b. While being a public official, Kwame Kilpatrick accepted a gift or gratuity; and
- c. The gift or gratuity was made with an understanding that Kwame Kilpatrick would exercise his official judgment in a particular manner, or on a particular side of any question, cause or proceeding, which was by law before him in an official capacity.

In other words, Michigan law makes it an offense for any public official to receive money or anything of value with a corrupt intent to permit his official judgment to be influenced. Under this law, a corrupt act means an act done with intent to gain an advantage that is not consistent with one's official duty and the rights of others.²⁵

²⁵People v. Clark, 134 Mich. App. 324, 329, 350 N.W. 2d 878, 881 (Mich. App. 1984); People v. Ewald, 302 Mich. 31, 4 N.W.2d 456 (1942).

Agreement to Commit a RICO Offense²⁶

One other point about the fourth element of Count One.

The charge in Count One is that the defendants **agreed** to conduct the affairs of the Kilpatrick Enterprise through a pattern of racketeering activity.

The evidence is not required to prove that the defendant personally committed or agreed to personally commit two racketeering acts. Rather, it is enough if the evidence proves beyond a reasonable doubt that the defendant agreed with someone else that he would participate in the Kilpatrick Enterprise with the knowledge and intent that at least one member of the conspiracy (who could, but need not, be the defendant himself) would commit at least two racketeering acts in the conduct of the affairs of the enterprise. The evidence need only show that the defendant under your consideration knew the general nature and common purpose of the conspiracy and that the conspiracy extended beyond his individual role.

It is not necessary that the evidence prove that a particular defendant was a member of the conspiracy from its beginning or until its end. Different persons may be members of the conspiracy at different times. Also, a defendant may be convicted as a conspirator even though he plays only a minor role in the conspiracy, provided that you find beyond a reasonable doubt that the conspiracy existed and that the defendant knowingly participated in it with the intent to accomplish its objectives or assist other conspirators in accomplishing its objectives.

²⁶Pattern Criminal Federal Jury Instructions for the Seventh Circuit 271 (1999 ed.); Eleventh Circuit Pattern Jury Instructions § 75.2 (2010 ed.); Salinas v. United States, 522 U.S. 52, 62-65 (1997); United States v. Lawson, 535 F.3d 434, 445 (6th Cir. 2008); United States v. Lawson, 535 F.3d 408, 420-421 (6th Cir. 2008); United States v. Ashman, 979 F.2d 469, 492 (7th Cir. 1992); United States v. Sutherland, 656 F.2d 1181, 1187 n.4 (5th Cir. 1981).

You may find all of the elements of the charge in Count One, such as the conspiratorial agreement, any defendant's knowledge of it, and any defendant's participation in the conspiracy, from circumstantial evidence. For example, if you find that the evidence proves that the defendant and at least one other conspirator committed several racketeering acts in furtherance of the affairs of the Kilpatrick Enterprise, you may conclude that this means they **agreed** to conduct the affairs of the enterprise through those acts. It is entirely up to you to determine whether all of the evidence, taken together, proves that a particular defendant entered into the required conspiratorial agreement.

Interstate Commerce

The parties have agreed that interstate commerce was affected for purposes of this instruction.

PART SIX:
26 U.S.C. § 7206(1)
SUBSCRIBING FALSE TAX RETURN
26 U.S.C. § 7201
INCOME TAX EVASION
COUNTS 31 THROUGH 39

COURT'S INSTRUCTION NO. _____

STATEMENT OF THE OFFENSE

Counts 31 through Count 35 charge defendant Kwame Kilpatrick with subscribing a false tax return for calendar years 2003, 2004, 2005, 2006, and 2007.

Count 36 charges Defendant Kwame Kilpatrick with income tax evasion for calendar year 2008.

Counts 37, 38, and 39 charge defendant Bernard Kilpatrick with subscribing a false tax return for calendar years 2004, 2005, and 2007.

Elements:²⁷

In order to sustain its burden of proof for the crime of willfully subscribing a false tax return as charged in Counts 31 through 35, and 37 through 39 of the indictment, the government must prove the following essential elements for each count beyond a reasonable doubt:

First, the defendant made and signed a tax return that contained false information about a material matter as detailed in the indictment;

Second, the defendant knew that this information was false;

Third, the false statement was material;

Fourth, the return contained a written declaration that it was being signed subject to the penalties of perjury; and

Fifth, in filing the false tax return, the defendant acted willfully.

²⁷2B Kevin F. O'Malley et al., Federal Jury Practice and Instructions § 67.15 (6th ed. 2012)

Definitions

A claim in a tax return is “material,” if it has a natural tendency to influence or was capable of influencing the actions of the Internal Revenue Service.²⁸

To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness.²⁹

You may find that a tax return was, in fact, signed by the person whose name appears to be signed to it. You may also find that a tax return that was electronically submitted was, in fact, electronically signed by the person whose name appears to be signed to it. It is not a requirement for you to find that the defendant actually signed the return, but rather, there must be evidence beyond a reasonable doubt that the defendant authorized the filing of the return with his name subscribed to it. You are not required, however, to make any such finding(s).³⁰

If you find beyond a reasonable doubt from the evidence in the case that the defendant signed the tax return in question, or authorized the filing of the tax return in question, then you may also find, but are not required to find, that the defendant knew of the contents of the return he signed.³¹

Elements - Tax Evasion³²

²⁸2B Kevin F. O’Malley et al., Federal Jury Practice and Instructions § 30.06 (6th ed. 2012)

²⁹2B Kevin F. O’Malley et al., Federal Jury Practice and Instructions § 67.20 (6th ed. 2012).

³⁰26 U.S.C. §§ 6061(b), 6064; United States v. Fawaz, 881 F.2d 259, 265 (6th Cir. 1989).

³¹2B Kevin F. O’Malley et al., Federal Jury Practice and Instructions § 67.22 (6th ed. 2012)

³²2B Kevin F. O’Malley et al., Federal Jury Practice and Instructions § 67.03 (6th ed. 2012)

In order to sustain its burden of proof for the crime of willfully attempting to evade or defeat a tax as charged in Count 35 of the Indictment against Kwame Kilpatrick, the government must prove the following essential elements beyond a reasonable doubt:

First: A substantial income tax was due from the defendant;

Second: The defendant attempted to evade or defeat this tax as detailed in the indictment;
and

Third: In attempting to evade or defeat such tax, the defendant acted willfully.

In order to show an “attempt in any manner to evade or defeat any tax,” the government must prove beyond a reasonable doubt that Kwame Kilpatrick intended to evade or defeat the tax due and that Kwame Kilpatrick also willfully did some affirmative act in order to accomplish this intent to evade or defeat that tax.³³

Although the government must prove a willful attempt to evade a substantial portion of tax, the government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of tax owed.³⁴

³³2B Kevin F. O’Malley et al., Federal Jury Practice and Instructions § 67.04 (6th ed. 2012); United States v. King, 126 F.3d 987 (7th Cir 1987)

³⁴2B Kevin F. O’Malley et al., Federal Jury Practice and Instructions § 67.08 (6th ed. 2012)

PART SEVEN:
DEFENDANTS' THEORY OF THE CASE

PART EIGHT:
SPECIAL EVIDENTIARY MATTERS

COURT'S INSTRUCTION NO. _____

INTRODUCTION

That concludes the part of my instructions explaining the elements of the crime and the defendants' position. Next I will explain some rules that you must use in considering some of the testimony and evidence.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.01

COURT'S INSTRUCTION NO. _____

DEFENDANT'S ELECTION NOT TO TESTIFY OR PRESENT EVIDENCE

A defendant has an absolute right not to testify. The fact that he did not testify cannot be considered by you in any way. Do not even discuss it in your deliberations.

Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.02

COURT’S INSTRUCTION NO. _____

OPINION TESTIMONY

You have heard the testimony of several witnesses who have testified as opinion witnesses.

You do not have to accept the opinions of those witnesses. In deciding how much weight to give each witness’s opinion, you should consider the witness' qualifications and how he or she reached his or her conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.

Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.03

COURT'S INSTRUCTION NO. _____

WITNESS TESTIFYING TO BOTH FACTS AND OPINIONS

(1) You have heard the testimony of _____, who testified to both facts and opinions. Each of these types of testimony should be given the proper weight.

(2) As to the testimony on facts, consider the factors discussed earlier in these instructions for weighing the credibility of witnesses.

(3) As to the testimony on opinions, you do not have to accept _____'s opinion[s]. In deciding how much weight to give it [them], you should consider [each] witness's qualifications and how he [or she] reached his conclusions along with the other factors discussed in these instructions for weighing the credibility of witnesses.

(4) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.03A

COURT'S INSTRUCTION NO. _____

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT NOT UNDER OATH

You have heard the testimony of some witnesses about whom you have heard that before this trial s/he made a statement that may be different from his/her testimony here in Court.

This earlier statement was brought to your attention only to help you decide how believable his/her testimony was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.04 (as modified).

COURT'S INSTRUCTION NO. _____

**TESTIMONY OF A WITNESS UNDER A GRANT OF IMMUNITY
OR REDUCED CRIMINAL LIABILITY**

You have heard the testimony of witnesses who have been promised by the government that they will receive immunity or a reduced sentence in return for their cooperation.

It is permissible for the government to make such a promise. But you should consider their testimony with more caution than the testimony of other witnesses. Consider whether the testimony may have been influenced by the government's promise.

Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe the testimony beyond a reasonable doubt.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.07

COURT'S INSTRUCTION NO. _____

TESTIMONY OF AN ACCOMPLICE

You have heard the testimony of several witnesses who were accomplices in the crimes charged in the indictment. You should consider their testimony with more caution than the testimony of other witnesses.

Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

The fact that some witnesses have pled guilty to a crime is not evidence that the defendant is guilty, and you cannot consider this against the defendant in any way.

COURT'S INSTRUCTION NO. _____

IMPEACHMENT OF A WITNESS BY PRIOR CONVICTION

You may have heard the testimony of witnesses who have previously been convicted of a crime.

This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. Do not use it for any other purpose. It is not evidence of anything else.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.05B

COURT'S INSTRUCTION NO. _____

CHARACTER AND REPUTATION OF DEFENDANT

You have heard testimony about the defendant's good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.09

COURT'S INSTRUCTION NO. _____

SUMMARIES AND OTHER MATERIALS NOT ADMITTED IN EVIDENCE

During the trial you have seen counsel use summaries, charts, or similar material which were offered to assist in the presentation and understanding of the evidence. This material is not itself evidence and must not be considered as proof of any facts.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.12

COURT'S INSTRUCTION NO. _____

SECONDARY – EVIDENCE SUMMARIES ADMITTED IN EVIDENCE

During the trial you have seen or heard summary evidence in the form of a chart, calculation, or testimony. This summary was admitted in evidence, in addition to the material it summarizes, because it may assist you in understanding the evidence that has been presented.

But the summary itself is not evidence of the material it summarizes, and is only as valid and reliable as the underlying material it summarizes.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 7.12A

COURT'S INSTRUCTION NO. _____

TRANSCRIPTIONS OF RECORDED CONVERSATIONS

You have heard some recorded conversations that were received in evidence, and you have seen some written transcripts of the recordings.

Keep in mind that the transcripts are not evidence. They were shown only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

PART NINE:
CONCLUDING INSTRUCTIONS

COURT'S INSTRUCTION NO. _____

INTRODUCTION

That concludes the part of my instructions explaining the rules for considering particular testimony and evidence. Now let me explain some things about your deliberations in the jury room, and your possible verdicts.

The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

Once you start deliberating, do not talk to the jury officer or to me or to anyone else about the case. We must communicate in writing. Write down your message, sign it, and then give it to the jury officer. He or she will give it to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Your messages should normally be sent to me through your foreperson.

If you want to see any of the exhibits that were admitted into evidence, you may send me a message, and those exhibits will be provided to you.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

COURT'S INSTRUCTION NO. _____

EXPERIMENTS, RESEARCH AND INVESTIGATION

Remember that you must make your decision based only on the evidence that you saw and heard here in court. This means that you must not try to gather any information about the case on your own while you are deliberating.

This means that during deliberations you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case.

Make your decision based only on the evidence that you saw and heard here in court.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 8.02 (as modified)

COURT'S INSTRUCTION NO. _____

UNANIMOUS VERDICT

Your verdict, whether it is guilty or not guilty, must be unanimous. This means that to find a defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

And to find a defendant not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt. Either way, guilty or not guilty, your verdict must be unanimous.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 8.03

COURT'S INSTRUCTION NO. _____

DUTY TO DELIBERATE

Once the closing arguments are completed, you may talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement.

Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and you are wrong.

But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that---your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what everyone else has to say, and then decide for yourself if the government has proved the defendants guilty beyond a reasonable doubt.

COURT'S INSTRUCTION NO. _____

JUROR NOTES

If you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence.

You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 8.10

COURT'S INSTRUCTION NO. _____

PUNISHMENT

If you decide that the government has proved one or more of the defendants guilty, then it will be my job to decide what the appropriate punishments should be.

Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

Your job is to look at the evidence and decide if the government has proved one or more of the defendants guilty beyond a reasonable doubt. If it has, say so. If it has not, say so.

COURT'S INSTRUCTION NO. _____

VERDICT FORM

I have prepared a verdict form that you should use to record your verdict. The form reads as follows: [read form].

If you decide that the government has proved the charge against a defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the charge against a defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson should then sign the form, put the date on it, and return it to me.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 8.06

COURT'S INSTRUCTION NO. _____

COURT HAS NO OPINION

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved each defendant guilty beyond a reasonable doubt as to each of the charges.

Sixth Circuit Pattern Criminal Jury Instructions, 2011 Edition, § 8.09