

1 Jeremy Warren
2 WARREN & BURSTEIN
3 State Bar No. 177900
4 501 West Broadway, Suite 240
5 (619) 234-4433
6 jw@wabulaw.com

7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA,) Case No.: 19cr4768-GPC
10)
11 Plaintiff,) Defendant's proposed jury instructions
12)
13 v.)
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15 GIOVANNI TILOTTA,)
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17 Defendant.)
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29 **Introduction**

30 Undersigned counsel has reviewed the government's proposed jury
31 instructions. Counsel concurs with most of the Ninth Circuit Model Instructions,
32 requests certain modifications to some, and addresses the government's proposed
33 instructions.
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1. No Objection.

Mr. Tilotta concurs with the following proposed instructions, as requested by the government:

Model No.	Title of model instruction
1.1	Duty of jury
1.2	<i>(See below)</i> ¹
1.3	What is evidence
1.4	What is not evidence
1.6	Ruling on objections
1.7	Credibility of witnesses
1.8	Conduct of the jury
1.9	No transcript available to the jury
1.10	Taking notes
1.11	Outline of trial
1.13	Separate consideration for each defendant
1.14	Questions to witnesses by jurors during trial
1.16	Bench conferences and recesses
2.1	Cautionary instruction – first recess
2.3 (if appropriate)	Stipulations of fact
2.6	Transcript of recording in English
2.10	Other crimes, wrongs or acts of defendant
2.12	Evidence for limited purpose
3.1	Duties of jury to find facts and follow law
3.2	<i>(See below)</i>
3.3	Other crimes, wrongs or acts
3.8	Impeachment evidence – Witness
3.9	Testimony of witnesses involving special circumstances – immunity, benefits, accomplice, plea
3.10	Government use of undercover agents and informants
3.14	Opinion evidence, expert witnesses

¹ As discussed below, Mr. Tilotta submits this instruction can be combined with the reasonable doubt and burden of proof instructions. Alternatively, Mr. Tilotta concurs with the Model Instruction.

3.16-17

Charts and summaries-admitted/not admitted

2. Proposed modifications to general instructions.

Mr. Tilotta proposes modifications to the following instructions:

Model No.	Title of model instruction
1.2	The charge – presumption of innocence
6.2	Charge against defendant not evidence – presumption of innocence – burden of proof
1.5	Direct and circumstantial evidence

A. Presumption of innocence

These are the preliminary and end-of-case presumption of innocence instructions. Each includes a statement that the accused is “presumed innocent *unless and until* the government proves the defendant guilty beyond a reasonable doubt.” (emphasis added). The phrase is problematic because it implies both that the presumption disappears at some point and also that proof of the defendant’s guilt is inevitable. Accordingly, Mr. Tilotta objects and asks the Court to make one of the changes suggested below.

First, the Court could simply excise out the clause, and emphasize that the presumption remains throughout the case. As modified, instruction 1.2 would read:

This is a criminal case brought by the United States government. The government charges the defendant with [specify crime[s] charged]. The charges against the defendant are contained in the indictment. The indictment simply describes the charges the government brings against the defendant. The indictment is not evidence and does not prove anything.

The defendant has pleaded not guilty to the charges and is presumed innocent ~~and until the government proves the defendant guilty beyond a reasonable~~

1 ~~doubt throughout the trial~~. In addition, the defendant has the right to remain
2 silent and never has to prove innocence or to present any evidence.

3 And as modified, instruction 6.2 should read:

4 The indictment is not evidence. The defendant has pleaded not guilty to the
5 charges. The defendant is presumed to be innocent ~~and until the government~~
6 ~~proves the defendant guilty beyond a reasonable doubt throughout the trial..~~
7 In addition, the defendant does not have to testify or present any evidence ~~to~~
8 ~~prove innocence~~. The defendant does not have to prove innocence; the
9 government has the burden of proving every element of the charges beyond a
10 reasonable doubt.

11 Alternatively, the Court could use language from one of our sister Circuits.

12 The Fifth Circuit's instruction is entitled "presumption of innocence, burden of proof,
13 reasonable doubt." See Fifth Circuit Model Jury Instruction 1.05
14 (<https://www.lb5.uscourts.gov/juryinstructions/fifth/crim2019.pdf>). It states in
15 relevant part:

16 The indictment or formal charge against a defendant is not evidence of guilt.
17 Indeed, the defendant is presumed by the law to be innocent. The defendant
18 begins with a clean slate. The law does not require a defendant to prove his
19 innocence or produce any evidence at all [and no inference whatever may be
20 drawn from the election of a defendant not to testify].

21 The government has the burden of proving the defendant guilty beyond a
22 reasonable doubt, and if it fails to do so, you must acquit the defendant. While
23 the government's burden of proof is a strict or heavy burden, it is not necessary
24 that the defendant's guilt be proved beyond all possible doubt. It is only
25 required that the government's proof exclude any "reasonable doubt"
26 concerning the defendant's guilt.

27 The 7th Circuit takes a similar approach, explaining the presumption of
28 innocence applies "throughout the trial." Still, like the 9th Circuit, it does include
"unless" language:

1 [The; Each] defendant is presumed innocent of [each and every one of]
2 the charge[s]. This presumption continues throughout the case. It is not
3 overcome unless, from all the evidence in the case, you are convinced beyond
4 a reasonable doubt that the [defendant; particular defendant you are
5 considering] is guilty as charged.

6 The government has the burden of proving [the; each] defendant's guilt
7 beyond a reasonable doubt. This burden of proof stays with the government
8 throughout the case.

9 [The; A] defendant is never required to prove his innocence. He is not
10 required to produce any evidence at all.

11 7th Circuit Model Instruction 1.03 ([https://www.ca7.uscourts.gov/pattern-jury-](https://www.ca7.uscourts.gov/pattern-jury-instructions/pattern-criminal-jury-instructions-2020edition.pdf)
12 [instructions/pattern criminal jury instructions 2020edition.pdf](https://www.ca7.uscourts.gov/pattern-jury-instructions/pattern-criminal-jury-instructions-2020edition.pdf)). At least it
13 tempers the word "unless" with a reminder that the presumption remains
14 throughout the case and is only capable of being overcome *after* the jury hears "all
15 the evidence," neither of which the 9th Circuit instruction accomplishes.

16 The bottom line is this: the 9th Circuit instruction is misleading, improperly
17 suggesting the government will meet its burden, and failing to tell the jury the
18 presumption of innocence never evaporates. As such, the model instruction violates
19 Mr. Tilotta's right to due process and a fair trial. The Court can correct this via
20 adopting tried and true instructions from other circuits, or to use his Proposed
21 Instruction No. 1 below.
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Proposed Instruction No. 1

Burden of Proof, Reasonable Doubt, Activities Not Charged

I instruct you that you must presume a defendant to be innocent of the crimes charged. Thus a defendant, although accused of crimes in the indictment, begins the trial with a “clean slate” – with no evidence against him. The indictment, as you already know, is not evidence of any kind.

The defendant is, of course, not on trial for any act or crime not contained in the indictment. The law permits nothing but legal evidence presented before the jury in court to be considered in support of any charge against a defendant.

The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if during your deliberations you conclude from the evidence that the government has proved, beyond a reasonable doubt, each element of the crime charged.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

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

1 sense and is not based purely on speculation. It may arise from a careful and
2 impartial consideration of all the evidence, or from lack of evidence.

3 Unless the government proves, beyond a reasonable doubt, each and every
4 element of an offense charged in the indictment, you must find the defendant not
5 guilty of that offense.
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7 If after a careful and impartial consideration with your fellow jurors of all the
8 evidence, you are not convinced beyond a reasonable doubt that a defendant is guilty
9 of any or all charged counts, it is your duty to find that defendant not guilty on that
10 or those counts. On the other hand, if after a careful and impartial consideration
11 with your fellow jurors of all the evidence, you are convinced beyond a reasonable
12 doubt that a defendant is guilty of any charged count, it is your duty to find that
13 defendant guilty of that or those counts.
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17 Authority

18 The instruction is an accurate statement of the law, and it incorporates - but
19 is more complete than - the Ninth Circuit's model instructions on burden of proof
20 (3.2), reasonable doubt (3.5), and acts not charged (3.10). The proposed instruction
21 has been given several times in this district. *See United States v. Lozano-Medel*,
22 06cr1619-BTM (S.D. Cal. 2006); *United States v. Flaherty*, 07cr0621-BTM (S.D. Cal.
23 2007); *United States v. Lovin, et. al.*, 07cr2016-IEG (S.D. Cal. 2009) (modified to
24 include multiple charged counts).
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B. Direct and circumstantial evidence

Next, Mr. Tilotta urges the Court to give a modified and more complete instruction regarding direct and circumstantial evidence, as reflected in his Proposed Instruction No. 2, below.

Proposed Instruction No. 2:**Direct and Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as sprinklers, may explain the water on the sidewalk. Therefore, before you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any evidence. Also, if the circumstantial evidence permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt. If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

Authority

This instruction is legally accurate, and helpful to the jury's understanding of different types of evidence. It both encompasses and expands upon Ninth Circuit model instructions (1.5 and 3.8). A version of this is routinely given in California courts. See Judicial Council of California Criminal Jury Instructions (2016) CALCRIM No. 223 (Direct and Circumstantial Evidence: Defined) and CALCRIM No. 224 (Circumstantial Evidence: Sufficiency of Evidence). This instruction was given in *United States v. Murillo, et. al.*, 05cr069-VAP (C.D. Cal. 2008).

3. Case-specific instructions

A. 11.1 – conspiracy.

Preliminarily, a minor point. Mr. Tilotta requests that the instructions not use his name in all-capital letters. All-caps are a vestige of an earlier era, and while the case title uses capital letters, they need not and should not be used elsewhere.

Moving on, the government’s proposed instruction appears to accurately reflect the law. However, the Court should strike the paragraph on the bottom of page 4, stating the government need not prove the false statements “related to the lawfulness of the underlying sale.” While that may be legally accurate, it is unnecessary, and the instructions already are sufficiently complicated. The additional language will only complicate and confuse the jury – and potentially water down the burden – by inserting “need not prove.”

B. Conspiracy – multiple conspiracies.

Mr. Tilotta requests the Court provide the jury with instruction 11.3 on multiple conspiracies.

C. 14.3, 4.1 – aiding and abetting Garmo’s unlicensed gun business

The government’s proposed instruction is a good starting point. Mr. Tilotta requests the following modifications (and includes an edited version below):

1. On page 8 of the government’s filing, the last sentence of the second to last paragraph should read: “The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and

intention of helping that person *commit the crime of* dealing in firearms without a license.” This language more closely tracks the model instruction 4.1 and minimizes confusion to the jury.

2. As to the substantive crime defined on page 9 of the government’s instruction, Mr. Tilotta ask the Court to change the following paragraph as follows:

The government must prove beyond a reasonable doubt that Morad Marco Garmo ~~engaged in a greater degree of activity than the occasional sale of a hobbyist or collector, and that Garmo~~ devoted time, attention and labor to selling firearms as a trade or business with the *principal or predominant objective of livelihood and profit* through the repeated purchase and sale of firearms. A person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms, *or who has other intentions beyond livelihood or profit*, is not engaged in the business of dealing in firearms.

The strikethrough section is covered in the second half of the instruction. The first italicized section is the statutory definition of “engaged in the business” of dealing firearms, 18 U.S.C. § 921(a)(21)(C). The second italicized addition is taken from the statute’s further definition of “the principal objective of livelihood and profit,” 18 U.S.C. § 921(a)(22).

3. The Court should strike the penultimate paragraph stating, “The government need not prove profits if the person was engaged in the regular and repetitive purchase and disposition of firearms for

1 criminal purposes.” This language is drawn from § 921(a)(22). But
2 it is clear from its language that this subsection addresses whether
3 the firearms are *used* for “criminal purposes or terrorism.” §
4 921(a)(22). There is no evidence that any of the firearms Garmo sold
5 were for going to be used for criminal purposes or terrorism, e.g., to
6 commit robberies or drug deals. Indeed, to the contrary, the
7 government’s alleged straw purchasers were businessmen, attorneys
8 and even a judge simply seeking to purchase guns they could buy
9 over the counter in 49 other states. As such, this portion of the
10 instruction is unnecessary, confusing, and unhelpful.

11 The revised instruction incorporating Mr. Tilotta’s suggested edits are
12 attached on the next page (including taking his name out of all-caps).
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**14.3, 4.1 AIDING AND ABETTING
DEALING IN FIREARMS WITHOUT A LICENSE**

Defendants Tilotta and Anton are charged in Count 2 of the indictment with aiding and abetting dealing firearms without a license, in violation of Sections 922(a)(1)(A) and 2 of Title 18 of the United States Code.

To prove a defendant guilty of dealing in firearms without a license by aiding and abetting, the government must prove each of the following elements beyond a reasonable doubt:

First, Morad Marco Garmo committed the crime of dealing in firearms without a license;

Second, the defendant aided, counseled, commanded, induced or procured Garmo with respect to at least one element of engaging in the business of dealing in firearms without a license;

Third, the defendant acted with the intent to facilitate dealing in firearms without a license; and

Fourth, the defendant acted before the crime was completed.

To be guilty of aiding and abetting a crime, it is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person *commit the crime of* dealing in firearms without a license.

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime.

1 In turn, the elements of the crime of dealing in firearms without a license are:

2 First, Morad Marco Garmo was willfully engaged in the business of dealing in
3 firearms beginning no later than October 21, 2015 and continuing up to and including
4 February 13, 2019; and

5 Second, Garmo did not then have a license as a firearms dealer.

6 The government must prove beyond a reasonable doubt that Morad Marco Garmo
7 ~~Garmo engaged in a greater degree of activity than the occasional sale of a hobbyist or~~
8 ~~collector, and that Garmo~~ devoted time, attention and labor to selling firearms as a trade or
9 business with the *principal or predominant objective of livelihood and profit* through the
10 repeated purchase and sale of firearms. A person who makes occasional sales, exchanges,
11 or purchases of firearms for the enhancement of a personal collection or for a hobby, or
12 who sells all or part of his personal collection of firearms, *or who has other intentions*
13 *beyond livelihood or profit*, is not engaged in the business of dealing in firearms.

14 For a person to engage in the business of dealing in firearms, it is not necessary to
15 prove an actual sale of firearms. Nor is it necessary to prove that dealing in firearms was
16 the person's primary business.

17 ~~The government need not prove profits if the person was engaged in the regular and~~
18 ~~repetitive purchase and disposition of firearms for criminal purposes.~~

19 Willfully, as used in this statute, requires proof that Morad Marco Garmo knew that
20 his conduct was unlawful, but does not require proof that Garmo knew of the federal
21 licensing requirement.
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D. Substantive instructions for Counts 4 and 5.

The government's proposed instructions for the substantive charges of aiding and abetting false statements in the acquisition of a firearm (counts 4 and 5) require modification to mirror the allegations in the indictment.

The indictment alleges the gravamen of each offense was Mr. Tilotta's accepting an ATF Form 4473 stating that Garmo or Magana were the actual buyer of certain firearms when in truth and in fact, Mr. Tilotta well knew that they were acquiring the firearms on behalf of Hamel. *See* Superseding Indictment, docket 152. To avoid a constructive amendment of the indictment, the instruction for these counts should pinpoint the alleged false statement actually charged.

To this end, Mr. Tilotta suggests the following edits:

1. Count 4 instruction. Insert, after "Second, the defendant aided, counseled, commanded, induced or procured Garmo with respect to at least one element of making a false statement in the acquisition of a firearm," the following: "by accepting an ATF Form 4473 claiming that Morad Marco Garmo was the actual buyer of the Sig Sauer P226 Legion 9mm pistol, while knowing that Leo Hamel was the actual purchaser."
2. Also, after "First, Morad Marco Garmo knowingly made a false statement or representation," the following: "by claiming that he was the actual buyer of the Sig Sauer P226 Legion 9mm pistol, when in

1 truth and in fact, Leo Hamel was the actual buyer.”

2 The Count 5 instruction should be changed in accord, substituting in Magana
3 for Garmo, and the Walther PPS M2 9mm pistol for the Sig Sauer.
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5 **E. Count 7 instruction, 14.9**

6 Mr. Tilotta requests the following modifications to the instruction relating to
7 the sale of firearms in violation of California law as charged in Count 7:
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9 A. The third element should specify that Mr. Tilotta knew the location of the
10 sale *or delivery* was in violation of state law.

11 B. The paragraph outlining California’s rules on firearm sales or deliveries is
12 a summary. The model instruction does not include one. If the Court
13 deems it necessary, it should include the entirety of Cal. Penal Code 26805,
14 and short of that, should include subsection (d), which lists permissible
15 delivery locations.
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19 **Conclusion**

20 Mr. Tilotta asks the Court to accept his proposed and modified instructions.
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22 Respectfully submitted,

23 Dated: February 22, 2022

24 /s/ Jeremy Warren
25 Jeremy Warren
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