

**SUBSTANTIVE JURY INSTRUCTIONS**  
**United States v. W. Carl Reichel**  
**No. 15-cr-10324-DPW**

This case started with this document, the Indictment. This is the document that frames the case by setting forth what the government has undertaken to prove. But I want you to understand this document is ultimately just three pieces of paper. These pieces of paper are being provided to you as a way for you to understand the dimensions of the case and follow along in evaluating what the government undertakes.

There are two related things that you should also understand. This document does not prove anything and it is not evidence of anything. You have to make the independent judgment in this case whether the evidence that was admitted satisfies the elements of the offense as to which I am going to instruct you.

Your report of your judgment is going to be recorded on another document, the verdict slip which you are also being provided. The verdict slip asks you to tell us if the defendant is “NOT GUILTY” or “GUILTY”. You can see that there is a single

count as to which we seek your judgment; that is a conspiracy charge. What you are going to do is ask yourselves, and then tell us, is: “Has the government satisfied me beyond a reasonable doubt that evidence proves Mr. Reichel is guilty of the Conspiracy charged in the Indictment?”

At the heart of this case is what is known as the Anti-Kickback Statute governing federal health care programs. If you turn to paragraph 9 of the Indictment you will see reference to violation of that statute, Title 42 of the United States Code Section 1320a-7b(b)(2)(B) as the purpose of the charged conspiracy.

This statute provides in relevant part that one who:

Knowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person

.....

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item from which payment may be made in whole or in part under a Federal health care program,

shall be guilty of an offense against the United States.

The specific object of the conspiracy here, as charged in

paragraph 10 of the Indictment, was for Mr. Reichel and co-conspirators to unlawfully enrich themselves and Warner Chilcott by paying remuneration to physicians to induce prescriptions of Warner Chilcott drugs.

The Anti-Kickback Statute reflects a policy choice that whatever may be acceptable practice in other business settings, in the prescribing of drugs – a very sensitive business and professional setting - it is against the law to provide remuneration to induce prescriptions to be written on any basis other than a disinterested evaluation of the medical needs of patients. I will instruct you in a minute as to the precise elements that the Government must prove to establish a violation of the Anti-Kickback Statute that implements this policy. For present purposes you should understand as background the policy behind the statute.

The statute is not concerned with whether the Warner Chilcott drugs at issue are in comparison with similar drugs marketed by competitors more or less efficacious or more or less expensive. Consequently you are not being asked to render a judgment about the relative medical or economic benefits of the drugs in question.

The statute you are dealing with addresses what constitutes improper payments in the marketing of drugs.

As I will explain to you in a moment, while the government need not prove that the conspiracy was successful and resulted in any actual violation of the Anti-Kickback Statute (although evidence regarding results may be used by you to evaluate whether a conspiracy as charged existed and whether Mr. Reichel joined in it), you need to understand the elements of the Anti-Kickback Statute to understand the purpose of the charged conspiracy. The elements of the Statute can be stated in four parts:

- [1] the offer or payment or the causing of any offer or payment of remuneration,
- [2] part of the purpose of which was to induce orders or induce a physician to order or arrange for the order of Warner Chilcott drugs in return for the remuneration,
- [3] that those Warner Chilcott drugs were paid for in whole or in part by a Federal health care program, and
- [4] that the purposeful inducement in element [2] was knowing and willful

Let me further define the core terms in these elements.

“Remuneration” means something of value in whatever form.

It may be cash or something in kind. Paying for a meal for a person

involved in making orders for drugs can be remuneration. Giving a person the opportunity to earn money as a speaker on behalf of the company can be remuneration.

“Induce” in this context means to undertake to gain influence over the judgment of the physician making a decision regarding the prescription and order of drugs. More specifically, as charged in this indictment, the contemplated inducement must be what is referred to as a *quid pro quo* (“this for that”) transaction, one in which a person pays for meals or gives speaker payments (the “this”) to a physician in exchange for the order or prescribing of Warner Chilcott drugs (the “that”).

In order to be a relevant inducement the remuneration must involve an intent to execute a *quid pro quo* transaction. A defendant cannot be convicted of the Anti-Kickback statute merely because he sought to cultivate a business relationship or create a reservoir of goodwill that might ultimately affect one or more unspecified purchase or order decisions. If the remuneration is only for a purpose other than seeking to effect a *quid pro quo* transaction of payments of remuneration for order or purchase of

drugs, it is not within the scope of the Anti-Kickback Statute.

However, a defendant may act with a mixture of motives and the Government's burden is to prove that part of the remuneration is intended to compensate for past orders and/or induce future orders; but it is not required to prove that such compensation was the only reason for the remuneration.

“Knowing[ly]” means that the act was done voluntarily and intelligently and not because of ignorance or misunderstanding.

“Willful[ly]” means that the act was done voluntarily and intentionally and with the specific intent that the elements of the offense be undertaken, that is with bad purpose either to disobey or disregard the law, and not because of some mistake. A person need not have actual knowledge of the precise federal statute at issue or specific intent to violate that particular law. A person acts willfully if he acts unjustifiably and wrongly while knowing that his actions are unjustifiable and wrong.

Since an essential element of the offense is that it be undertaken “knowingly” and “willfully,” it follows that good faith on the part of the defendant is a complete defense. It is for you to

decide whether or not the defendant acted in good faith, but if you decide that at all relevant times he acted in good faith, it is your duty to acquit him. The government has to prove intent, and that means overcoming any reasonable doubt regarding the defendant's good faith. That is to say, however intentional the conduct may have been, the law is not violated if the defendant acted in good faith and held an honest belief that his actions were proper and not in furtherance of some illegal venture. The defendant has no burden to prove the defense of good faith. The burden is on the government to prove criminal intent and, consequently, to prove lack of good faith.

With an understanding of the elements of the underlying offense - an Anti-Kickback Statute violation - in mind, let me now explain the elements of Conspiracy, the precise offense with which the defendant is charged. For you to find the defendant guilty of Conspiracy, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First, that the agreement specified in the indictment — and not some other agreement or undertakings — existed between at

least two people to achieve the objective that I have outlined, that is, violation of the Anti-Kickback Act.

Second, that the defendant knowingly and wilfully joined in that agreement. The terms “knowingly” and “willfully” are defined for purposes of the Conspiracy charge in the same way I have defined them in discussing the Anti-Kickback Statute

And, third, that one of the conspirators committed an act in Massachusetts - called an “overt act” - during the period of the conspiracy in an effort to further the purposes of the conspiracy.

A “conspiracy” is a criminal agreement. The agreement can be spoken or unspoken. It does not have to be embodied in a formal written agreement. It does not have to be set forth with the comprehensive detail of a Trust Indenture or an insurance contract. But it must be an understanding between two or more individuals (and not simply between a person and a corporation because a corporation and an individual may not conspire with each other) in which the persons involved share the basic agreement as to what it was that they were undertaking to do, here to violate the Anti-Kickback Statute. That does not mean they had a formal meeting



in which they sat down, shook hands and agreed to do it. You should look at the evidence in a practical, functional common sense sort of way. You must reach your conclusion after evaluating all the evidence to determine the nature of any relevant relationships, the manner in which those relationships were manifested and the intent which those relationships reflect.

The government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people or the fact that they may have associated with each other or discussed common aims or interests does not necessarily establish proof of the existence of a conspiracy, although you may consider those facts, if you find them, in deciding whether there was an agreement.

What the government must do is prove two types of intent beyond a reasonable doubt. First, that the defendant knowingly and willfully joined the charged conspiracy: that is an intent to agree. Second, that the defendant shared with one or more co-conspirators an intent that the underlying crime of violating the Anti-Kickback Statute would be committed; that is an intent to

violate the law. Mere presence or professional involvement or position in an organization's hierarchy with conspirators when conspiratorial acts are being undertaken is not enough, but you may consider that, as with all of the evidence, in deciding whether or not it has been proved beyond a reasonable doubt there was such an agreement — an agreement with both intents, that is, the intent to agree and the intent to undertake the particular purpose as charged in the indictment – in which the defendant joined

Generally, the way in which you begin to approach proof of this is to ask yourself what is it that the defendant said in his own words and did in his own deeds? That is the starting point. That is the touch point. You have got to ask yourself, “What did the defendant do here, and did it manifest the kind of agreement that is alleged here?” You may then analyze the remainder of the evidence from that perspective. And you may use both direct and circumstantial evidence, as seems reasonable to you, in reaching your judgment.

You do not have to find that the defendant knew specifically about all the details or knew every other co-conspirator who was

involved, or that he participated in each act of the agreement, or even that he played a major role, but the government must prove beyond a reasonable doubt that he knew the essential features and general aims of the venture and agreed to them.

Even if a defendant was not part of the agreement at the very start, he can be found guilty of Conspiracy if the government proves that he willfully and knowingly joined that agreement later and all the elements of the conspiracy charge are proven beyond a reasonable doubt. On the other hand, if a person has no knowledge of a conspiracy but simply happens to act at some point in some way that furthers some object or purpose of the conspiracy, he does not thereby become a conspirator, although, again, those are factors – if you find them - that you may consider in evaluating whether the Government has met its burden of proof beyond a reasonable doubt that the defendant joined the conspiracy.

With respect to the element of an “overt act,” what the Government is required to prove beyond a reasonable doubt is that an act was knowingly and willfully committed by one or more of the conspirators in an effort to accomplish some purpose of the

conspiracy. A conspiracy may involve many overt acts but only one overt act has to be proven to satisfy this element. The government is not required to prove that the defendant personally, himself, committed or even knew about the overt act. It is sufficient if one co-conspirator committed one overt act at some time during the period of the conspiracy. The overt act does not itself have to be illegal, but it has to be an act that furthers the purposes of the conspiracy.

Any overt act that you find must have taken place in Massachusetts. This requirement is important to determine whether this Court is the proper place to try the defendant for this offense. A federal conspiracy charge may be tried in any United States District Court where an overt act in furtherance of the conspiracy occurred. It is the Government's burden to prove that an overt act in furtherance of the Conspiracy charged took place in Massachusetts.

Ultimately the government does not have to prove that the conspiracy succeeded or its objects were achieved; although, here they argue that this was such a case. But for purposes of Count

One, the Conspiracy count alleged against Mr. Reichel, it is sufficient for the government to prove beyond a reasonable doubt – together with all of the elements I have explained to you - that there was an agreement to achieve its object. The crime of conspiracy is then considered completed so long as the other elements are met, irrespective of whether it successfully achieves its objectives. This is because conspiracy is considered a separate crime from the substantive offense that is its object. The law views agreements to engage in the violations of the law as independently dangerous. The law calls such agreements “conspiracies,” and has established a separate crime independent from the underlying substantive crime that is the object of the conspiracy. That separate crime of conspiracy is the crime of which Mr. Reichel is accused.