

1 Friday, October 7, 2015.

2 THE COURTROOM DEPUTY: United States versus Jamal
3 Adams.

4 THE COURT: Okay folks. Welcome back. We have a
5 note from the jury. Let me just you read it into the record.
6 I think you've been given a copy.

7 All right. I understand you have not been but let
8 me read it for you. It is a little bit lengthy but I think
9 fairly clear.

10 "Question on Count I. The opening paragraph
11 includes three "means" by which the defendant corruptly
12 endeavored to obstruct and impede the Internal Revenue laws
13 namely (A) false W4s, (B) false documents to Bankruptcy
14 Court, and (C) false tax returns. Our question is, do we
15 need to find that all of A, B and C each meet each of the
16 three elements of the count to find him guilty? That is, if
17 we find the defendant guilty of A, but not guilty of B, and
18 not guilty of C, must we find the defendant not guilty of
19 Count I, or do we find him guilty of Count I because we found
20 him guilty of A?"

21 I think the answer is pretty clear that the
22 government doesn't need to prove that he has committed all of
23 the offenses here. So I would propose --

24 Let me propose a response to them, then I will hear
25 from you folks momentarily.

1 (There was a pause in the proceedings.)

2 THE COURT: I would propose answering something
3 along the lines of, the government must prove beyond a
4 reasonable doubt all three elements of Count I. But the
5 government need not prove all three of the means listed.

6 The defense's position on that?

7 MR. GARDNER: Your Honor, I agree with your premise.
8 My concern is --

9 Court's indulgence for one second.

10 THE COURT: Sure.

11 MR. GARDNER: Defense's position is they need to be,
12 even though they can find one, two or three, that they don't
13 need to find one, two and three. The defense's position is
14 they need to be unanimous on whether it is one, two or three.

15 THE COURT: I'm not sure that's correct, but they
16 seem to indicate -- I mean, let me propose something else.
17 Then I'll hear from the government because it seems they're
18 not -- there is no issue on unanimity within means. It's
19 just whether they need to agree on all the means.

20 MR. GARDNER: That's true.

21 THE COURT: But I could say, how about if I said:
22 The government must prove beyond a reasonable doubt all three
23 elements of Count I, but the government need not prove all
24 three of the means listed as long as you all agree on one of
25 the means?

1 MR. GARDNER: I think that's exactly right, Your
2 Honor.

3 THE COURT: All right.
4 Government?

5 MS. SISKIND: There is actually a case on point on
6 that issue. I don't have the name. But if your clerk
7 searches 7212(a) and specific unanimity, it should be the
8 first case that comes up. It was a case where a judge sua
9 sponte gave an instruction.

10 THE COURT: That's Williams from the 10th circuit.

11 MS. SISKIND: Yes, Your Honor.

12 THE COURT: It says you don't need a unanimity
13 instruction.

14 MS. SISKIND: Yes, Your Honor.

15 THE COURT: So the question though, obviously that's
16 not a D.C. Circuit case. And the defense never requested
17 unanimity instruction in the jury instructions, and maybe,
18 therefore, if they don't get one -- if I give the instruction
19 I was prepared to give, that they have waived it.

20 But if the Court of Appeals finds they have not
21 waived it and they find there is unanimity required in this
22 circuit, then you could lose. So the question tactically is,
23 since the jury does not indicate there is any dissent within
24 a means, maybe you are better off with this instruction
25 protectively than an argument that down the road is accepted

1 by the Court of Appeals.

2 MS. SISKIND: May I confer with Mr. McLellan?

3 (There was a pause in the proceedings.)

4 MS. SISKIND: Your Honor, we're going to object to a
5 specific unanimity instruction. It wasn't proposed initially
6 by the defense, even though there is nothing on point in the
7 D.C. Circuit, the one case, the only case I've ever located
8 on this issue finds it is not a necessary instruction. And
9 that it impermissibly expands the government's burden in this
10 case. As long as the jury finds each of the three elements
11 beyond a reasonable doubt unanimously, that is sufficient.
12 Unanimity as to means is not required for the statute.

13 THE COURT: That's what this case says, Mr. Gardner,
14 actually I looked at the case before the jury instructions
15 came up, in the event that somebody raised the unanimity
16 question. And that case, actually the District Court Judge
17 there sua sponte gave the unanimity instruction. The
18 defense, on appeal, the defense objected to that. The Court
19 of Appeals said, it was error to give it. But how are you
20 prejudiced? This helped you. So, it affirmed the
21 conviction. But the point is, that the Court of Appeals did
22 say on this specific code section, it was error to give a
23 unanimity instruction.

24 MR. GARDNER: I actually did see that Williams case,
25 it was in the instructions. But I agree with Ms. Siskind

1 that that was the only case I could find from any circuit
2 court. As you pointed out, it was not binding precedent from
3 the Supreme Court or this circuit. So we don't know what the
4 Supreme Court will say, if it ever gets there, which right
5 now it doesn't appear on the path right now.

6 THE COURT: I'm not going to give it because that is
7 the law, you know, Williams has directly -- the Court of
8 Appeals looked at this directly, has determined this -- it
9 made sense to me when I read the case. The government may be
10 taking a bit of a risk and maybe they're giving you an
11 appellate issue. But my job can't be to protect myself. It
12 has to be to follow what I believe the law is and it appears
13 to me it is not unanimity on this count.

14 MR. GARDNER: We understand, Your Honor.

15 THE COURT: Okay. So any objection beyond that to
16 what I've proposed? Let me read I again for you.

17 The government must prove beyond a reasonable doubt
18 all three elements of Count I. But the government need not
19 prove all three of the means listed.

20 MR. GARDNER: No, Your Honor.

21 THE COURT: Any objection by the government to that
22 proposed instruction?

23 MS. SISKIND: No, Your Honor.

24 THE COURT: I'm sorry, let me just state for the
25 record, and I was -- Williams must have been another case.

1 Williams is not the case in which this came up. Let me give
2 you the cite for this case. I apologize to everybody.
3 Williams dealt with this code section and also it is a 10th
4 Circuit case. But it was not on the unanimity issue. So I
5 apologize for the mix up. The case is U.S. v. Sorensen,
6 S-o-r-e-n-s-e-n. I'll give you the Westlaw cite, it's a 2015
7 case, 2015 WL 5315645, 10th circuit, just for everybody's
8 edification.

9 Okay, let's bring the jury in and I'll give them the
10 instruction.

11 (Jury Present)

12 THE COURT: Okay, folks. Thanks for your note. I
13 got it. Let me read it again to remind you folks what it
14 was.

15 The question on Count I, the opening paragraph
16 includes three means by which the defendant corruptly
17 endeavored to obstruct and impede the Internal Revenue laws
18 namely (A) false W4s, (B) false documents to Bankruptcy Court
19 and (C) false tax returns. Our question is do we need to
20 find that all of A, B and C each meet each of the three
21 elements of the count to find him guilty.

22 That is, if we find the defendant guilty of A, but
23 not guilty of B, and not guilty of C, must we find the
24 defendant not guilty of Count I? Or do we find him guilty of
25 Count I because we found him guilty of A?

1 First of all, let me just compliment you on the
2 clarity of your question. Having tried hundreds of jury
3 cases, I can tell you that I've received many impenetrable
4 notes from the jury. So, thank you for the clarity of the
5 question.

6 I don't know if my answer will be as clear. I hope
7 it will. But here is my answer. The government must prove
8 beyond a reasonable doubt all three elements of Count I. But
9 the government need not prove all three of the means listed.
10 You may continue your deliberations.

11 (Jury Out)