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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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4 UNITED STATES OF AMERICA, )  
5 Plaintiff, )  
6 v. )  
7 DAVID KENT FITCH, )  
8 Defendant. )  
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2:04-cr-00262-JCM (PAL)

**JURY INSTRUCTIONS**

10 Members of the jury, now that you have heard all the evidence, it is my duty to instruct you  
11 on the law which applies in this case. A copy of these instructions will be available in the jury  
12 room for you to consult, if you find it necessary.

13 It is your duty to find the facts from all the evidence in the case. To those facts you will  
14 apply the law as I give it to you. You must follow the law as I give it to you in these Instructions  
15 whether you agree with it or not. And you must not be influenced by any personal likes or  
16 dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on  
17 the evidence before you. You will recall that you took an oath promising to do so at the beginning  
18 of the case.

19 In following my instructions, you must follow all of them and not single out some and  
20 ignore others; they are all equally important. And you must not read into these Instructions, or into  
21 anything I may have said or done, any suggestion as to what verdict you should return -- that is a  
22 matter entirely up to you.

1           The indictment is not evidence. It is simply the description of the charges made by the  
2 government against the defendant. You are here to determine from the evidence whether the  
3 defendant is guilty or not guilty. You are not called upon to return a verdict as to the guilt of any  
4 other person or persons. The defendant is not on trial for any act or conduct not alleged in the  
5 indictment.

6           The law presumes a defendant to be innocent of a crime. The law does not require a defendant  
7 to prove his or her innocence or produce any evidence at all, and no inference whatever may be drawn  
8 from the election of a defendant not to testify. The Government has the burden of proving a defendant  
9 guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

10           The punishment provided by law for a crime is for the court to decide. You may not consider  
11 punishment in deciding whether the government has proved its case against a defendant beyond a  
12 reasonable doubt.

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1 I have told you that the government must prove a defendant's guilt beyond a reasonable  
2 doubt. A reasonable doubt is a doubt based on reason and common sense, and may arise from a  
3 careful and impartial consideration of all the evidence, or lack of evidence. Proof beyond a  
4 reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not,  
5 however, proof beyond all possible doubt.

6 If after a careful and impartial consideration with your fellow jurors of all the evidence,  
7 you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find  
8 the defendant not guilty. On the other hand, if after a careful and impartial consideration with your  
9 fellow jurors of all the evidence, you are convinced beyond a reasonable doubt that the defendant is  
10 guilty, it is your duty to find the defendant guilty.

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1           The evidence from which you are to decide what the facts are consists of (1) the sworn  
2 testimony of the witnesses, both on direct and cross-examination, regardless of who called the  
3 witness; (2) the exhibits which have been received into evidence; and (3) any facts to which all the  
4 lawyers have agreed or stipulated.

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1           There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof  
2 of a fact, such as testimony of an eye witness. Circumstantial evidence is indirect evidence, that is,  
3 proof of a chain of facts from which you could find that another fact exists, even though it has not  
4 been proved directly. You are entitled to consider both kinds of evidence. The law permits you to  
5 give equal weight to both, but it is for you to decide how much weight to give to any evidence.

6           It is for you to decide whether a fact has been proved by circumstantial evidence. In  
7 making that decision, you must consider all the evidence in the light of reason, common sense and  
8 experience.

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1 In reaching your verdict you may consider only the testimony and exhibits received into  
2 evidence. Certain things are not evidence and you may not consider them in deciding what the  
3 facts are. I will list them for you.

4 1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses.  
5 What they have said in their opening statements, closing arguments and at other times, is intended  
6 to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ  
7 from the way the lawyers have stated them, your memory of them controls.

8 2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their  
9 clients to object when they believe a question is improper under the rules of evidence. You should  
10 not be influenced by the objection or by the court's ruling on it.

11 3. Testimony that has been excluded or stricken, or that you have been instructed to  
12 disregard, is not evidence and must not be considered. In addition some testimony and exhibits  
13 have been received only for a limited purpose; where I have given a limiting instruction, you must  
14 follow it.

15 4. Anything you may have seen or heard when the court was not in session is not evidence.  
16 You are to decide the case solely on the evidence received at the trial.

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1 In deciding the facts in this case, you may have to decide which testimony to believe and  
2 which testimony not to believe. You may believe everything a witness says, or part of it, or none  
3 of it. In considering the testimony of any witness, you may take into account:

- 4 1. the opportunity and ability of the witness to see or hear or know the things testified to;
- 5 2. the witness' memory;
- 6 3. the witness' manner while testifying;
- 7 4. the witnesses' interest in the outcome of the case and any bias or prejudice;
- 8 5. whether other evidence contradicted the witness' testimony;
- 9 6. the reasonableness of the witness' testimony in light of all the evidence; and
- 10 7. any other factors that bear on believability.

11 The weight of the evidence as to a fact does not necessarily depend on the number of witnesses  
12 who testify.

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1           The defendant is on trial only for the crimes charged in the indictment, not for any other  
2 activities. You are here only to determine whether the defendant is guilty or not guilty of the  
3 charges in the indictment. Your determination must be made only from the evidence in the case.  
4 The defendant is not on trial for any conduct or offense not charged in the indictment. You should  
5 consider evidence about the acts, statements, intentions of others, or evidence about other acts of  
6 the defendant, only as they relate to this charge against this defendant.

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1           A defendant in a criminal case has a constitutional right not to testify. No presumption of  
2 guilt may be raised, and no inference of any kind may be drawn, from the fact that the defendant  
3 did not testify. Additionally, the law never imposes upon a defendant in a criminal case the burden  
4 or duty of calling any witnesses or producing any evidence.

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1           You have heard testimony that the defendant made statements following his arrest. It is for  
2 you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to  
3 give to it. In making those decisions, you should consider all of the evidence about the statement,  
4 including the circumstances under which the defendant may have made it.

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1           You have heard evidence that David Lee Krause, a witness, has been convicted of a felony.  
2           You may consider this evidence, along with other pertinent evidence, in deciding whether or not to  
3           believe this witness and how much weight to give to the testimony of this witness.

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**Jury Instruction #11**

1           You have received testimony from David Lee Krause, a witness who indicated he was not  
2 prosecuted by the United States for selling his identification to the defendant. You may consider  
3 this in evaluating Mr. Krause's testimony to the extent it may have influenced his testimony in any  
4 manner. In addition, you should examine Mr. Krause's testimony with greater caution than that of  
5 other witnesses.

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1           A separate crime is charged in each count. You must decide each count separately. Your  
2 verdict on one count should not control your verdict on any other count. In order to convict on a  
3 count, you must unanimously find that the government has proven each element of that count  
4 beyond a reasonable doubt.

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1 Counts One, Two, Twelve and Thirteen of the Second Superseding Indictment charge that  
2 the defendant fraudulently used and attempted use to use several unauthorized access devices in  
3 violation of 18 U.S.C. § 1029(a)(2).

4 More particularly:

5 Count One charges that the defendant, knowingly and with the intent to defraud, used an  
6 unauthorized access device, i.e. a credit card that had been issued to Kenneth Deatherage to obtain  
7 goods of a value greater than \$1,000 during the period from July 13, 1999, through July 20, 1999;

8 Count Two alleges that the defendant knowingly and with the intent to defraud, used an  
9 unauthorized access device, to wit, a Citibank ATM card issued to Maria Bozi, to obtain United  
10 States currency of a value greater than \$1,000 during the period from on or about September 7,  
11 1999, to February 8, 2000;

12 Count Twelve charges that the defendant, knowingly and with the intent to defraud,  
13 attempted to use an unauthorized access device, to wit, a healthcare account number in the name of  
14 Maria Bozi, to fraudulently attempt to obtain services of a value in excess of \$1,000 on or about  
15 October 5, 1999;

16 Count Thirteen charges that the defendant, knowingly and with the intent to defraud, used  
17 an unauthorized access device, to wit, a credit card that had been issued to Maria Bozi, to  
18 fraudulently attempt to obtain goods of a value in excess of \$1,000 on or about October 26, 1999.

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1 In order for the defendant to be found guilty of using an unauthorized access device as  
2 charged in Count One and Count Two, the government must prove each of the following elements  
3 beyond a reasonable doubt:

4 First, the defendant knowingly used the specified unauthorized access devices within a  
5 one-year period;

6 Second, through such transaction, the defendant obtained payments or other things of an  
7 aggregate or total value of at least one thousand dollars (\$1,000) through such transactions within a  
8 one-year period;

9 Third, the defendant acted with intent to defraud; and

10 Fourth, the defendant's conduct occurred in or in some way affected interstate or foreign  
11 commerce.

12 Further, with respect to Counts Twelve and Thirteen, under federal law, anyone who  
13 attempts to commit this crime shall be subject to the same penalties as prescribed for the completed  
14 offense. A defendant may be found guilty of attempting to use an unauthorized access device as  
15 charged in Counts Twelve and Thirteen only if the government proves beyond a reasonable doubt:  
16 that the defendant intended to commit the crime of fraudulently using an unauthorized access  
17 device; and that the defendant did something which was a substantial step toward committing the  
18 crime, with all of you agreeing as to what constituted the substantial step. Mere preparation is not  
19 a substantial step toward the commission of this crime.

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1 An "access device" is defined in federal law to include any card plate, code, account  
2 number, serial number or personal identification document or other means of account access that  
3 can be used, alone or in conjunction with another access device, to obtain money, goods, services,  
4 or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer  
5 originated solely by paper instrument).

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The term “unauthorized access device” means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

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An intent to defraud is an intent to deceive or cheat.

1 Counts Three, Four, Five, Six, Seven, Eight, Nine, Ten, and Eleven of the Second  
2 Superseding Indictment allege that during the period from April 1999 through February 2000, the  
3 defendant executed a scheme to defraud Citibank by means of material false and fraudulent  
4 pretenses, representations and promises. More particularly, these counts allege that during the  
5 period from September 7, 1999, through September 17, 1999, the defendant made nine (9)  
6 withdrawals from a Citibank account assigned to Maria Bozi, and successfully deposited a check  
7 drawn on Maria Bozi's Citibank checking account, by means of false and fraudulent pretenses,  
8 representations, and concealment of material facts. These offenses have five elements:

9 First, the defendant knowingly carried out a scheme or plan to obtain money or property  
10 from Citibank by means of false or fraudulent pretenses, representations, or promises;

11 Second, the defendant knew that the pretenses, representations or promises were false;

12 Third, the pretenses, representations, or promises were material, that is they would  
13 reasonably influence a bank to part with money or property;

14 Fourth, the defendant acted with the intent to defraud; and

15 Fifth, Citibank was then a federally insured financial institution.  
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1 Counts Fourteen and Fifteen of the Second Superseding Indictment charge that on or about  
2 November 17, 1999, the defendant knowingly conducted two financial transactions involving the  
3 proceeds of a specified unlawful activity, to wit: bank fraud, knowing that the transactions were  
4 designed to conceal and disguise the nature, location, source, ownership and control of the  
5 proceeds, all in violation of 18 U.S.C. § 1956(a)(1)(B). These offenses have the following  
6 elements:

7 First, the defendant conducted a financial transaction involving property that represented  
8 the proceeds of a specified unlawful activity, to wit: bank fraud;

9 Second, the defendant knew that the property represented the proceed of the prior and  
10 separate bank fraud; and

11 Third, the defendant knew that the transaction was designed in whole or in part to conceal  
12 or disguise the nature, source, ownership and control of the proceeds of bank fraud.

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1 Count Sixteen of the Second Superseding Indictment charges that on or about November  
2 17, 1999, the defendant knowingly engaged in a monetary transaction by, through or to a financial  
3 institution in criminally derived property of a value greater than \$10,000, i.e., the deposit and  
4 transfer of funds in the sum of \$29,000 that had been derived from bank fraud, all in violation of  
5 18 U.S.C. § 1957. The offense has four elements:

6 First, the defendant knowingly engaged in a monetary transaction, i.e. the deposit,  
7 withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a  
8 monetary instrument by, through, or to a financial institution;

9 Second, the defendant knew that the transaction involved criminally derived property, i.e.,  
10 property constituting, or derived from, proceeds obtained from a criminal offense;

11 Third, the value of the property exceeded \$10,000; and

12 Fourth, the property was, in fact, derived from a specified unlawful activity, i.e., the  
13 property was derived from bank fraud.

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1 A "financial transaction" is defined to include (A) a transaction which in any way or degree  
2 affects interstate or foreign commerce that involves the movement of funds by wire or other means,  
3 or one or more monetary instruments, or (B) a transaction involving the use of a financial  
4 institution which is engaged in, or the activities of which affect, interstate or foreign commerce in  
5 any way or degree.

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“Financial institutions” include banks insured under the Federal Deposit Insurance Act.

1           The term "monetary transaction" means the deposit, withdrawal, or transfer of funds or  
2 monetary instruments by, through, or to a financial institution and in or affecting interstate  
3 commerce.

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1           A "monetary instrument" is, in turn, defined to include coin or currency of the United  
2 States, personal checks, bank checks, money orders, and investment securities or negotiable  
3 instruments in bearer form or otherwise in such form that title passes upon delivery.

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1           The phrase “interstate or foreign commerce” has been used in discussing the elements of  
2 several of the counts. Interstate commerce means trade or conducting business or travel between  
3 one state and another state or the District of Columbia; and foreign commerce means such trade,  
4 business or travel between the United States and another country. Interstate and foreign commerce  
5 may include the movement of money, goods, services or persons from one state to another state or  
6 the District of Columbia or between the United States and another country. This may include,  
7 among other matters, the purchase or sale of goods or supplies across national or state boundaries,  
8 and the use of interstate or international mail, wire or banking facilities. To establish the requisite  
9 effect on interstate or foreign commerce, the government is not required to prove a significant or  
10 substantial effect on interstate or foreign commerce. Rather, a *de minimis* or minimal effect on  
11 interstate or foreign commerce is sufficient. Proof that a transaction employs a utility of interstate  
12 commerce is sufficient to satisfy. Evidence of a transaction involving financial institutions insured  
13 by the Federal Deposit Insurance Corporation (FDIC) is also sufficient to meet the interstate  
14 commerce requirement.

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You will note the Superseding Indictment charges that certain offenses were committed “on or about” a particular date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the dates alleged in the respective counts of the indictment.

1           When you retire, you should elect one member of the jury as your foreperson. That person  
2 will preside over the deliberations and speak for you here in court.

3           You will then discuss the case with your fellow jurors to reach agreement if you can do so.  
4 Your verdict, whether guilty or not guilty, must be unanimous.

5           Each of you must decide the case for yourself, but you should do so only after you have  
6 considered all the evidence, discussed it fully with the other jurors, and listened to the views of  
7 your fellow jurors.

8           Do not be afraid to change your opinion if the discussion persuades you that you should.  
9 But do not come to a decision simply because other jurors think it is right.

10           It is important that you attempt to reach a unanimous verdict but, of course, only if each of  
11 you can do so after having made your own conscientious decision. Do not change an honest belief  
12 about the weight and effect of the evidence simply to reach a verdict.

13           Your verdict must be based solely on the evidence and on the law as I have given it to you  
14 in these instructions. However, nothing that I have said or done is intended to suggest what your  
15 verdict should be -- that is entirely for you to decide.

16           The arguments and statements of the attorneys are not evidence. If you remember the facts  
17 differently from the way the attorneys have stated them, you should base your decision on what you  
18 remember.

19           After you have reached unanimous agreement on a verdict, your foreperson will fill in the  
20 forms that will be given to you, sign and date them and advise the marshal outside your door that  
21 you are ready to return to the courtroom.

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1 If it becomes necessary during your deliberations to communicate with me, you may send a  
2 note through the marshal, signed by your foreperson or by one or more members of the jury. No  
3 member of the jury should ever attempt to communicate with me except by a signed writing, and I  
4 will communicate with any member of the jury on anything concerning the case only in writing, or  
5 orally here in open court. Remember that you are not to tell anyone – including me – how the jury  
6 stands, numerically or otherwise, on the question of the guilt of the defendant, until after you have  
7 reached a unanimous verdict or have been discharged.

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*Given  
June 21, 2007  
John E. Mahan*