

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN JAY MAST,

Defendant.

No. CR 17-40078-01-KES

**FINAL  
INSTRUCTIONS  
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 - IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 3 – KNOWINGLY DISTURBING PROTECTED  
WETLANDS OF THE UNITED STATES

For you to find Kevin Jay Mast guilty of the offense charged in the Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

**One, that the United States holds a property interest, established through a properly recorded and accepted easement;**

**Two, that identifiable wetlands existed at the time the easement was conveyed;**

**Three, that Mast knew the wetlands at issue were subject to an easement;**

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.

You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

You may find that Mast acted knowingly if you find beyond a reasonable doubt that he believed there was a high probability that wrongdoing was particularly likely and that he took deliberate actions to avoid learning of that fact. Knowledge may be inferred if Mast deliberately closed his eyes to what would otherwise have been obvious to him. A willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. You may not find Mast acted "knowingly" if you find he was merely negligent, careless, or mistaken as to any wrongdoing.

***Four, that Mast engaged in prohibited activity by disturbing, injuring, or destroying one or more of the wetlands at issue;***

The government does not have to prove that all of the wetlands were disturbed, injured, or destroyed to prove this element. Proof beyond a reasonable doubt of disturbing, injuring, or destroying any one of these wetlands is enough. However, in order to find the government has met this element, all twelve of you must agree that the same wetland was disturbed, injured, or destroyed.

***Five, that Mast's actions caused surface and/or subsurface damage that injured, disturbed, or destroyed one or more of the wetlands;***

The government does not have to prove that all of the wetlands were disturbed, injured, or destroyed to prove this element. Proof beyond a reasonable doubt of disturbing, injuring, or destroying any one of these wetlands is enough. However, in order to find the government has met this element, all twelve of you must agree that the same wetland was disturbed, injured, or destroyed.

***And six, that Mast's activity was not permitted or otherwise authorized.***

Mast argues that he reasonably relied on representations from government officials that his actions were legal. If you find that Mast proves the elements of entrapment by estoppel, as defined in Final Instruction No. 4, by the greater weight of the evidence, then you must find Mast not guilty of this crime.

If the government has proved all six of these elements beyond a reasonable doubt and if Mast has failed to prove entrapment by estoppel by the greater weight of the evidence, then you must find Mast guilty of the crime charged in the Indictment.

***Lesser Included Offense – Disturbing Protected Wetlands of the United States***

If your verdict under these instructions is not guilty of knowingly disturbing protected wetlands of the United States, or if, after all reasonable efforts, you are unable to reach a verdict on this instruction, you should record that decision on the verdict form and go on to consider whether Mast is guilty of the crime of disturbing protected wetlands of the United States under this instruction. The crime of disturbing protected wetlands of the United States, a lesser included offense of the crime charged in the Indictment, has the following five essential elements:

***One, that the United States holds a property interest, established through a properly recorded and accepted easement;***

***Two, that identifiable wetlands existed at the time the easement was conveyed;***

***Three, that Mast engaged in prohibited activity by disturbing, injuring, or destroying one or more of the wetlands at issue;***

The government does not have to prove that all of the wetlands were disturbed, injured, or destroyed to prove this element. Proof beyond a reasonable doubt of disturbing, injuring, or destroying any one of these wetlands is enough. However, in order to find the government has met this element, all twelve of you must agree that the same wetland was disturbed, injured, or destroyed.

***Four, that Mast's actions caused surface and/or subsurface damage that injured, disturbed, or destroyed one or more of the wetlands;***

The government does not have to prove that all of the wetlands were disturbed, injured, or destroyed to prove this element. Proof beyond a reasonable doubt of disturbing, injuring, or destroying any one of these wetlands is enough. However, in order to find the government has met this element, all twelve of you must agree that the same wetland was disturbed, injured, or destroyed.

***And five, that Mast's activity was not permitted or otherwise authorized.***

Mast argues that he reasonably relied on representations from government officials that his actions were legal. If you find that Mast proves the elements of entrapment by estoppel, as defined in Final Instruction No. 4, by the greater weight of the evidence, then you must find Mast not guilty of this lesser included offense.

If the government has proved all five of these elements beyond a reasonable doubt and if Mast has failed to prove entrapment by estoppel by the greater weight of the evidence, then you must find Mast guilty of the lesser included offense.

FINAL INSTRUCTION NO. 4 – ENTRAPMENT BY ESTOPPEL

Entrapment by estoppel is a defense based on advice from a government official that certain conduct is legal. Mast has the burden to establish that he was misled by the statements of a government official into believing that his conduct was lawful.

The defense of entrapment by estoppel arises if Mast shows the following two facts:

**One, that government agents or officials took it upon themselves to define for Mast the scope of his legal obligation—in this case, the legality of installing tile on a parcel of land subject to an easement held by the United States;**

**And two, that Mast reasonably relied upon the government agent or official's advice in conducting his affairs.**

If you find Mast proved these two elements by the greater weight of the evidence, then you must find Mast not guilty of the crime charged. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which of the evidence is more believable. If you find that Mast has not proved both elements of entrapment by estoppel by the greater weight of the evidence, then you must reject Mast's defense of entrapment by estoppel.

FINAL INSTRUCTION NO. 5 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charge, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of the offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that you must find the defendant not guilty of the offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of that offense.

FINAL INSTRUCTION NO. 6 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 7 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each

element before you.

- Take all the time that you feel is necessary.

Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 8 – DUTY DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is not guilty or guilty. If the defendant is guilty, I will decide what his sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

Dated January 18, 2018.

  
\_\_\_\_\_  
Karen E. Schreier  
United States District Judge

identifiable wetland(s) from the water levels as they existed in 1973, when the easement was established.<sup>2</sup>

***Five, a reasonable person would have recognized that installing tile at the locations where it was installed involved an unreasonable risk of injuring, disturbing, or destroying the United States' interest in identifiable wetland(s) on the property;***<sup>3</sup>

**and Six, the activity defendant engaged in was not permitted or otherwise authorized.**

Defendant in this case argues that he reasonably relied on government officials' representations that his actions were legal. If you find that defendant proves the elements of entrapment by estoppel, as defined in Final Instruction No. \_\_, by a preponderance of the evidence, then you must find defendant not guilty of this crime.

If the government has proved all six of these elements beyond a reasonable doubt as to defendant and if defendant has failed to show entrapment by estoppel by a preponderance of the evidence, as defined in Final Instruction No. \_\_, then you must find defendant guilty of the crime charged under Count No. \_\_. Otherwise, you must find defendant not guilty of this crime.

*United States v. Peterson*, No. 2:08-MJ-16, 2008 WL 4922413 (D.N.D. Nov. 12, 2008), *aff'd*, 632 F.3d 1038 (8th Cir. 2011) (citing *U.S. v. Johansen*, 93 F.3d 459, 467 (8th Cir. 1996)).

1/18/18  
Refused  
K. Schreier

<sup>2</sup> *U.S. v. Peterson*, 2008 WL 4922413 at \*7.

<sup>3</sup> *United States v. Kenner*, 238 F.Supp.3d 1157, 1163 (D. Neb. 2017).