

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

TINA FORREST

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File No. 1:08-CR-57-03

CHARGE TO THE JURY

Members of the Jury:

This is a criminal prosecution brought by the United States against defendant Tina Forrest. I remind you of the function of a grand jury indictment. An indictment is merely a formal way to accuse a defendant of a crime preliminary to trial.

The indictment is not evidence. It does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the nature of the charges against the defendant.

The defendant has pleaded not guilty to the charges in the Superseding Indictment. You have been chosen and sworn as jurors in this case to determine the facts that have been raised by the allegations of the indictment and the denial of the defendant when she pleaded not guilty.

Reasonable Doubt

The law presumes a defendant to be innocent of a crime. Therefore, although accused, a defendant begins the trial with a "clean slate," that is, with no evidence against her. Furthermore, the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against a defendant. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of a defendant's guilt after careful and impartial consideration of the evidence in the case.

The government is not required to prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

You must remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the government 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. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

So if, after careful and impartial consideration of all the evidence in this case, you have a reasonable doubt that the defendant is guilty of an offense charged in the indictment, then you must acquit her of that offense. Unless the government proves, beyond a reasonable doubt, that the defendant has committed each and every element of an offense charged in the indictment, you must find her not guilty of that offense.

As I have instructed you, the law presumes a defendant is innocent of the charges against her. The presumption of innocence lasts throughout the trial and ends only if you, the jury, find beyond a reasonable doubt that the defendant is guilty. Should the government fail to prove the guilt of the defendant beyond a reasonable doubt, you must acquit her.

Government as a Party

You are to perform the duty of finding the facts without bias or prejudice as to any party and with complete fairness and impartiality.

The case is important to the government, for the enforcement of criminal laws is one of the government's duties. Equally, this case is important to the defendant, who is charged with serious crimes.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater or lesser consideration than that accorded any other party to a case. All parties, whether government or individual, stand as equals before the Court.

Evidence

You have seen and heard the evidence presented in this trial, and it is the sole province of you the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been admitted, and any facts which may have been admitted or stipulated.

I would now like to call to your attention certain guidelines by which you are to evaluate the evidence. You may consider two types of evidence: direct and circumstantial. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts or circumstances pointing to the existence or non-existence of certain facts.

The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find her not guilty.

Evidence: Testimony and Arguments Excluded

I caution that you should entirely disregard any testimony which has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence.

Anything you have seen or heard outside the courtroom is not evidence -- you are to consider only the evidence in this case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from proven facts, reasonable inferences you believe are justified in light of your experiences.

Defendant's Right Not to Testify

The defendant did not testify in this case. Under our constitution, she has no obligation to testify or to present any other evidence because it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required to prove she is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against her may be drawn by you because she did not take the witness stand. You may not consider this as evidence against the defendant in any way in your deliberations in the jury room.

Credibility of Witnesses

You, as jurors, are the sole judges of the credibility of witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, since you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward the defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony.

The weight of the evidence is not determined by the number of witnesses testifying. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit this testimony. Two or more persons may hear or see things differently, or may have a different point of view regarding various occurrences. It is for

you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood.

You may find that a witness has made statements outside of this trial that are inconsistent with the statements made during the trial. You may find that a prior inconsistent statement, or a change in a witness's testimony, detracts from the credibility of the testimony the witness has provided in court. You may consider out-of-court statements not made under oath only to determine whether a witness's testimony has been truthful, but not as evidence of any facts contained in the statements. As to out-of-court statements that were made under oath, such as statements made in prior testimony, you may consider them for all purposes, including for the truth of the facts contained in the statements.

Law Enforcement Witness

You have heard the testimony of several law enforcement officials. The fact that a witness may be employed by the federal, state or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find appropriate.

False Exculpatory Statements

You may consider statements a defendant knowingly and voluntarily made when she was informed that a crime had been committed or when she was accused of a crime.

When a defendant voluntarily offers an explanation or makes some statement tending to show her innocence and it is shown that she knew the statement or explanation was false, you may consider this as showing a consciousness of guilt by the defendant since it is reasonable to infer that an innocent person does not invent or fabricate an explanation or statement tending to establish her innocence.

On the other hand, if you find that a defendant made a false exculpatory statement, there may be innocent reasons a person might make a false statement about their innocence. Fear of law enforcement, reluctance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement or explanation.

Whether or not evidence of a defendant's explanation or statement indicates a consciousness of guilt and the significance, if any, to be attached to that evidence, are for you to decide.

Witness's Plea Agreement

There has been testimony from government witnesses who pleaded guilty after entering into an agreement with the government to testify against the defendant. There is evidence the government agreed not to prosecute them on other charges, and, in exchange for the witness's willingness to plead guilty and testify at this trial against the defendant, promised to tell the sentencing judge of the witness's cooperation.

The government is permitted to enter into this kind of plea agreement. You may accept the testimony of a cooperating witness and convict the defendant on the basis of this testimony alone if the testimony convinces you of the defendant's guilt beyond a reasonable doubt.

You should bear in mind, however, that a witness who has entered into a cooperation agreement has an interest in this case different than an ordinary witness. A witness who realizes that he or she may be able to remain free from imprisonment or receive a lighter sentence by giving testimony favorable to the prosecution has a motive to testify falsely. Therefore, you must examine his or her testimony with caution and weigh it with great care. If, after scrutinizing his or her testimony, you decide to accept it, you may give it whatever weight, if any, it deserves.

Accomplices Called by the Government

Witnesses have testified who were actually involved in planning and carrying out the offenses charged in the indictment. Whether to believe these witnesses, or so-called accomplices, is for you to decide.

The government legitimately argues it must present the witnesses as it finds them, and that only people who take part in criminal activity have knowledge about criminal behavior by others.

For those reasons, accomplice testimony is allowed. Indeed, the law in federal courts is that the testimony of accomplices may be sufficient to convict a defendant if the jury finds the testimony proves guilt beyond a reasonable doubt.

It is also the case, however, that accomplice testimony must be scrutinized carefully in deciding how much of that testimony to believe.

You should consider the motivation behind an accomplice giving testimony as a witness. Do you think the accomplice was motivated to testify truthfully or falsely? Might the accomplice hope to receive favorable treatment from the government if he or she testified falsely? Or did the accomplice believe his or her interests would be best served by testifying truthfully?

In sum, you should look at all of the evidence in deciding what weight, if any, you will give to testimony from an accomplice.

Witness False Testimony

The defendant contends certain government witnesses have in part testified falsely against her for reasons of their own, such as to obtain freedom or early release from imprisonment for their own criminal conduct. The defendant contends that because only the prosecution can confer these benefits, and the defendant has no power to assist witnesses, the government's witnesses are unbelievable, biased, and unworthy in deciding the defendant's guilt beyond a reasonable doubt.

Government Witness - Not Proper To Consider Guilty Plea

You have heard testimony from government witnesses who pleaded guilty to charges arising out of the same facts as this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant from the fact that a prosecution witness pleaded guilty to similar charges. That witness's decision to plead guilty was a personal decision about his or her own guilt. The information may not be used by you in any way as evidence against or unfavorable to the defendant.

Failure to Name a Defendant

You may not draw any inference, favorable or unfavorable, towards the government or the defendant, from the fact that certain persons were not named as defendants in the Superseding Indictment. The circumstances under which these persons were not indicted must not be part of your deliberations.

Whether a person should be named as a co-conspirator or indicted is a decision made by the United States Attorney and the Grand Jury. Therefore, you may not consider it in any way in reaching your verdict as to the defendant.

Witness Using or Addicted to Drugs

One or both sides have called witnesses who were using or were addicted to drugs when the events he or she observed took place. I instruct you there is nothing improper about calling such a witness to testify about events within his or her personal knowledge.

On the other hand, testimony from such a witness must be examined with greater scrutiny than the testimony of any other witness. The testimony of a witness who was using drugs at the time of the events he or she is testifying about, or during the testimony at trial, may be less believable because of the effect the drugs may have on his or her ability to perceive or relate to the events in question.

If you decide to accept this testimony, after considering it in light of all the evidence, you may give it whatever weight, if any, it deserves.

Punishment

The punishment provided by law for the offenses charged in the Superseding Indictment is a matter exclusively for the Judge, and should never be considered by you in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Other Acts

You are here only to determine whether the defendant is guilty or not guilty of the charges in the Superseding Indictment. Your determination must be made only from the evidence in the case. The defendant is not on trial for any conduct or offense not charged in the Superseding Indictment. You may consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the defendant only as they relate to the charges against the defendant in the Superseding Indictment.

Consider Each Count Separately

A separate crime or offense is charged in each count of the Superseding Indictment. Each charge against the defendant, and any evidence pertaining to it, should be considered separately. The fact that you find the defendant guilty or not guilty of one of the charged offenses charged should not control your verdict as to any other charged offense against the defendant.

Instructions of Law

Having told you the general guidelines by which you will consider the evidence, I will now instruct you on the law that is applicable to your determinations in this case. It is your duty as jurors to follow the law as stated in these instructions and to apply the rules of law to the facts you find from the evidence.

You will not be faithful to your oath as jurors if you return a verdict that is contrary to the law stated in these instructions. It is the sole province of you, the jury, however, to determine the facts in this case. Through these instructions I do not intend to persuade you in any way in your role of determining the facts.

The parties in this case have a right to expect you will carefully and impartially consider all the evidence in the case, follow the law in these instructions and reach a just verdict.

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Count 1

Defendant Tina Forrest is charged in Count 1 of the Superseding Indictment with engaging in a conspiracy with others to knowingly and intentionally distribute cocaine base.

The Count reads as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA)
)
 v.)
)
 TINA FORREST,)
)
 Defendant.)

Criminal No. 1:08-cr-57-03

BY
CLERK
2008 DEC 17 AM 10:53
U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT 1

From on or about May 12, 2008 to on or about May 22, 2008, in the District of Vermont and elsewhere, the defendant, TINA FORREST, knowingly and intentionally conspired with Eva Nichols, Marisha Morgan, and others known and unknown to the Grand Jury, to distribute a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

This offense involved 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

(21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B))

"On or About" Explained

The Superseding Indictment charges that the offenses were committed "on or about" certain dates.

Although it is necessary for the government to prove beyond a reasonable doubt the offenses were committed on dates reasonably near the dates alleged in the Superseding Indictment, it is not necessary for the government to prove the offenses were committed precisely on the dates charged.

Elements of Offense of Conspiracy

21 U.S.C. § 846

Count 1 of the Superseding Indictment charges that Tina Forrest engaged in a conspiracy with others to distribute cocaine base. Title 21, United States Code, Section 846, as charged in Count 1 of the Superseding Indictment, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly or intentionally distribute a controlled substance, in this case, cocaine base.

So under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of each other member.

In order to establish a conspiracy offense, it is sufficient to show that the conspirators tacitly came to a mutual understanding to accomplish an unlawful act by means of a joint plan or common design. Also, because the essence of a conspiracy offense is the making of the scheme itself, it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan, although in this case there has been evidence introduced from which you may find that actual distribution of cocaine base occurred.

What the evidence in the case must show beyond a reasonable doubt is:

One: That two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the Superseding Indictment; and

Two: That the defendant knowingly became a member of the conspiracy.

As you can see, since the agreement is the essence of the offense, it is not necessary for the government to prove that an overt act was committed in furtherance of the conspiracy.

First Element - Existence of Agreement

The first element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in the Superseding Indictment.

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act.

You may, of course, find that the existence of an agreement to disobey or disregard the law has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you

may, in determining whether an agreement existed here, consider the actions and statements of all of those you find to be participants as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

Second Element - Membership in the Conspiracy

The second element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the defendant knowingly became a member of the conspiracy.

If you are satisfied that the conspiracy charged in the Superseding Indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether the defendant was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly joined the conspiracy. Did she participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or worker?

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, she must have had a stake in the venture or its outcome. You are instructed that, while proof of a financial interest in the outcome of a scheme is not essential, if you find that the defendant had such an interest, that is a factor which you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the Superseding Indictment.

As I mentioned a moment ago, before the defendant can be found to have been a conspirator, you must first find that she knowingly joined in the unlawful agreement or plan. The key

question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.

The defendant's knowledge is a matter of inference from the facts proved. I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need she have been apprised of all of their activities. Moreover, the defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on her part. Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of her participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary

that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly joins in that plan on one occasion, that is sufficient to convict her for conspiracy even though she had not participated before and even though she played a minor part.

I want to caution you, however, that the defendant's mere presence at the scene of a drug transaction does not, by itself, make her a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically make the defendant a member. A person may know, or be friendly with, a criminal, without being a criminal herself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at

least some of the purposes or objectives of the conspiracy and with the intent of aiding in the accomplishment of those unlawful ends.

In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking. She thereby becomes a knowing and willing participant in the unlawful agreement – that is to say, a conspirator.

Third Element - Amount of Drugs

If during your deliberations you unanimously conclude that the Government has proven beyond a reasonable doubt both that two or more persons agreed to distribute cocaine base and that the defendant knowingly became a member of that conspiracy, then you should find the defendant guilty under Count 1 of conspiring to distribute cocaine base. You should then further proceed to consider, in accordance with instructions that I am about to give, whether the Government has also proven that the conspiracy involved 5 grams or more of a mixture or substance which contained cocaine base. However, if you conclude that the Government has not proven both of those elements beyond reasonable doubt, you should find the defendant not guilty of the conspiracy charge and proceed to consider the remaining charges.

Count 1 charges the defendant with conspiring to distribute 5 grams or more of cocaine base. The third element of the conspiracy charged in Count 1, which the Government must prove beyond a reasonable doubt, is that during the period when the defendant was a member of the conspiracy, the defendant and/or other co-conspirators distributed 5 grams or more of a mixture or substance containing a detectable amount of cocaine base. The material need not be pure cocaine base; rather, the mixture or substance merely must contain a detectable amount of cocaine base.

In deciding whether the Government has proven that the conspiracy involved 5 grams or more of cocaine base, you may consider quantities of cocaine base that the defendant herself distributed; quantities that she intentionally helped others to distribute; and quantities that she knew or reasonably should have known that other members of the conspiracy distributed at a time when the defendant was still a member of the conspiracy.

The government is not required to prove that the defendant knew that the amount involved was 5 or more grams. The government satisfies its burden on the quantity element if it proves beyond a reasonable doubt that the quantity involved was 5 or more grams of cocaine base.

If you jurors unanimously find that the Government has proven beyond reasonable doubt that the conspiracy charged in Count 1 involved 5 grams or more of cocaine base, then you should so indicate on the verdict sheet. If you unanimously conclude that this element has not been proven beyond reasonable doubt, then you should also report that finding on the verdict sheet.

Counts 2 through 5 of the Indictment

In Counts 2 through 5 of the Superseding Indictment, the defendant, Tina Forrest, is charged with knowingly and intentionally distributing cocaine base on or about certain dates.

The Counts read as follows:

COUNT 2

On or about May 12, 2008, in the District of Vermont, the defendant, TINA FORREST, together with Eva Nichols, knowingly and intentionally distributed a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

This offense involved 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

(21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 18 U.S.C. § 2)

COUNT 3

On or about May 14, 2008, in the District of Vermont, the defendant, TINA FORREST, together with Eva Nichols, knowingly and intentionally distributed a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

This offense involved 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

(21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 18 U.S.C. § 2)

COUNT 4

On or about May 14, 2008, in the District of Vermont, the defendant, TINA FORREST, together with Eva Nichols, knowingly and intentionally distributed a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

This offense involved 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

(21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 18 U.S.C. § 2)

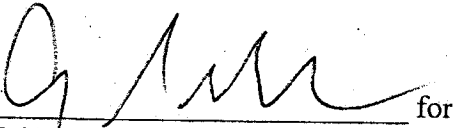
COUNT 5

On or about May 22, 2008, in the District of Vermont, the defendant, TINA FORREST, together with Eva Nichols, knowingly and intentionally distributed a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

This offense involved 5 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

(21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 18 U.S.C. § 2)

A TRUE BILL



THOMAS D. ANDERSON

United States Attorney

Rutland, Vermont

December 17, 2008

The Statute Defining the Offense Charged

As I just told you, Counts 2 through 5 of the Superseding Indictment charge the defendant, Tina Forrest, with distributing cocaine base in violation of 21 U.S.C. § 841(a)(1).

Section 841(a)(1) of Title 21 of the United States Code provides, in part, that: "(a) . . . it shall be unlawful for any person knowingly or intentionally- (1) to . . . distribute . . . a controlled substance;"

Elements of the Offense of Distribution of a Controlled Substance

In order to sustain its burden of proof for the crime of distribution of a controlled substance, the government must prove the following two elements beyond a reasonable doubt:

One: The defendant knowingly and intentionally distributed a controlled substance, as charged in the Superseding Indictment; and

Two: At the time of the distribution, the defendant knew that the substance distributed was a controlled substance, in this case, cocaine base.

I instruct you that cocaine base is a controlled substance.

"Knowingly" Defined

You have been instructed that in order to sustain its burden of proof, the government must prove that the defendant acted knowingly. A person acts knowingly if she acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. You may consider evidence of the defendant's words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly.

Conscious Avoidance of Knowledge

In determining whether a defendant acted knowingly, you may consider whether the defendant deliberately closed her eyes to what would otherwise have been obvious to her. If you find beyond a reasonable doubt that defendant acted with a conscious purpose to avoid learning the truth that the material being distributed was a controlled substance, then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken.

First Element - Distribution Defined

The first element the government must prove beyond a reasonable doubt is distribution. The term "to . . . distribute," as used in these instructions, means to deliver a controlled substance, in this case, cocaine base. "Deliver" means the actual, constructive, or attempted transfer of cocaine base. Simply stated, the words distribute and deliver mean to pass on, or to hand over to another, or to cause to be passed on or handed over to another, or to try to pass on or hand over to another, cocaine base. For example, if A tells or orders B to hand over the drugs to C, then A has caused the drugs to be handed over, and therefore has distributed them. Distribution does not require a sale. Activities in furtherance of the ultimate sale, such as vouching for the quality of drugs, negotiating for or receiving the price, and supplying or delivering the drugs may constitute distribution. In short, distribution requires a concrete involvement in the transfer of the drugs.

Second Element - Knowledge that the Drugs Were Controlled
Substances

The second element the government must prove beyond a reasonable doubt is that the defendant knew that the substance being distributed was a controlled substance. In this regard, the government does not have to prove that the defendant knew the exact nature of the drugs involved. It is enough that the government proves that the defendant knew that it was some kind of controlled substance.

Aiding and Abetting (Counts 2-5)

Alternatively, the Superseding Indictment charges the defendant in Counts 2 through 5 with violating section 2 of Title 18 of the United States Code, which makes it a crime to "aid or abet" the commission of an offense against the United States. Specifically, the defendant is charged with aiding and abetting Eva Nichols in the knowing and intentional distribution of a controlled substance, namely, cocaine base.

Under the aiding and abetting statute, it is not necessary for the government to show that the defendant herself physically committed the crime with which she is charged in order for you to find her guilty. A person who aids or abets another in committing an offense is just as guilty of that offense as if he or she committed it himself or herself.

Accordingly, you may find the defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged, that is knowingly distributing a controlled substance, namely, cocaine base. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other

person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate herself in some way with the crime, and that she willfully and knowingly seek by some act to help make the crime succeed. Participation in a crime is willful if such action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or disregard the law.

The mere presence of the defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by the defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

To determine whether the defendant aided or abetted the commission of the crime as charged, ask yourself these questions:

Did she participate in the crime as something she wished to bring about?

Did she associate herself with the criminal venture knowingly and willfully?

Did she seek by her actions to make the criminal venture succeed?

If she did, then the defendant is an aider and abettor, and therefore guilty of the offense. If your answer to any of these questions is "no," then the defendant is not an aider and abettor, and you must find her not guilty as such.

Third Element - Amount of Drugs

If during your deliberations with respect to each of Counts 2 through 5, you unanimously conclude the government has proven beyond a reasonable doubt both that the defendant knowingly and intentionally distributed a controlled substance, as charged in the Superseding Indictment, and at the time of the distribution, the defendant knew that the substance distributed was a controlled substance, namely, cocaine base, then you should find the defendant guilty under the respective Count of distributing cocaine base. You should then consider with respect to each distribution Count, in accordance with instructions that I am about to give, whether the Government has also proven that the distribution involved 5 grams or more of a mixture or substance which contained cocaine base. However, if you conclude the government has not proven both of those elements beyond a reasonable doubt with respect to any of the Counts 2 through 5, you should find the defendant not guilty of the respective Count and proceed to consider the other distribution Counts.

Counts 2 through 5 each charge the defendant with distributing 5 grams or more of cocaine base. The third element of each of Counts 2 through 5, which the Government must prove beyond reasonable doubt, is that the defendant distributed 5 grams or more of a mixture or substance containing a detectable amount of cocaine base. The material need not be pure cocaine base;

rather, the mixture or substance merely must contain a detectable amount of cocaine base.

In deciding whether the Government has proven that the distribution involved 5 grams or more of cocaine base, you may consider quantities of cocaine base that the defendant herself distributed and quantities that she intentionally helped others to distribute.

The government is not required to prove that the defendant knew that the amount involved was 5 or more grams. The government satisfies its burden on the quantity element if it proves beyond a reasonable doubt that the quantity involved was 5 or more grams of cocaine base.

If, with respect to each of Counts 2 through 5, you unanimously find the government has proven beyond reasonable doubt that the distribution involved 5 grams or more of cocaine base, then you should so indicate on the verdict sheet for the respective Count. If you unanimously conclude that this element has not been proven beyond reasonable doubt, then you should also report that finding on the verdict sheet for the respective Count. You must make this determination separately for each of the offenses charged in Counts 2 through 5.

Conclusion

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant solely from the evidence presented in court. Again, merely because the defendant has been indicted is not evidence against her. Also, the defendant is not on trial for any act or conduct or offense not alleged in the Superseding Indictment.

In the event the defendant is found guilty, her sentence is the responsibility of the judge and should never be considered by you in any way in arriving at an impartial verdict as to her guilt or innocence.

It is your duty to consult with one another and to deliberate in a calm and civil manner. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you are wrong. But also do not surrender your honest convictions solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict -- it must be unanimous on every element of the charges.

I appoint _____ as your foreperson.

Upon retiring to the jury room, your foreperson will preside over your deliberations and be your spokesperson in court. When you have reached a verdict, the foreperson will record the verdict, sign and date the verdict form, and bring it to the courtroom where it will be read.

If during your deliberations you wish to communicate with me, the foreperson should do so in writing, place it in an envelope and give it to the court security officer who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may speak with you. I caution you, however, with regard to any message or question you might send, that you should never reveal your numerical division, if any.

Copies of this charge will go with you into the jury room for your use.