

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 1:10-cr-139
	:	
ORLANDO PACHECO,	:	
	:	
Defendant.	:	

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

This case is a criminal prosecution brought by the United States against the defendant, Orlando Pacheco. The Indictment charges a single count of conspiracy in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A). The Indictment alleges that:

From in or about 2007 to in or about summer 2009, in the District of Vermont and elsewhere, defendant ORLANDO PACHECO, a/k/a “Orlando Pacheco-Gonzalez,” a/k/a “Nacho,” a/k/a “Tio,” knowingly and willfully conspired with Noel Delarosa, a/k/a “Green Eyes,” a/k/a/ “Green,” a/k/a “G.I.,” a/k/a “G,” a/k/a “A-Rod,” a/k/a “Junior,” John Orlando Brooker, Jr., a/k/a “Breezey,” a/k/a “Money,” Daniel Lugo, a/k/a “Benny,” a/k/a “Cuzo,” a/k/a “Cuz,” Herman Robinson, a/k/a “Herm,” Leroy Rice, a/k/a “Kinfolk,” and others known and unknown to the Grand Jury to distribute a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

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

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

ROLE OF INDICTMENT

At this time, I would like to remind you of the function of an indictment. An indictment is merely a formal way to accuse a defendant of a crime preliminary to trial. An indictment is not evidence. The Indictment 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 count in the Indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the Indictment and the defendant’s denial of guilt by his “not guilty” plea. You are to perform this duty without bias or prejudice against the defendant or the prosecution.

REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE

The government must prove the defendant guilty beyond a reasonable doubt. The question is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, 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. A reasonable doubt is not a whim, speculation, or suspicion. However, a reasonable doubt may arise from a lack of evidence. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require the government to prove guilt

beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to a defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt. 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.

If, after fair and impartial consideration of all the evidence against a defendant, you have a reasonable doubt, it is your duty to find that defendant not guilty. On the other hand, if, after fair and impartial consideration of all the evidence, you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict.

The law presumes that a defendant is innocent of the charges against him. The presumption of innocence lasts throughout the trial and during your deliberations. The presumption of innocence ends only if you, the jury, find beyond a reasonable doubt that a defendant is guilty. Should the government fail to prove the guilt of a defendant beyond a reasonable doubt, you must find that defendant not guilty.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of 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 into evidence, and all the 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.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness

testifies about something she or he knows by virtue of her or his own senses—something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact, the existence or non-existence of some other fact. For example, if you were to see cow tracks in a pasture, that would be circumstantial evidence that there are or were cows in the pasture.

Circumstantial evidence is of no less value than direct evidence. Circumstantial evidence alone may be sufficient evidence of guilt.

You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of a defendant's guilt beyond a reasonable doubt, you must find him not guilty.

STRICKEN TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony or exhibit that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. By the rulings the court made in the course of the trial, I did not intend to indicate to you any of my own preferences, or to influence you in any manner regarding how you should decide the case. The attorneys have a duty to object to evidence they believe is not admissible. You must not hold it against either side if an attorney made an objection.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. It would be a violation of your oath as jurors to consider

anything outside the courtroom in your deliberations. But in your consideration of the evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of the evidence. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

ADMISSIONS BY A DEFENDANT

There has been evidence the defendant made certain statements in which the government claims he admitted certain facts.

In deciding what weight to give the defendant's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statements such weight as you feel they deserve in light of all the evidence.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the 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, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, 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 a defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper. You may accept all of it, some of it, or reject it altogether.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. 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 such 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 should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case you have heard testimony from a number of witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented in this case.

INTEREST IN OUTCOME

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

LAW ENFORCEMENT WITNESSES

You have heard the testimony of law enforcement officials in this case. 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 proper 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 it deserves.

GOVERNMENT INFORMERS

There has been evidence introduced at trial that the government used informers in this case. I instruct you that there is nothing improper in the government's use of informers and, indeed, certain criminal conduct would never be detected without the use of informers. You, therefore, should not concern yourselves with how you personally feel about the use of informers, because that is really beside the point. Put another way, your concern is to decide whether the government has proved the guilt of each defendant beyond a reasonable doubt, regardless of whether evidence was obtained by the use of informers.

On the other hand, where informers testify, as they did here, their testimony must be examined with greater scrutiny than the testimony of an ordinary witness. You should consider whether they received any benefits or promises from the government which would motivate them to testify falsely against a particular defendant or defendants. For example, they may believe that they will only continue to receive these benefits if they produce evidence of criminal conduct.

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

ACCOMPLICES AND UN-INDICTED CO-CONSPIRATORS

The government has called as witnesses people who are named by the prosecution as co-conspirators, but who were not charged as defendants. You have also heard witnesses who testified that they were accomplices, that is, they said they participated with a defendant or defendants in the commission of a crime. The testimony of such witnesses must be examined and weighed by the jury with greater care than the testimony

of a witness who did not claim to have participated in the commission of that crime. You should consider whether they have an interest in the case and whether they have a motive to testify falsely. In other words, ask yourselves whether they have a stake in the outcome of this trial. As I have indicated, their testimony may be accepted by you if you believe it to be true and it is up to you, the jury, to decide what weight, if any, to give to the testimony of these unindicted co-conspirators and accomplices.

WITNESSES' GUILTY PLEAS

You have heard testimony from government witnesses who pled 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 on trial from the fact that a prosecution witness pled guilty to similar charges or offenses. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

WITNESSES' PLEA AGREEMENTS

There has been testimony from government witnesses who pled guilty after entering into agreements with the government to testify. The government also promised to bring the witnesses' cooperation to the attention of the sentencing court. The government is permitted to enter this kind of plea agreement.

You should bear in mind that a witness who has entered into such an agreement has an interest in this case different from an ordinary witness. A witness who realizes that he or she may be able to obtain his or her own freedom, or receive a lighter sentence by giving testimony favorable to the government, may have a motive to testify falsely. Conversely, a witness who realizes that he or she may benefit by providing truthful

testimony may have a motive to be honest. Therefore, you must examine his or her testimony with caution and weigh it with great care. After scrutinizing his or her testimony, you may decide to accept it, reject it, accept it in part, or reject it in part, and you may give it whatever weight, if any, you find it deserves.

PRIOR PERJURY BY WITNESS

There has been evidence that a witness who testified at this trial lied under oath at another proceeding. I must warn you that the testimony of this witness should be viewed cautiously and weighed with great care. It is, however, for you to decide how much of his testimony, if any, you wish to believe.

USE OF DRUGS BY CERTAIN WITNESSES

There has been evidence introduced at the trial that some of the individuals that the government called as witnesses were using drugs when the events they observed took place. There is nothing improper about calling such witnesses to testify about events within their personal knowledge. However, testimony from such witnesses must be examined with greater scrutiny than the testimony of other witnesses. You must consider the effect, if any, the drugs may have on the witness's ability to perceive and recall the events in question.

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

PRIOR INCONSISTENT STATEMENTS OF A NON-PARTY WITNESS

You may find that a witness has made statements outside of this trial that are inconsistent with the statements that the witness gave here. You may consider the out-of-

court statements not made under oath only to determine the credibility of the witness and 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 therein.

RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

You may not consider the race, religion, national origin, sex, or age of the defendant or any of the witnesses in your deliberations over the verdict or in the weight given to any evidence.

BIAS, PREJUDICE, EQUALITY BEFORE THE COURT

You are to perform the duty of finding the facts without bias or prejudice toward any party. You are to perform this duty in an attitude of complete fairness and impartiality.

This case is important to the parties and the court. You must give it the fair and serious consideration which it deserves.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the court.

IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

You may not infer that a defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.

IMPERMISSIBLE TO INFER PARTICIPATION FROM MERE PRESENCE

You also may not infer that a defendant is guilty of participating in criminal conduct merely from the fact that he was present at the time the crime was being committed and had knowledge that it was being committed.

DEFENDANT NOT TESTIFYING

You may have observed the defendant did not testify in this case. A defendant has a constitutional right not to do so. He does not have to testify, and the government may not call him as a witness. A defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining whether a defendant is guilty or not guilty of the crime charged, you are not to consider, in any manner, the fact that the defendant did not testify. Do not even discuss it in your deliberations.

INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

The parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

THE ESSENTIAL ELEMENTS OF THE CHARGE

You will recall that the Indictment charges the defendant with knowingly and willfully conspiring to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). I instruct you that cocaine is a Schedule II controlled substance.

Title 21, United States Code, Section 846, as charged in Count 1, 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.

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.

In order to find the defendant guilty in this case, you must find that the government has proved beyond a reasonable doubt the following essential elements of the charge. That at the time and places alleged in the Indictment:

(1) two or more persons, in some way or manner, came to a mutual understanding to try to accomplish the common and unlawful plan that is charged in the Indictment; and

(2) that the defendant knowingly and willfully became a member of such conspiracy.

FIRST ELEMENT: EXISTENCE OF AN 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 into the unlawful agreement charged in the Indictment.

In order for the government to satisfy this element, it must prove 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 need not find that the alleged members of the conspiracy actually met and entered into any express or formal agreement. You need not find that the alleged members stated in words or writing what the object or purpose of the conspiracy was, or every precise detail of the scheme. The agreement may only consist of a mutual understanding that the members would commit some illegal activity by means of a common plan or course of action, as alleged in the Indictment.

There may or may not be direct proof of the agreement. However, because a conspiracy is sometimes characterized by secrecy, you may or may not infer its existence

from the circumstances and the conduct of the parties involved. You may therefore consider the actions and statements of all of those you find to be participants as proof that a common design existed for acting together to accomplish an unlawful purpose. Acts that may seem innocent when taken individually may indicate guilt when viewed collectively and with reference to the circumstances in general.

Co-conspirators need not be charged with the crime of conspiracy in order for you to find that the defendant had an agreement with other individuals to commit the illegal act charged in the Indictment.

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 and willfully became a member of the conspiracy.

If you are satisfied that the conspiracy charged in the Indictment existed, you must next ask yourselves who the members of that conspiracy were. In order to make this determination, you must decide whether a defendant knowingly and willfully joined the conspiracy with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective.

You must find that the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement, and with the intent of aiding in the accomplishment of those ends, in order to satisfy the knowledge and intent element of the conspiracy charge. In other words, the government must prove beyond a reasonable doubt that the defendant acted with the specific intent to distribute a

controlled substance. Proof of such intent need not be direct. Intent may be proved by circumstantial evidence alone.

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have a stake in the venture or its outcome. A financial interest in the outcome of the scheme is not essential. Nevertheless, if you find that a 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 Indictment.

The fact that acts of a defendant, without knowledge of the conspiracy, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. The defendant's knowledge is a matter of inference and must be established by his own acts or statements, as well as those of the other alleged co-conspirators. A defendant need not have known the identities of each and every member, nor been fully informed of all of their activities, nor all of the details of the conspiracy.

The extent of a defendant's participation has no bearing on his guilt. A conspirator's liability is not measured by the extent or duration of his 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 roles in the scheme. The law does not require that each participant in the conspiracy play an equal role.

If the evidence establishes beyond a reasonable doubt that a defendant knowingly and willfully entered into an agreement to commit the substantive offense charged in the Indictment, the fact that the defendant did not join the agreement at its beginning, did not

know all of the details of the agreement, did not participate in each act of the agreement, or did not play a major role in accomplishing the unlawful goal, is not important to your decision regarding membership in the conspiracy.

However, mere association with others, mere presence at the place where a crime takes place or is discussed—or knowing about criminal conduct—does not, in and of itself, make someone a member of the conspiracy. Also, proof that a defendant had a financial interest in the outcome of a scheme, in and of itself, does not suffice to prove membership. Presence or association with conspirators and financial interest, though, are factors that you may consider among others to determine whether a defendant was a member of the conspiracy.

In sum, a 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. He thereby becomes a knowing and willing participant in the unlawful agreement. In other words, he becomes a conspirator.

SINGLE OR MULTIPLE CONSPIRACIES

There is another issue to consider in determining whether the government has proven beyond a reasonable doubt that two or more persons entered the unlawful agreement charged in Count 1 of the Indictment. The defendant contends that the government's proof fails to show the existence of one overall conspiracy. Rather, he claims that there were actually several separate and independent conspiracies with various groups of members.

Whether there existed a single unlawful agreement, or many such agreements, or indeed, no agreement at all, is a question of fact for you, the jury, to determine in accordance with the instructions I am about to give you.

When two or more people join together to further one common unlawful design or purpose, a single conspiracy exists. By way of contrast, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes.

Proof of several separate and independent conspiracies is not proof of the single, overall conspiracy charged in the Indictment, unless one of the conspiracies proved happens to be the single conspiracy described in Indictment.

You may find that there was a single conspiracy despite the fact that there were changes in either personnel (by the termination, withdrawal, or addition of new members), or activities, or both, so long as you find that some of the co-conspirators continued to act for the entire duration of the conspiracy charged in Count 1. The fact that the members of the conspiracy are not always identical does not necessarily imply that separate conspiracies exist.

On the other hand, if you find that the conspiracy charged in Count 1 did not exist, you cannot find the defendant guilty of the single conspiracy charged in that count. This is so even if you find that some conspiracy other than the one charged in Count 1 existed, even though the purposes of both conspiracies may have been the same, and even though there may have been some overlap in membership.

Similarly, if you find that the defendant was a member of another conspiracy, and not the one charged in Count 1, then you must acquit the defendant of the conspiracy charged in Count 1.

Therefore, you must determine whether the conspiracy charged in Count 1 existed. If it did, then you must determine the nature of the conspiracy and who were its members.

MULTIPLE CONSPIRACIES – FACTORS IN DETERMINING

In deciding whether there was more than one conspiracy established, you should concentrate on the nature of the agreement. To prove the single conspiracy charged in Count 1, the government must convince you that each of the members agreed to participate in what he knew was a group activity directed toward a common goal. There must be proof of an agreement on an overall objective.

But a single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members played. And a single conspiracy may exist even if different members joined at different times, or the membership of the group changed. These are all things that you may consider in deciding whether there was more than one conspiracy, but they are not necessarily controlling.

Similarly, just because there were different subgroups operating in different places, or many different criminal acts committed over a long period of time, does not necessarily mean that there was more than one conspiracy. Again, you may consider these things, but they are not necessarily controlling.

What is controlling is whether the government has proved, beyond a reasonable doubt, that there was an overall agreement on a common goal.

DEFINITION OF DISTRIBUTION

The word “distribute” means to deliver a narcotic. “Deliver” is defined as the actual, constructive, or attempted transfer of a narcotic. Simply stated, the words

distribute and deliver mean to pass on, or to hand over to another, or to be caused to be passed on or handed over to another, or to try to pass on or hand over to another, narcotics.

Distribution does not require sale. Activities in furtherance of the ultimate sale, such as vouching for the quality of the drugs, negotiating for or receiving the price, and supplying and delivering the drugs may constitute distribution. In short, distribution requires a concrete involvement in the transfer of drugs.

AMOUNT OF DRUGS

If you find that the government has not proven beyond a reasonable doubt the elements that I have just described to you, you will indicate that you find the defendant not guilty on the special verdict form I have provided to you. You will then answer no further questions with regard to the defendant.

If you find that the government has proven beyond a reasonable doubt the elements that I have just described to you, then there is another issue you must decide with regard to Count 1. I have provided you with a special verdict form asking you questions that you must answer.

The Indictment charges the defendant with a conspiracy that involves 5 kilograms (i.e., 5,000 grams) or more of a mixture or substance containing a detectable amount of cocaine.

You should assess the amount of cocaine involved in the conspiracy with regard to the defendant. The government does not have to prove that a defendant directly handled or distributed the particular quantity alleged, although you may consider that evidence along with other evidence to assess the quantity element.

The government can prove the defendant responsible for the quantity involved in a conspiracy in three ways. First, the government can offer evidence that proves beyond a reasonable doubt that the defendant personally and directly participated in the possession or distribution of the drugs in question. With regard to this type of proof, the government need not prove that the defendant knew the type or amount of drugs in question as long as the government proves beyond a reasonable doubt that the defendant knew the drugs in question were a controlled substance. Second, the government can offer evidence that proves beyond a reasonable doubt that the defendant knew that the conspiracy involved a particular quantity of a controlled substance or controlled substances during the time period that a defendant participated in the conspiracy. Third, the government can offer evidence that proves beyond a reasonable doubt that the conspiracy involved a particular quantity of a controlled substance or substances during the time period that a defendant participated in the conspiracy and that, based on all of the circumstances, it was reasonably foreseeable to that defendant that the conspiracy involved the particular quantity. With regard to each of these types of proof, the government must prove beyond a reasonable doubt that the conspiracy at issue is the one described in the Indictment.

Remember, you should address this issue and complete the form only if you find the essential elements of the conspiracy alleged in the Indictment have been established.

If you decide that the government has not proven beyond a reasonable doubt that the charged conspiracy involves 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, then you must consider whether the charged conspiracy involved either (a) 500 grams or more of cocaine but less than 5 kilograms; or (b) less than 500 grams.

KNOWINGLY

You have been instructed that in order to sustain its burden of proof on the charge in the Indictment, the government must prove that the defendant acted knowingly. A person acts knowingly if that person acts intentionally and with knowledge, and not because of ignorance or carelessness. Whether a defendant acted knowingly may be proven by the defendant's words and conduct and by all the facts and circumstances surrounding this case.

WILLFULLY

To act willfully means to do an act on purpose, and not inadvertently or by mistake or accident. Whether a defendant acted willfully may be proven by the defendant's conduct and by all the facts and circumstances surrounding this case.

"IN OR ABOUT" EXPLAINED

The Indictment in this case charges that a particular offense was committed "in or about 2007," and continued to "in or about summer 2009." Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on dates reasonably near the dates alleged in the Indictment, it is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

CONCLUSION

I caution you, members of the jury, that you are here to determine whether the defendant before you today is not guilty or guilty solely from the evidence in this case. I remind you that the mere fact that the defendant has been indicted is not evidence against him. Also, a defendant is not on trial for any act or conduct or offense not alleged in the

Indictment. Nor are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as the defendant in this case.

You should not consider the consequences of a guilty or not guilty determination. The punishment provided by law for the offense charged in the Indictment is a matter exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however, surrender your honest convictions about the case 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. In other words, your verdict must be unanimous regarding each element of the offense.

I appoint _____ as your foreperson.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. If a vote is to be taken, your foreperson will ensure that it is done. A special verdict form has been prepared for your conclusions. After you have reached an agreement, the foreperson will record a verdict of guilty or not guilty as to the defendant. Your foreperson will then sign and date the verdict form and you will return to the courtroom. In all other respects, a foreperson is the same as any other juror. His or her vote does not count more than any other member of the jury.

If, during your deliberations you should desire to communicate with the court, please put your message or question in writing signed by the foreperson, and pass the note to the marshal who will bring it to my attention. I will then confer with the attorneys and I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time. You should also never communicate the subject matter of your note or your deliberations to any member of the court's staff.

Dated at Brattleboro, Vermont in the District of Vermont this _____ day of
September, 2011.

Hon. J. Garvan Murtha
United States District Judge

