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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)
)
 v.)
)
VON SIMMONDS)

Case No. 5:13-cr-42

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 Von Simmonds. The indictment charges VON SIMMONDS with the following crime:

During in or about winter 2012-2013, in the District of Vermont and elsewhere, defendant VON SIMMONDS, a/k/a "Red," knowingly and willfully conspired with others known and unknown to the Grand Jury to distribute a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

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. An 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 charge against the defendant. The defendant has pleaded not guilty to the crime charged 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 denial made by the not guilty plea of the defendant. 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 crime 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 a fair and impartial consideration of all the evidence against the 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 the 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

the defendant is guilty. Should the government fail to prove the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

JURORS' EXPERIENCE/SPECIALIZED KNOWLEDGE

Anything you have seen or heard outside the courtroom is not evidence, and must be disregarded entirely. 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.

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 that have been admitted or stipulated. I would now like to call to your attention to certain guidelines by which you are to evaluate the evidence.

There are two types of evidence that 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, 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 the defendant's guilt beyond a reasonable doubt, you must find him not guilty. Your verdict must be based solely on the evidence introduced at trial, or the lack thereof.

STRICKEN TESTIMONY/ATTORNEYS' STATEMENTS/COURT'S RULINGS

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.

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 an out-of-court statement that was not made under oath only to determine the credibility of the witness, and you may not consider it as evidence of any facts contained in the statements. However, if an out-of-court statement was made under oath, such as a statement made in prior testimony, then you may consider the statement for all purposes, including for the truth of the facts contained therein.

It is up to you, the jury, after considering all the evidence of this case, to determine whether a prior statement was inconsistent, and if so what weight, if any, to give to the inconsistent statement.

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, if any, toward the defendant; 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 or the most evidence. Remember, a defendant in a criminal prosecution has no obligation to present any evidence or call any 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.

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 may create 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 has 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 any 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.

EXPERT WITNESSES

You have heard evidence from witnesses who are known as expert witnesses. An expert witness is a person who has special knowledge, experience, training, or education in his or her profession or area of study. Because of this expertise, an expert witness may offer an opinion about one or more of the issues in the case. In evaluating their testimony, you should evaluate their credibility and statements just as you would with any other witness. You should also evaluate whether the expert witness's opinion is supported by the facts that have been proved, and whether the opinion is supported by the witness's knowledge, experience, training, or education. You are not required to give the testimony of an expert witness any greater weight than you believe it deserves just because the witness has been referred to as an expert.

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 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 a law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

ACCOMPLICES

You have heard the testimony of individuals who testified that they were accomplices, that is, they said they participated with the defendant in the commission of a crime. The testimony of accomplices 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.

This is also true of accomplices or other witnesses who have received immunity. A witness receives immunity from the government when that witness is told his or her crimes will go unpunished in exchange for testimony, or that his or her testimony will not be used against him or her. A witness who has entered into such an agreement has an interest in this case different from any 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. Therefore, you must examine his or her testimony with caution and weigh it with great care. You must determine whether the testimony of the accomplice has been affected by self-interest, or by an agreement he or she may have with the government, or by his or her own interest in the outcome of this case, or by any prejudice he or she may have against the defendant.

As I have indicated, it is up to you, the jury, to decide what weight, if any, to give to the testimony of these witnesses.

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 or participated in 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.

STATEMENTS BY THE DEFENDANT

There has been evidence that 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. If you find that the statement was made, I instruct you that you are to give the statement such weight as you feel it deserves in light of all the evidence.

DEFENDANT NOT TESTIFYING

You may have observed that 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.

IMPERMISSIBLE INFERENCES WITH REGARD TO DEFENDANT

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 wrong doing.

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.

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, AND 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. You must not allow any of your personal feelings about the nature of the crime charged to interfere with your deliberations, or influence the weight given to any of the evidence.

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.

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 OFFENSE

“IN OR ABOUT” EXPLAINED

The indictment charges that the offense was committed “in or about” certain dates. 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 offense was committed precisely on the dates charged.

CONSPIRACY TO DISTRIBUTE

The indictment charges the defendant with knowingly and willfully conspiring to distribute cocaine base, a Schedule II controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

I instruct you that, as a matter of law, ~~that~~ cocaine base is a Schedule II controlled substance. Cocaine base is also known as crack and is a different drug than cocaine which is also known as powder cocaine.

Section 841(a)(1) makes it a crime for anyone to knowingly or intentionally distribute a controlled substance. Section 846 makes it a separate offense for anyone to conspire or agree with someone else to distribute controlled substances in violation of Section 841(a)(1). Under the law, a “conspiracy” is an agreement of two or more persons to join together to accomplish some unlawful purpose.

In order to find the defendant guilty of the crime charged, you must find that the government has proved beyond a reasonable doubt the following essential elements:

- FIRST:** That defendant and one or more persons, in some way or manner, entered into an agreement or conspiracy to try to accomplish the unlawful plan charged, here the distribution of cocaine base; and
- SECOND:** That the defendant knowingly and willfully became a member of such conspiracy.

I will now explain these elements in more detail.

FIRST ELEMENT

The first element the government must prove beyond a reasonable doubt is that defendant and one or more persons entered into the unlawful agreement charged in the indictment, that is, during in or about winter 2012-2013, the defendant conspired with others to distribute cocaine base.

In order for the government to satisfy this element, it must prove that there was a mutual understanding, either spoken or unspoken, between defendant and one or more persons 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, here the distribution of cocaine base, 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 in light of the circumstances.

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

The second element the government must prove beyond a reasonable doubt 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, then you must next decide

whether the 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 its basic aims and purposes, 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. The government must prove beyond a reasonable doubt that the defendant acted with the specific intent to distribute cocaine base. 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 the 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 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 indictment.

The fact that acts of the 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 of the conspiracy may be established by his own acts or statements, as well as those of the other alleged co-conspirators.

The defendant need not have known the identities of each and every member, nor have been fully informed of all of their activities, nor all of the details of the conspiracy. The defendant need not have joined in all of the conspiracy's unlawful objectives.

The extent of the 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 the 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 the 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, however, are factors that you may consider among others to determine whether the defendant was a member of the conspiracy.

In sum, the government must prove beyond a reasonable doubt that the defendant, with an understanding of the unlawful character of the conspiracy, 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.

“KNOWINGLY” DEFINED

A person acts knowingly if that person acts intentionally and with knowledge, and not because of ignorance or carelessness. Whether the defendant acted knowingly may be proven by the defendant’s words and conduct and by all the facts and circumstances supplied by the evidence in this case.

“WILLFULLY” DEFINED

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

“DISTRIBUTION” DEFINED

The word “distribute” means to deliver a controlled substance. “Deliver” is defined as the actual, constructive, or attempted transfer of a controlled substance.

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, a controlled substance.

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.

BUYER-SELLER RELATIONSHIP

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. Thus, where an individual purchases a controlled substance for his own personal use, that alone will not support a conviction for conspiracy to distribute a controlled substance.

In addition, a buyer and seller of cocaine base do not enter into a conspiracy to distribute cocaine base simply because the buyer resells the cocaine base to others, even if the seller knows that the buyer intends to resell the cocaine base.

To establish that a buyer and seller entered into a conspiracy to distribute cocaine base, the government must prove beyond a reasonable doubt that they shared a conspiratorial purpose to advance other transfers, whether by the seller or by the buyer.

MULTIPLE CONSPIRACIES

If the government has failed to prove beyond a reasonable doubt the existence of the conspiracy charged in the indictment, then you must find the defendant not guilty, even though some other conspiracy did exist or might have existed. Likewise, if the government has failed to prove beyond a reasonable doubt that the defendant was a member of the conspiracy which is charged, then you must find the defendant not guilty even though he may have been a member of some other conspiracy. However, proof that the defendant was a member of some other conspiracy would not prevent you from returning a guilty verdict if the government also proved that he was a member of the conspiracy charged in the indictment.

JUROR NOTE TAKING

During this trial, you have been provided with pencil and paper, and some of you have taken notes. As I explained at the beginning of the trial, all jurors should be given equal attention during the deliberations regardless of whether or not they have taken notes. Any notes you have taken may only be used to refresh your memory during deliberations. You may not use your notes as authority to persuade your fellow jurors as to what a witness did or did not say. In your deliberations you must rely upon your collective memory of the evidence in deciding the facts of the case. If there is any difference between your memory of the evidence and your notes, you may ask that the record of the proceedings be read back. If a difference still exists, the record must prevail over your notes.

RECOLLECTION OF EVIDENCE

Let me remind you that in deliberating upon your verdict, you are to rely solely and entirely upon your own memory of the testimony.

If, during your deliberations, you are unable to recall with any degree of accuracy, a particular part of the testimony, or a part of these instructions, you may do the following:

- (1) Write out your question, and have the foreperson sign it;
- (2) Knock on the door of the jury room; and
- (3) Deliver your note to the Court Officer to give to me.

After the attorneys have been consulted, and the record has been reviewed, I will decide what action to take, and I will tell you my ruling.

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 a 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 a 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.

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 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. 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 Court Officer 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.

I appoint _____ as your foreperson.

Dated at Rutland, in the District of Vermont, this 3rd day of June, 2014.



Christina Reiss, Chief Judge
United States District Court