UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 2:16-cr-00052-cr-2
	)	
JOHN JONES	)	

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 JOHN JONES. The Third Superseding Indictment ("the indictment") charges JOHN JONES in three counts.

The first count of the indictment charges the defendant with engaging in a conspiracy with others to distribute heroin and at least 28 grams of cocaine base. Count I alleges:

> From about early 2015 through July 13, 2015, in the District of Vermont and elsewhere, the defendant JOHN JONES, a.k.a. "Champ," knowingly and willfully conspired with Childlove Gelin, a.k.a. "Rome" and "Haiti," and with others, known and unknown to the grand jury, to distribute a mixture and substance containing a detectible amount of heroin, a Schedule I controlled substance, and a mixture and substance containing a detectible amount of cocaine base, a Schedule II controlled substance. With respect to defendant JOHN JONES, his conduct as a member of the conspiracy, including the reasonably foreseeable conduct of other members

of the conspiracy, involved 28 grams or more of a mixture and substance containing a detectible amount of cocaine base.

This count charges the defendant with violating Sections 846, 841(a)(1), and 841(b)(1)(B) of Title 21 of the United States Code. Title 21, United States Code, Section 846 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.

Count II of the indictment charges the defendant with distributing a controlled substance. Count II alleges:

> On or about July 7, 2015, in the District of Vermont, the defendant, JOHN JONES, a.k.a. "Champ," knowingly and intentionally distributed heroin, a Schedule I controlled substance.

This count charges the defendant with violating Sections 841(a)(1) and 841(b)(1)(C) of Title 21 of the United States Code, as well as Section 2 of Title 18 of the United States Code. Section 841(a)(1) of Title 21 makes it a crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]" Section 2 of Title 18 states that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The final count of the indictment charges the defendant with possession with the intent to distribute cocaine base. Count III alleges:

> On or about July 13, 2015, in the District of Vermont, the defendant, JOHN JONES, a.k.a. "Champ," knowingly and intentionally possessed with intent to distribute a mixture and substance containing a detectible amount of cocaine base, a Schedule II controlled substance. The offense involved 28 grams or more of a mixture and substance containing a detectible amount of cocaine base.

This count charges the defendant with violating Section 841(a)(1) and 841(b)(1)(C) of Title 21 of the United States Code, as well as Section 2 of Title 18 of the

United States Code. I remind you that Section 841(a)(1) of Title 21 makes it a crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]" I also repeat that Section 2 of Title 18 states that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

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 before 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 charges against the defendant. The defendant has pleaded not guilty to the counts 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 in 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 government.

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 element 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, then it is your duty to find the defendant not guilty. On the other hand, if, after a 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 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.

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

Circumstantial evidence is evidence that 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, then you must find him not guilty. Your verdict must be based solely on the evidence introduced at trial, or the lack thereof.

GOVERNMENT NOT REQUIRED TO UTILIZE PARTICULAR INVESTIGATIVE METHODS

The government is not required to pursue any particular investigative method or methods in the investigation or prosecution of a crime. I remind you, however, that the government is always required to prove the defendant's guilt beyond a reasonable doubt.

STRICKEN TESTIMONY, ATTORNEYS' STATEMENTS AND OBJECTIONS, AND THE 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.

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 THE 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 may create a motive to testify falsely and may sway the witness to testify in a way that advances her or his 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 her or his testimony and accept it only 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 her or his 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 an expert witness's testimony, you should evaluate his or her 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. 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.

GOVERNMENT'S CONFIDENTIAL INFORMANTS

There has been evidence introduced at trial that the government used one or more confidential informants in this case, and you have heard the testimony of some of these

confidential informants. There is nothing improper about the government's use of informants. You, therefore, should not concern yourselves with how you personally feel about the informants, but you should be concerned with deciding whether the government has proved the guilt of the defendant beyond a reasonable doubt, regardless of whether evidence was obtained via a confidential informant.

On the other hand, when an informant testifies, his or her testimony must be examined with greater scrutiny than the testimony of an ordinary witness. You should consider whether the informant received any benefits or promises from the government that would motivate him or her to testify falsely against the defendant. For example, the informant may believe that he or she will only continue to receive these benefits if he or she produces evidence of criminal conduct.

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

IMMUNITY OF GOVERNMENT WITNESSES

You have heard the testimony of one or more witnesses who has testified under a grant of immunity from this court. What this means is that the testimony of the witness may not be used against her or him in any criminal case, except for a prosecution for perjury, giving a false statement, or otherwise failing to comply with the immunity order of this court.

The government is entitled to call, as a witness, a person who has been granted immunity by order of this court. You may convict a defendant on the basis of such a witness's testimony alone, but only if you find that the testimony proves the defendant guilty beyond a reasonable doubt.

However, the testimony of a witness who has been granted immunity should be examined by you with greater care than the testimony of an ordinary witness. You may give the testimony of a government witness who has been granted immunity such weight, if any, as you believe it deserves.

You should scrutinize it closely to determine whether or not it is affected in any way to further the witness's own interest or if the witness otherwise has a motive to falsify her or his testimony.

WITNESSES WHO HAVE, HAVE RECENTLY,
OR ARE CURRENTLY USING CONTROLLED SUBSTANCES

There has been evidence introduced at trial that some of the individuals who the government called as witnesses were using controlled substances 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. The testimony of a witness who was using controlled substances at the time of the events she or he is testifying about, or who has recently or is currently using controlled substances during the time of her or his testimony, may be less believable because of the effect the controlled substances may have on her or his ability to perceive or remember the events in question.

If you decide to accept the testimony of such a witness, 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 NON-PARTY WITNESSES

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.

WITNESSES' PLEA AGREEMENTS

There has been evidence that some of the government's witnesses pled guilty after entering into agreements with the government to testify. There is also evidence that the government agreed to dismiss some of the charges against some of the witnesses, or

agreed not to prosecute them on other charges in exchange for an agreement to plead guilty and testify at trial. The government also promised to bring the witnesses' cooperation to the attention of the sentencing court.

The government is permitted to offer this kind of plea agreement. You, in turn, may accept the testimony of such a witness or witnesses and convict the defendant on the basis of this testimony alone, but only if the testimony convinces you, the jury, of the defendant's guilt for the crimes charged beyond a reasonable doubt.

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 she or he may be able to obtain her or his own freedom, or receive a more lenient sentence or a reduction in their sentence by giving testimony favorable to the government, may have a motive to testify falsely. Conversely, a witness who realizes that she or he may benefit by providing truthful testimony may have a motive to be honest. Therefore, you must examine her or his testimony with caution and weigh it with great care. You may decide whatever weight, if any, you find it deserves.

USE OF RECORDINGS AND TRANSCRIPTS

Some of the evidence in this case includes audio and video recordings. Along with these recordings, the parties were permitted to display a transcript containing the parties' interpretation of what can be heard on the recordings.

The transcripts were provided as an aid or guide to assist you, the jury, in listening to and watching the recordings; however, the transcripts themselves are not evidence.

The audio and video recordings are evidence, and, as such, you must rely on your own interpretation of what you heard on these recordings. If you think you heard something different on the recording than what was represented on the transcript, then what you heard on the recording must control.

WITNESSES' GUILTY PLEAS

You have heard the testimony of government witnesses who previously pled guilty to criminal charges. You are not to draw any conclusion or inferences of any kind about the guilt of the defendant from the fact that a prosecution witness may have pled guilty to

similar charges. A witness's decision to plead guilty is a decision personal to them. It may not be used by you in any way as evidence against the defendant here in this trial.

IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

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

IMPERMISSIBLE TO INFER PARTICIPATION FROM PRESENCE

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

JURORS' EXPERIENCE OR 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.

JURORS' SYMPATHY, PASSION, OR PREJUDICE

In arriving at a verdict, you must not permit yourselves to be influenced in the slightest degree by sympathy, passion, or prejudice, or any other emotion in favor of or against either party. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, or prejudice.

DEFENDANT NOT TESTIFYING

You may have observed that the defendant did not testify in this case. The 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. The defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. A defendant is never required to prove that she or he is not guilty. Therefore, in determining the defendant's guilt or innocence of a 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.

OTHER ACTS

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

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 crimes charged to interfere with your deliberations, or to 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 that 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.

COUNT I

CONSPIRACY TO DISTRIBUTE HEROIN

AND 28 GRAMS OR MORE OF COCAINE BASE

ESSENTIAL ELEMENTS OF THE OFFENSE OF CONSPIRACY

Count I of the Third Superseding Indictment charges that the defendant, John Jones, engaged in a conspiracy with Childlove Gelin and others to distribute heroin and at least 28 grams of cocaine base. Title 21, United States Code, Section 846, as charged in Count I of the Third 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. I instruct you that heroin and cocaine base are both controlled substances.

Under the law, a "conspiracy" is an agreement or a "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 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 heroin and cocaine base occurred.

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

First: 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 Third Superseding Indictment; and

Second: that the defendant knowingly became a member of such conspiracy.

Because 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.

EXISTENCE OF AN AGREEMENT

The first element that 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 Count I of the Third 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 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 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.

MEMBERSHIP IN THE CONSPIRACY

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

If you are satisfied that the conspiracy charged in the Third 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 he 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, he 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 a defendant had such an interest that is a factor which you may properly consider in determining whether or not that defendant was a member of the conspiracy charged in the Third Superseding Indictment.

As I mentioned a moment ago, before the defendant can be found to have been a conspirator, you must first find that he 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. In that regard, 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 he have been apprised of all the other members' activities. In addition, 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 his part.

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 his participation. 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. The law does not require that each participant in the conspiracy play an equal role. Even a single act may be sufficient to draw a 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 or leave it at the same time. A member of the conspiracy may stop participating in the conspiracy before the conspiracy ends and may join a conspiracy after it has already begun. 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. 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 him for conspiracy even though he had not participated before and even though he played a minor part.

I caution you, however, that a defendant's mere presence at the scene of the alleged crime does not, by itself, make him or her a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically make a defendant a member. A person may know, or be friendly with, a criminal, without being a criminal himself. 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. Similarly, 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.

I also caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Furthermore, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make that defendant a member. 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, a defendant, with an understanding of the unlawful character of the conspiracy, must have 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 — that is to say, a conspirator.

"ON OR ABOUT" DEFINED

The Third Superseding Indictment charges that the offenses were committed "in or about" or "on 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 Third Superseding Indictment, it is not necessary for the government to prove that the offense was committed precisely on the dates charged.

As to Count I, as I have instructed you, it is not necessary that all members of the conspiracy join it at the same time or leave it at the same time. A member of the conspiracy may stop participating in the conspiracy before the conspiracy ends and one may join a conspiracy after it has already begun. Therefore, to find the defendant, John Jones, guilty of Count I, you need not find that his participation in the conspiracy spanned the entire period alleged in the Third Superseding Indictment.

"KNOWINGLY" AND "WILLFULLY" DEFINED

You have been instructed that to sustain its burden of proof on Count I, the government must prove that the defendant acted knowingly and willfully. A person acts knowingly if he 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.

Willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something that the law forbids, that is to say with the bad purpose to disobey or to disregard the law. The defendant's conduct was not willful if it was due to negligence, inadvertence, or mistake.

"DISTRIBUTION" DEFINED

Count I accuses the defendant, John Jones, of knowingly and willfully conspiring with Childlove Gelin and others "to distribute" heroin and at least 28 grams of cocaine base. The term "to distribute," in this context, and as used in these instructions, means to deliver a controlled substance, in this case, heroin and cocaine base.

"Deliver" means the actual, constructive, or attempted transfer of heroin or 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, heroin or cocaine base.

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

FINDING AS TO QUANTITY OF CONTROLLED SUBSTANCES REQUIRED

If you find that the government has not proven beyond a reasonable doubt the elements of conspiracy to distribute a controlled substance that I have just described to

you, you must find the defendant "Not Guilty" of Count I on the special verdict form I will provide you with. You will then answer no further questions as to Count I.

However, if you find that the government has proven beyond a reasonable doubt the elements of conspiracy to distribute a controlled substance, then there is one more issue that you must decide with regard to Count I: if cocaine base was involved, the quantity of cocaine base for which the defendant is responsible. Consistent with the other aspects of the charge, the government bears the burden of proof beyond a reasonable doubt on this issue.

I have provided you with a special verdict form asking you a question with regard to the type of controlled substances the conspiracy involved and the amount of cocaine base for which the defendant is responsible. As to the amount of cocaine base, the special verdict form asks whether the government has proven beyond a reasonable doubt that the conspiracy involved 28 grams or more of a mixture or substance containing a detectible amount of cocaine base.

In proving the amount of cocaine base involved in the conspiracy with regard to the defendant, the government does not have to prove that the defendant directly handled or distributed the quantity alleged although you may consider that evidence along with other evidence to assess the quantity element. Rather, in deciding whether the government has proven that the conspiracy involved a particular quantity of cocaine base, you may consider quantities the defendant was personally involved in and quantities he knew or reasonably should have known other members of the conspiracy were involved in or would be involved in at the time the defendant was a member of the conspiracy.

Remember, you should address the issue of the quantity of cocaine base involved in the conspiracy only if you find the essential elements of the conspiracy alleged in Count I have been proved beyond a reasonable doubt. If you decide that the government has not proven beyond a reasonable doubt that the charged conspiracy involved 28 grams or more of cocaine base, then you must find the defendant not guilty of the charged amount, even if you find that the defendant was otherwise involved in a lesser quantity of cocaine base.

COUNT II

ESSENTIAL ELEMENTS OF THE OFFENSE OF DISTRIBUTION OF A CONTROLLED SUBSTANCE

Count II of the Third Superseding Indictment charges the defendant with distributing heroin, a controlled substance. 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:

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

Second: At the time of the distribution, the defendant knew that the substance distributed was a controlled substance.

I instruct you that heroin is a Schedule I controlled substance.

"DISTRIBUTION" DEFINED

As to Count II, 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, controlled substancesa.

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

"KNOWINGLY" AND "INTENTIONALLY" DEFINED

With respect to Count II, you have been instructed that in order to sustain its burden of proof, the government must prove that the defendant acted knowingly and intentionally. A person acts knowingly if he 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. A person acts intentionally if he acts deliberately and purposefully, and not because of mistake or accident.

KNOWLEDGE

Although the government must prove that the defendant knew that he possessed a controlled substance, the government does not have to prove the defendant knew the exact nature of the controlled substances he possessed. It is enough that the government proves that the defendant knew that he possessed some kind of controlled substance.

Your decision whether the defendant knew the materials he distributed were a controlled substance involves a decision about the defendant's state of mind. It is obviously impossible to prove directly the operation of the defendant's mind. But a wise and intelligent consideration of all the facts and circumstances shown by the evidence and the exhibits in this case may enable you to infer what the defendant's state of mind was. In our everyday affairs, we are continuously called upon to decide from the actions of others what their state of mind is. You may rely on both direct and circumstantial evidence in determining the defendant's state of mind.

COUNT III

ESSENTIAL ELEMENTS OF THE OFFENSE OF POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE

The defendant is charged in Count III with possession with intent to distribute cocaine base. To sustain its burden of proof for the crime of possession with intent to distribute a controlled substance, the government must prove the following three elements beyond a reasonable doubt:

First: The defendant knowingly and intentionally possessed a controlled substance, as charged in the Third Superseding Indictment;

Second: At the time of the possession, the defendant knew that the substance was a controlled substance; and

Third: At the time of the possession, the defendant intended that he or someone else would distribute the controlled substance.

I instruct you that cocaine base is a Schedule II controlled substance.

"POSSESSION" DEFINED

The word "possess" means to own or to exert control over. The word "possession" can take on several different, but related, meanings.

The law recognizes two kinds of "possession" — actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession of it. For example, if you find that the defendant had the controlled substances on his person, you may find that he had possession of the controlled substances.

However, a person need not have actual physical custody of an object in order to be in legal possession of it. A person who, although not in actual possession, knowingly has dominion and control over the place where a thing is located and has the ability and intention to exercise control over that thing, is in constructive possession of it.

The law also recognizes that "possession" may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. However, it is possible that more than one person may have the power and intention to exercise control over controlled substances. If two or more persons share actual or constructive possession of controlled substances, then possession is joint. If you find that the defendant had such power and intention, then he possessed the controlled substances under this element even if he possessed the controlled substances jointly with another.

Possession of controlled substances cannot be found solely on the ground that the defendant was near or close to the controlled substances. Nor can it be found simply because the defendant was present at a scene where controlled substances were involved, or solely because the defendant associated with a person who did control the controlled substances or the property where they were found. However, these factors may be considered by you, in connection with all other evidence, in making your decision whether the defendant possessed the controlled substances.

You may find that the element of "possession" as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

INFERENCE FROM CONTROL OVER PLACE WHERE FOUND OR LOCATED

A defendant may own or have control over the place where the controlled substances are found or located. When the defendant is the sole person having such ownership or control, this control is significant evidence of the defendant's control over the controlled substances themselves, and thus of his possession of the controlled substances. You should note, however, that the defendant's sole ownership or control of a location or place does not necessarily mean that the defendant had control and possession of the controlled substances found or located in it.

A defendant may also share ownership or control of the place where the controlled substances are found or located. In this event, the controlled substances may be possessed by only one person, or by some of the people who control the place, or by all of them. However, without more, the fact that a particular defendant had joint ownership or control over the place where the controlled substances were found or located is not sufficient evidence to find that the defendant possessed the controlled substances found there. In order to find that a particular defendant possessed controlled substances because of his or her joint ownership or control over the place where they were found or located, you must find beyond a reasonable doubt that the defendant knew about the presence of the controlled substances and intended to exercise control over them.

KNOWLEDGE THAT SUBSTANCES WERE CONTROLLED

To establish this element, the government must prove that the defendant knew that he possessed a controlled substance, and that his possession was not due to carelessness, negligence, or mistake. If you find that the defendant did not know that he had a controlled substance in his possession, or that he did not know that what he possessed was, in fact, a controlled substance, then you must find the defendant not guilty.

Although the government must prove that the defendant knew that he possessed a controlled substance, the government does not have to prove that the defendant knew the exact nature of the controlled substances in his possession. It is enough that the

government proves that the defendant knew that he possessed some kind of controlled substance. I have already instructed how you may evaluate a defendant's state of mind.

INTENT TO DISTRIBUTE

To prove the third element of Count III, the government must prove beyond a reasonable doubt that the defendant had control over the controlled substances with the state of mind or purpose to transfer them to another person.

Since you cannot read the defendant's mind, you must make inferences from his behavior. However, you may not convict the defendant unless these inferences convince you beyond a reasonable doubt that the defendant intended to distribute the controlled substances.

When I say that you must find that the defendant intended to distribute the controlled substances, this does not mean that you must find that the defendant intended personally to distribute or deliver the controlled substances. It is sufficient if you find that the defendant intended to cause or assist in the distribution of the controlled substances.

In essence, what you are determining is whether the controlled substances in the defendant's possession were for his personal use or for the purpose of distribution. It may be possible to make this determination from the quantity of controlled substances found in the defendant's possession. The possession of a large quantity of controlled substances does not necessarily mean that the defendant intended to distribute them. On the other hand, a defendant may have intended to distribute controlled substances even if he did not possess large amounts of them. Other physical evidence, such as paraphernalia for the packaging or processing of controlled substances, may show intent. There might also be evidence of a plan to distribute. You should make your decision whether the defendant intended to distribute the controlled substances you find were in his possession from all the evidence presented.

FINDING AS TO QUANTITY OF CONTROLLED SUBSTANCES REQUIRED

The Third Superseding Indictment alleges in Count III that the defendant's possession with intent to distribute a controlled substance involved 28 grams or more of a mixture or substance containing a detectable amount of cocaine base.

If you find the defendant "Not Guilty" on Count III, there is no reason to consider this issue. If you find the defendant "Guilty" on Count III, then you should decide this question and indicate your determination on the special verdict form. If you decide that the government has proven beyond a reasonable doubt that the charged crime of possession with intent to distribute cocaine base involved 28 grams or more of cocaine base, then you must indicate that finding on the special verdict form.

COUNTS II & III

AIDING AND ABETTING

Count II of the Third Superseding Indictment charges the defendant with distribution of heroin and with aiding and abetting that offense. Count III of the Third Superseding Indictment charges the defendant with possession with intent to distribute at least 28 grams of cocaine base and with aiding and abetting that offense. The aiding and abetting statute, Section 2(a) of Title 18 of the United States Code, provides that:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crimes with which he is charged in order for the government to sustain its burden of proof. A person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

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

To find the defendant guilty of aiding or abetting, you must first find that another person has committed the crime charged. No one can be convicted of aiding or 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 that crime.

In order to aid or abet another in the commission of a crime, it is necessary that the defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed.

To establish that defendant knowingly associated himself with the crime, the government must establish that, as to Count II, the defendant knew that another person knowingly and intentionally distributed heroin, and, as to Count III, the defendant knew that another person knowingly and intentionally possessed with intent to distribute at least 28 grams of cocaine base. To establish that the defendant participated in the commission of the crime, the government must prove that the defendant engaged in some affirmative conduct or overt act for the specific purpose of bringing about the crime.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or merely associating with others who were committing a crime is not sufficient to establish aiding and abetting. One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether a defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

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

Did he knowingly associate himself with the criminal venture?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense. If, on the other hand, your answer to any one of these questions is "no," then the defendant is not an aider or abettor, and you must find him not guilty.

COUNTS II & III

UNANIMITY AS TO THEORY OF GUILT

You must convict the defendant of Count II if you find beyond a reasonable doubt either (1) that he knowingly and intentionally distributed heroin, or (2) that he aided and abetted someone else in the commission of that offense.

You must convict the defendant of Count III if you find beyond a reasonable doubt either (1) that he knowingly and intentionally possessed with intent to distribute at least 28 grams of cocaine base, or (2) that he aided and abetted someone else in the commission of that offense.

The government need not prove that the defendant both committed the charged offenses and that he aided and abetted someone else's commission of those crimes. You may convict the defendant of Counts II and III if you unanimously find him guilty of doing one or the other as to each Count. In other words, all of the jurors must be in agreement as to which of these theories of guilt have been proven beyond a reasonable doubt.

UNANIMOUS VERDICT REQUIRED

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous regarding each essential element of each count.

MULTIPLE COUNTS

The Third Superseding Indictment contains multiple counts. Each count charges the defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each. Whether you find the defendant guilty or not guilty as to one offense should not control your verdict as to the other offenses charged.

DISCREPENCIES BETWEEN THE SPECIAL VERDICT FORM AND THESE INSTRUCTIONS

If you find that there are any discrepencies between the special verdict form I will provide you with and any of the instructions I give to you now, my instructions must govern your deliberations.

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 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.

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. If the verdict form varies in any way from the instructions provided within this jury charge, I instruct you that you are to follow the instructions provided within this jury charge.

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 [redacted] as your foreperson.

Dated at Burlington, in the District of Vermont, this 26th day of October, 2017.

Christina Reiss, Chief Judge
United States District Court