

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

UNITED STATES OF AMERICA

v.

SAMUEL HERBIN,
Defendant.

No. 2:04-CR-93

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, Samuel Herbin. The grand jury Indictment charges the defendant in five counts. You will receive a copy of the Indictment to take with you into the jury room.

ROLE OF THE COURT

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

You should not single out any instruction as alone stating

the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be - or ought to be - it would violate your sworn duty to base a verdict upon any other view of the law than that which I give to you.

ROLE OF THE INDICTMENT

At this time, I would like to remind you of the function of a grand jury indictment. An indictment is merely a formal way to accuse the defendant of a crime preliminary to trial. An indictment is not evidence. The Indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the nature of the charges against the defendant.

The defendant has pleaded not guilty to all of the charges 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

I have said that the government must prove the defendant

guilty beyond a reasonable doubt. The question naturally 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 caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy. Under your oath as jurors you are not to be swayed by sympathy; you are to be guided solely by the evidence in this case.

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 that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the 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.

If, after fair and impartial consideration of all of the evidence you have a reasonable doubt, it is your duty to find the 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 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.

MULTIPLE COUNTS

A separate crime or offense is charged in each of the five counts of the Indictment. Each charge against the defendant and the evidence pertaining to each charge should be considered separately. You must return a separate verdict on each count in which the defendant is charged. The fact that you may find the defendant not guilty or guilty as to one of the offenses charged should not influence your verdict as to any other offense charged against the defendant.

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 received in evidence, and all the facts which may have been admitted or stipulated. I

would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses -- something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence. It is a general rule that the law makes no distinction between direct evidence and circumstantial evidence, but requires that your verdict must be based on all the evidence presented. You may convict a defendant on the basis of circumstantial evidence alone, but only if that evidence convinces you of the guilt of that defendant beyond a reasonable doubt.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony 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. The evidence that you will consider in reaching your verdict consists, as I have said, only of the sworn testimony of witnesses, the stipulations made by the parties, and all the exhibits that have been received in evidence. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

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, since you may accept or reject the testimony of any witness, in whole or in

part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward the defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a

discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

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

EXPERT WITNESSES

You have heard testimony from expert witnesses. An expert is allowed to express an opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts. In weighing the expert's testimony, you may consider his or her qualifications, opinions, and reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether to believe a witness's testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in

this case rests solely with you.

LAW ENFORCEMENT WITNESSES

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

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

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

ACCOMPLICES AND IMMUNIZED WITNESSES

You have also heard witnesses 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 from 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 he or she 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 than 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 has 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 defendants.

UNINDICTED CO-CONSPIRATOR AS GOVERNMENT WITNESS

The government has called as witnesses people who are named by the prosecution as co-conspirators, but who were not charged as defendant.

For this reason, you should exercise caution in evaluating their testimony and scrutinize it with great care. You should consider whether they have an interest in the case and whether they have a motive to testify falsely. In other words, ask yourselves whether they have a stake in the outcome of this

trial. As I have indicated, their testimony may be accepted by you if you believe it to be true and it is up to you, the jury, to decide what weight, if any, to give to the testimony of these unindicted co-conspirators.

WITNESSES WHO ARE DRUG USERS

There has been evidence introduced at the trial that the government called as witnesses persons who may have been using drugs when the events they observed took place. I instruct you that 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 drugs at that time of the events he or she is testifying about may be less believable because of the effect the drugs may have on the witness's ability to perceive or relate to 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.

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.

GOVERNMENT AS A PARTY

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

This case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, this case is important to the defendant, who is charged with a serious crime.

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

IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

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

IMPERMISSIBLE TO INFER PARTICIPATION FROM MERE PRESENCE

You also may not infer that the 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.

RECORDINGS

The Government has offered evidence in the form of video and tape recordings of conversations with the defendant. These recordings may have been made without the knowledge of the defendant. The use of this procedure to gather evidence is perfectly lawful, and the government is entitled to use the recordings in this case.

"ON OR ABOUT" EXPLAINED

The Indictment in this case charges that particular offenses were committed "on or about" or "on or before" or "in or about" a certain date. It is not necessary for the government to prove that the offense was committed precisely on the date charged; however, it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the Indictment. For instance, if the Indictment charges that a specific crime occurred on March 5, 1992 and you find beyond a reasonable doubt from the evidence that the alleged crime occurred on March 4, 1992, a date reasonably near March 5, 1992, you should return a verdict of guilty on that charge.

VENUE

In addition to the elements of each offense charged, you must consider whether any act in furtherance of the crime occurred within the District of Vermont. You are instructed that

the district encompasses the entire state of Vermont.

In this regard the government need not prove that the crime itself was committed in this district or that the defendant was present here. It is sufficient to satisfy this element if any act in furtherance of the crime occurred within this district. If you find that the government has failed to prove that any act in furtherance of the crime occurred within the district -- or if you have reasonable doubt on this issue -- then you must acquit.

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 1: CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE

The defendant is charged in Count 1 with engaging in a conspiracy with others to knowingly and intentionally possess with the intent to distribute cocaine base. Count 1 of the Indictment reads as follows: "In or about March 2004, in the District of Vermont, defendant . . . did conspire with others known and unknown to the Grand Jury to knowingly and intentionally possess with the intent to distribute a mixture or substance containing cocaine base, a Schedule II controlled substance. The offense involved 50 grams or more of a mixture or substance which contained a detectable amount of cocaine base." The defendant is charged with violating 21 U.S.C. §§ 841(b)(1)(A) and 846.

Title 21 of the 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 Title 21, Section 841 of the United States Code. The section states that anyone who ". . . conspires to commit any offense defined in . . . [Section 841] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy." Section 841(a)(1) and 841(b)(1)(A) make it a crime

for anyone to possess with intent to distribute cocaine base. The Indictment, therefore, charges the defendant with conspiring with others to knowingly and intentionally distribute crack cocaine, a Schedule II controlled substance.

CONSPIRACY

A conspiracy is a type of criminal partnership where two or more persons agree to join together to commit a particular offense. The most vital part of the conspiracy is the agreement, which must be willingly entered into by the parties to it. A successful completion of the conspiracy's objective is irrelevant in determining the defendant's guilt on this charge.

ELEMENTS OF THE OFFENSE

In order to satisfy its burden of proof on the conspiracy charge, the government must establish each of the following essential elements beyond a reasonable doubt:

First, that two or more persons entered into the unlawful agreement charged in the Indictment to commit an unlawful act, to wit, to distribute crack cocaine, in or about March 2004;

Second, that at some point after its formation, the defendant knowingly and willfully became a member of the conspiracy;

(1) 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 into the unlawful agreement charged in the Indictment.

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

There may or may not be direct proof of the agreement. However, because a conspiracy is characterized by secrecy, you may infer its existence from the circumstances and the conduct of the parties involved. You may therefore consider the actions and statements of all of those you find to be participants as proof that a common design existed for acting together to accomplish an unlawful purpose. Acts that may seem innocent when taken individually may indicate guilt when viewed collectively and with reference to the circumstances in general.

Co-conspirators need not be charged with the crime of conspiracy in order for you to find that the defendant had an

agreement with other individuals to commit some illegal act.

(2) MEMBERSHIP IN THE CONSPIRACY

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

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

You must find that the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement in order to satisfy the knowledge element of the conspiracy charge. The defendant's knowledge is a matter of inference and must be established by his own acts or statements, as well as those of the other alleged co-conspirators. The defendant need not have known the identities of each and every member, nor been fully informed of all of their activities, nor all of the details of the conspiracy.

The extent of the defendant's participation has no bearing on his guilt. If the evidence establishes beyond a reasonable doubt that defendant knowingly and deliberately 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. A single act may be sufficient to find that defendant was a member of the conspiracy. In other words, if his presence was a functional part of the conspiracy, then you may find that he was a member of that 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. Mere presence or association with conspirators and financial interest, though, are factors that you may consider among others to determine whether a defendant was a member of the conspiracy.

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

SUBSTANTIVE OFFENSE: DISTRIBUTION OF A CONTROLLED SUBSTANCE

If you find that a conspiracy existed and that the defendant was a member of that conspiracy, you must also find that the illegal undertaking pursued by the conspiracy was the distribution of crack cocaine, a Schedule II controlled substance, as charged under 21 U.S.C. 841(b)(1)(A) and 846. I also instruct you that crack cocaine is a Schedule II controlled substance.

AMOUNT OF DRUGS

If you find that the government has proven beyond a reasonable doubt the elements that I have just described to you, then there is one more issue you must decide. I have provided you with a special verdict form asking you to decide upon the amount of drugs involved in the conspiracy. The burden is on the government to establish the type and amount of drugs beyond a reasonable doubt. Remember, you should address this issue and complete the form only if you find the first two elements to have been established. If you did not find that the government has proven the two elements, then do not complete this form.

DEFINITION OF DISTRIBUTION

The word "distribute" means to deliver a narcotic. "Deliver" is defined as the actual, constructive or attempted transfer of a narcotic. Simply stated, the words distribute and deliver mean to pass on, or to hand over to another, or to cause to be passed

on or handed over to another, or to try to pass on or hand over to another, narcotics.

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

KNOWINGLY

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

COUNT 2: MAINTAINING DRUG-INVOLVED PREMISES

The defendant is charged with maintaining a drug-involved premises. Count 2 charges that from on or about March 17, 2004 to on or about March 31, 2004, in the District of Vermont, the defendant knowingly maintained a place, being 12 Baker Street, Building 3, Apartment 4, in Essex, Vermont, for the purpose of distributing cocaine base, that is, crack cocaine, a Schedule II

controlled substance. The Indictment charges the defendant with violating section 856(a)(1) of Title 21 of the United States Code. That section makes it a crime to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance."

ELEMENTS OF THE OFFENSE

In order to prove the defendant guilty of maintaining a drug-involved premises, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant permanently or temporarily maintained or leased, rented, or used the place described in the Indictment;

Second, that the defendant maintained that place for the purpose of manufacturing, distributing or using any controlled substance; and

Third, that the defendant acted knowingly.

(1) MAINTAINING A PLACE

The first element which the government must prove beyond a reasonable doubt is that the defendant permanently or temporarily maintained or leased a room or enclosure located at 12 Baker Street, Building 3, Apartment 4, Essex, Vermont. To "maintain" a place means to exercise significant supervisory control over the activities that occur and the people who are in that place over a

period of time. (For example, a person who owns and resides in a house or apartment exercises such control, while a casual visitor does not.) In determining whether the defendant maintained a room or enclosure at 12 Baker Street, Building 3, Apartment 4, Essex, Vermont, you should consider all of the relevant evidence, taking into account such factors as how much control defendant exercised over the apartment, the duration of that control, and whether the defendant was responsible for furnishing, repairing, and protecting the place, or providing food and other supplies to those at the place.

(2) PURPOSE

The second element which the government must prove beyond a reasonable doubt is that the defendant maintained, or leased, rented or used, a room or enclosure at 12 Baker Street, Building 3, Apartment 4, Essex, Vermont, for the purpose of manufacturing, distributing or using any controlled substance.

To establish this element, the government must prove that the drug activity was a significant or principal reason why defendant maintained the place. The government is not required to prove that the drug activity was the defendant's only purpose in maintaining the place, although that would obviously satisfy this element.

(3) KNOWLEDGE

The third element which the government must prove beyond a

reasonable doubt is that the defendant acted knowingly.

An act is done knowingly when it is done voluntarily and intentionally and not because of accident, mistake or some other innocent reason.

The question of whether a person acted with knowledge is a question of fact for you to determine, like any other fact question. Direct proof of knowledge is not always available, and such proof is not required. The ultimate fact of whether someone knew something at a particular time, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

COUNT 3: MAINTAINING PROPERTY USED BY OTHERS AS DRUG-INVOLVED

PREMISES

The defendant is charged with managing or controlling a place used by others as a drug-involved premises. Count 3 of the Indictment charges that from on or about March 17, 2004 to on or about March 31, 2004, in the District of Vermont, the defendant managed or controlled a room or enclosure located at 12 Baker Street, Building 3, Apartment 4, Essex, Vermont, as a lessee, and did knowingly and intentionally make available for use the room or enclosure for the purpose of unlawfully storing cocaine base, a Schedule II controlled substance.

The Indictment charges the defendant with violating section 856(a)(2) of Title 21 of the United States Code. That section makes it a crime to "manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance."

ELEMENTS OF THE OFFENSE

In order to prove the defendant guilty of managing or controlling a place used by others as a drug-involved premises, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant managed or controlled a room or enclosure located at 12 Baker Street, Building 3, Apartment 4, Essex, Vermont, as a lessee;

Second, that the defendant made available for use with or without compensation that property as alleged in the indictment;

Third, that those others used the place for the purpose of storing a controlled substance; and

Fourth, that the defendant acted knowingly and intentionally.

(1) MANAGEMENT OR CONTROL OF A PLACE

The first element which the government must prove beyond a reasonable doubt is that the defendant managed or controlled a room or enclosure located at 12 Baker Street, Building 3, Apartment 4, Essex, Vermont as a lessee.

(2) MADE AVAILABLE FOR USE

The second element which the government must prove beyond a reasonable doubt is that the defendant made available for use with or without compensation that property as alleged in the Indictment.

(3) PURPOSE OF USING PLACE

The third element which the government must prove beyond a reasonable doubt is that individuals to whom the defendant made the apartment available used the place for the purpose of storing a controlled substance.

To establish this element, the government must prove that the drug activity was a significant or principle reason why those individuals used the place. The government is not required to prove that the drug activity was their only purpose in using the place, although that would obviously satisfy this element.

(4) KNOWING AND INTENTIONAL CONDUCT

The fourth element which the government must prove beyond a reasonable doubt is that the defendant acted knowingly and intentionally.

To establish this element, the government must prove that

the drug activity was occurring at 12 Baker Street, Building 3, Apartment 4, Essex, Vermont and defendant knew of and intentionally allowed that activity to continue.

An act is done knowingly when it is done voluntarily and not because of accident, mistake or some other innocent reason. An act is done intentionally when it is done deliberately and purposefully.

The question of whether a person acted with knowledge or intent is a question of fact for you to determine, like any other fact question. Direct proof of knowledge and intent is not always available, and such proof is not required. The ultimate fact of whether someone knew or intended something at a particular time, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

COUNT 4: POSSESSION WITH INTENT TO DISTRIBUTE

The Indictment charges the defendant with knowing and intentional possession with intent to distribute crack cocaine. The Indictment charges that "On or about March 31, 2004, in the District of Vermont defendant . . . did knowingly and intentionally possess with the intent to distribute a mixture or substance which contained a detectable amount of cocaine base, a

Schedule II controlled substance. The offense involved 50 grams or more of a mixture or substance which contained a detectable amount of cocaine base."

The defendant is charged with violating section 841(a)(1) of Title 21 of the United States Code, which makes it a crime "for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

In order to prove any or all of Count 4 against the defendant, the government must prove all of the following three elements beyond a reasonable doubt:

First, that the defendant possessed the controlled substance alleged;

Second, that he knew that he possessed a controlled substance; and

Third, that he possessed it with the intent to distribute it.

(1) POSSESSION OF A CONTROLLED SUBSTANCE

The first element the government must prove beyond a reasonable doubt is that the defendant possessed a controlled substance, in this case crack cocaine.

To establish this element, the government must prove that the substance that the defendant is charged with possessing is, in fact, crack cocaine. The government may prove this through

either direct evidence or through circumstantial evidence. An example of direct evidence is the testimony of a chemist who has done a chemical analysis of the material. Circumstantial evidence would be evidence from which you could infer that the material was crack cocaine, such as testimony about the material's appearance. Whether the government relies on direct or circumstantial evidence to prove that the material in issue was the controlled substance in question, it must prove so beyond a reasonable doubt.

DEFINITION OF POSSESSION

As I have instructed you, the government must prove beyond reasonable doubt that the defendant "possessed" a controlled substance. The legal concept of possession may differ from the everyday usage of the term, so I will explain it in some detail.

Actual possession is what most of us think of as possession; that is, having physical custody or control of an object. For example, if an individual has drugs on his or her person, he or she may be found to have had possession of the drugs. However, a person need not have actual physical custody of an object in order to be in legal possession of it. If a person has the ability and intent to exercise substantial control over an object that he or she does not have in his or her physical custody, then you may find that person in possession of that item. An example of this from everyday experience would be a person's possession

of items he or she keeps in the safe deposit box of a bank. Although the person does not have physical custody of those items, he or she exercises substantial control over them and so has legal, or "constructive" possession of them.

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

The law recognizes that "possession" may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.

A defendant may own or have control over the place where the narcotics are found, such as an apartment or a vehicle. When the defendant is the sole person having such ownership or control, this control is significant evidence of the defendant's control over the drugs themselves, and thus of his possession of the drugs. You should note, however, that the defendant's sole

ownership or control of a residence or vehicle does not necessarily mean that the defendant had control and possession of the drugs found in it.

(2) KNOWLEDGE THAT THE SUBSTANCE WAS A CONTROLLED SUBSTANCE

The second element the government must prove beyond a reasonable doubt is that the defendant knew that he possessed a controlled substance.

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 he did not know that he had the crack cocaine 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 he knew the exact nature of the substance in his possession. It is enough that the government proves that he knew that he possessed some kind of controlled substance.

METHOD OF PROVING KNOWLEDGE

Your decision as to whether the defendant knew the substance he possessed was a controlled substance involves a decision about his state of mind. It is obviously impossible to prove directly the operation of someone's mind. But a wise and intelligent

consideration of all the facts and circumstances shown by the evidence and the exhibits in the 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. Experience has taught us that, frequently, actions speak louder and more clearly than spoken or written words. Therefore, you may well rely in part on circumstantial evidence in determining the defendant's state of mind.

A person's behavior may indicate knowledge. Nervousness in the presence of the drugs or flight from the site at which authorities have identified drugs may indicate that a person knew what he or she had in his or her possession. These examples are neither exhaustive nor conclusive. It is up to you, based on all the evidence, to determine whether the defendant knew that he possessed a controlled substance.

(3) INTENT TO DISTRIBUTE

The third element that the government must prove beyond a reasonable doubt is that the defendant intended to distribute a controlled substance. To satisfy this element, the government must prove beyond a reasonable doubt that the defendant had control over the controlled substance with the state of mind or purpose to transfer it to another person.

DISTRIBUTION

To "distribute" a controlled substance means to deliver it to someone. "Delivery" 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 try to pass on or hand over to another.

Distribution does not require a 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 or delivering the drugs may constitute distribution. In short, distribution requires a concrete involvement in the transfer of the drugs.

INTENTION

The same considerations that apply to your determination of whether the defendant knew he possessed a controlled substance apply to your decision concerning his intention to distribute it. Since you cannot read his mind, you must make inferences from his testimony or behavior. However, you may not convict the defendant unless these inferences convince you beyond a reasonable doubt that he intended to distribute the controlled substance.

When I say that you must find that the defendant intended to distribute the controlled substance, this does not mean that you must find that he intended personally to distribute or deliver it. It is sufficient if you find that he intended to cause or

assist the distribution of the controlled substance.

Basically, what you are determining is whether the controlled substance in the defendant's possession was for his personal use or for the purpose of distribution. Often it is possible to make this determination from the quantity of drugs found in a person's possession. (For example, it would be highly unlikely that a person with 50,000 doses of amphetamine possessed them all for consumption).

The possession of a large quantity of drugs does not necessarily mean that a person intended to distribute them. On the other hand, a person may have intended to distribute the drugs even if he or she did not possess large amounts of them. Other physical evidence, such as paraphernalia for the packaging or processing of drugs, can show an intent. There might also be evidence of a plan to distribute. You should make your decision as to whether the defendant intended to distribute the controlled substance in his possession from all of the evidence presented.

AMOUNT OF DRUGS

If you find that the government has proven beyond a reasonable doubt the elements that I have just described to you, then there is one more issue you must decide. I have provided you with a special verdict form asking you to decide upon the amount of drugs involved in the conspiracy. The burden is on the government to establish the type and amount of drugs beyond a

reasonable doubt. Remember, you should address this issue and complete the form only if you find the first three elements to have been established. If you did not find that the government has proven the three elements, then do not complete this form.

AIDING AND ABETTING

In Counts 2, 3 and 4 of the Indictment, the defendant is charged with aiding and abetting, respectively, maintaining drug-involved premises; maintaining property used by others as a drug-involved premises, and possession with intent to distribute crack cocaine.

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 or abets or counsels, commands or 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 crime with which he is charged in order for the government to sustain its burden of proof. A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proven 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.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, 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 to commit 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 the defendant knowingly associated himself with the crime, the government must establish that the defendant was aware of the criminal activity that it alleges under each count.

To establish that the defendant participated in the commission of the crime, the government must prove that defendant engaged in some affirmative conduct or overt act for the specific purpose of bringing about that 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 the defendant aided or abetted the commission of the crime with which he is charged in Counts 3 and 4, ask yourself these questions:

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

Did he associate himself with the criminal venture knowingly?

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 and abettor, and you must find him not guilty.

COUNT 5: FELON IN POSSESSION OF A FIREARM

The Indictment charges the defendant with being a person convicted of a crime who possessed a firearm in or affecting interstate commerce. Count 5 of the Indictment charges that "at

all times material herein . . . the defendant, had been previously convicted of a crime punishable by a term of imprisonment exceeding one year, to wit: On or about July 26, 1994, in the Queens County (NY) Supreme Court, being First Degree Assault. In or about March 2004, in the District of Vermont . . . the defendant, having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, as set forth above, did knowingly and intentional possess in and affecting commerce a firearm, being a Lorcin .380 semi-automatic pistol (Serial No. 470627)."

The relevant statute on this subject is Title 18, United States Code section 922(g), which states that "It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

ELEMENTS OF THE OFFENSE

The government must prove each of the following elements beyond a reasonable doubt in order to sustain its burden of proving the defendant guilty:

First, that the defendant was convicted, in any court, of a crime punishable by imprisonment for a term exceeding one year,

as charged;

Second, that the defendant knowingly possessed the firearm, as charged; and

Third, that the possession (or receipt or transportation) charged was in or affecting interstate commerce.

(1) DEFENDANT'S PRIOR CONVICTION

The first element the government must prove beyond a reasonable doubt before you can convict is that before the date the defendant is charged with possessing the firearm, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year.

The government contends that the defendant was convicted of First Degree Assault in New York state court. I charge you that as a matter of law, First Degree Assault is a crime punishable by imprisonment for a term exceeding one year. However, it is for you to determine beyond a reasonable doubt if the defendant was convicted of this crime.

To satisfy this first element, you need only find beyond a reasonable doubt that the defendant was, in fact, convicted of that crime and that the conviction was prior to the possession of the weapon as charged in the indictment. It is not necessary that the government prove that the defendant knew that the crime was punishable by imprisonment for more than one year, nor is it necessary for the defendant to have been sentenced to

imprisonment for more than one year. A plea of guilty has the same consequences as a conviction after trial.

I instruct you, in this connection, that the prior conviction that is an element of the charge here, is only to be considered by you for the fact that it exists, and for nothing else. You are not to consider it for any other purpose. You are not to speculate as to what it was for. You may not consider the prior conviction in deciding whether it is more likely than not that the defendant was in knowing possession of the gun that is charged.

(2) POSSESSION OF FIREARM

The second element which the government must prove beyond a reasonable doubt is that on or about the date set forth in the Indictment the defendant knowingly possessed a firearm.

A "firearm" is any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

To "possess" means to have something within a person's control. This does not necessarily mean that the defendant must hold it physically, that is, have actual possession of it. As long as the firearm is within the defendant's control, he possesses it. If you find that the defendant either had actual possession of the firearm, or that he had the power and intention to exercise control over it, even though it was not in his

physical possession, you may find that the government has proven possession.

The law also recognizes that possession may be sole or joint. If one person alone possesses a firearm, that is sole possession. However, it is possible that more than one person may have the power and intention to exercise control over the firearm. This is called joint possession. If you find that the defendant had such power and intention, then he possessed the firearm under this element even if he possessed it jointly with another. Proof of ownership of the firearm is not required.

To satisfy this element, you must also find that the defendant knowingly possessed the firearm. This means that he possessed the firearm purposely and voluntarily, and not by accident or mistake. It also means that he knew that the weapon was a firearm, as we commonly use the word. However, the government is not required to prove that the defendant knew that he was breaking the law.

(3) FIREARM IN OR AFFECTING COMMERCE

The third element that the government must prove beyond a reasonable doubt is that the firearm the defendant is charged with possessing was in or affecting interstate commerce.

This means that the government must prove that at some time prior to the defendant's possession, the firearm had traveled in interstate commerce. It is sufficient for the government to

satisfy this element by proving that at any time prior to the date charged in the indictment, the firearm crossed a state line. It is not necessary that the government prove that the defendant himself carried it across a state line, nor must the government prove who carried it across or how it was transported. It is also not necessary for the government to prove that the defendant knew that the firearm had previously traveled in interstate commerce.

In this regard, there has been evidence that the firearm in question was manufactured in a different state than Vermont, the state where the defendant is charged with possessing it. You are permitted to infer from this fact that the firearm traveled in interstate commerce; however, you are not required to do so.

CONSCIOUSNESS OF GUILT FROM FLIGHT

You have heard evidence that the defendant fled after he saw police outside the apartment at 12 Baker Street, and that he stayed away from Vermont when he suspected that an alleged co-conspirator may have been providing information to the government. Whether there was such a flight, and whether there was such a continued absence, is up to you, as jurors to determine.

If proved, the flight of a defendant after he knows that he is to be accused of a crime may tend to prove that the defendant believed that he was guilty. It may be weighed by you in this

connection, together with all of the other evidence.

However, flight need not always reflect feelings of guilt. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt.

You are specifically cautioned that evidence of flight of a defendant may not be used by you as a substitute for proof of guilt. A person's belief that he is guilty does not necessarily reflect actual guilt, and a person's flight might have explanations other than consciousness of guilt. Flight does not create a presumption of guilt.

Whether or not evidence of flight does show that the defendant believed that he was guilty, and the significance, if any, to be given to the defendant's feelings on this matter are for you to determine.

CONSCIOUSNESS OF GUILT FROM USE OF FALSE NAME

There has been evidence that the defendant may have used a false name. If you find that the defendant knowingly used a name other than his own in order to conceal his identity and to avoid identification, you may, but are not required to, infer that the defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is, in fact, guilty of the crime for which he is charged. Whether or not evidence of the use of a false name shows that the defendant believed he was guilty and the significance, if any, to be

attached to that evidence are matters for you to determine.

NOTES

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than a fellow juror. Your notes should remain in the jury room and will be collected at the end of the case.

CONCLUSION

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant before you today solely from the evidence in this case. I remind you that the mere fact that this defendant has been indicted is not evidence against him. Also, the 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 know that the punishment provided by law for the offense charged in the Indictment is a matter exclusively within

the province of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

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 other 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 other jurors, or for the mere purpose of returning a verdict.

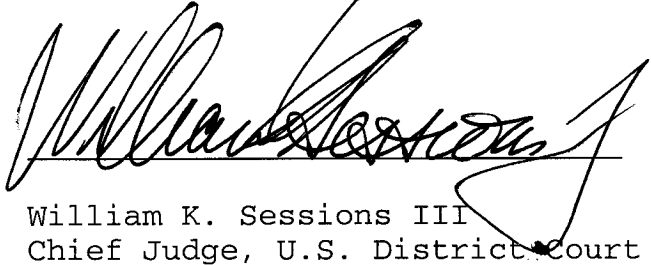
To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous. Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. After you have reached agreement as to the counts contained in the Indictment, you will have your foreperson record a verdict of guilty or not guilty as to each count. Your foreperson will sign and date the verdict form and you will then return to the courtroom.

If, during your deliberations you should desire to communicate with the Court, please put your message or question in writing signed by the foreperson, and pass the note to the

marshal who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you returned 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. Also, a copy of this charge will go with you into the jury room for your use.

I appoint _____ as your foreperson.

Dated at Burlington, Vermont this 20 day of December, 2006.



William K. Sessions III
Chief Judge, U.S. District Court