UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
v.	:	No. 2:06-CR-82-02
JOSEPH BROWN,	:	
Defendant.	:	

JURY CHARGE

Members of the Jury:

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

This case is a criminal prosecution brought by the United States against the Defendant, Joseph Brown. The grand jury superseding indictment charges the defendant in three counts. You will receive a copy of the superseding indictment to take with you into the jury room.

Count One alleges that:

> Beginning in approximately January 2006 and continuing until July 28, 2006, in the District of Vermont and elsewhere, the defendants Jose Lavandier and Joseph Brown knowingly and intentionally conspired with Timothy Brochu and other persons known and unknown to the grand jury to distribute, and to possess with the intent to distribute, cocaine and cocaine base, schedule II controlled substances.
>
> The grand jury further charges that the conspiracy involved fifty grams or more of a mixture and substance which contained cocaine base.

Count Two alleges that:

> On or about July 28, 2006, in the District of Vermont,

the defendants Jose Lavandier and Joseph Brown possessed with the intent to distribute cocaine and cocaine base, schedule II controlled substances.

The grand jury further charges that the offense involved fifty grams or more of a mixture and substance which contained cocaine base.

Joseph Brown has denied that he is guilty of these charges. There is a third count contained in the superseding indictment, but that is not for your consideration at this time.

ROLE OF 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.

Joseph Brown has pleaded not guilty to the counts in the superseding 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.

MULTIPLE COUNTS

A separate crime or offense is charged in each of the two counts of the indictment. Each charge against Joseph Brown and

the evidence pertaining to each charge should be considered separately. You must return separate verdicts on each count in which Joseph Brown is charged. Whether you find Joseph Brown not guilty or guilty as to one offense should not affect your verdict as to any other offense charged.

REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE

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.

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 crimes charged beyond a reasonable doubt. The

law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

If, after fair and impartial consideration of all 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.

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

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, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward 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 in this case.

GOVERNMENT WITNESS -- NOT PROPER TO CONSIDER GUILTY PLEA

You have heard testimony from a government witness who pled guilty to charges arising out of the same facts as this case. You are not to draw any conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against the defendant on trial here.

CO-OPERATING WITNESS PLEA AGREEMENT

There has been testimony from a government witness who pled guilty after entering into an agreement with the government to testify. There is evidence that the government agreed to dismiss some charges against this witness and/or agreed not to prosecute him on other charges in exchange for his agreement to plead guilty and testify at this trial. The government also promised to bring the witness' cooperation to the attention of the sentencing court.

Bear in mind that 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 may be able to obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has a motive to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. If, after scrutinizing his testimony, you decide to accept it, you may give it whatever

weight, if any, you find it deserves.

ACCOMPLICES CALLED BY THE GOVERNMENT

You have heard witnesses testify that they were actually involved in planning and carrying out the offenses charged in the superseding indictment.

The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.

For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilty beyond a reasonable doubt.

However, it is also the case that accomplice testimony is of such nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT

You have heard evidence that witnesses made statements on earlier occasions which may be inconsistent with the witnesses' trial testimony. Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing on the defendant's guilt. Evidence of the prior inconsistent statement was placed before you for the more limited purpose of

helping you decide whether to believe the trial testimony of the witness who contradicted himself. If you find that the witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if any weight to be given to the inconsistent statement in determining whether to believe all or part of the witness' testimony.

WITNESS USING DRUGS

There has been evidence introduced at the trial that the government called as witnesses persons who were using or addicted to 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 the 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 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.

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.

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.

RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence. You may not consider any personal feelings you may have about 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. All defendants are entitled to the presumption of innocence, and the government has the burden of proof beyond a reasonable doubt.

It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision-making process.

To repeat, your verdict must be based exclusively upon the evidence or the lack of evidence in this case.

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.

DEFENDANT AS A WITNESS

In a criminal case a defendant cannot be required to testify. Whether or not he testifies is a matter of his own choosing. If he does choose to testify, as Joseph Brown has testified in this case, you should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of this case. You should not disregard or disbelieve his testimony simply because he is accused of a crime.

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 associated with other people who were guilty of wrongdoing.

IMPERMISSIBLE TO INFER PARTICIPATION FROM MERE PRESENCE

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

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 applies 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.

CONSPIRACY

Count 1 of the Superseding Indictment charges that Joseph Brown engaged in a conspiracy with others to distribute, and to possess with intent to distribute, cocaine and cocaine base.

Under the law, a "conspiracy" is an agreement or combination of two or more persons to join together to accomplish some unlawful purpose. The object of the conspiracy alleged is the distribution of or possession with intent to distribute cocaine and cocaine base.

I instruct you that cocaine and cocaine base, often called crack cocaine, are controlled substances. You must decide whether or not the materials in question were in fact cocaine and cocaine base. The government may prove this fact through either direct evidence or 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 cocaine and/or cocaine base, such as testimony concerning the names used by the defendant or alleged co-conspirators to refer to the material, or testimony about the material's appearance. Whether the government relies on direct or circumstantial evidence to prove that the material was cocaine or cocaine base, it must prove this fact beyond a reasonable doubt.

The crime of conspiracy to violate a federal law is an

independent offense. It is separate and distinct from the actual violation of any specific federal laws. Indeed, you may find the defendant guilty of the crime of conspiracy to commit an offense against the United States even though the substantive crime which was the object of the conspiracy was not actually committed.

In order to satisfy its burden of proof on Count 1, the government must establish each of the following three essential elements beyond a reasonable doubt:

First, that two or more persons entered into the unlawful agreement charged in the indictment between January 2006 and July 28, 2006;

Second, that Joseph Brown knowingly and willfully became a member of the conspiracy;

Third, that the conspiracy involved 50 grams or more of a mixture or substance which contained cocaine base.

EXISTENCE OF AGREEMENT

The first element which 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 Superseding Indictment.

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators

stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act.

You may, of course, find that the existence of an agreement to disobey 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, then, actions may 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 among the persons named in the indictment to act together to accomplish an unlawful purpose.

MEMBERSHIP IN THE CONSPIRACY

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

If you are satisfied that the conspiracy charged in the

superseding indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether Joseph Brown was, in fact, a member of the conspiracy, you should consider whether he knowingly and willfully 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 order to find that Joseph Brown knowingly joined in the conspiracy, the key question is whether he joined 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. 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 informed of all of their activities. Moreover, the defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on his part. Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of his guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed each member may perform separate acts and may perform them at different times. Some conspirators play major roles, while

others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

I want to caution you, however, that the defendant's mere presence at the scene of the alleged crime does not, by itself, make him a member of the conspiracy. Similarly, mere association with one or more members of a conspiracy does not automatically make the 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 membership in a conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intent of aiding in the accomplishment of those unlawful ends. In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering

the illegal undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement -- that is to say, a conspirator.

DRUG QUANTITY

If you find that the government has proved beyond a reasonable doubt both that two or more persons agreed to distribute cocaine or cocaine base and that Joseph Brown knowingly and wilfully became a member of this conspiracy, then there is one more issue that you must decide with respect to the conspiracy count. You must consider whether the government has also proven beyond a reasonable doubt that during the period when the defendant was a member of the conspiracy, the defendant and/or other co-conspirators distributed or possessed with intent to distribute, 50 grams or more of a mixture or substance which contained cocaine base. The material need not be pure cocaine base; rather, the mixture or substance must contain a detectable amount of cocaine base. In making this determination, you should exclude any quantities of powder cocaine. Powder cocaine is not cocaine base.

In deciding whether the government has proven that the conspiracy involved 50 grams or more of cocaine base, you may consider quantities of cocaine base that the defendant himself distributed; quantities that he intentionally helped others to distribute; and quantities that he knew or reasonably should have

known that other members of the conspiracy distributed at a time when the defendant was a member of the conspiracy.

If you unanimously find that the Government has proven beyond a reasonable doubt that the conspiracy charged in Count 1 involved 50 grams or more of cocaine base, then you should so indicate on the verdict sheet. If you unanimously conclude that this element has not been proven beyond a reasonable doubt, then you should report that finding on the verdict sheet.

ACTS AND DECLARATIONS OF CO-CONSPIRATORS

You will recall that I have admitted into evidence the acts and statements of others because these acts and statements were committed by persons who, the government charges, were also co-conspirators of the defendant. The reason for allowing this evidence to be received has to do with the nature of the crime of conspiracy. A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy.

Accordingly, the reasonably foreseeable acts, declarations, statements and omissions of any member of the conspiracy and in furtherance of the common purpose of the conspiracy, are deemed, under the law, to be the acts of all of the members, and all of the members are responsible for such acts, declarations,

statements and omissions.

If you find beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the superseding indictment, then any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of that conspiracy, may be considered against that defendant. This is so even if such acts were done and statements were made in the defendant's absence and without his knowledge.

However, before you may consider the statements or acts of a co-conspirator in deciding the issue of a defendant's guilt, you must first determine that the acts and statements were made during the existence, and in furtherance of the unlawful scheme. If the acts were done or the statements made by someone whom you do not find to have been a member of the conspiracy, or if they were not done or said in furtherance of the conspiracy, they may be considered by you as evidence only against the member who did or said them.

I remind you, however, you are here only to determine whether Joseph Brown is guilty or not guilty of the charges in the superseding indictment. He is not on trial for any conduct or offense not charged in the superseding indictment. You should consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the defendant, only as they relate to these charges against him.

POSSESSION WITH INTENT TO DISTRIBUTE

Count 2 of the Superseding Indictment charges Joseph Brown with possession with the intent to distribute cocaine and cocaine base, schedule II controlled substances. In order to prove this charge against the defendant, the government must establish beyond a reasonable doubt each of the following four elements of the crime:

First, that Joseph Brown possessed a controlled substance;

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

Third, that Joseph Brown possessed the controlled substance with the intent to distribute it; and

Fourth, that Joseph Brown possessed with intent to distribute 50 grams or more of cocaine base.

POSSESSION OF CONTROLLED SUBSTANCE

The first element the government must prove beyond a reasonable doubt is that Joseph Brown possessed cocaine and cocaine base, a schedule II controlled substance.

To establish this element, the government must prove that the material that the defendant is charged with possessing is, in fact, cocaine and cocaine base. I have already instructed you on this element in connection with the conspiracy count and I charge you to apply that instruction to this element of Count 2.

POSSESSION

As I have instructed you, the government must prove beyond a reasonable doubt that the defendant "possessed" the drugs. 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 you find that the defendant had the drugs on his person, you may find that he had possession of the drugs. However, a person need not have actual physical custody of an object in order to in legal possession of it. If an individual has the ability and intent to exercise substantial control over an object that he does not have in his physical custody, then he is in possession of that item. An example of this from everyday experience would be a person's possession of items he keeps in the safe deposit box of his bank. Although the person does not have physical custody of those items, he exercises substantial control over them and so has legal possession of them.

The law also recognizes that possession may be sole or joint. If one person alone possesses something, that is sole possession. However, it is possible that more than one person may have the power and intention to exercise control over the drugs. That is called joint possession. If you find that the

defendant had such power and intention, then he possessed the drugs under this element even if he possessed the drugs jointly with another.

Possession of drugs cannot be found solely on the ground that the defendant was near or close to the drugs. Nor can it be found simply because the defendant was present at a scene where drugs were involved, or solely because the defendant associated with a person who did control the drugs 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 Joseph Brown possessed the drugs.

INFERENCE FROM CONTROL OVER PLACE WHERE FOUND

A defendant may own or have control over the place where the drugs 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.

A defendant may also share ownership or control of the place where drugs are found. In this event the drugs may be possessed by only one person, or by some of the people who

control the place, or by all of them. However, standing alone, the fact that a particular defendant had joint ownership or control over the place where the drugs were found is not sufficient evidence to find that the defendant possessed the drugs found there. In order to find that a particular defendant possessed drugs because of his joint ownership or control over the place where they were found, you must be able to find beyond a reasonable doubt that the defendant knew about the presence of the drugs and intended to exercise control over them.

KNOWLEDGE THAT THE DRUGS WERE A CONTROLLED SUBSTANCE

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

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

Although the government must prove that Joseph Brown knew that he possessed a controlled substance, the government does not have to prove that he knew the exact nature of the drugs in his possession. It is enough for proof of this element that the

government proves that Joseph Brown knew that he possessed some kind of controlled substance.

METHOD OF PROVING KNOWLEDGE

Your decision whether Joseph Brown knew the material he possessed was a controlled substance involves a decision about his 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 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.

For example, if a defendant was the sole occupant of a residence or a vehicle, it is reasonable to conclude that he knew about items in the residence or vehicle. A defendant's behavior may also indicate knowledge. Nervousness in the presence of the drugs or flight from the site at which authorities have identified drugs may indicate that a defendant knew what he had in his possession. These examples are neither exhaustive nor conclusive. It is up to you, based on all the evidence, to

determine whether Joseph Brown knew that he possessed a controlled substance.

CONSCIOUS AVOIDANCE OF KNOWLEDGE

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

INTENT TO DISTRIBUTE

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

The same considerations that apply to your determination whether Joseph Brown knew he possessed a controlled substance apply to your decision concerning his intention to distribute them. Since you cannot read Joseph Brown's mind, you must make inferences from his behavior. However, you may not convict

Joseph Brown 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 Joseph Brown intended to distribute the controlled substance, this does not mean that you must find that he intended *personally* to distribute or deliver the drugs. It is sufficient if you find that he intended to cause or assist the distribution of the drugs.

Basically, what you are determining is whether the drugs in Joseph Brown's possession were for his personal use of for the purpose of distribution. Often it is possible to make this determination from the quantity of drugs found in a defendant's possession. The possession of a large quantity of a controlled substance does not necessarily mean that a defendant intended to distribute it. On the other hand, a defendant may have intended to distribute a controlled substance even if he did not possess large amounts of it. Other physical evidence, such as paraphernalia for the packaging or possessing of drugs, can show such an intent. You should make your decision whether Joseph Brown intended to distribute the controlled substance in his possession from all of the evidence presented.

DRUG QUANTITY

The fourth element the government must prove beyond a reasonable doubt is that Joseph Brown possessed 50 grams or more

of cocaine base. I have already instructed you on this element as it pertains to the conspiracy charge and you should apply that instruction in considering whether the government has satisfied its burden on this count as well.

AIDING AND ABETTING

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself. A defendant may be convicted of aiding and abetting a crime where the government proves:

(1) that the underlying crime was committed by a person other than the defendant;

(2) that the defendant knew of the crime; and

(3) that the defendant acted with the intent to contribute to the success of the underlying crime.

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.

To aid or abet another to commit a crime, the defendant must 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 a defendant knowingly associated himself with the crime, the government must establish

that the defendant knew that a controlled substance was being distributed. 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 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 or 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.

GUILT OF SUBSTANTIVE OFFENSE

There is another method by which you may evaluate the possible guilt of the defendant for the substantive charge of possession with intent to distribute even if you do not find that the government has satisfied its burden of proof with respect to each element of this offense. If, in light of my instructions, you find, beyond a reasonable doubt, that Joseph Brown was a member of the conspiracy charged in count 1 of the superseding indictment, and thus, guilty on the conspiracy count, then you

may also, but you are not required to, find him guilty of the substantive crime charged against him in count 2, provided you find, beyond a reasonable doubt, each of the following elements:

First, that the crime of possession with intent to distribute was committed;

Second, that the person or persons you find actually committed the crime were members of the conspiracy you found to have existed;

Third, that the crime of possession with intent to distribute was committed pursuant to the common plan and understanding you found to exist among the conspirators;

Fourth, that Joseph Brown was a member of that conspiracy at the time the substantive crime was committed;

Fifth, that Joseph Brown could have reasonably foreseen that the substantive crime of possession with intent to distribute might be committed by his co-conspirators.

If you find all five of these elements to exist beyond a reasonable doubt, then you must find Joseph Brown guilty of the crime of possession with intent to distribute charged against him, even though he did not personally participate in the acts constituting the crime or did not have actual knowledge of it.

The reason for this rule is simply that a co-conspirator who commits a substantive crime pursuant to a conspiracy is deemed to be an agent of the other conspirators. Therefore, all

of the co-conspirators must bear criminal responsibility for the commission of the substantive crimes.

If, however, you are not satisfied as to the existence of any of these five elements, then you must not find Joseph Brown guilty of the crime of possession with intent to distribute, unless the government proves, beyond a reasonable doubt, that Joseph Brown personally committed, or aided and abetted the commission of, the substantive crime charged.

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 Joseph Brown has been indicted is not evidence against him. Also, he is not on trial for any act or conduct or offense not alleged in the superseding 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 offenses charged in the superseding 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.

At this time, I would like to offer my sincere thanks to the alternates.

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 first two counts contained in the superseding indictment, you will have your foreperson record a verdict of guilty or not guilty as to each count, and record your answer to each of the drug quantity questions. Your foreperson will then 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 then 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 this charge will go with you into the jury room for your use.

I appoint _____ as your foreperson.

Dated at Burlington, Vermont this 31st day of October, 2008.

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