

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

UNITED STATES OF AMERICA :  
 :  
 v. :  
 :  
 FRANK ANNETTE, : Case No. 2:10-cr-131  
 :  
 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, Frank Annette. The indictment charges Frank Annette in three counts. Count One alleges that:

From in or about June 2007 to on or about January 14, 2009, in the District of Vermont and elsewhere, defendants Bernard C. Doherty, Jr., Frank Annette, Benjamin Bridge and Barry Tenney, knowingly and willfully conspired together with Phillip Amoroso, Paul Keeler, Matthew James Adams, Mark Adams, Jr., and others known or unknown to the Grand Jury, to distribute a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance, and a mixture or substance containing a detectable amount of heroin, a Schedule I controlled substance.

This offense involved 280 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance. (21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A))

Count Two alleges that:

From in or about June 2007 to on or about January 14, 2009, in the District of Vermont and elsewhere, defendants Bernard C. Doherty, Jr., and Frank Annette knowingly and willfully conspired together and with Paul Keeler to possess a firearm in furtherance of a drug trafficking crime for which they may be prosecuted in a court of the United States, that is, conspiracy to distribute cocaine base and heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1). (18 U.S.C. §§ 924(c)(1)(A), 924(o))

Count Three alleges that:

From in or about June 2007 to on or about January 14, 2009, in the District of Vermont and elsewhere, defendants Bernard C. Doherty, Jr., and Frank Annette knowingly possessed, and aided and abetted Paul Keeler in the possession of, a firearm in furtherance of a drug trafficking crime for which they may be prosecuted in a court of the United States, that is, conspiracy to distribute cocaine base and heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1). (18 U.S.C. §§ 2, 924(c)(1)(A))

Frank Annette has pleaded not guilty to these charges.

#### **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 a defendant of a crime prior 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. It simply describes the charges against the defendant.

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 Frank Annette's not guilty plea. You are to perform this duty without bias or prejudice against the defendant or the prosecution.

**PRESUMPTION OF INNOCENCE, REASONABLE DOUBT AND BURDEN OF PROOF**

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

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. However, reasonable doubt may arise from a lack of evidence.

In a criminal case, the burden is 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. For each offense charged in the indictment, if after fair and impartial consideration of all the evidence you have a reasonable doubt, you must find the defendant not guilty of that offense. If you view the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—you must find the defendant not guilty. If, however, after fair and impartial consideration of all the evidence you are satisfied of the defendant's guilt of that offense beyond a reasonable doubt, you should vote to convict.

**FAILURE TO NAME A DEFENDANT**

You may not draw any inference, favorable or unfavorable, towards the government or the defendant on trial, from the fact that certain persons were not named as defendants in the

indictment. The circumstances regarding which these persons were not indicted must play no part in your deliberations, except that you may consider whether the witness's testimony should be believed because he or she has been granted immunity. I will instruct you in more detail about his matter in a moment.

Whether a person should be named as a co-conspirator or indicted as a defendant is a matter within the sole discretion of the United States Attorney and the grand jury. Therefore, you may not consider it in any way in reaching your verdict as to Frank Annette.

#### **MULTIPLE COUNTS**

The indictment charges Frank Annette in three counts. Each count alleges Frank Annette committed a different crime. You must consider each count and any evidence pertaining to it separately and return a separate verdict of guilty or not guilty for each.

#### **"IN OR ABOUT" EXPLAINED**

The indictment in this case charges that offenses were committed "in or about June 2007," and continued to "on or about January 14, 2009." Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged in the indictment, it is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

**EVIDENCE**

You have seen and heard the evidence produced in this trial and it is the sole responsibility 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 Frank Annette 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. By the rulings I have made in the course of the trial, I did not intend to indicate to you any of my own views, or to influence you in any manner regarding how you should decide the case. The attorneys have a duty to object to evidence they believe is not admissible.

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

**STIPULATION OF FACTS**

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 proven.

**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.

**ADMISSIONS BY A DEFENDANT**

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

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

**FALSE EXCULPATORY STATEMENTS**

You have heard testimony that Frank Annette made certain statements outside the courtroom to law enforcement authorities in which he claimed that his conduct was consistent with innocence and not with guilt. The government claims that these statements in which he exonerated or exculpated himself are false.

If you find that Frank Annette gave a false statement in order to divert suspicion from himself, you may, but are not required to infer that he believed that he was guilty. You may not, however, infer on the basis of this alone, that he is in fact guilty of the crimes for which he is charged.

Whether or not the evidence of a defendant's statements shows that he believed that he was guilty, and the significance, if any, to be attached to any such evidence, are matters for you, the jury, to decide.

**INTEREST IN OUTCOME**

As a general matter, in evaluating the credibility of each

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

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

**GOVERNMENT WITNESS -- NOT PROPER TO CONSIDER GUILTY PLEA**

You have heard testimony from government witnesses 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 government witnesses who pled guilty after entering into an agreement with the government to

testify. The government also promised to bring the witnesses' 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 AND IMMUNIZED WITNESSES**

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

This is also true of accomplices or other witnesses who have received immunity. A witness receives immunity from the government when that witness is told his or her crimes will go unpunished in exchange for testimony, or that his or her testimony will not be used against him or her. A witness who has entered into such an agreement has an interest in this case different from any ordinary witness. A witness who realizes that he or she may be able to obtain his or her own freedom, or receive a lighter sentence by giving testimony favorable to the government 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.

#### **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 law enforcement officials, and to give to that testimony whatever weight, if any, you find it deserves.

**PRIOR INCONSISTENT STATEMENTS OF A NON-PARTY WITNESS**

You may find that a witness has made statements outside of this trial that are inconsistent with the statements that the witness gave here. You may consider the out-of-court statements not made under oath only to determine the credibility of the witness and not as evidence of any facts contained in the statements. As to out-of-court statements that were made under oath, such as statements made in prior testimony, you may consider them for all purposes, including for the truth of the facts contained therein.

**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.

**RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE**

You may not consider the race, religion, national origin, sex, or age of the defendant or of 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 serious crimes.

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 NOT TESTIFYING**

You may have observed that Frank Annette did not testify in this case. In a criminal case a defendant has a constitutional right not to testify, and the government may not call him as a witness. Whether or not a defendant testifies is a matter of his own choosing. A defendant has no obligation to testify or to present evidence, because it is the government's burden to prove a defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he is innocent. A defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining Frank Annette's guilt or innocence of the crimes charged, you are not to consider, in any manner, the fact that he did not testify. Do not even discuss it in your deliberations.

**IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION OR FROM  
MERE PRESENCE**

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. 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 responsibility of the jury to determine the facts in this case. I do not, by any instructions I give to you, intend to persuade you in any way as to any question of fact.

**COUNT ONE OF THE INDICTMENT: CONSPIRACY TO DISTRIBUTE COCAINE  
BASE AND HEROIN**

You will recall that Count One of the indictment charges Frank Annette with knowingly and willfully conspiring to distribute 280 grams or more of a mixture or substance containing a detectable amount of cocaine base, a Schedule II controlled substance, and a mixture or substance containing a detectable

amount of heroin, a Schedule I controlled substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A). I instruct you that cocaine is a Schedule II controlled substance and that heroin is a Schedule I controlled substance.

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 in violation of Section 841. Section 841 makes it a crime for anyone to knowingly or intentionally distribute a controlled substance.

Under the law, a "conspiracy" is an agreement or a kind of partnership in criminal purposes in which each member becomes the agent or partner of the other members.

In order to establish the conspiracy offense charged in Count One, it is sufficient to show that the conspirators tacitly came to a mutual understanding to accomplish an unlawful act by means of a joint plan or common design. The indictment alleges the objective of the conspiracy was to distribute cocaine base and heroin. If you find beyond a reasonable doubt that the objective of the conspiracy was to distribute one or both of these types of drugs, then you may find that the joint plan or common design is proven. Also, because the essence of a conspiracy is the making of the scheme itself, it is not necessary for the government to prove that the conspirators

actually succeeded in accomplishing their unlawful plan.

In order to find the defendant guilty of Count One, you must find that the government has proven beyond a reasonable doubt the following essential elements of the charge. That at the time and places alleged in the indictment:

- (1) two or more persons, in some way or manner, came to a mutual understanding to try to accomplish the common and unlawful plan that is charged in the indictment;
- (2) that the defendant knowingly and willfully became a member of such conspiracy; and
- (3) if an objective of the conspiracy was the distribution of cocaine base, that the conspiracy involved 280 grams or more of a mixture or substance which contained cocaine base

**Element One: Existence of an Agreement**

The first element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered into the unlawful agreement charged in the indictment.

In order for the government to satisfy this element, it must prove 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 that scheme. The agreement may only consist of a mutual understanding that the members would commit some illegal activity by means of a common plan or course of action, as alleged in the indictment.

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

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

**Element Two: Membership in the Conspiracy**

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

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

You must find that Frank Annette joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement, and with the intent of aiding in the accomplishment of those ends, in order to satisfy the knowledge and intent element of the conspiracy charge. In other words, the government must prove beyond a reasonable doubt that the Frank Annette acted with the specific intent to distribute a controlled substance. Proof of such intent need not be direct. Intent may be proved by circumstantial evidence alone.

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

you find that Frank Annette had such an interest, that is a factor which you may properly consider in determining whether or not he was a member of the conspiracy charged in the indictment.

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

The extent of a defendant's participation has no bearing on his guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor roles in the scheme. The law does not require that each participant in the conspiracy play an equal role.

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

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

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

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

**Element Three: Drug Quantity**

If you find that the government has proved beyond a reasonable doubt both that two or more persons agreed to distribute cocaine base or heroin and that Frank Annette knowingly and wilfully became a member of this conspiracy, then there is one more issue that you must decide with respect to

Count One. I have provided you with a special verdict form asking you questions with regard to the amount of cocaine base involved in the conspiracy that the government has proven beyond a reasonable doubt. You must consider whether the government has also proven beyond a reasonable doubt that during the period when Frank Annette was a member of the conspiracy, the conspiracy involved either 280 grams or more, 28 grams or more, or less than 28 grams of a mixture or substance which contained a detectable amount of 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 the quantity of cocaine base involved in the conspiracy that the government has proven, you may consider quantities of cocaine base that the defendant himself distributed. With regard to this type of proof, the government need not prove that the defendant knew the type or amount of drugs in question as long as the government proves beyond a reasonable doubt that the defendant knew the drugs in question were a controlled substance. You may also consider the quantities that Frank Annette intentionally helped others to distribute. Finally, you may consider 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 One involved one of the quantities of cocaine base listed on the verdict form, then you should so indicate on the verdict form. If you unanimously conclude that this element has not been proven beyond a reasonable doubt, then you should report that finding on the verdict form by answering "No" to all the quantities listed. Remember, you should address this issue and complete the form only if you find the elements of conspiracy generally have been established. If you did not find that the government has proven both the elements described earlier with regard to a particular defendant, then do not complete this form.

### **Distribute**

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

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

**Knowingly**

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

**Willfully**

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

**COUNT TWO OF THE INDICTMENT: CONSPIRACY TO POSSESS A FIREARM  
IN FURTHERANCE OF A DRUG TRAFFICKING CRIME**

Count Two charges Frank Annette with conspiring with Bernard C. Doherty, Jr. and Paul Keeler to possess a firearm in furtherance of a drug trafficking crime. The relevant statute on

this subject is Title 18, United States Code section 924(c), which provides:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be guilty of a crime].

Title 18, United States Code section 924(o) provides that "[a] person who conspires to commit an offense under subsection (c) shall be [guilty of a crime]."

To prove this offense, the government must establish beyond a reasonable doubt that, at the time and places alleged in Count Two:

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

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

In a moment, I will instruct you about the elements of the offense of possession of a firearm in furtherance of a drug trafficking crime. As to the conspiracy charged in Count Two, I have already instructed you on how to determine whether the government has proven a conspiracy beyond a reasonable doubt. As I explained with respect to Count One, you will need to determine whether an agreement existed, and whether the defendant knowingly

and willfully joined in the agreement. The instructions relating to Count One explain how you should make those findings.

**ACTS AND DECLARATIONS OF CO-CONSPIRATORS**

As you know, Counts One and Two charge that Frank Annette knowingly and willfully participated in certain conspiracies. You will recall that I have admitted into evidence against Frank Annette acts and statements of others because these acts and statements were committed by persons who, the government charges, were also confederates or co-conspirators of the defendant, Frank Annette.

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 Frank Annette was a member of one of the conspiracies charged in Counts One and Two

of the indictment, then, any acts done or statements made in furtherance of that conspiracy by persons also found by you to have been members of it, may also be considered against Frank Annette concerning his role in the same conspiracy. This is so even if such acts were done and statements were made in the his absence and without his knowledge.

However, before you may consider the statements or acts of a co-conspirator, you must first determine that the acts and the statements were made during the existence, and in furtherance, of the unlawful scheme.

**COUNT THREE OF THE INDICTMENT: POSSESSION OR AIDING AND ABETTING IN THE POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME**

In Count Three of the indictment, Frank Annette is charged with either knowingly possessing, or aiding and abetting Paul Keeler in the possession of, a firearm in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States. The underlying drug trafficking crime alleged is the conspiracy to distribute cocaine base and heroin, the offense charged in Count One.

The relevant statute on this subject is, as in Count Two, Title 18, United States Code section 924(c).

If upon all of the evidence you find that the government has failed to prove Count One beyond a reasonable doubt, then you will proceed no further. Count Three is to be considered only if

you first find the defendant guilty under Count One as charged.

In reaching your verdict on Count Three, you may consider the evidence of Count One only for the purpose of determining whether the elements of Count One have been satisfied.

**Elements of the Offense: Knowing Possession of a Firearm in Furtherance of a Drug Trafficking Crime**

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

First, that the defendant committed a drug trafficking crime for which he might be prosecuted in a court of the United States.

Second, that the defendant knowingly possessed a firearm in furtherance of the crime charged in Count One.

**Element One: Commission of the Predicate Crime**

The first element the government must prove beyond a reasonable doubt is that the defendant committed a drug trafficking crime for which he might be prosecuted in a court of the United States.

Defendant is charged in Count One of the indictment with committing the crime of knowingly and willfully conspiring to distribute cocaine base and heroin. I instruct you that the crime of knowingly and willfully conspiring to distribute cocaine base and heroin is a drug trafficking crime. However, it is for you to determine that the government has proven beyond a reasonable doubt that the defendant committed the crime of

knowingly and willfully conspiring to distribute cocaine base and heroin as charged.

**Element Two: Knowing Possession of Firearm in Furtherance of the Commission of the Predicate Crime**

The second element the government must prove beyond a reasonable doubt is that the defendant knowingly possessed a firearm in furtherance of the commission of the crime charged in Count One.

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. The term also includes the frame or receiver of any such weapon, or any firearm silencer or muffler, or destructive device.

To prove that Frank Annette possessed the firearm in furtherance of the crime, the government must prove that he had possession of the firearm and that such possession was in furtherance of that crime. Possession means that a defendant either had physical possession of the firearm on his person or that he had dominion and control over the place where the firearm was located and had the power and intention to exercise control over the firearm. To possess a firearm in furtherance of the crime means that the firearm helped forward, advance or promote the commission of the crime. The mere possession of the firearm at the scene of the crime is not sufficient under this definition. The firearm must have played some part in furthering

the crime in order for this element to be satisfied.

To satisfy this element, you must also find that the defendant possessed the firearm knowingly. 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.

**Aiding and Abetting in Possession of a Firearm in  
Furtherance of a Drug Trafficking Crime**

Alternatively, the indictment charges Frank Annette in Count Three with violating section 2 of Title 18 of the United States Code, which makes it a crime to "aid or abet" the commission of an offense against the United States.

Specifically, Frank Annette is charged with aiding and abetting Paul Keeler in the possession of a firearm in furtherance of a conspiracy to distribute cocaine base and heroin.

Under the aiding and abetting statute, it is not necessary for the government to show that the 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, that is:

possessing a firearm in furtherance of a drug trafficking crime that may be prosecuted in a court of the United States.

Obviously, no one can be convicted of aiding and 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 Frank Annette aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant knowingly and willfully 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.

Participation in a crime is willful if done voluntarily and intentionally, and with the specific intent that the crime succeed; that is to say, with a bad purpose either to disobey or disregard the law. 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 Frank Annette aided or abetted the commission of the crime as charged in Count Three, ask yourself these questions:

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

Did he knowingly and willfully associate himself with the criminal venture?

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

If you find that the government has proven beyond a reasonable doubt that the answer to these questions is "yes," then he is an aider and abettor, and therefore guilty of the offense. If you find that the government has not proven beyond a reasonable doubt an affirmative answer to any of these questions, then Frank Annette is not an aider and abettor, and you must find him not guilty as such.

**Unanimity as to Theory of Guilt**

You must convict the defendant of Count Three if you find

beyond a reasonable doubt either (1) that he possessed a firearm in furtherance of a drug trafficking crime, or (2) that he aided and abetted Paul Keeler in the possession of a firearm in furtherance of a drug trafficking crime. In other words, the government need not prove that the defendant both possessed a firearm in furtherance of a drug trafficking crime and that he aided and abetted Paul Keeler's commission of that crime. You may convict the defendant of Count Three if you unanimously find him guilty of doing one or the other.

**CONCLUSION**

I caution you, members of the jury, that you are here to determine the guilt or innocence of Frank Annette solely from the evidence in this case. I remind you that the mere fact that he 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 indictment.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict. It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your 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 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.

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 the other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

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 1st day of June, 2012.

/s/William K. Sessions III  
William K. Sessions III  
U.S. District Court Judge