

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA :
 :
 v. :
 :
 KENNETH L. MILLER, : Case No. 2:11-cr-161
 :
 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.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

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

This case is a criminal prosecution brought by the United

States against the defendant, Kenneth L. Miller. The Indictment charges Kenneth Miller in Count One with aiding and abetting Lisa Miller in the international parental kidnapping of a child, in violation of Title 18 of the United States Code, sections 1204 and 2.

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 Kenneth Miller. Kenneth Miller is not on trial for any act or any conduct not specifically charged in the indictment.

You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the superseding indictment and the denial made by Kenneth Miller'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, Kenneth Miller, 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 Kenneth Miller is guilty. Should the government fail to prove the guilt of Kenneth Miller beyond a reasonable doubt, you must find him 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 the offense charged in the indictment, if after fair and impartial consideration of all the evidence you have a reasonable doubt, you must find Kenneth Miller not guilty of the 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 Kenneth Miller not guilty. If, however, after fair and impartial consideration of all the evidence you are satisfied of Kenneth Miller's guilt of the 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 that these persons were not indicted must play no part in your deliberations.

Whether a person should be 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 Kenneth Miller.

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 Kenneth Miller 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.

CHARTS & SUMMARIES

Charts or summaries have been prepared by the government and shown to you during the trial to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these charts and summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts or summaries correctly present the information contained in the testimony and in the exhibits on which they were based. You are entitled to consider the charts and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

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.

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, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that 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.

ADMISSION OF DEFENDANT

There has been evidence that Kenneth Miller made certain statements in which the government claims he admitted certain facts charged in the indictment.

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

DEFENDANT NOT TESTIFYING

You may have observed that Kenneth Miller 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 Kenneth Miller'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.

ACCOMPLICE TESTIMONY

You have heard from witnesses who testified that they were actually involved in planning and carrying out the crime charged in the indictment. The testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

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

You should ask yourselves whether these so-called accomplices would benefit more by lying, or by telling the truth. If you believe that a witness was motivated by self-interest, or by an agreement with the government, was the motivation one that would cause the witness to lie, or was it one that would cause him to tell the truth? Did this motivation color the witness's testimony?

In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you will want to give to any accomplice witnesses.

RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

You may not consider the race, religion, national origin, sex, or age of Kenneth Miller 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 Kenneth Miller, 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.

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

The indictment reads:

From on or about September 21, 2009, to on or about September 23, 2009, in the District of Vermont and elsewhere, defendant KENNETH L. MILLER aided and abetted Lisa Miller in the removal of a child from the United States with the intent to obstruct the lawful exercise of parental rights.

Kenneth Miller has pleaded not guilty to this charge.

The relevant statutes are Title 18 of the United States Code, sections 1204 and 2. Section 1204 provides, as relevant to this case:

Whoever removes a child from the United States, or attempts to do so . . . with intent to obstruct the lawful exercise of parental rights" commits an offense.

Section 2 provides that

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

ELEMENTS OF THE OFFENSE

In order to prove Kenneth Miller guilty of aiding and abetting international parental kidnapping, the government must prove beyond a reasonable doubt:

First, that the child was in the United States;

Second, that Lisa Miller took the child from the United States to another country;

Third, that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins; and

Fourth, that Kenneth Miller aided and abetted Lisa Miller in committing this crime.

CHILD PREVIOUSLY RESIDED IN UNITED STATES

The first element the government must prove beyond a reasonable doubt is that the child was previously in the United States.

TAKING CHILD FROM UNITED STATES

The second element the government must prove beyond a reasonable doubt is that Lisa Miller took the child from the United States to another country. In order to prove this element, the government must establish that Lisa Miller moved the child from the United States to another country. This had to occur before the child reached the age of sixteen.

INTENT TO OBSTRUCT PARENTAL RIGHTS

The third element the government must prove beyond a reasonable doubt is that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins. The term "parental rights" means the right to physical custody of the child. This includes the right to sole custody of the child, the right to joint custody of the child, and the right to

visitation with the child. Those rights may arise by court order, legally binding agreements of the parties, or by the operation of law. In this case, the Rutland Vermont family court's orders regarding custody and visitation defined the parental rights of Lisa Miller and Janet Jenkins.

The term "obstruct" means to hinder or impede.

To find that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights, you must find that she acted deliberately with the purpose of interfering with the parental rights of Janet Jenkins, specifically her visitation rights. You may consider all of the evidence of Lisa Miller's acts in determining whether the government has proven beyond a reasonable doubt that Lisa Miller acted with this intent.

AIDING AND ABETTING

To prove someone guilty of aiding and abetting a crime, it is not necessary for the government to show that Kenneth Miller himself physically committed the crime. 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 Kenneth Miller guilty of the offense charged if you find beyond a reasonable doubt that the government has proven that another person, in this case Lisa Miller, actually committed the offense of international parental kidnapping, and that Kenneth Miller aided or abetted Lisa Miller

in the commission of the offense.

As you can see, the first requirement is that you find that another person, in this case Lisa Miller, has committed the crime of international parental kidnapping. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether Kenneth Miller aided or abetted the commission of that crime.

In order to aid or abet another to commit a crime, it is necessary that a defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed. A defendant need not know all of the details of the crime committed by the other person.

To establish that Kenneth Miller knowingly associated himself with the crime of international parental kidnapping, the government must establish that he intended to obstruct the lawful exercise of parental rights. Kenneth Miller need not have specific knowledge of the particular federal or state law that he is charged with violating, however. The government must prove beyond a reasonable doubt that Kenneth Miller had knowledge of the facts that constitute the offense, i.e., that Janet Jenkins had parental rights—specifically visitation rights—and that Lisa

Miller intended to obstruct the lawful exercise of those rights by removing the child from the country. The government need not prove that Kenneth Miller knew that he was breaking a particular law, or that he knew or had reason to know the details of a particular court order.

To establish that Kenneth Miller participated in the commission of the crime of international parental kidnapping, the government must prove that he engaged in some affirmative conduct or overt act for the specific purpose of bringing about the crime.

The mere presence of a defendant where a crime is being committed, even coupled with his knowledge 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 Kenneth Miller aided or abetted the commission of the crime of international parental kidnapping, ask yourself these questions:

Did he participate in the crime charged as something he

wished to bring about?

Did he knowingly associate himself with the criminal venture?

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

If he did, then Kenneth Miller is an aider and abettor and therefore guilty of the offense. If, however, your answer to any one of these questions is "no," then Kenneth Miller is not an aider and abettor, and you must find him not guilty.

KNOWINGLY

You have been instructed that in order to sustain its burden of proof, the government must prove that Kenneth Miller acted knowingly. A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether Kenneth Miller acted knowingly may be proven by his conduct, by all of the facts and circumstances surrounding this case, and by the reasonable inferences to be drawn from them.

INTENTIONALLY

To act intentionally means to act deliberately and purposefully. That is, the act must have been the product of the actor's conscious objective rather than the product of a mistake or accident.

CONSCIOUS AVOIDANCE

In determining whether Kenneth Miller acted knowingly, you may consider whether he deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that Kenneth Miller acted with, or that his ignorance was solely and entirely the result of, a conscious purpose to avoid learning the truth—in this case that Janet Jenkins had parental rights—then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that Kenneth Miller was merely negligent, foolish or mistaken.

If you find that Kenneth Miller was aware of a high probability that Janet Jenkins had parental rights, and that he acted with deliberate disregard of the facts, you may find that he acted knowingly. However, if you find that Kenneth Miller actually believed that Janet Jenkins did not have parental rights, he may not be convicted.

GUILTY KNOWLEDGE FROM CLANDESTINE BEHAVIOR

Willful intent or guilty knowledge may be inferred from the secretive or irregular manner in which a transaction is carried out.

CUSTODY NOT AT ISSUE

In making your determination in this case, you are not to concern yourselves with the future custody of the child. It is not your role to decide what custody arrangement is or was in her

best interest. You should also not consider whom you believe to be the better parent of the child.

DATE OF CRIME CHARGED

The indictment charges that the offense alleged was committed "on or about" specific dates. The government must prove that the offense happened on substantially similar dates, but is not required to prove that the alleged offense happened on those exact dates.

VENUE

If you find that the government has proved beyond a reasonable doubt all of the elements of the offense that I have described for you, you must also determine whether venue is appropriate in the District of Vermont. In this regard, the government must show by a preponderance of the evidence that the essential conduct of removing a child from the United States took place at least in an essential part outside the United States. The government must also show by a preponderance of the evidence that Kenneth Miller was first arrested in the District of Vermont. The District of Vermont includes the entire territory of the state.

CONCLUSION

I caution you, members of the jury, that you are here to determine the guilt or innocence of Kenneth Miller before you today solely from the evidence in this case. I remind you that

the mere fact that he has been indicted is not evidence against him.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your 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 count contained in the indictment, you will have your foreperson record a verdict of guilty or not guilty. 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 14th day of August, 2012.

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