

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT

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DISTRICT OF VERMONT

UNITED STATES OF AMERICA :

:

v. : Docket No. 2:12-CR-65

:

KEVIN HARRIS, :

Defendant. :

JURY CHARGE

Members of the Jury:

This case is a criminal prosecution brought by the United States against the defendant Kevin Harris. The Superseding Indictment charges the defendant in seven counts.

Count 1 charges the defendant with knowingly and willfully conspiring to distribute a controlled substance and reads as follows:

From in or about August 2011 to on or about September 23, 2011, in the District of Vermont and elsewhere, defendant Kevin Harris, a/k/a "Black," knowingly and willfully conspired with Anthony Miller, Dondre Chisom, Rebecca O'Neill, and others known and unknown to the Grand Jury to

distribute a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance, and a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance.

This offense involved 28 grams or more of a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance.

Counts 2 through 5 charge the defendant with distributing, or aiding and abetting, the distribution of a controlled substance.

Count 2 reads, "On or about August 9, 2011, in the District of Vermont, defendant KEVIN HARRIS, a/k/a 'Black,' knowingly and intentionally distributed a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance."

Count 3 reads, "On or about September 20, 2011, in the District of Vermont, defendant KEVIN HARRIS, a/k/a 'Black,' knowingly and intentionally distributed a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance."

Count 4 reads, "On or about September 20, 2011, in the District of Vermont, defendant KEVIN HARRIS, a/k/a 'Black,' knowingly and intentionally distributed a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance."

Count 5 reads, "On or about September 22, 2011, in the District of Vermont, defendant KEVIN HARRIS, a/k/a 'Black,'

knowingly and intentionally distributed a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance."

Count 6 charges the defendant with possession, or aiding and abetting possession by another, with the intent to distribute a controlled substance. Count 6 reads as follows:

On or about September 23, 2011, in the District of Vermont, defendant KEVIN HARRIS, a/k/a "Black," knowingly and intentionally possessed with intent to distribute a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance, and a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance.

Finally, Count 7 charges the defendant with possessing, or aiding and abetting possession by another of, a firearm in furtherance of a drug trafficking crime. Count 7 reads as follows:

In or about August and September 2011, in the District of Vermont, defendant KEVIN HARRIS, a/k/a "Black," knowingly possessed a firearm in furtherance of a drug trafficking crime for which he 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), as charged in Count 1.

You will receive a copy of the Indictment to take with you into the jury room.

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. The 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 charge against the defendant.

The defendant has pled not guilty to the charges in the indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the indictment and the denial made by the not guilty plea of the defendant. You are to perform this duty without bias or prejudice against the defendant or the government.

OTHER ACTS

You are only to determine whether the defendant is guilty or not guilty of the charges in the Superseding Indictment. Your determination must be made only from the evidence in the case. The defendant 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 the defendant.

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 defendant in the Superseding Indictment or that certain persons were named as co-conspirators but not indicted. The circumstances that these persons were not indicted must play no part in your deliberations.

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 the defendant on trial.

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, AND REASONABLE DOUBT

I instruct you that you must presume the defendant to be innocent of the crimes charged. Thus the defendant, although accused of crimes in the indictment, begins the trial with a "clean slate"--with no evidence against him. The indictment, as you already know, is not evidence of any kind. The defendant is, of course, not on trial for any act or crime not contained in the indictment. The law permits nothing but legal evidence presented before the jury in court to be considered in support of any charge against the defendant. The presumption of innocence alone therefore, is sufficient to acquit the defendant.

The burden is always upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for 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.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense-- the kind of doubt that would make a reasonable person hesitate to act. 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 affairs.

Unless the government proves, beyond a reasonable doubt, that the defendant has committed each and every element of the offense charged in the indictment, you must find the defendant 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, of course, adopt the conclusion of innocence.

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.

You may consider two types of evidence: direct and circumstantial. Direct evidence is evidence such as the testimony of an eyewitness, or a person who asserts or claims to have actual knowledge of a fact. Circumstantial evidence is proof of circumstances from which you may draw a logical conclusion concerning an essential fact in the case. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence.

Nor is a greater degree of certainty required for circumstantial evidence than of direct evidence. You may convict a defendant on the basis of circumstantial evidence alone, but only if that evidence convinces you of the guilt of that defendant beyond a reasonable doubt.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record.

Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists, as I have said, only of the sworn testimony of witnesses, the stipulations made by the parties, and all exhibits that have been received in evidence.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. You should not assume that I hold any opinion on matters to which my questions may have related. At all times, you, the jurors, are at liberty to disregard all questions and comments by me in making your findings as to the 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 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.

CHARTS AND SUMMARIES

The government has presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

RECORDINGS

The government has offered evidence in the form of recordings of conversations with the defendant and others. This information may have been gathered without the knowledge of the defendant. The use of these procedures to gather evidence is perfectly lawful, and the government is entitled to use the recordings in this case.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility

or believability of each witness. You do not have to give the same weight to the testimony of each witness, since you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward the defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than others does not mean that you should necessarily find the facts in favor of the side offering the most witnesses.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent

misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

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

LAW ENFORCEMENT WITNESSES

You have heard the testimony of several law enforcement officials. The fact that a witness may be employed by the federal, state or local government as a law enforcement official does not mean that his or her testimony is 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.

GOVERNMENT INFORMERS

There has been evidence introduced at trial that the government used an informer in this case. I instruct you that there is nothing improper in the government's use of informers and, indeed, certain criminal conduct never would be detected without the use of informers. You, therefore, should not concern yourselves with how you personally feel about the use of informers, because that is really beside the point. Put another way, your concern is to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt, regardless of whether evidence was obtained by the use of an informer.

ACCOMPLICES AND IMMUNIZED WITNESSES

You have also heard witnesses who testified that they were accomplices, that is, they said they participated with the defendant in the commission of a crime. The testimony of accomplices must be examined and weighed by the jury with greater care than the testimony of a witness who did not claim to have participated in the commission of that crime.

This is also true of accomplices or other witnesses who have received immunity. A witness receives immunity from the government when 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 defendant.

CODEFENDANTS' PLEA AGREEMENTS

In this case, there has been testimony from government witnesses 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 the witnesses or agreed not to prosecute them on other charges in exchange for the witnesses' agreement to plead guilty and testify at this trial

against the defendant. The government also promised to bring the witnesses' cooperation to the attention of the sentencing court.

The government is permitted to enter into this kind of plea agreement. You, in turn, may accept the testimony of such a witness and convict the defendant on the basis of this testimony alone, if it convinces you of the defendant's guilt beyond a reasonable doubt.

However, you should 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.

DEFENDANT NOT TESTIFYING

You may have observed that the defendant did not testify in this case. A defendant has a constitutional right not to do so. He does not have to testify, and the government may not call him as a witness. 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 a defendant's

guilt or innocence of a crime charged, you are not to consider, in any manner, the fact that the defendant did not testify. Do not even discuss it in your deliberations.

GOVERNMENT AS A PARTY

You are to perform the duty of finding the facts without bias or prejudice as to any party. You are to perform your final 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 public 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. All parties, whether government or individuals, stand as equals before the Court.

RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

You may not consider the race, religion, national origin, sex, or age of the defendant or any of the witnesses in your deliberations over the verdict or in the weight given to any evidence.

IDENTIFICATION TESTIMONY

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his identification of the defendant. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief on the part of the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and, later, to make a reliable identification of the offender.

You have heard the arguments of counsel on this subject, and I will not repeat them all here. I will only suggest to you that you should consider the following matters: Did the witness have the ability to see the offender at the time of the offense? Has the witness's identification of the defendant as the offender been influenced in any way? Has his identification been unfairly suggested by events that occurred since the time of the offense? Is his recollection accurate?

In addition, you should consider the credibility of the identification witness just as you would any other witness.

Let me repeat, the burden is on the prosecution to prove every element of the crime charged, including the identity of the defendant as the offender. Therefore, if, after examining all of the evidence, you find that a crime was committed, but you have a reasonable doubt about whether it was the defendant who committed that crime, you must find him not guilty.

INSTRUCTIONS ON SUBSTANTIVE LAW OF THE CASE

Having told you the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

All the parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

MULTIPLE COUNTS

The Superseding Indictment contains a total of seven counts. Each count charges the defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each. Generally, whether you find the defendant guilty or not guilty as to one offense should not affect your verdict as to any other offense charged; however, I will instruct you about one exception to that rule for Count 7.

"IN OR ABOUT" EXPLAINED

The Superseding Indictment in this case charges that the conspiracy and firearm offenses in Counts 1 and 7, respectively, were committed in or about August 2011 and September, 2011 and that the controlled substance distribution and possession offenses charged in Counts 2 through 6 were committed "on or about" specified dates. It is not necessary for the government to prove that the offenses were committed precisely on the dates charged; the law only requires a substantial similarity between

the dates alleged in the indictment and the dates established by testimony or exhibits.

COUNT 1: CONSPIRACY

Count 1 of the Superseding Indictment charges the defendant with knowingly and willfully conspiring with Anthony Miller, Dondre Chisom, Rebecca O'Neill, and others to distribute heroin, a Schedule I controlled substance, and 28 grams or more of cocaine base, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Title 21, United States Code, Section 846, as charged in Count 1, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something, which, if actually carried out, would be a violation of Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly or intentionally distribute a controlled substance. I instruct you that cocaine base and heroin are controlled substances.

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 each other member. In order to establish a conspiracy offense, 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. Also, because the essence of a conspiracy offense is the making of the

scheme itself, it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan, although in this case there has been evidence introduced from which you may find that actual distribution of cocaine and heroin occurred.

The Elements of the Offense

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

- (1) that two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the Superseding Indictment; and
- (2) that each defendant knowingly became a member of such conspiracy.

The First Element: Existence of Conspiracy

The first element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in Count 1 of 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 or disregard the law has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all of those you find to be participants as proof that a common design existed on the part of persons charged to act together to accomplish an unlawful purpose.

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 Count 1.

The Second Element: Membership in the Conspiracy

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

If you are satisfied that the conspiracy charged in Count 1 of the Superseding Indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether the defendant whom you are considering was in fact a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined the conspiracy. You should consider whether he participated in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or worker.

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have had a stake in the venture or its outcome. You are instructed that proof of a financial interest in the outcome of a scheme is not essential. Nevertheless, if you find that a defendant had such an interest, that is a factor which you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the Superseding Indictment.

As I mentioned a moment ago, before a defendant can be found to have been a conspirator, you must first find that he knowingly joined in the unlawful agreement or plan. The key question,

therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.

The defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, a defendant need not have known the identities of each and every other member, nor need he have been apprised 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 activities.

The defendant need not have joined in all of the conspiracy's unlawful objectives. For example, in this case, the government has alleged in Count 1 of the Superseding Indictment that the conspirators unlawfully agreed to distribute two controlled substances, specifically cocaine base and heroin. The government need not prove beyond a reasonable doubt that the defendant agreed to accomplish both the distribution of cocaine base and the distribution of heroin. Proof beyond a reasonable doubt that the defendant agreed to participate in a conspiracy that had either of these objectives is sufficient to find that the defendant participated in the unlawful agreement alleged in Count 1.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. 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 parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the ambit of the conspiracy.

I want to caution you, however, that a 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 the 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 proof of the existence of 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 intention of aiding in the accomplishment of those unlawful ends.

In sum, a defendant, with an understanding of the unlawful character of the conspiracy, must have 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.

"Knowingly" and "Willfully" Defined

You have been instructed that to sustain its burden of proof on Count 1, the government must prove that the defendant acted knowingly or willfully. A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. You may consider evidence of the defendant's words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly.

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

Amount of Drugs

If you find that the government has not proven beyond a reasonable doubt the elements that I have just described to you, you will indicate that you find the defendant not guilty of Count 1 on the special verdict form I have provided to you. You will then answer no further questions.

If you find that the government has proven beyond a reasonable doubt the elements of conspiracy that I have just described to you, then there are several more issues you must

decide with respect to Count 1. I have provided you with a special verdict form asking you questions that you must answer.

Count 1 charges the defendant with a conspiracy that involves 28 grams or more of a mixture or substance containing a detectable amount of cocaine base.

You should assess the amount of cocaine base involved in the conspiracy with regard to the defendant. The government does not have to prove that the defendant directly handled or distributed the particular quantity alleged, although you may consider that evidence along with other evidence to assess the quantity element.

The government can prove the defendant responsible for the quantity involved in a conspiracy in three ways. First, the government can offer evidence that proves beyond a reasonable doubt that the defendant personally and directly participated in the possession or distribution of the drugs in question. 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. Second, the government can offer evidence that proves beyond a reasonable doubt that the defendant knew that the conspiracy involved a particular quantity of a controlled substance or controlled substances during the time period that a defendant

participated in the conspiracy. Third, the government can offer evidence that proves beyond a reasonable doubt that the conspiracy involved a particular quantity of a controlled substance or substances during the time period that a defendant participated in the conspiracy and that, based on all of the circumstances, it was reasonably foreseeable to that defendant that the conspiracy involved the particular quantity. With regard to each of these types of proof, the government must prove beyond a reasonable doubt that the conspiracy at issue is the one described in Count 1 of the Superseding Indictment.

Remember, you should address this issue and complete the special verdict form only if you find the essential elements of the conspiracy alleged in Count 1 have been established.

If you decide that the government has not proven beyond a reasonable doubt that the charged conspiracy involved 28 grams or more of a mixture or substance containing a detectable amount of cocaine base, then you must consider whether the conspiracy involved less than 28 grams of a mixture or substance containing a detectable amount of cocaine base. If you find the defendant guilty of one of those offenses, you are to indicate that finding on the special verdict form.

COUNTS 2-5: DISTRIBUTION OF A CONTROLLED SUBSTANCE

Counts 2 through 5 of the Superseding Indictment charge the defendant with distributing, or aiding and abetting, the distribution of a controlled substance.

The Elements of the Offense

In order to prove the defendant guilty of the offenses charged in Counts 2 through 5, the government must prove each of the following elements beyond a reasonable doubt:

- (1) that the defendant knowingly and intentionally distributed a controlled substance, as charged in the Superseding Indictment; and
- (2) at the time of the distribution, the defendant knew that the substance distributed was a controlled substance.

I instruct you that cocaine base and heroin are both controlled substances.

Definition of Distribution

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

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

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

Knowingly and Intentionally Defined

With respects to Counts 2-5, your decision whether the defendant knew the materials he possessed were narcotics involves a decision about the defendant's state of mind. It is obviously impossible to prove directly the operation of the defendant's mind. But a wise and intelligent consideration of all the facts and circumstances shown by the evidence and the exhibits in 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 the defendant was the sole occupant of a residence or a vehicle, it is reasonable to conclude that the defendant knew about items in the residence or vehicle. The 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 the defendant knew that the materials in question were narcotics. Also, the possession of a large quantity of drugs may indicate that the 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 the defendant knew that he possessed narcotics.

Aiding and Abetting

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

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

with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

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

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

To establish that the defendant participated in the commission of the crime, the government must prove that defendant engaged in some affirmative conduct or overt act for the specific purpose of bringing about that crime.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or merely associating with others who were committing a crime is not sufficient to establish aiding and abetting. One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an

aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

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

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

Did he knowingly associate himself with the criminal venture?

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

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

COUNT 6: POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED
SUBSTANCE

Count 6 of the Superseding Indictment charges the defendant with possession, or aiding and abetting possession by another, with the intent to distribute heroin and cocaine base.

The Elements of the Offense

In order to prove this charge against the defendant, the government must prove the following three elements beyond a reasonable doubt:

- (1) that the defendant knowingly and intentionally possessed a controlled substance, as charged in the Superseding Indictment;
- (2) that at the time of the possession, the defendant knew that the substance was a controlled substance; and
- (3) that at the time of the possession, the defendant intended that he or others would distribute the controlled substance.

I instruct you that both cocaine base and heroin are controlled substances.

As I instructed with respect to the conspiracy charge in Count 1, the government need not prove beyond a reasonable doubt that the defendant possessed with intent to distribute both cocaine base and heroin. Proof beyond a reasonable doubt that the defendant possessed either of controlled substance with the intent to distribute it is sufficient to find that the defendant committed the offense charged in Count 6.

Definition of "Knowingly and Intentionally" -- Count 6

I have already instructed you about the definition of "knowingly and intentionally" in Counts 2-5. You should apply the same definition to Count 6.

Definition of "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 be 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. This 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 the defendant possessed the drugs.

Aiding and Abetting--Count 6

Count 6 of the Superseding Indictment charges the defendant alternatively with aiding and abetting another in the possession with the intent to distribute heroin and cocaine base. I have already provided you with instructions on aiding and abetting. Applying those instructions to Count 6, the government must prove beyond a reasonable doubt that the defendant knew that heroin or

cocaine base would be possessed with the intent to distribute. The government must also prove beyond a reasonable doubt that the defendant facilitated or encouraged the possession of the heroin or cocaine base in some way.

COUNT 7: POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG

TRAFFICKING CRIME

The defendant is charged in Count 7 with possessing, or aiding and abetting possession by another of, a firearm in furtherance of a drug trafficking crime, which is charged in Count 1.

If upon all of the evidence you find that the government has failed to prove Count 1 beyond a reasonable doubt, then you should enter a verdict of not guilty on Count 7. Count 7 is to be considered only if you first find the defendant guilty under Count 1 as charged.

In reaching your verdict on Count 7, you may consider the evidence of Count 1 only for the purpose of determining whether the elements of Count 7 have been satisfied.

The Elements of the Offense

The government must prove each of the following elements beyond a reasonable doubt to sustain its burden of proving the defendant guilty of Count 7:

- (1) that the defendant committed a drug trafficking crime for which he might be prosecuted in a court of the United States; and
- (2) that the defendant knowingly possessed a firearm in furtherance of the crime charged in Count 1.

The First Element--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 1 of the indictment with committing the crime of conspiracy to distribute heroin and 28 grams or more of cocaine base. I instruct you that the crime of conspiracy to distribute heroin and 28 grams or more of cocaine base 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 conspiracy to distribute heroin and 28 grams or more of cocaine base as charged.

The Second Element--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 1.

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 the defendant possessed the firearm in furtherance of the crime, the government must prove that the defendant had possession of the firearm and that such possession was in furtherance of that crime. Possession means that 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.

Aiding and Abetting--Count 7

Count 7 of the Superseding Indictment charges the defendant alternatively with aiding and abetting another in the possession of a firearm in furtherance of a drug trafficking crime. I have already provided you with instructions on aiding and abetting. Applying those instructions to Count 7, the government must establish that the defendant knew that a firearm would be possessed in furtherance of a drug trafficking crime. In addition to proving that the defendant knew that a gun would be possessed in furtherance of the offense, the government must also prove that the defendant facilitated or encouraged the possession of that weapon in some way.

UNANIMITY AS TO THEORY OF GUILT

For each of Counts 2 through 7, you must convict the defendant if you find beyond a reasonable doubt either (1) that he committed the charged crime or (2) that he aided and abetted another in the commission of the charged crime. In other words, the government need not prove that the defendant both committed the charged crime and aided and abetted another in the commission of the charged crime. For each of Counts 2 through 7, you must

convict the defendant if you unanimously find him guilty of doing one or the other.

NOTES

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

CONCLUSION

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant before you today solely from the evidence presented to you in this case. I remind you that the mere fact that this defendant has been indicted is not evidence against him. Also, the defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as

to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

You should know that the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with the other jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. But also do not surrender your honest convictions about the case solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

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.

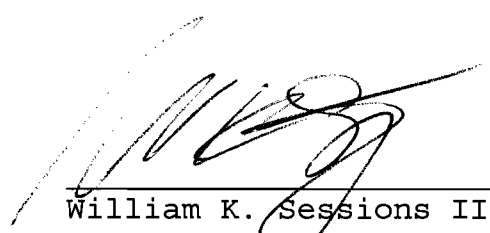
Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. After you have reached agreement as to each of the counts contained in the indictment, you will have your foreperson record

a verdict of guilty or not guilty as to Count I of the indictment. 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 then 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, in the District of Vermont, this twelfth day of April, 2013.



William K. Sessions III
District Judge