UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Docket No. 2:96-CR-17-2
	:	
MUSTAPHA MAISONNEUVE,	:	
Defendant.	:	

JURY CHARGE

Members of the Jury:

This case is a criminal prosecution brought by the United States against the defendant Mustapha Maisonneuve. The grand jury indictment charges the defendant in six counts. You will receive a copy of the indictment to take with you into the jury room.

Count 1 alleges that the defendant, Mustapha Maisonneuve, also known as Gregory Batiste, conspired, in the District of Vermont and elsewhere, with others known and unknown, including Tamiko Johnson, to knowingly and intentionally distribute cocaine base, also known as crack cocaine, from on or about December 15, 1995, up to and including January 13, 1996.

Counts 2, 3 and 4 allege that on three different dates,

January 5, 1996, January 10, 1996, and January 12, 1996, in the District of Vermont, the defendant knowingly and intentionally distributed, or aided and abetted others in the distribution of a quantity of cocaine base.

Count 5 alleges that on or about January 12, 1996, in the District of Vermont, the defendant traveled in interstate commerce from Massachusetts to Vermont with the intent to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to wit: a business enterprise involving cocaine base, and thereafter performed or attempted to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of that unlawful activity.

Count 6 alleges that on or about January 13, 1996, in the District of Vermont, the defendant, an alien who had been previously arrested and deported from the United States pursuant to law, was found in the United States, having not obtained the consent of the Attorney General of the United States for reapplication for admission into the United States.

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 charges against the defendant.

The defendant has pled not guilty to all of the charges in the indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the indictment and the denials 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.

MULTIPLE COUNTS

A separate crime or offense is charged in each of the six counts of the indictment. Each charge against the defendant and the evidence pertaining to each charge should be considered separately. You must return separate verdicts on each count in which the defendant is charged. The fact that

you may find the defendant not guilty or guilty as to one of the offenses charged should not control your verdict as to any other offense charged against the defendant.

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.

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. Circumstantial evidence is proof of circumstances from which you may draw a logical conclusion concerning an essential fact in the case.

You may convict the defendant on the basis of circumstantial evidence alone, but only if that evidence convinces you of the guilt of the 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.

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.

INFORMANT - CREDIBILITY OF WITNESS

First, I will speak to you about informants. An informant is someone who provides testimony against someone else for money, or to escape punishment for his or her own

misdeeds or crimes, or for other personal reasons or advantage. I instruct you that there is nothing improper in the government's use of informants.

The testimony of an informant must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated. The jury must determine whether the informant's testimony has been affected by self-interest, or by the agreement he or she has with the government, or his or her own interest in the outcome of the case, or by prejudice against the defendant.

ACCOMPLICES AND IMMUNIZED WITNESSES: CREDIBILITY OF WITNESS

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. I instruct you that there is nothing improper in the government's use of accomplices. 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 other witnesses who have received immunity. A witness receives immunity from the government

when he or she is told his or her crimes will go unpunished in exchange for testimony, or that his or her testimony will not be used against him or her. A witness who has entered into such an agreement has an interest in this case different than any ordinary witness. A witness who realizes that he or she may be able to obtain his or her own freedom, or receive a lighter sentence by giving testimony favorable to the government has a motive to testify falsely. Conversely, a witness who realizes that he or she may benefit by providing truthful testimony has a motive to be honest. 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 or other witness having received immunity 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.

DRUG USERS: CREDIBILITY OF WITNESSES

There has been evidence that a person or persons were using drugs when the events he or she observed took place. There is nothing improper about calling such a witness to

testify; however, testimony from such a witness should be examined with greater care than the testimony of witnesses who were not using drugs when the event they observed took place, because of the effect the drugs may have had on that person's ability to perceive or describe the events in question.

PRIOR INCONSISTENT STATEMENTS OF A NON-PARTY WITNESS

You may find that a witness has made statements outside of this trial which 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.

IMPEACHMENT BY FELONY CONVICTION - NON-DEFENDANT

You have heard the testimony of witnesses who were previously convicted of crimes, punishable by more than one year in jail or involving dishonesty or false statements. These prior convictions were put into evidence for you to

consider in evaluating the witnesses' credibility. You may consider the fact that the witnesses who testified are convicted felons or have been convicted of crimes involving dishonesty or false statements in deciding how much of their testimony to accept and what weight, if any, it should be given.

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 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. All parties, whether government or individuals, stand as equals before the Court.

INTEREST IN OUTCOME

In evaluating the credibility of witnesses, 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' interest has affected or colored his or her testimony.

DISPOSITION OF CO-DEFENDANTS CASES

At this time there are a number of alleged co-conspirators who are not on trial and you are not being asked to reach a verdict as to them. You are not to be concerned with these persons, nor to speculate about the reasons why they are not a part of this case, and this fact should not

affect or influence your verdict with respect to the remaining defendant. You must base your verdict as to the defendant solely on the basis of the evidence or lack of evidence against him.

WITNESSES - NOT PROPER TO CONSIDER GUILTY PLEA

You have heard testimony from witnesses who pled guilty to charges arising out of the same facts as in this case. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that witnesses pled guilty to similar charges. Those witnesses' decisions to plead guilty were personal decisions about their own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

ORAL ADMISSIONS - VIEWED WITH CAUTION

Evidence as to any oral admissions, claimed to have been made outside of court by a party to any case, should always be considered with caution and weighed with great care. The person making the alleged admission may have been mistaken, or may not have expressed clearly the meaning intended; or the

witness testifying to an alleged admission may have misunderstood, or may have misquoted what was actually said.

However, when an oral admission made outside of court is proved by reliable evidence, such an admission may be treated as trustworthy, and should be considered along with all other evidence in the case.

CONSCIOUSNESS OF GUILT FROM USE OF FALSE NAME

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

FALSE EXCULPATORY STATEMENTS

Statements knowingly and voluntarily made by a defendant upon being informed that a crime had been committed or upon being accused of a criminal charge may be considered by the jury.

When a defendant voluntarily offers an explanation or voluntarily makes some statement tending to show his innocence and it is later shown that the defendant knew that the statement or explanation was false, the jury may consider this as showing a consciousness of guilt on the part of the defendant since it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his or her innocence.

Whether or not evidence as to a defendant's explanation or statement points to a consciousness of guilt on his part and the significance, if any, to be attached to any such evidence, are matters exclusively within the province of the jury as the sole judges of the facts.

In your evaluation of evidence of an exculpatory statement shown to be false, you may consider that there may be reasons -- fully consistent with innocence -- that could cause a person to give a false statement showing their

innocence. Fear of law enforcement, reluctance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement or explanation.

LAW ENFORCEMENT WITNESS

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.

RACE, RELIGION, NATIONAL ORIGIN, SEX OR AGE

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

EXPERT WITNESSES

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

determination of the facts in this case rests solely with you.

DEFENDANT NOT TESTIFYING

You 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 the 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.

SIMILAR ACTS - INTENT, KNOWLEDGE, PLAN, ABSENCE OF MISTAKE

The government has offered evidence tending to show that on a different occasion the defendant may have engaged in conduct similar to the charges in the indictment.

In that connection, let me remind you that the defendant is not on trial for committing any acts not alleged in the indictment. Accordingly, you may not consider evidence of the similar acts as a substitute for proof that the defendant committed the crimes charged. Nor may you consider this

evidence as proof that the defendant has a criminal personality or bad character. The evidence of the other, similar acts was admitted for a much more limited purpose and you may consider it only for that limited purpose.

If you determine that the defendant committed the acts charged in the indictment and the similar acts as well, you may, but need not, consider those acts not charged in the indictment for other legitimate purposes, such as proof of the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because the defendant committed the other act he must also have committed the acts charged in the indictment.

IDENTIFICATION TESTIMONY

One important issue in this case is the identification of the defendant as the perpetrator of the crimes charged.

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.

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' identification of the defendant as the offender been influenced in any way? Has the identification been unfairly suggested by events that occurred since the time of the offense? Is the recollection accurate?

TAPE RECORDINGS AND TRANSCRIPTS

Tape recordings of conversations have been received in evidence. The use of this procedure to gather evidence is perfectly lawful. Typewritten transcripts of these tape recorded conversations have been furnished to you solely for your convenience in assisting you in following the conversation or in identifying the speakers.

The tapes themselves, however, are evidence in the case and the typewritten transcripts are not evidence. If you perceive any variation between the two, you should be guided solely by the tapes and not by the transcripts.

IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

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

IMPERMISSIBLE TO INFER PARTICIPATION FROM MERE PRESENCE

You may not infer that the defendant was 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.

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.

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.

"ON OR ABOUT" EXPLAINED

The indictment in this case charges in each count that a particular offense was committed "on or about" a certain date.

It is not necessary for the government to prove that the offense was committed precisely on the date charged; however, it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in each specific count.

OFFENSES AGAINST THE UNITED STATES

All of the counts of the indictment require proof that offenses were committed against the laws of the United States.

COUNT 1 - CONSPIRACY

I will begin my instructions on the law in this case by first explaining to you the charge of conspiracy. You will recall that the defendant is charged in Count 1 of the indictment with conspiring to knowingly and intentionally distribute cocaine base, with the objective of unjustly enriching himself from the distribution of this drug. The drug conspiracy statute reads:

> Any person who . . . conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy. 18 U.S.C. § 846.

In this case the drug offense which the defendant is charged with conspiring to commit is the distribution of cocaine base. Federal law prohibits this conduct. The Drug Prevention and Control Act, 21 U.S.C. § 841(a)(1) provides:

> (a) . . . [I]t shall be unlawful for any person knowingly or intentionally --
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.

I instruct you now that cocaine base is a controlled substance and that it is a violation of this statute to distribute this substance, and thus, it is a violation of the conspiracy statute to conspire to distribute it.

Elements of the Offense of Conspiracy

A conspiracy is a kind of criminal partnership -- a combination or agreement of two or more persons to join together to accomplish some unlawful purpose. The crime of conspiracy to violate a federal law is an offense separate and distinct from the actual violation of any specific federal laws, which the law refers to as "substantive crimes."

Indeed, you may find a defendant guilty of the crime of conspiracy to commit an offense even if the substantive

crime, in this case the distribution of cocaine base, was not actually committed.

The essence of a conspiracy is the agreement itself. In order to establish conspiracy, the government does not have to prove that the objects of the conspiracy were carried out or that the conspirators actually succeeded in carrying out their unlawful plan.

Nor is it necessary for the government to prove any overt acts as furthering the conspiracy in order for the offense of conspiracy to be complete.

The government must prove three elements beyond a reasonable doubt in order to establish a conspiracy:

First, that two or more persons formed or entered into an unlawful agreement to violate a federal law;

Second, that the defendant knowingly and willfully became a member of the conspiracy, that is, he entered into the unlawful agreement or understanding, either at the time it was reached or some later time when it was still in effect; and

Third, that at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

1. Existence of Agreement

In order for the government to prove the element of agreement, 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. It is sufficient for the government to prove it was the purpose and intention of the defendant to commit an unlawful act, whether or not he succeeded in accomplishing the objective of the conspiracy.

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.

2. Membership in the Conspiracy

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

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

In 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, while proof of a financial interest in the

outcome of a scheme is not essential, if you find that the 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.

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.

It is important for you to note that a defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators, and the reasonable inferences which may be drawn from them.

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

Having provided you with instructions on the elements of a conspiracy, I now instruct you that for the conspiracy alleged in Count 1 of this indictment, the government must prove these three elements beyond a reasonable doubt:

First, that between on or about December 15, 1995, and January 13, 1996, two or more persons reached an agreement or

in some way or manner came to a mutual understanding to knowingly and intentionally distribute cocaine base.

Second, that the defendant voluntarily joined in the agreement or understanding either at the time it was reached or at some later time while it was still in effect; and

Third, that at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding was to distribute cocaine base.

I will now define several terms relevant to Count 1.

1. Controlled substances

I have already instructed you that cocaine base is, as a matter of law, a controlled substance. Quantity is not an element of the crime of distributing controlled substances, and therefore the government need not prove that a specific quantity of controlled substances was involved in the conspiracy. Rather, it is enough that the government prove beyond a reasonable doubt that the defendant conspired to knowingly and intentionally distribute a measurable amount of cocaine base.

2. Definition of Distribute

The term "distribute" means to deliver or to transfer possession or control of something from one person to

another. The term "to distribute" includes the sale of something by one person or another.

3. Knowingly and Intentionally

A person acts knowingly and intentionally if he acts voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether a defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case.

COUNTS 2, 3, 4 - DISTRIBUTION OF COCAINE BASE

Counts 2, 3 and 4 of the indictment charge the defendant with the substantive offense of actual distribution of a controlled substance, namely, cocaine base. In these counts, the defendant is charged with violating the Drug Abuse Prevention and Control Act, 21 U.S.C. § 841 (a) (1), which, as I read earlier, makes it a crime "for any person knowingly and intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture distribute, or dispense a controlled substance."

The elements of this crime which the government must prove beyond a reasonable doubt are:

First, that the defendant distributed or aided and

abetted in the distribution of a controlled substance, namely cocaine base, on the date in question. For Count 2, he must have distributed or aided and abetted in the distribution of cocaine base on January 5, 1996; for Count 3, on January 10, 1996, and for Count 4, on January 12, 1996. Second, the government must prove beyond a reasonable doubt that for each count, on the date in question, the defendant distributed or aided and abetted in the distribution of cocaine base knowingly and intentionally.

If you find from your consideration of all the evidence that these elements have been proven beyond a reasonable doubt with regard to any of the three counts, then you should find the defendant guilty on that count.

If, on the other hand, you find from your consideration of all the evidence that either of these elements has not been proved beyond a reasonable doubt with regard to any of the three counts, then you should find the defendant not guilty on that count.

The instructions and definitions I have provided you in relation to Count 1 for the terms "controlled substance", "distribute" and "knowingly and intentionally" apply for Counts 2, 3 and 4 as well.

AIDING AND ABETTING (18 U.S.C. § 2)

As I have noted, you may find the defendant guilty of aiding and abetting the distribution of cocaine base as stated in Counts 2, 3 and 4.

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 you to find the defendant guilty.

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 proved 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 the crime.

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

Participation in a crime is willful if action is taken voluntarily and intentionally; that is to say, with a bad purpose either to disobey or to 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 the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in 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 associate himself with the criminal venture knowingly and willfully?

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 answers to this series of questions are "no," then the defendant is not an aider and abettor, and you must find him not guilty.

PINKERTON CHARGE

As I have previously noted, the government does not allege that the defendant actually committed the acts charged in Counts 2 through 4. Nevertheless, there is another method by which you may evaluate the guilt or innocence of the defendant for the substantive charges in Counts 2 through 4 of the indictment.

If, in light of my instructions, you find, beyond a reasonable doubt, that the defendant was a member of the conspiracy charged in Count 1 of the indictment, and thus, guilty on the conspiracy count, then you may also, but you

are not required to, find him guilty of the substantive crimes charged against him in Counts 2 through 4, provided you find, beyond a reasonable doubt, the following elements:

First, that the crime charged in Counts 2 through 4 that you are considering was committed;

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

Third, that the substantive crime you are considering was committed pursuant to the common plan and understanding you found to exist among the conspirators;

Fourth, that the defendant was a member of that conspiracy at the time the substantive crime was committed.

Fifth, that the defendant could have reasonably foreseen that the substantive crime might be committed by his co-conspirators.

If you find all five of these elements to exist beyond a reasonable doubt, then you may find the defendant guilty of the substantive crime charged against him, even though he did not personally participate in the acts constituting the crime or did not have actual knowledge of it.

If, however, you are not satisfied as to the existence

of any of these five elements, then you may not find the defendant guilty of the substantive crimes, unless the government proves, beyond a reasonable doubt, that the defendant personally committed, or aided and abetted the commission of, the substantive crime charged.

COUNT 5 - THE TRAVEL ACT

Count 5 of the indictment charges the defendant with violating a law known as the Travel Act.

The Travel Act makes it a federal crime for anyone to travel in interstate commerce for the purpose of carrying on certain unlawful activities. The law says:

> Whoever travels in interstate or foreign commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,
>
> and thereafter performs or attempts to perform any of [these] acts [is guilty of a crime].

For the purposes of this section, "unlawful activity" means "any business enterprise involving . . . narcotics or controlled substances." 18 U.S.C. § 1952(b).

Elements of the Offense

In order to prove that the defendant violated the Travel Act, the government must establish, beyond a reasonable doubt, each of the following three elements of the offense.

First, that the defendant traveled or caused someone else to travel interstate;

Second, that this travel was done with the intent to promote, manage, establish or carry on a business enterprise involving cocaine base; and

Third, that after this interstate travel, the defendant performed or attempted to perform an act in furtherance of this same business enterprise.

Interstate Travel Defined

As I have just told you, the first element that the government must prove beyond a reasonable doubt is that the defendant traveled or caused another to travel interstate. Interstate travel is simply travel between one state and any other state.

The defendant has been charged with traveling or causing another to travel between Massachusetts and Vermont on or about January 12, 1996. If the government has proved this fact beyond a reasonable doubt, then you may find that it has proved the first element of the Travel Act charge against the

defendant.

Intent to Engage in Unlawful Activity

The second element that the government must prove beyond a reasonable doubt is that the defendant traveled interstate or caused another to travel interstate with the intent to promote, manage, establish or carry on the unlawful activity charged in the indictment; that is, a business enterprise involving cocaine base.

It is not enough for the government to prove that the defendant traveled interstate or caused another to so travel. The government must also prove, beyond a reasonable doubt, that the defendant embarked on his interstate trip for the purpose of facilitating the unlawful activity.

On the other hand, the government does not have to prove that the furtherance of the unlawful activity was the defendant's sole purpose in traveling or causing someone to travel interstate. It is sufficient if the government proves that the defendant had a mixed motive. That is, so long as one of the defendant's reasons for traveling interstate was to further the unlawful activity, this element may be satisfied. Thus, if you find that the defendant traveled in foreign commerce or interstate travel with the intent to

facilitate the unlawful activity, and you also find that the defendant undertook this same travel for other reasons that have nothing to do with the unlawful activity, you may still find that the government has met its burden of proof on the second element of the offense.

You are thus being asked to look into the defendant's mind and ask what was the defendant's purpose in traveling interstate. You may determine the defendant's intent from all the evidence that has been placed before you, including the statements of the defendant and his conduct before and after the travel.

Travel Need Not Be Essential to the Unlawful Scheme

As I have instructed you, the government must prove that the defendant intended the interstate travel to facilitate or further the unlawful activity. The government does not, however, have to prove that the travel was essential to the unlawful activity or fundamental to the unlawful scheme, or that the unlawful activity could not have been accomplished without the travel. So long as the government proves that the defendant, with the necessary unlawful intent, traveled or caused another to travel interstate, the government may rely on any interstate travel that made the unlawful activity

easier to accomplish.

The Required Knowledge

The government must prove that the defendant traveled or caused another to travel interstate with the intent to facilitate an activity which the defendant knew was illegal. The government does not have to prove that the defendant knew that the travel was illegal. However, the government must prove beyond a reasonable doubt that the defendant knew that the activity he intended to facilitate was illegal. Thus, if the defendant traveled or caused another to travel interstate intending to facilitate a business deal, but he did not know that the deal was illegal or involved unlawful activity, then you must find the defendant not guilty.

Business Enterprise Requirement

The government must prove that the unlawful activity that the defendant traveled or caused another to travel to facilitate was a business enterprise. That is, the government must prove that the unlawful activity was part of a continuous course of criminal conduct, and not simply an isolated criminal incident. If you find that the unlawful activity was an isolated incident, and was not part of an ongoing course of criminal conduct, you must find the

defendant not guilty.

However, to prove that the unlawful activity was a business enterprise, the government does not have to show that the alleged illegal activity was engaged in for a particular length of time. Nor must the government prove that such activity was defendant's primary pursuit or occupation, or that it actually turned a profit. What the government must prove beyond a reasonable doubt is that the defendant engaged in a continuous course of criminal conduct for the purpose of profit, rather than casual, sporadic or isolated criminal activity.

Third Element - Subsequent Act in Furtherance of the Unlawful Activity

The third element that the government must prove, again beyond a reasonable doubt, is that the defendant's travel was followed by his performance or attempted performance of an act in furtherance of the business enterprise in cocaine base or that the person who the defendant caused to travel interstate thereafter performed or attempted to perform an act in furtherance of the business enterprise. This act need not itself be unlawful. However, this act must come after

the travel. Any act that happened before the travel cannot satisfy this element.

COUNT 6 - REENTRY OF DEPORTED ALIEN

Count 6 alleges that on or about January 13, 1996, in the District of Vermont, the defendant, an alien having previously been arrested and deported from the United States pursuant to law, was found in the United States having not obtained the consent of the United States Attorney General for reapplication for admission into the United States. Section 1326 (a) of Title 8 of the United States Code provides:

> Any alien who:
> (1) has been arrested and deported . . . and thereafter
> (2) enters . . . or is at any time found in, the United States, unless . . . prior to his reembarkation at a place outside the United States, the Attorney General has expressly consented to such alien's reapplying for admission. . .
> shall be guilty of an [offense].

In order to satisfy its burden of proof, the government must establish these elements beyond a reasonable doubt: First, that the defendant was an alien. An alien is defined as any person not a citizen or national of the United States.

Second, that the defendant had previously been deported from the United States, and third, that he was found in the United States having not obtained the consent of the Attorney General for reapplication for admission into the United States.

CONCLUSION

I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant before you today solely from the evidence in this case. I remind you that the mere fact that the 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 offenses 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 other jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous.

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

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. After you have reached agreement as to each of the counts contained in the indictment, you will have your foreperson record a verdict of guilty or not guilty as to each count 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 ___ day of September, 1997.

_____
William K. Sessions III
District Judge