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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT DISTRICT OF VERMONT FILED 1-17-98 BY <u>JAM</u> DEPUTY CLERK

UNITED STATES OF AMERICA :

v. :

SADRIJA RADONCIC :
HUSSEIN KRCIC :

Cr. No. 2:97 CR 47-01;02

JURY CHARGE

Members of the Jury:

This case is a criminal prosecution brought by the United States against defendants Sadrija Radoncic and Hussein Krcic. The Grand Jury indictment charges the defendants with two counts. You will receive a copy of the indictment to take with you into the jury room.

Count I of the indictment charges that Sadrija Radoncic and Hussein Krcic conspired together to smuggle illegal aliens into the United States from Canada, from on or about December 1, 1995 through on or about January 5, 1996. Specifically, Count I alleges that the defendants knowingly and willfully conspired and agreed together and with others to commit an offense against the United States by conspiring to smuggle aliens into the United States at a place other than a designated port of entry on the border or a place other than as designated by the Commissioner of

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the Immigration and Naturalization Service.

Count II charges that defendants Radoncic and Krcic, on or about January 4, 1996, brought to the United States aliens, namely Hakiya Kandic and Jahja Markovic, knowing that said persons were aliens, at a place other than a designated port of entry or a place other than as designated by the Commissioner of the Immigration and Naturalization Service.

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 defendants 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 defendants.

The defendants have pleaded not guilty to the charge 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 defendants. You are to perform this duty without bias or prejudice against the defendants or the prosecution.

MULTIPLE COUNTS

A separate crime or offense is charged in each of the two counts of the indictment. Each charge against each defendant and the evidence pertaining to each charge should be considered separately. You must return separate verdicts on each count in which the defendants are charged. The fact that you may find a defendant not guilty or guilty as to one of the offenses charged should not control your verdict as to any other offense charged against that defendant.

In addition, it does not follow that if you find one defendant not guilty or guilty on one charge, that the other defendant is also not guilty or guilty of that same charge. Each defendant is entitled to fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the other defendant on any charge. You must give separate and individual consideration to each charge against each defendant.

In addition, some of the evidence in this case was limited to one defendant. Any evidence admitted solely against one defendant may be considered only as against that defendant and may not in any respect enter into your deliberations on the other defendant.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

Although the defendants have been indicted, you must remember that an indictment is only an accusation. It is not evidence. The defendants have pled not guilty to that indictment.

As a result of the defendants' plea of not guilty, the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendants for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

The law presumes the defendants to be innocent of all the charges against them. I therefore instruct you that the defendants are to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven them guilty beyond a reasonable doubt.

The defendants begin the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all the evidence in this case. If the government fails to sustain its burden, you must find the defendants not guilty.

This presumption was with the defendants when the trial began and remains with them even now as I speak to you and will continue with the defendants into your deliberations unless and until you are convinced that the government has proven their guilt beyond a reasonable doubt.

REASONABLE DOUBT

I have said that the government must prove the defendants guilty beyond a reasonable doubt. The question naturally is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt which would cause a reasonable person to hesitate to act in a manner of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy. Under your oath as jurors you are not to be swayed by sympathy; you are to be guided solely by the evidence in this case.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law

does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendants, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt.

If, after fair and impartial consideration of all of the evidence you have a reasonable doubt, it is your duty to acquit the defendants. On the other hand, if after fair and impartial consideration of all the evidence you are satisfied of the defendants' guilt beyond a reasonable doubt, you should vote to convict.

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 a 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.

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.

The case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, this case is important to the defendants, who are charged with a serious crime.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the Court.

SIMILAR ACTS

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

In that connection, let me remind you that the defendants are not on trial for committing acts not alleged in the indictment. Accordingly, you may not consider this evidence of similar acts as a substitute for proof that the defendants committed the crimes charged. Nor may you consider this evidence as proof that each defendant has a criminal personality or bad character. The evidence of the other, similar acts was admitted for a more limited purpose and you may consider it only for that limited purpose.

If you determine that a 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 a 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.

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 defendants, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

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

testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

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

RACE, RELIGION, NATIONAL ORIGIN, SEX OR AGE

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

ACCOMPLICES AND IMMUNIZED WITNESSES: CREDIBILITY OF WITNESS

You have heard a witness who testified that he was an accomplice, that is, he said he participated with one or both of these defendants 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 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 has been affected by self-interest, or by an agreement he or she may have with the government, or by his or her own interest in the outcome of this case, or by any prejudice he or

she may have against the defendants.

CO-DEFENDANT'S PLEA AGREEMENT

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

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 defendants 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. The defendants' 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.

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.

LAW ENFORCEMENT WITNESS

You have heard the testimony of law enforcement officials in this case. The fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

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.

CONSCIOUSNESS OF GUILT FROM FALSE EXCULPATORY STATEMENT

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

If you find that the defendant gave a false statement in order to divert suspicion from himself, you may but are not required to infer that the defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is, in fact, guilty of the crime for which he is charged. Whether or not the evidence as to a defendant's

statements shows that the defendant believed that he was guilty, and the significance, if any, to be attached to any such evidence, are matters for you, the jury, to decide.

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.

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 defendants in this case have been charged in the Indictment with conspiring to knowingly bring an alien to the United States.

Federal law makes it a separate criminal offense for anyone to conspire or agree with someone else to do something which if actually carried out would constitute an offense against the United States. The conspiracy statute in question, 18 U.S.C. § 371, reads:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be [guilty of an offense against the United States].

In this case the offense which the defendants are charged with conspiring to commit is 8 U.S.C. § 1324, which is entitled, "Bringing In and Harboring Certain Aliens." Federal law prohibits this conduct. That statute states, in subsection (a)(1)(A)(i), that:

Any person who -- knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner [of the Immigration and Naturalization Service], regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and

regardless of any future official action which may be taken with respect to such alien [commits an offense against the United States].

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 bringing in of aliens, 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.

In order to satisfy its burden of proof as to Count I, the government must establish each of the following four elements beyond a reasonable doubt:

First, that two or more persons entered the unlawful agreement charged in the indictment between on or about December 1, 1995 and January 5, 1996;

Second, that the defendant knowingly became a member of the conspiracy;

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and

Fourth, that the overt acts which you find to have been committed were committed to further some objective of the conspiracy.

FIRST ELEMENT -- 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.

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.

SECOND ELEMENT -- MEMBERSHIP IN THE CONSPIRACY

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

If you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of that conspiracy were. In 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. 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 charged in the indictment.

As I mentioned a moment ago, before the 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 the 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.

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, the 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 objectives.

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 the defendant within the ambit of the conspiracy.

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

THIRD ELEMENT -- COMMISSION OF AN OVERT ACT

The third element which the government must prove beyond a reasonable doubt, to establish the offense of conspiracy, is that at least one of the overt acts charged in the indictment was knowingly committed by at least one of the conspirators, at or about the time and place alleged.

In order for the government to satisfy this element, it is not required that all of the overt acts alleged in the indictment be proven.

Similarly, you need not find that the defendant in this case committed the overt act. It is sufficient for the government to

show that one of the conspirators knowingly committed an overt act in furtherance of the conspiracy, since such an act becomes, in the eyes of the law, the act of all of the members of the conspiracy.

You are further instructed that the overt act need not have been committed at precisely the time alleged in the indictment. It is sufficient if you are convinced beyond a reasonable doubt that it occurred at or about the time and place stated. However, you must unanimously agree upon which overt act was committed and by which conspirator.

Finally, you must find that either the agreement was formed or that an overt act was committed in the District of Vermont, which includes the entire State of Vermont.

FOURTH ELEMENT -- COMMISSION OF AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY

The fourth, and final, element which the government must prove beyond a reasonable doubt is that the overt act was committed for the purpose of carrying out the unlawful agreement.

In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done, by at least one conspirator, in furtherance of some object or purpose of the conspiracy, as charged in the indictment. In this regard, you should bear in

mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act which, in and of itself, is criminal or constitutes an objective of the conspiracy.

COUNT II -- KNOWINGLY BRINGING AN ALIEN TO THE UNITED STATES

The defendants are charged with violating Section 1324(a)(1)(A) of Title 8 of the United States Code. Specifically, the indictment in this case alleges:

On or about the 4th day of January, 1996, within the District of Vermont, the Defendants Sadrija Radoncic and Hussein Krcic, brought to the United States aliens, namely Hakiya Kandic and Jahja Markovic, knowing that said persons were aliens, at a place other than a designated port of entry and at a place other than as designated by the Commissioner of Immigration and Naturalization Service.

Section 1324(a)(1)(A) provides, in relevant part:

Any person who -- knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner [of the Immigration and Naturalization Service], regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien [commits an offense against the United States].

ELEMENTS OF THE OFFENSE CHARGED IN COUNT II

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant brought a person who was an alien into the United States at a place other than a designated port of entry or at a place other than as designated by a United States immigration official;

Second, the defendant knew that the person was an alien; and

Third, the defendant acted with the intent to violate the United States immigration laws by assisting that person to enter the United States at a time or place other than as designated by a United States immigration official or to otherwise elude United States immigration officials.

An alien is a person who is not a natural-born or naturalized citizen, or a national of the United States. The term "national of the United States" includes not only a citizen, but also a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

The term "knowingly," as used in these instructions to describe the alleged state of mind of the defendant, means that he was conscious and aware of his action, realized what he was doing or what was happening around him and did not act because of mistake, accident, or other innocent reason.

PINKERTON THEORY -- ALTERNATIVE PROOF OF SUBSTANTIVE OFFENSES

With regard to the substantive alien smuggling offense against the defendants, if you do not find that the government has satisfied its burden of proof with respect to each of the elements I have just outlined for you, you may, but you are not required to, evaluate the possible guilt of each defendant by another method. A conspirator can be held responsible for the substantive crimes committed by his co-conspirators to the extent that these crimes were reasonably foreseeable consequences of acts furthering the conspiracy, even if the defendant did not himself participate in the substantive crimes. Whether the particular crimes committed in this case were foreseeable and in furtherance of the conspiracy is a factual matter for you, the jury, to determine.

Under this alternative theory I have just described to you, if you find beyond a reasonable doubt that one of the defendants is guilty of the conspiracy count as charged in count one, then you may also, but you are not required to, find him guilty of the substantive alien smuggling offense charged against him, provided that you find, beyond a reasonable doubt, each of the following elements:

- (1) that the substantive crime charged was committed;
- (2) that the person you find actually committed the offenses was a member of the conspiracy you found existed and of which the

charged individual was a member;

(3) that the substantive crimes were committed pursuant to a common plan and understanding you found to exist among the conspirators;

(4) that the charged individual was a member of the conspiracy at the time the crimes were committed; and

(5) that the defendant could have reasonably foreseen that the substantive crimes would be committed by his co-conspirator.

If however, you are not satisfied as to the existence of any of these five elements, then you may not find the defendant charged with the substantive crimes guilty of these crimes, unless the government proves beyond a reasonable doubt that the defendant personally committed these crimes.

AIDING AND ABETTING -- ELEMENTS OF THE CRIME

You may also find that each defendant committed the charged offense as one who aided or abetted the offense. Under the aiding and abetting statute, it is not necessary for the Government to show that the defendant himself physically committed the crime with which he is charged in order for you to find him guilty.

Section 2 of Title 18 states:

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

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Hence, a person who aids and 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 or defendant actually committed the offense with which the defendant is charged, and that either 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 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 prove that a defendant aided or abetted another person in committing a crime, it is necessary to show that the defendant knew of the proposed crime, joined in the specific venture and shared in it, and that his efforts contributed to its success.

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 three questions: First, did he know of the crimes charged? Second, did he join the specific criminal venture and share in it? Finally, did he contribute, by his actions, to the success of the criminal venture? 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 of that charge.

When does a defendant "willfully cause" a crime, as stated in subsection (b) of Section 2? The term "willfully caused" does not mean that the defendant himself need have physically committed the crime or supervised or participated in the actual criminal conduct charged in the indictment.

The meaning of the term "willfully caused" can be found in the answers to the following questions:

First, did the defendant take some action without which the crime would not have occurred?

Second, did the defendant intend that the crime would be

actually committed by others?

If you are persuaded beyond a reasonable doubt that the answer to both of these questions is yes, then the defendant is guilty of the crime charged just as if he himself had actually committed it.

CONSCIOUS AVOIDANCE

In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what otherwise would have been obvious to him. by this I mean that a finding of guilty knowledge cannot be avoided by a showing that the defendant deliberately closed his eyes to the essential nature of the facts.

It is not necessary that the government prove to a certainty that a particular defendant knew his actions were unlawful. Rather, it is enough if the government proves beyond a reasonable doubt that the defendant was aware of a high probability that the law was being violated, unless you find that the defendant actually believed that he was acting in a lawful manner.

"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. For instance, if the Indictment charges that a specific crime occurred on March 5, 1992 and you find from the evidence beyond a reasonable doubt that the alleged crime occurred on March 4, 1992, a date reasonably near March 5, 1992, you should return a verdict of guilty on that charge.

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 another juror. 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 defendants before you

today solely from the evidence in this case. I remind you that the mere fact that these defendants have been indicted is not evidence against them. Also, the defendants are 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 your 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.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. After you have reached agreement as to the counts contained in the Indictment, you will have your foreperson record a verdict of guilty or not guilty as to each count 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 of 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 January, 1998.

William K. Sessions III
District Judge