012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	2:98-CR-084-02
	)	
PEGGY MARCELINO	)	

JURY INSTRUCTIONS

This case is a criminal prosecution brought by the United States against the defendant Peggy Marcelino. The Grand Jury indictment charges the defendant with three counts related to the alleged possession with intent to distribute of cocaine which is a controlled substance. You will receive a copy of the indictment to take with you into the jury room.

Count 1 of the indictment alleges that the defendant knowingly and intentionally possessed with the intent to distribute cocaine in violation of 21 United States Code section 841(a)(1); and 18 United States Code section 2.

Count 2 of the indictment alleges that the defendant conspired to knowingly and intentionally possess with intent to distribute cocaine in violation of 21 United States Code section 846.

Count 3 of the indictment alleges that the defendant traveled from New York to Vermont with the intent to promote unlawful activity involving cocaine in violation of 18 United States Code section 1952(a)(3);2

ROLE OF INDICTMENT

At this time, I would like to remind you of the function of a grand jury indictment.

4-14-99 - 4-15-99

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

MULTIPLE COUNTS

A separate crime or offense is charged in each count of the indictment. Each charge 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.

REASONABLE DOUBT

The law presumes a defendant to be innocent of a crime. Thus, although accused, a defendant begins the trial with a "clean slate" -- with no evidence against her. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against a defendant. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all

the evidence in the case.

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 own affairs.

You must remember that a defendant is never to be convicted on mere suspicion or conjecture. 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. The defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

So if, after careful and impartial consideration of all the evidence in the case, you have a reasonable doubt that the defendant is guilty of an offense charged in the indictment, then you must acquit the defendant of that offense. 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. Furthermore, if you view the evidence in the case as reasonably permitting either of two conclusions as to any count -- one of innocence, the other of guilt, you must adopt the conclusion of innocence and find the defendant not guilty of that count.

The law presumes that a defendant is innocent of the charges against her. The presumption of innocence lasts throughout the trial and ends only if you, the jury, find beyond a reasonable doubt that the defendant is guilty. Should the Government fail to prove the guilt of the defendant beyond a reasonable doubt, you must acquit her.

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.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses -- something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

You may convict a defendant on the basis of circumstantial evidence alone, but

only if that evidence convinces you of the guilt of that defendant beyond a reasonable doubt.

EXPERT WITNESSES

You have heard testimony from expert witnesses. An expert is allowed to express an opinion on those matters about which the expert 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 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 the expert's 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 may have observed that the defendant did not testify in this case. A defendant has a constitutional right not to do so. She does not have to testify, and the government may not call her as a witness. The defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining a defendant's guilt or innocence of a crime charged, you are not to consider, in any manner, the fact that the defendant did not

testify. Do not even discuss it in your deliberations.

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 government and the defendant, and all exhibits 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 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 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.

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 their 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.

IMPERMISSIBLE TO INFER
PARTICIPATION FROM ASSOCIATION

You may not infer that the defendant is guilty of participating in criminal conduct merely from the fact that she associated with other people who were guilty of

wrongdoing.

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 her 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 evidence as to a defendant's explanation or statement points to a consciousness of guilt on her 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.

ADMISSIONS

There has been evidence in this case that the defendant made certain

statements in which the government claims she admitted certain facts charged in the indictment. These statements are known as admissions. You should first examine with great care whether each statement was made. You should then consider whether the statement was made voluntarily and knowingly. All such alleged statements or admissions should be disregarded entirely unless you find beyond a reasonable doubt that the admission was made knowingly and voluntarily.

In determining whether a statement was made voluntarily and knowingly, you should consider all circumstances in evidence surrounding the making of the statement. If you determine that a statement was made knowingly and voluntarily, you may give it such weight as you feel it deserves. Depending on their content, admissions may constitute the strongest sort of evidence against the party making them. Admissions, however, may also provide or support a defense, and you are entitled to decide how to view them and the weight to give them.

"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.

INSTRUCTIONS ON THE

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.

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.

Count 1

21 U.S.C. § 841(a)(1) -- THE STATUTE

Count 1 of the Indictment charges the defendant with knowingly and intentionally possessing a quantity of cocaine with intent to distribute on May 14, 1998, in violation of 21 U.S.C. § 841(a)(1). That statute reads as follows:

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

ELEMENTS OF THE OFFENSE CHARGED

In order to sustain its burden of proof for the crime of possession with intent to distribute a controlled substance as charged in Count 1 of the indictment, the government must prove the following three essential elements beyond a reasonable doubt:

One: The defendant possessed the controlled substance described in the indictment;

Two: The defendant knew that the substance distributed was a controlled substance; and

Three: The defendant intended to distribute this controlled substance.

"POSSESSION" -- DEFINED

The word "possess" means to own or to exert control over. The word "possession" can take on several different, but related, meanings.

The law recognizes two kinds of "possession" -- actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that "possession" may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.

You may find that the element of "possession" as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

"TO DISTRIBUTE" -- DEFINED

The term "to distribute," as used in these instructions, means to deliver or to transfer possession or control of something from one person to another.

"CONTROLLED SUBSTANCE" – DEFINED

I instruct you as a matter of law that cocaine is a Schedule II controlled substance under Title 21, United States Code. Therefore, if you find beyond a reasonable doubt that the substance alleged to have been distributed was cocaine, the government has satisfied this element of the offense.

AIDING AND ABETTING (18 U.S.C. § 2)

In this case, the government also alleges that the defendant aided and abetted the possession with intent to distribute charged in Count 1 of the indictment. You may find that the defendant committed the offense charged in Count 1 as one who aided or abetted the offense. 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 she 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 she committed it him or herself.

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 she 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, or in the case of a failure to act, with the specific intent to fail to do something the law

requires to be done; 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 crime venture.

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

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

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

Did she seek by her actions to make the criminal venture succeed?

If she did, then the defendant is an aider and abettor and therefore guilty of the offense.

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

Count 2

CONSPIRACY (21 U.S.C. § 846)

Title 21, United States Code, Section 846 as charged in Count 2 of this indictment, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of

Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly or intentionally distribute or possess with intent to distribute a controlled substance, in this case, cocaine. The indictment charges the defendant with conspiring with others to knowingly and intentionally possess with the intent to distribute cocaine, a Schedule II substance. The definitions for "knowing," "possessing", "intent to distribute" and "controlled substance, cocaine" are the same as was previously explained in Count 1.

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

In order to establish a conspiracy offense it is not necessary for the government to prove that all of the people named in the indictment were members of the scheme or had entered into any formal type of agreement. It is sufficient to show that the conspirators tacitly came to a mutual understanding to accomplish an unlawful act by means of a joint plan or common design. Also, because the essence of a conspiracy offense is the making of the scheme itself, it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan, although in this case there has been evidence introduced from which you may find that actual distribution of cocaine occurred.

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

First: that two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and

Second: That the defendant knowingly became a member of such conspiracy.

EXISTENCE OF AGREEMENT

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

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act.

You may, of course, find that the existence of an agreement to disobey or disregard the law has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved.

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

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 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 was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly joined the conspiracy. Did she 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, she must have had a stake in the venture or its outcome. You are instructed that, while proof of a financial or other 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 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 she knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.

The defendant's knowledge is a matter of inference from the facts proved. In

that connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need she 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 her 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 her 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.

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly joins in that plan on one occasion, that is sufficient to convict her for conspiracy even though she had not participated before and even though she played a minor part.

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 or her 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. 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 defendants must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intent 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. She thereby becomes a knowing and willing participant in the unlawful agreement -- that is to say, a conspirator.

PINKERTON THEORY - ALTERNATIVE PROOF
OF SUBSTANTIVE OFFENSE

With regard to the substantive possession with intent to distribute cocaine and Travel Act charges against the defendant, if you do not find that the government has satisfied its burden of proof with respect to each of the elements I have outlined for you

in Count 1 and with respect to the elements I intend to outline for you in Count 3, you may, but are not required to, evaluate the possible guilt of the defendant by another method. A conspirator can be held responsible for the substantive crimes committed by her co-conspirators to the extent that these crimes were reasonably foreseeable consequences of acts furthering the conspiracy, even if the defendant did not herself 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 the defendant is guilty of the conspiracy count as charged in count two, then you may also, but you are not required to, find her guilty of the substantive possession with intent to distribute offense and/or the Travel Act violation, provided that you find, beyond a reasonable doubt, each of the following elements:

(1) that the substantive possession with intent to distribute cocaine and/or the Travel Act offenses were 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 her 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.

Count 3

THE INDICTMENT AND THE STATUTE

Count 3 of the indictment charges the defendant with violating a law known as the Travel Act, 18 U.S.C. § 1952(c). The indictment alleges that the defendant traveled in interstate commerce from New York to Vermont with the intention of promoting, managing or carrying on an unlawful activity. Specifically, the indictment alleges that the defendant was involved in a business enterprise related to the sale of cocaine

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:

> § 1952(c). Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to
>
> * * *
>
> (3) otherwise 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].

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 interstate;

Second, that this travel was done with the intent to promote, manage, establish or carry on an unlawful activity; and

Third, that after this interstate travel, the defendant performed or attempted to perform acts in furtherance of this same unlawful activity.

INTERSTATE TRAVEL DEFINED

The first element that the government must prove beyond a reasonable doubt is that the defendant traveled interstate. Interstate travel is simply travel between one state and any other state.

The defendant has been charged with traveling from New York to Vermont. If the government has proved these facts beyond a reasonable doubt, then you may find that it has proved the first element of the Travel Act charge against the defendant.

SECOND ELEMENT:
INTENT TO ENGAGE IN UNLAWFUL ACTIVITY

The second element that the government must prove beyond a reasonable doubt is that the defendant traveled interstate with the intent to promote, manage, establish or carry on the unlawful activity charged in the indictment.

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

Similarly, it is not enough for the government to prove that the defendant was involved in some unlawful activity and also happened to travel interstate. It is also not enough for the government to prove that the defendant traveled interstate and accidentally furthered the unlawful activity. The defendant must have intended the advancement of the unlawful activity to result from her interstate travel.

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 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 interstate 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 her conduct before and after the travel.

TRAVEL NEED NOT BE ESSENTIAL TO THE UNLAWFUL SCHEME

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 interstate 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 interstate travel. So long as the government proves that the defendant traveled with the necessary unlawful intent, the government may rely on any interstate travel by the defendant that made the unlawful activity easier to accomplish.

THE REQUIRED KNOWLEDGE

The government must prove that the defendant traveled 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 her travel was illegal. However, the government must prove beyond a reasonable doubt that the defendant knew that the activity she intended to facilitate was illegal. Thus, if the defendant traveled interstate intending to facilitate a business deal, but she did not know that the deal was illegal or involved unlawful activity, then you must find the defendant not guilty.

BUSINESS ENTERPRISE REQUIREMENTS
FOR PROSECUTIONS INVOLVING NARCOTICS

The government must prove that the unlawful activity that the defendant traveled 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 beyond a reasonable doubt is that the defendant's interstate travel was followed by her performance or attempted performance of an act in furtherance of the unlawful activity. This act need not itself be unlawful. However, this act must come after the interstate travel. Any act that happened before the travel cannot satisfy this element.

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 a fellow 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 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 her. 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 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, copies of this charge will go with you into the jury room for your use.

I appoint _____ as your foreperson.

Dated, Burlington, Vermont
April ___, 1999

William K. Sessions III
United States District Court Judge