

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TRAMAIN M. WHITING,

Defendant.

No. 06-CR-145-LRR

FINAL JURY INSTRUCTIONS

Ladies and Gentlemen of the Jury:

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NUMBER 1

In considering these instructions, attach no importance or significance whatsoever to the order in which they are given.

INSTRUCTION NUMBER 2

Neither in these instructions nor in any ruling, action or remark that I have made during this trial have I intended to give any opinion or suggestion as to what the facts are or what your verdicts should be.

INSTRUCTION NUMBER 3

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you just verdicts, unaffected by anything except the evidence, your common sense and the law as I give it to you.

INSTRUCTION NUMBER 4

I have mentioned the word "evidence." The "evidence" in this case consists of the following: the testimony of the witnesses, including the defendant, stipulations of the parties and the documents and other things received as exhibits.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by the lawyers are not evidence.
2. Anything that might have been said by jurors or the attorneys during the jury selection process is not evidence.
3. Objections are not evidence. The parties have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
4. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
5. Anything you saw or heard about this case outside the courtroom is not evidence.

During the trial, documents were referred to but they were not admitted into evidence and, therefore, they will not be available to you in the jury room during deliberations.

INSTRUCTION NUMBER 5

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witness to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NUMBER 6

The jurors are the sole judges of the weight and credibility of the testimony and the value to be given to each witness who has testified in this case. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NUMBER 7

In a previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be "impeached" and how you are to consider the testimony of certain witnesses.

A witness may be discredited or impeached by contradictory evidence; by showing that the witness testified falsely concerning a material matter; by showing the witness has a motive to be untruthful; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

You have heard evidence that Brian Whiting has made a proffer agreement with the government. Brian Whiting's testimony was received in evidence and may be considered by you. You may give the testimony of this witness such weight as you think it deserves. Whether or not his testimony may have been influenced by the proffer agreement is for you to determine.

You have heard evidence that Brian Whiting and Darius Whiting were once convicted of crimes. You may use that evidence only to help you decide whether to believe these witnesses and how much weight to give their testimony.

You have heard evidence that Brian Whiting plead guilty to a crime which arose out of the same events for which the defendant is on trial here. You must not consider that guilty plea as any evidence of this defendant's guilt. You may consider Brian Whiting's guilty plea only for the purpose of determining how much, if at all, to rely upon his testimony.

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INSTRUCTION NUMBER 7 (Cont'd)

You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.

INSTRUCTION NUMBER 8

You have heard testimony from a person described as an expert. A person who, by knowledge, skill, training, education or experience, has become an expert in some field may state his opinions on matters in that field and may also state the reasons for his opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used and all the other evidence in the case.

INSTRUCTION NUMBER 9

The government and the defendant have stipulated—that is, they have agreed—that certain facts are as counsel have stated. You must, therefore, treat those facts as having been proved.

INSTRUCTION NUMBER 10

You have heard testimony that the defendant made statements to law enforcement officers in this case. It is for you to decide: (1) whether the defendant made the statements and (2) if so, how much weight you should give to them. In making these two decisions you should consider all of the evidence, including the circumstances under which the statements may have been made.

INSTRUCTION NUMBER 11

Exhibits have been admitted into evidence and are to be considered along with all of the other evidence to assist you in reaching your verdicts. You are not to tamper with the exhibits or their contents, and each exhibit should be returned into open court, along with your verdicts, in the same condition as it was received by you.

INSTRUCTION NUMBER 12

The Indictment in this case charges the defendant with five different crimes.

In Count 1, the Indictment charges that between on or about 2002 and about November 7, 2006, the defendant knowingly and unlawfully combined, conspired, confederated and agreed with others to:

(1) distribute and possess with intent to distribute a mixture or substance containing a detectable amount of cocaine, and

(2) manufacture, distribute and possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base,

within 1,000 feet of a playground, to wit: Shawnee Park in Cedar Rapids, Iowa.

In Count 2, the Indictment charges that on or about November 7, 2006, the defendant knowingly and intentionally possessed with intent to distribute and aided and abetted the possession with intent to distribute approximately 192 grams of a mixture or substance containing a detectable amount of cocaine and approximately 207.2 grams of a mixture or substance containing a detectable amount of cocaine base, within 1,000 feet of a playground, to wit: Shawnee Park in Cedar Rapids, Iowa.

In Count 3, the Indictment charges that on or about November 7, 2006, the defendant knowingly and intentionally possessed with intent to distribute and aided and abetted the possession with intent to distribute approximately 2.6 grams of a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground, to wit: Shawnee Park in Cedar Rapids, Iowa.

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INSTRUCTION NUMBER 12 (Cont'd)

In Count 4, the Indictment charges that on or about November 7, 2006, the defendant knowingly and unlawfully used and carried and aided and abetted the using and carrying of four firearms during and in relation to drug trafficking crimes, and possessed and aided and abetted the possession of four firearms in furtherance of drug trafficking crimes.

In Count 5, the Indictment charges that on or about November 7, 2006, the defendant knowingly and unlawfully combined, conspired, confederated and agreed with others to commit the firearms offense charged in Count 4 of the Indictment.

The defendant has pleaded not guilty to the crimes with which he is charged.

As I told you at the beginning of trial, an Indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find a defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crimes charged.

Keep in mind that each count charges a separate crime. You must consider each count separately and return a separate verdict for each count.

There is no burden upon the defendant to prove that he is innocent.

INSTRUCTION NUMBER 13

Count 1 of the Indictment charges the defendant with conspiring to distribute, possess with intent to distribute and/or manufacture a controlled substance within 1,000 feet of a playground. This offense has three essential elements, which are:

One, between on or about 2002 and about November 7, 2006, two or more persons reached an agreement or came to an understanding to commit one or more of the following offenses:

Object 1: To distribute and/or possess with intent to distribute a mixture or substance containing a detectable amount of cocaine within 1,000 feet of a playground, Shawnee Park; or

Object 2: To manufacture, distribute and/or possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground, Shawnee Park;

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

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

If you unanimously find each of these essential elements have been proved beyond a reasonable doubt and you unanimously and beyond a reasonable doubt find which object or objects were involved in the conspiracy, then you must find the defendant guilty of the crime charged under Count 1; otherwise you must find the defendant not guilty of the crime charged under Count 1.

INSTRUCTION NUMBER 14

As to Count 1, the government is not required to prove that the conspiracy existed during the entire period of time alleged in the Indictment, or that the defendant was a member of the conspiracy for the entire period of time alleged in the Indictment. What the evidence must show is that a conspiracy existed, and that the defendant joined in the conspiracy at some time during the period alleged in the Indictment.

INSTRUCTION NUMBER 15

As to Count 1, the quantity of controlled substances involved in the agreement or understanding includes the controlled substances the defendant possessed for personal use or distributed or agreed to distribute. The quantity also includes the controlled substances fellow conspirators distributed or agreed to distribute, if you find that those distributions or agreements to distribute were a necessary consequence of the agreement or understanding and were reasonably foreseeable by the defendant.

INSTRUCTION NUMBER 10

In determining whether the defendant is guilty of the offense charged in Count 1, the government is not required to prove that the amount or quantity of controlled substances was as charged in the Indictment. The government need only prove beyond a reasonable doubt that there was some measurable amount of controlled substances involved.

If you find the defendant guilty of the offense of conspiracy to manufacture, distribute and/or possess with intent to distribute a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground (Object 2 of Count 1) you will need to determine whether the mixture or substance containing a detectable amount of cocaine base involved in the conspiracy was (1) 50 grams or more; (2) 5 grams or more, but less than 50 grams; or (3) less than 5 grams.

The burden of proof is on the government to establish quantity beyond a reasonable doubt.

INSTRUCTION NUMBER 17

With regard to Objects 1 and 2 of Count 1 of the Indictment, you are instructed that the crime of distributing a controlled substance within 1,000 feet of a playground has three essential elements which are:

- (1) Intentional transfer of a controlled substance by a person;
- (2) Who, at the time of the transfer, knew that it was a controlled substance;
and
- (3) The transfer took place within 1,000 feet of the real property comprising a playground.

With regard to Objects 1 and 2 of Count 1 of the Indictment, you are instructed that the crime of possessing with intent to distribute a controlled substance within 1,000 feet of a playground has four essential elements, which are:

- (1) A person was in possession of a controlled substance;
- (2) The person knew he was in possession of the controlled substance;
- (3) The person intended to distribute some or all of the controlled substance to another person; and
- (4) The possession took place within 1,000 feet of the real property comprising a playground.

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INSTRUCTION NUMBER 17 (Cont'd)

With regard to Object 2 of Count 1 of the Indictment, you are instructed that the crime of manufacturing a controlled substance within 1,000 feet of a playground has three essential elements, which are:

- (1) A person manufactured a controlled substance;
- (2) The person knew he was manufacturing and intended to manufacture a controlled substance; and
- (3) The manufacturing took place within 1,000 feet of the real property comprising a playground.

INSTRUCTION NUMBER 18

Count 2 of the Indictment charges the defendant with possession with intent to distribute and aiding and abetting the possession with intent to distribute 192 grams of a mixture or substance containing a detectable amount of cocaine and 207.2 grams of a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground. The defendant may be found guilty of this offense under one or more of the two following alternatives: (1) personally possessing with intent to distribute a mixture or substance containing a detectable amount of cocaine within 1,000 feet of a playground or aiding and abetting the same; and (2) personally possessing with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground or aiding and abetting the same.

*First Alternative:
Personally Possessing with Intent to Distribute
Cocaine within 1,000 Feet of a Playground*

The offense of personally possessing with intent to distribute a mixture or substance containing a detectable amount of cocaine within 1,000 feet of a playground has four essential elements, which are:

- One,* on or about November 7, 2006, the defendant possessed a mixture or substance containing a detectable amount of cocaine;
- Two,* the defendant knew he was in possession of the mixture or substance containing a detectable amount of cocaine;

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INSTRUCTION NUMBER 18 (Cont'd)

Three, the defendant intended to distribute some or all of the mixture or substance containing a detectable amount of cocaine to another person; and

Four, the possession took place within 1,000 feet of the real property comprising a playground, Shawnee Park.

If you unanimously find each of these essential elements of this alternative of Count 2 have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under this alternative of Count 2; otherwise you must find the defendant not guilty of the crime charged under this alternative of Count 2.

Second Alternative:

Personally Possessing with Intent to Distribute

50 Grams or More of Cocaine Base within 1,000 Feet of a Playground

The offense of personally possessing with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground has five essential elements, which are:

One, on or about November 7, 2006, the defendant possessed a mixture or substance containing a detectable amount of cocaine base;

Two, the defendant knew he was in possession of the mixture or substance containing a detectable amount of cocaine base;

Three, the defendant intended to distribute some or all of the mixture or substance containing a detectable amount of cocaine base to another person;

(CONTINUED)

INSTRUCTION NUMBER 18 (Cont'd)

- Four,* the possession took place within 1,000 feet of the real property comprising a playground, Shawnee Park; and
- Five,* the amount the defendant possessed with intent to distribute was 50 grams or more of a mixture or substance containing a detectable amount of cocaine base.

If you unanimously find each of these essential elements of this alternative of Count 2 have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under this alternative of Count 2; otherwise you must find the defendant not guilty of the crime charged under this alternative of Count 2.

You may also find the defendant guilty of Count 2 under each of these alternatives by reason of aiding and abetting. In order to have aided and abetted the commission of a crime, the defendant must:

- (1) Have known the crime under consideration by you was being committed or going to be committed; and
- (2) Have knowingly acted in some way for the purpose of causing, encouraging or aiding the commission of the crime under consideration by you.

To find the defendant guilty of Count 2 by reason of aiding and abetting, the government must prove beyond a reasonable doubt that the essential elements of one of the alternative crimes were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

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INSTRUCTION NUMBER 18 (Cont'd)

You should understand that merely being present at the scene of an event or merely acting in the same way as others or merely associating with others does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or is about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

INSTRUCTION NUMBER 19

In determining whether the defendant is guilty of the offense charged in Count 2, the government is not required to prove the amount or quantity of the controlled substance was as charged in the Indictment. The government need only prove beyond a reasonable doubt that there was a measurable or detectable amount of the controlled substance.

If you find the defendant guilty under the Second Alternative of Count 2, you must determine the quantity of the mixture or substance containing a detectable amount of cocaine base involved in Count 2 and state your answer in the Interrogatory for Count 2. The burden of proof is on the government to establish this quantity beyond a reasonable doubt. Your verdict as to this quantity must be unanimous.

INSTRUCTION NUMBER 20

Count 3 of the Indictment charges the defendant with possession with intent to distribute and aiding and abetting the possession with intent to distribute 2.6 grams of a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground. The defendant may be found guilty of this offense under one of the two following alternatives: (1) personally possessing with intent to distribute a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground or aiding and abetting the same; and (2) personally possessing with intent to distribute a mixture or substance containing a detectable amount of cocaine base or aiding and abetting the same.

***First Alternative: Personally Possessing with Intent
to Distribute Cocaine Base within 1,000 Feet of a Playground***

The offense of personally possessing with intent to distribute 2.6 grams of a mixture or substance containing a detectable amount of cocaine base within 1,000 feet of a playground has four essential elements, which are:

- One,* on or about November 7, 2006, the defendant possessed a mixture or substance containing a detectable amount of cocaine base;
- Two,* the defendant knew he was in possession of the mixture or substance containing a detectable amount of cocaine base;
- Three,* the defendant intended to distribute some or all of the mixture or substance containing a detectable amount of cocaine base to another person; and

(CONTINUED)

INSTRUCTION NUMBER 20 (Cont'd)

Four, the possession took place within 1,000 feet of the real property comprising a playground, Shawnee Park.

If you unanimously find each of these essential elements of this alternative of Count 3 have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under this alternative of Count 3; otherwise you must find the defendant not guilty of the crime charged under this alternative of Count 3.

*Second Alternative: Personally Possessing with Intent
to Distribute Cocaine Base*

The offense of personally possessing with intent to distribute 2.6 grams of a mixture or substance containing a detectable amount of cocaine base has three essential elements, which are:

- One,* on or about November 7, 2006, the defendant possessed a mixture or substance containing a detectable amount of cocaine base;
- Two,* the defendant knew he was in possession of the mixture or substance containing a detectable amount of cocaine base; and
- Three,* the defendant intended to distribute some or all of a mixture or substance containing a detectable amount of cocaine base to another person.

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INSTRUCTION NUMBER 20 (Cont'd)

If you unanimously find each of these essential elements of this alternative of Count 3 have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under this alternative of Count 3; otherwise you must find the defendant not guilty of the crime charged under this alternative of Count 3.

You may also find the defendant guilty of Count 3 under each of these alternatives by reason of aiding and abetting. In order to have aided and abetted the commission of a crime, the defendant must:

- (1) Have known the crime under consideration by you was being committed or going to be committed; and
- (2) Have knowingly acted in some way for the purpose of causing, encouraging or aiding the commission of the crime under consideration by you.

To find the defendant guilty of Count 3 by reason of aiding and abetting, the government must prove beyond a reasonable doubt that the essential elements of one of the alternative crimes were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event or merely acting in the same way as others or merely associating with others does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or is about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

INSTRUCTION NUMBER 21

In determining whether the defendant is guilty of the offense charged in Count 3, the government is not required to prove the amount or quantity of the controlled substance was as charged in the Indictment. The government need only prove beyond a reasonable doubt that there was a measurable or detectable amount of the controlled substance.

INSTRUCTION NUMBER 22

For your information, one gram equals 1,000 milligrams, one ounce equals 28.35 grams, one pound equals 453.6 grams and one kilogram equals 1,000 grams.

INSTRUCTION NUMBER 23

With regard to Counts 1, 2 and 3, you are instructed that the government and the defendant stipulated that Shawnee Park, located in Cedar Rapids, Iowa, meets the definition of a playground. The parties further stipulated that Shawnee Park is within 1,000 feet of the residence of 1218 18th Street NW, Cedar Rapids, Iowa. You must, therefore, treat those facts as having been proved.

INSTRUCTION NUMBER 24

Count 4 of the Indictment charges the defendant with a firearms offense. The defendant may be found guilty of this offense under one of the two following alternatives: (1) the defendant used or carried a firearm during or in relation to a drug trafficking crime or aided and abetted the same; and (2) the defendant possessed a firearm in furtherance of a drug trafficking crime or aided and abetted the same.

*First Alternative:
Using or Carrying a Firearm During
or in Relation to a Drug Trafficking Crime*

The offense of using or carrying a firearm during or in relation to a drug trafficking crime has two essential elements, which are:

- One,* on or about November 7, 2006, the defendant committed one or more of the following drug trafficking crimes:
- (A) conspiracy to distribute some quantity of a mixture or substance containing a detectable amount of cocaine;
 - (B) conspiracy to manufacture some quantity of a mixture or substance containing a detectable amount of cocaine base;
 - (C) conspiracy to distribute some quantity of a mixture or substance containing a detectable amount of cocaine base;
 - (D) conspiracy to possess with intent to distribute some quantity of a mixture or substance containing a detectable amount of cocaine base;

(CONTINUED)

INSTRUCTION NUMBER 24 (Cont'd)

- (E) possession with intent to distribute some quantity of a mixture or substance containing a detectable amount of cocaine; or
- (F) possession with intent to distribute some quantity of a mixture or substance containing a detectable amount of cocaine base; and

Two, the defendant knowingly used or carried a firearm during or in relation to one or more of those drug trafficking crimes.

If you unanimously find each of these essential elements of this alternative of Count 4 have been proved beyond a reasonable doubt and you unanimously and beyond a reasonable doubt find which drug trafficking crime listed in (A) through (F) under element one was involved in Count 4, then you must find the defendant guilty of the crime charged under this alternative of Count 4; otherwise you must find the defendant not guilty of the crime charged under this alternative of Count 4.

The phrase "used a firearm" means that the firearm was actively employed in the course of the commission of a drug trafficking crime. You may but are not required to find that a firearm was used during the commission of a drug trafficking crime if you find that during the commission of a drug trafficking crime it was brandished, displayed, bartered, used to strike someone, fired or attempted to be fired, traded or offered to trade, or if the defendant made reference to a firearm that was in his possession.

You may find that a firearm was "carried" during the commission of a drug trafficking crime if you find that the defendant had a firearm on his person or transported a firearm in a vehicle.

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INSTRUCTION NUMBER 24 (Cont'd)

In determining whether the defendant used or carried a firearm, you may consider all of the factors received in evidence in the case including the nature of the underlying drug trafficking crimes alleged, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crimes alleged and the circumstances surrounding the presence of the firearm.

*Second Alternative:
Possessing a Firearm in Furtherance of a Drug Trafficking Crime*

The offense of possessing a firearm in furtherance of a drug trafficking crime has two essential elements, which are:

- One,* on or about November 7, 2006, the defendant committed one or more of the following drug trafficking crimes:
- (A) conspiracy to distribute some quantity of a mixture or substance containing a detectable amount of cocaine;
 - (B) conspiracy to manufacture some quantity of a mixture or substance containing a detectable amount of cocaine base;
 - (C) conspiracy to distribute some quantity of a mixture or substance containing a detectable amount of cocaine base;
 - (D) conspiracy to possess with intent to distribute some quantity of a mixture or substance containing a detectable amount of cocaine base;

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INSTRUCTION NUMBER 24 (Cont'd)

- (E) possession with intent to distribute some quantity of a mixture or substance containing a detectable amount of cocaine; or
- (F) possession with intent to distribute some quantity of a mixture or substance containing a detectable amount of cocaine base; and

Two, the defendant knowingly possessed a firearm in furtherance of one or more of those drug trafficking crimes.

If you unanimously find each of these essential elements of this alternative of Count 4 have been proved beyond a reasonable doubt and you unanimously and beyond a reasonable doubt find which drug trafficking crime listed in (A) through (F) under element one was involved in Count 4, then you must find the defendant guilty of the crime charged under this alternative of Count 4; otherwise you must find the defendant not guilty of the crime charged under this alternative of Count 4.

The phrase "possessed in furtherance of" means the firearm must have some purpose or effect with respect to a drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. The firearm must facilitate or have the potential to facilitate a drug trafficking crime.

You may also find the defendant guilty of Count 4 under each of these alternatives by reason of aiding and abetting. In order to have aided and abetted the commission of a crime, the defendant must:

(CONTINUED)

INSTRUCTION NUMBER 24 (Cont'd)

- (1) Have known the crime under consideration by you was being committed or going to be committed; and
- (2) Have knowingly acted in some way for the purpose of causing, encouraging or aiding the commission of the crime under consideration by you.

To find the defendant guilty of Count 4 by reason of aiding and abetting, the government must prove beyond a reasonable doubt that the essential elements of one of the alternative crimes were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event or merely acting in the same way as others or merely associating with others does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or is about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

INSTRUCTION NUMBER 25

Count 5 of the Indictment charges the defendant with conspiracy to use or carry a firearm during and in relation to a drug trafficking crime and/or possess a firearm in furtherance of a drug trafficking crime. This offense has three essential elements, which are:

One, on or about November 7, 2006, two or more persons reached an agreement or came to an understanding to commit one or more of the following offenses:

Object 1: Using or carrying one or more firearms during or in relation to a drug trafficking crime or aiding and abetting the same; or

Object 2: Possessing one or more firearms in furtherance of a drug trafficking crime or aiding and abetting the same;

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

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

If you unanimously find each of these essential elements have been proved beyond a reasonable doubt and you unanimously and beyond a reasonable doubt find which object or objects were involved in the conspiracy, then you must find the defendant guilty of the crime charged under Count 5; otherwise you must find the defendant not guilty of the crime charged under Count 5.

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INSTRUCTION NUMBER 25 (Cont'd)

To assist you in determining whether there was an agreement or understanding to use or carry one or more firearms during or in relation to a drug trafficking crime or an agreement or understanding to aid and abet the same (Object 1), you are advised that the elements of this crime are set out in the Instruction Number 24.

To assist you in deciding whether there was an agreement or understanding to possess one or more firearms in furtherance of a drug trafficking crime or an agreement or understanding to aid and abet the same (Object 2), you are advised that the elements of this crime are set out in the Instruction Number 24.

INSTRUCTION NUMBER 210

The term "firearm" means any weapon (including a starter gun) which will, or is designed to, or may be readily converted to expel a projectile by the action of an explosive.

INSTRUCTION NUMBER 27

In considering whether the government has met its burden of proving the offense of conspiracy as alleged in Counts 1 and 5 of the Indictment, you are further instructed as follows:

The government must prove that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is a defendant or is named in the Indictment.

The "agreement or understanding" need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely being associated with others, does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one, does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

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INSTRUCTION NUMBER 27 (Cont'd)

You must decide, after considering all of the evidence, whether the conspiracy alleged in the count in the Indictment under consideration by you existed. If you find that an alleged conspiracy did exist, you must also decide whether the defendant voluntarily and intentionally joined the conspiracy, either at the time it was first formed or at some later time while it was still in effect. In making that decision, you must consider only evidence of the defendant's own actions and statements. You may not consider actions and pretrial statements of others except to the extent that pretrial statements of others describe something that had been said or done by the defendant.

Keep in mind that Counts 1 and 5 of the Indictment charge *conspiracies* to commit crimes and do not require the government to prove that the crimes were actually committed.

Also keep in mind that the Indictment charges that the conspiracy involved in Count 1 had two objects, that is, that the defendant conspired to commit separate crimes and that the conspiracy in Count 5 had two objects, that is, that the defendant conspired to commit separate crimes. You are instructed that it is not necessary for the government to prove a conspiracy to commit all the objects in the count under consideration by you. It would be sufficient if the government proves, beyond a reasonable doubt, a conspiracy to commit *one* of the objects for the count under consideration by you. However, in that event, in order to return a verdict of guilty of the conspiracy in the count under consideration by you, you must unanimously agree upon *which* one or more of the crimes was the object of that conspiracy.

INSTRUCTION NUMBER 28

If you find beyond a reasonable doubt that the conspiracy in the count under consideration by you existed and that the defendant was one of its members, then you may consider acts knowingly done and statements knowingly made by the defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant joined the conspiracy, because a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

INSTRUCTION NUMBER 29

You are instructed as a matter of law that a mixture or substance containing a detectable amount of cocaine base is a Schedule II controlled substance. You are instructed that "crack cocaine" and "a mixture or substance containing a detectable amount of cocaine base" refer to the same substance. You must ascertain whether or not the substance in question as to Counts 1, 2, 3, 4 and 5 was a mixture or substance containing a detectable amount of cocaine base. In so doing, you may consider all the evidence in the case which may aid in the determination of that issue.

You are instructed as a matter of law that a mixture or substance containing a detectable amount of cocaine is a Schedule II controlled substance. You are instructed that "cocaine" and "powder cocaine" refer to the same substance. You must ascertain whether or not the substance in question in Counts 1, 2, 4 and 5 was a mixture or substance containing a detectable amount of cocaine. In so doing, you may consider all the evidence in the case which may aid in the determination of that issue.

INSTRUCTION NUMBER 30

The term "distribute" means to deliver a controlled substance to the possession of another person. The term "deliver" means the actual or attempted transfer of a controlled substance to the possession of another person. No consideration for the delivery need exist, and it is not necessary that money or anything of value change hands. The law is directed at the act of "distribution" of a controlled substance and does not concern itself with any need for a "sale" to occur.

INSTRUCTION NUMBER 31

The law recognizes several kinds of "possession." A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is in "actual possession" of it.

A person who, although not in actual possession, has both the power and 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.

If one person alone has actual or constructive possession of a thing, possession is "sole." If two or more persons share actual or constructive possession of a thing, possession is "joint."

Whenever the word "possession" is used in these instructions, it includes "actual" as well as "constructive" possession and also "sole" as well as "joint" possession.

INSTRUCTION NUMBER 32

Intent may be proven by circumstantial evidence. It rarely can be established by other means. While witnesses may see or hear and thus be able to give direct evidence of what a person does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit an offense.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so. As I have said, it is entirely up to you to decide what facts to find from the evidence.

INSTRUCTION NUMBER 33

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NUMBER 34

An act is done "knowingly" if the defendant realized what he was doing and did not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider the evidence of the defendant's acts and words, along with all other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NUMBER 35

You will note the Indictment charges that the offenses were committed “between,” “about” or “on or about” certain dates. The government need not prove with certainty the exact date or the exact time period of an offense charged. It is sufficient if the evidence established that an offense occurred within a reasonable time of the date or period of time alleged in the Indictment.

INSTRUCTION NUMBER 36

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NUMBER 37

In conducting your deliberations and returning your verdicts, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict—whether guilty or not guilty—must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

(CONTINUED)

INSTRUCTION NUMBER 37 (Cont'd)

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Finally, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be—that is entirely for you to decide.

INSTRUCTION NUMBER 38

Attached to these instructions you will find Verdict Forms and Interrogatories. These are simply the written notices of the decisions that you reach in this case. The answers to these Verdict Forms and Interrogatories must be the unanimous decisions of the jury.

You will take the Verdict Forms and Interrogatories to the jury room, and when you have completed your deliberations and each of you has agreed on answers to the Verdict Forms and Interrogatories, your foreperson will fill out the Verdict Forms and Interrogatories, sign and date them and advise the marshal or court security officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return such verdicts as accord with the evidence and these instructions.

March 15, 2007
DATE


LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT