Jury Copy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Cr. No. 07-100S
	)	
RAFAEL FERNANDEZ-ROQUE	)	
and ADOLFO VERDUGO	)	

JURY INSTRUCTIONS

Introduction

At this time, it is my duty to instruct you on the law applicable to this case. You must accept the rules of law that I give you and apply them to the facts in this case as you find those facts to be.

In applying the law that I am about to explain to you in these instructions, you must consider the instructions as a whole. You should not choose one part and disregard another. You must accept and apply the law as I give it to you in its entirety.

You must accept and apply the rules of law that I give to you whether you agree with them or not. It would be a violation of the oath you took as jurors to base a decision on any version of the law other than that contained in my instructions just as it would be a violation of that oath to return a decision upon anything but the evidence in this case. It is not up to you to decide what the law is or should be. Your duty is to apply the law as I explain it to you.

[You should not worry about memorizing or writing down all of the instructions as I state them, because I will send into the jury room a written copy of my instructions. However, you must know that the law is as I will give it to you from the bench; the written copy is merely a guide to assist you.]

[Although in these instructions I may refer to both Defendants together or each Defendant individually, you are to remember that each Defendant has been charged individually; that is, the case against each Defendant must be evaluated on its own merits. It is possible for you to acquit both Defendants, acquit one Defendant and convict the other, or to convict both Defendants.]

Presumption of Innocence

As I have previously told you during the course of this trial, the Defendants are presumed to be innocent of the accusations against them. This presumption of innocence remains with the Defendants unless and until the Government presents evidence satisfying you beyond a reasonable doubt that the Defendants are guilty.

The presumption of innocence is sufficient to require a not guilty verdict unless you find that such evidence has been presented.

If you find that the Government has proved a Defendant guilty beyond a reasonable doubt, the presumption of innocence disappears and is of no further avail to him. However, until that time, the presumption remains with each Defendant.

Defendants Constitutional Right Not to Testify

Rafael Fernandez-Roque and Adolfo Verdugo have a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that they did not testify. For any of you to draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

Proof of All Elements

I will shortly explain the offense with which the Defendants are charged and the elements the Government must prove in order to establish that each Defendant is guilty of that offense.

In order for the Government to prove a Defendant guilty of an offense, it must convince you, beyond a reasonable doubt, that it has proved each and every element of that offense. Possibilities or even probabilities are not sufficient.

If the Government fails to prove any one or more elements of an offense beyond a reasonable doubt, you must find the Defendant not guilty of that particular offense.

On the other hand, if you are convinced, beyond a reasonable doubt, that all elements of an offense with which the Defendant has been charged have been proved, then you should find the Defendant guilty of that offense.

Bear in mind that the requirement that the Government prove every element of an offense with which a Defendant is charged does not mean that the Government is required to prove every statement contained in the indictment.

What it means is that the Government must prove facts sufficient to prove all of the elements of the offense with which the Defendant is charged as I have explained them.

Reasonable Doubt

As I have said, the burden is upon the government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions-one that a defendant is guilty as charged, the other that the defendant is not guilty-you will find the defendant not guilty.

It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof

that overcomes every possible doubt.

Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of ~~each~~ the offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

Indictment - Effect

You will have the indictment with you in the jury room to help you remember the precise nature of the charges against each Defendant.

I remind you, once again, that an indictment is nothing more than an accusation. It should not be considered as evidence of guilt. It may not even be the basis of an inference of guilt. All that it does is to bring this matter before you for determination. Beyond that, it has no significance, whatever. It merely sets forth the elements of the offense which the Government must prove beyond a reasonable doubt.

Summary of the Charges

The indictment contains one count directed at the Defendants. Count I charges each of the Defendants with conspiring to distribute and to possess with intent to distribute 5 kilograms or more of cocaine on or about May 30, 2007.

Count 1

(Conspiring to Distribute and to Possess with Intent to Distribute Cocaine)

Defendants each are accused of conspiring to distribute and to possess with intent to distribute 5 kilograms or more of cocaine. It is against federal law to conspire with someone to commit this crime.

For you to find the Defendants guilty of conspiracy, you must be convinced that the government has proven each of the following things beyond a reasonable doubt, as to each Defendant:

First, That the conspiracy charged in the indictment, and not some other agreement or agreements, existed between at least two people, including the Defendant;

Second, that the agreement was to distribute and possess with intent to distribute 5 kilograms or more of cocaine, and

Third, that the Defendant willfully joined in that agreement.

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details. But the government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily

establish proof of the existence of a conspiracy, but you may consider such factors.

The government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy is complete upon the agreement to commit the underlying crime. Thus, it is not necessary for you to be convinced that a Defendant actually delivered the controlled substance to someone else, or that he made any money out of the transaction. It is enough for the government to prove, beyond a reasonable doubt, that he had intended to have in his possession what he knew was cocaine and that he intended to transfer it or some of it to someone else.

A person's intent may be inferred from the surrounding circumstances. Intent to distribute may, for example, be inferred from a quantity of drugs larger than that needed for personal use. In other words, if you find that a Defendant intended to possess a quantity of cocaine — more than that which would be needed for personal use — then you may infer that Defendant intended to distribute cocaine. The law does not require you to draw such an inference, but you may draw it.

The term "possess" means to exercise authority, dominion or control over something.

"Possession" includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual

possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.

"Possession" also includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before Defendant can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that Defendant willfully joined in the agreement must be based upon evidence of his own words and/or actions. You need

not find that Defendant agreed specifically to or knew about all the details of the crime, or knew every other co-conspirator or that he participated in each act of the agreement or played a major role, but the government must prove beyond a reasonable doubt that he knew the essential features and general aims of the venture.

Even if Defendant was not part of the agreement at the very start, he can be found guilty of conspiracy if the government proves that he willfully joined the agreement later. On the other hand, a person who has no knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Finally, the issue is not whether one played a major or minor role in the conspiracy, but rather whether he was part of it at all.

If you find Defendant guilty, you will also have to answer one or more questions concerning the quantity of the substance involved.

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Mere Presence

Mere presence at the scene of a crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct to find that a Defendant committed that crime.

However, the law recognizes a difference between mere presence and culpable presence in the context of drug trafficking activities. While mere presence is not sufficient to base criminal charges, a Defendant's presence at the point of a drug sale, taken in the light of attendant circumstances, can constitute strong evidence of complicity.

Thus, you must evaluate the circumstances of this case in order to determine the quality of the Defendant's presence at a location where drugs are found. This will assist you in determining whether the Defendant was merely present or culpably present.

Method of Assessing Evidence

Now that you know what it is that the Government must prove and the standard of proof to be applied, the next question is how do you determine whether the Government has proved these things beyond a reasonable doubt?

Obviously, you must make your determination solely from the evidence properly before you and from all reasonable and legitimate inferences to be drawn from that evidence.

The evidence that is properly before you consists of:

1. The testimony of the witnesses;
2. The exhibits that I have admitted into evidence; and
3. Any stipulations among the attorneys in which they agree as to what the facts are.

From that evidence, you may draw whatever conclusions are reasonable under the circumstances.

The evidence that is properly before you does not include:

1. Comments or statements by the attorneys;
2. Answers given by witnesses which I ordered stricken and instructed you to disregard;
3. Documents, photographs or other items which may have been referred to but have not been admitted into evidence. Since they are not proper evidence, you should not speculate or guess as to what they might say or show and

you may not consider them except to the extent that, and for the purpose that, they may have been read or shown to you during the course of the trial; or

4. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.

Witnesses - Credibility - General Factors

As to the testimony of witnesses, your principal task is to determine the credibility of the witnesses and the weight you will give to the testimony of each. Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented. You do not have to accept the testimony of any witness if you find the witness not credible. You must decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your common sense and personal experience.

In making that determination, there are a number of factors that you may consider:

1. The opportunity or lack of opportunity the witness had to acquire knowledge of the facts about which the witnesses testified. In other words, was the witness in a position to have accurately perceived the facts that the witness related to you.
2. The reliability or unreliability of the witness's memory. In other words, did the witness have a clear recollection of what happened or was the witness's memory uncertain or unclear.
3. The witness's appearance on the stand. Did the witness

appear to be a person who was telling the complete and unadulterated truth, or did it appear that the witness was slanting things one way or another either consciously or unconsciously.

4. The probability or improbability of the witness's testimony. Did what the witness had to say sound reasonable or plausible <u>or</u> did it appear to be highly unlikely or impossible.

5. Whether the witness had anything to gain or lose from the outcome of this case. In other words, was the witness totally impartial or did the witness have some stake in the outcome or some reason to favor one side or the other.

Witnesses - Credibility - Government Agents

The fact that a witness may be employed by a law enforcement agency does not, by itself, mean that you should give that witness's testimony any greater or any lesser weight simply because of that fact. You should assess the credibility and testimony of such a witness by applying the same factors as you would with respect to any other witness.

Testimony Requiring Specialized Knowledge or Skill

During this trial, you have heard testimony from witnesses who claim to have specialized knowledge in a technical field. Because of their specialized knowledge, they are permitted to express opinions which may be helpful to you in determining the facts.

Since they do have specialized knowledge, the opinions of these witnesses, whether expressed personally or in documents which have been admitted into evidence, should not be disregarded lightly.

On the other hand, you are not required to accept such opinions just because the witnesses have specialized knowledge.

In determining what weight to give to testimony requiring specialized knowledge or skill, you should apply the same tests of credibility that apply to the testimony of any other witness. That is to say, you should consider such things as the witness':

-- opportunity to have observed the facts about which he testified; and

-- apparent candor or lack of candor.

In addition, you should take into account the witness':

-- qualifications, especially in comparison to the qualifications of witnesses who may have expressed contrary opinions; and

-- the accuracy of the facts upon which the witness's opinions

were based.

In short, you should carefully consider the opinions of these witnesses, but they are not necessarily conclusive.

Testimony Not Requiring Specialized Knowledge

In regard to opinion testimony, you have heard a witness, Michael Naylor, give opinions about matters requiring special knowledge or skill (such as the interpretation of "drug code") as well as other matters requiring no special knowledge or skill, but merely his own observations (such as the identification of voices). While you should keep in mind that Mr. Naylor's testimony involves both kinds of opinion testimony (specialized and so-called lay opinion), you should judge all of his testimony, whether or not it relies on specialized knowledge or skill, in the same way that you judge the testimony of any other witness. The fact that he has given an opinion based on specialized knowledge or skill does not mean that you are required to accept it. Give his testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all of the other evidence in the case.

Witnesses - Number - Weight of Testimony

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he or she is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness's testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses's testimony that counts.

Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, just because there may be more witnesses testifying on one side of an issue than on the other does not mean that the weight of the evidence lies in favor of the greater number of witnesses. Once again, it is the credibility or

quality of the testimony that determines where the weight of the evidence lies.

Exhibits

In addition to assessing the credibility of the witnesses and the weight to be given to their testimony, you should also evaluate the exhibits which you will have with you in the jury room. Examine them and consider them carefully.

However, bear in mind that merely because an exhibit has been admitted into evidence does not mean that you are required to accept it at face value. Like the testimony of a witness, the significance of an exhibit or the weight you attach to it will depend upon your evaluation of that exhibit in light of all the facts and circumstances of the case.

Tape Recordings and Transcripts

During this trial, you have heard a number of tape recorded conversations. These conversations may be considered by you, like any other evidence.

The parties have agreed to transcripts which were prepared of those taped conversations as exhibits. You may consider both the recording and the transcripts of both as evidence in this case. As to Exhibit 23, however, keep in mind that with respect to Line 3, the parties dispute whether a particular word was spoken. It is for you to decide what was said on that recording.

Statements by Defendants

You have heard evidence that each Defendant made certain statements in which the government claims he admitted certain facts.

Testimony regarding unrecorded statements, particularly in circumstances where recording equipment is available, must be viewed with caution. It is for you to decide (1) whether each Defendant made the statement he is alleged to have made, and (2) if so, how much weight to give it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the statement may have been made and any facts or circumstances tending to corroborate or contradict the version of events described in the alleged statement.

Circumstantial Evidence

As I mentioned previously, you may consider only the evidence that is properly before you. However, that does not mean that, in determining the facts, you are limited to the statements of the witnesses or the contents of the exhibits.

In reaching your conclusions, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in the case.

Such evidence is sometimes called circumstantial evidence.

To put it another way, a fact may be proved either by direct evidence or by circumstantial evidence. Direct evidence includes such things as the testimony of an eyewitness who personally observed the fact in question or a photograph or document showing the actual thing described.

Circumstantial evidence consists of proof of a series of facts or circumstances from which the existence or nonexistence of another fact may be reasonably inferred.

The law makes no distinction between the weight to be given to direct and circumstantial evidence. However, it does require that any fact required to convict a Defendant be proved beyond a reasonable doubt.

Example of circumstantial evidence: rain on the driveway/grass.

Conduct of Court - General

As I have said before, it is up to you to determine the facts in this case. You should not interpret anything I have said or done during this trial as expressing an opinion on my part as to what the facts in this case are. I have not intended to express any such opinion and you should not be concerned about what my opinions might be regarding the facts. That is a matter for you to decide.

Objections by Counsel

During this trial there have been occasions when the attorneys have objected to a question that was asked of a witness. You should not penalize an attorney, or more importantly, his client, for objecting. It is the attorney's right and duty to protect a client's interests by objecting to what the attorney may believe is evidence that does not satisfy the requirements of the rules of evidence.

If I sustained the objection, it is important that you not speculate about what the answer to the objected-to question might have been. By sustaining the objection, the court has determined that the evidence should not be considered by you.

The Government as a Party

The mere fact that this case is brought in the name of the United States of America does not entitle the prosecution to any greater consideration than that accorded to the Defendant. By the same token, it does not mean that the prosecution is entitled to any less consideration. All parties, whether Government or individuals, stand as equals at the bar of justice.

Bias and Prejudice

Neither bias in favor of any person or cause, prejudice against any person or cause, nor sympathy of any kind should be permitted to influence you in the course of your deliberations.

All that any party here is entitled to, or, for that matter expects, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence before you and your application of the law as I have explained it to you.

Verdict - Unanimity Required

In order to return a verdict in this case, all twelve of you must agree as to what that verdict will be. You cannot return a verdict of either guilty or not guilty with respect to any charge against the Defendant unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

Selection of Foreperson and Duty to Deliberate

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

Jury Recollection Controls - Rehearing Testimony

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. Understand that in a short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

Return of Verdict

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

Copy of Instructions

I have instructed you on the law that governs your deliberations. **[As I mentioned at the beginning,]** I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; the written copy is merely a guide to assist you.