U.S. v. Maldonado, 09-CR-71
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.

Presumption of Innocence

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

Defendants' Constitutional Right Not to Testify

A defendant in a criminal trial has a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that the Defendant 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

In a moment, I will explain the offenses with which the Defendant is charged and the elements the Government must prove in order to establish that the Defendant is guilty of these offenses.

In order for the Government to prove the Defendant guilty of any offense, it must convince you, beyond a reasonable doubt, that it has proven 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 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 proven, then you should find the Defendant guilty of that offense.

Bear in mind that the requirement that the Government prove every element of the offenses with which the 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 offenses with which the Defendant is charged, as I will explain them.

Reasonable Doubt

As I have said, the burden is upon the government to prove beyond a reasonable doubt that the Defendant is guilty of the charges made against him. It is a strict and heavy burden, but it does not mean that the Defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning the 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 the 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 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 the 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 the 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 at all. It merely sets forth the elements of the offenses which the Government must prove beyond a reasonable doubt.

Definition of "On or About"

You will note the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The Charges

Defendant Jose Maldonado is charged with

- two counts of possessing with intent to distribute 50 grams or more of a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii) (Counts I, IV);
- one count of possessing with intent to distribute 100 grams or more of a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(i) (Count II);
- one count of possessing with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(ii) (Count III);
- one count of possessing with intent to distribute a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count V); and
- one count of possessing firearms in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count VI).

Counts 1 through 5 - Title 21, United States Code, Section 841
Possession of a Controlled Substance with Intent to Distribute

In counts 1 through 5, the Defendant is accused of violating Section 841 of Title 21 of the United States Code. This section provides, in relevant part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to . . . possess with intent to . . . distribute . . . a controlled substance . . . .

Elements of Count 1

For you to find the Defendant guilty of the charge in Count 1, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt:

First, that on or about April 7, 2009, the Defendant possessed 50 grams or more of the controlled substance cocaine base;

Second, that Defendant's possession was knowing or intentional; and

Third, that the Defendant possessed the cocaine base with the specific intent to distribute it.

Elements of Count 2

For you to find the Defendant guilty of the charge in Count 2, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt:

First, that on or about April 7, 2009, the Defendant possessed 100 grams or more of the controlled substance heroin;

Second, that Defendant's possession was knowing or intentional; and

Third, that the Defendant possessed the heroin with the specific intent to distribute it.

Elements of Count 3

For you to find the Defendant guilty of the charge in Count 3, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt:

First, that on or about April 8, 2009, the Defendant possessed 500 grams or more of the controlled substance cocaine;

Second, that Defendant's possession was knowing or intentional; and

Third, that the Defendant possessed the cocaine with the specific intent to distribute it.

Elements of Count 4

For you to find the Defendant guilty of the charge in Count 4, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt:

First, that on or about April 8, 2009, the Defendant possessed 50 grams or more of the controlled substance cocaine base;

Second, that Defendant's possession was knowing or intentional; and

Third, that the Defendant possessed the cocaine base with the specific intent to distribute it.

Elements of Count 5

For you to find the Defendant guilty of the charge in Count 5, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt:

First, that on or about April 8, 2009, the Defendant possessed the controlled substance heroin;

Second, that Defendant's possession was knowing or intentional; and

Third, that the Defendant possessed the heroin with the specific intent to distribute it.

Controlled Substance

You are instructed as a matter of law that cocaine base, cocaine, and heroin all qualify as a "controlled substance."

Possession

For the purposes of Counts 1 through 5, when determining whether Defendant "possessed" the controlled substances, the term "possess" means to exercise authority, dominion, or control over something. Proof of possession requires a showing that the Defendant had both the power and the intention to exercise control over it.

Possession may be actual or constructive. Proof of either one is sufficient to satisfy the possession requirement. When a defendant has direct and immediate power and control over something, the defendant has actual possession of it. Direct and immediate control may exist when the object is on the Defendant's person or within his reach. When a defendant has indirect power and control over something, he has constructive possession of it even though it is not on his person or within his reach. Indirect control may exist when something is readily accessible to a defendant and he has the power and the intention to exercise control over it. Knowledge of and indirect control over something may, depending upon the circumstances, be inferred from ownership or control over the area where it was found.

The law also recognizes that possession may be sole or joint. Once again, proof of either one is sufficient to satisfy

the possession requirement. If one person alone has actual or constructive possession of something, that person has sole possession. If two or more persons share actual or constructive possession of something, they have joint possession.

The Government is not required to prove that a defendant owned something in order to establish that the defendant possessed it, but ownership is a factor that may be considered.

A person does not have to have something on his person in order to be deemed in possession of it. However, a person must have both the power and the intent to exercise control over something (either alone or together with others) in order to be deemed in possession.

Evidence that the Defendant was present near the object, or that the Defendant associated with someone who possessed it, or that he knew that the object was there may be factors to be considered but they are not, by themselves, sufficient to establish possession.

Knowing

For the purposes of Counts 1 through 5, when determining whether the Defendant possessed the controlled substance "knowingly or intentionally," the term "knowingly" means that the possession was voluntary and intentional and not because of mistake or accident. Therefore, to satisfy this element, you must find beyond a reasonable doubt that the Defendant knowingly possessed what he knew was a controlled substance. However, it is not necessary that the Defendant had knowledge of which particular controlled substance it was, nor is it necessary that the Defendant had knowledge of the weight of the controlled substance.

Intent to Distribute

For the purposes of Counts 1 through 5, to prove intent to distribute, it is not necessary for you to be convinced that the Defendant actually delivered the controlled substance to someone else, or that he made any money out of the transaction.

It is enough if you find, beyond a reasonable doubt, that he had in his possession what he knew was a controlled substance 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 controlled substance larger than that needed for personal use. In other words, if you find that the Defendant possessed a quantity of cocaine more than what would be needed for personal use, then you may infer that the Defendant intended to distribute the cocaine.

The law does not require you to draw such an inference, but you may draw it.

Count 6 - Title 18, United States Code, Section 924
Possession of a Firearm in Furtherance of Drug Trafficking

In Count 6, the Defendant is accused of violating Section 924 of Title 18 of the United States Code. This section makes it a crime to possess a firearm in furtherance of a drug trafficking crime.

Elements of Count 6

For you to find the Defendant guilty of the charge in Count 6, you must be satisfied that the Government has proven each of the following elements beyond a reasonable doubt:

First, that the Defendant committed the crime of knowingly or intentionally possessing 100 grams or more of heroin with the intent to distribute it, as charged in Count 2 of the indictment; and

Second, that the Defendant knowingly possessed a firearm in furtherance of the commission of that crime.

Knowing Possession

The terms "possess" and "knowingly" have the same meaning as I instructed you in relation to Counts 1 through 5.

Firearm

The term "firearm" means any weapon which will or is designed or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon.

In Furtherance

The phrase "in furtherance of" means that you must find, beyond a reasonable doubt, that the Defendant's possession of the firearm made the commission of the underlying crime easier, safer, or faster, or in any other way helped the Defendant commit the crime. There must be some connection between the firearm and the underlying crime, but the firearm need not have been actively used during the crime. For example, the nexus between the firearm and drug trafficking crime can be established by the type of drug activity that is being conducted, accessibility of the firearm, the type of firearm, whether the firearm is stolen, the status of the possession (legitimate or illegal), whether the firearm is loaded, proximity of the firearm to the drugs or drug profits, and the time and circumstances under which the firearm is found.

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 proven these elements beyond a reasonable doubt?

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;
3. Any stipulations by which the parties have agreed to what the facts are.
4. Any facts that I have instructed you to find.

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, statements, questions, or objections by the attorneys.
2. Anything, including answers from witnesses, which I have excluded from evidence or 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 and for the purpose that they may have been read or shown to you during the course of the trial.
4. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.
5. The indictment.

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.

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

1. The opportunity the witness had or did not have to acquire knowledge of the facts about which the witness 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 have 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.

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 light of all the evidence, you believe that the witness is mistaken or has testified falsely or is proposing something impossible or unworthy of belief, you may disregard that witness' 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 the weight of the evidence. Rather, it is the quality of the witnesses' testimony that counts.

So, for example, 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.

Expert Witnesses

During this trial, you have heard testimony from several witnesses who claim to have specialized knowledge in a technical field. Such persons are sometimes referred to as expert witnesses. 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 expert 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 the testimony of a so-called expert witness, 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's:

- 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's:

- qualifications; and

- the accuracy of the facts upon which the witness's opinions were based.

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

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 on your evaluation of that exhibit in light of all the facts and circumstances of the case.

Recordings and Transcripts

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

When you listened to those recordings, the Government was permitted to furnish you with transcripts it prepared of those conversations as an aid to assist you.

I remind you, again, that it is the recording (on disk) and not the transcripts that constitutes evidence of what was said. Therefore, if what you heard on the recording is in any way different from what appeared on the transcripts, what you heard on the recording is controlling.

Statements by Defendant

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

It is for you to decide (1) whether the Defendant actually made the statement, and (2) if so, how much weight to give the statement. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which it may have been made and any facts or circumstances tending to corroborate or contradict the version of events described in the 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 proven, reasonable inferences that seem justified in 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 proven 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 proven 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. The facts are for you to decide.

Objections

During this trial there have been occasions when the attorneys or the Defendant have objected to a question that was asked of a witness. You are not to penalize either the Government or the Defendant for making objections to testimony which they believed to be not in conformance with the rules of evidence. It is their right to make such objections.

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 the charges 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 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 correct 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 unanimous agreement if you can do so.

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 you should. Do not come to a decision simply because other jurors think it is right.

Jury Recollection Controls - Rehearing Testimony

If any reference by the court or by counsel to matters of evidence is inconsistent 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. But 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.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the Marshall, 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 the jury concerning the case only in writing, or here in open court.

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, 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. I will send a written copy of my instructions to the jury room. But keep in mind that the law is as I have given it to you from the bench; the written copy is merely a guide to assist you.