1 DRAFT
2 (The jury is present for the following)
3 THE COURT: All right, ladies and gentlemen. I
4 know you've been working very hard, and I thank you for
5 the question that you've submitted. The question that
6 you've asked is somewhat nuanced and complicated
7 question so I'm going to do my best to try to give you
8 a little bit of a clarification that will assist you in
9 answering the questions that you have.
10 Now, I'm going to read your question for the
11 record. The attorneys are aware that I've been
12 discussing it with them. Your question is as follows:
13 Please provide clarification about element five of the
14 Pinkerton charge as it relates to Count VI of the
15 charges against the Defendant, what is the legal
16 definition of foreseen and does it include a specific
17 time frame. We are stalling up on verbiage.
18 So, first, in order to answer your question, I
19 am presupposing and in doing so reminding you of the
20 remainder of the elements of the Pinkerton charge, that
21 is to say that you don't get to the fifth element of
22 the Pinkerton instruction unless you have gone through
23 the first four elements of the Pinkerton instruction
24 and found that each of those elements has been
25 satisfied, so to reiterate, that someone committed the

1 substantive crime -- I'm stating this in terms of the
2 presupposition so that I can answer your questions I
3 think precisely, which is what you want, so that
4 someone committed the crime charged in the count, and
5 here we're talking about Count VI, that the person you
6 find actually committed the substantive crime was a
7 member of the conspiracy and that you found that -- the
8 Defendant to be a member of this conspiracy and that a
9 co-conspirator committed the substantive crime in
10 furtherance of the conspiracy and that the Defendant
11 was a member of the conspiracy at the time the
12 substantive element was committed and had not withdrawn
13 from it.
14 So those elements have to be satisfied until you
15 get to the fifth element, which would require that the
16 Defendant would have reasonably foreseen that one or
17 more of his co-conspirators might have committed the
18 crime. And of course that means with respect to Count
19 VI that we're dealing with May 4th, 2012, which is the
20 date on which Count VI is alleged to have occurred.
21 So first let me try to deal with your -- having
22 set the stage for it, let me deal with your question
23 about time frame. The time frame is not and would not
24 be limited to May 4th, 2012. The time frame would be
25 bounded only by what you have found the dates of the

1 conspiracy to be, up to and including May 4th, 2012.
2 That would be the time frame during which you would be
3 asking the question of whether it was reasonably
4 foreseeable for the Defendant, reasonably to have
5 foreseen that one of his co-conspirators might commit
6 that substantive crime on May 4th, 2012. It's the time
7 frame of the conspiracy up to and including May 4th,
8 2012, but not beyond 2012 for the obvious common sense
9 reason that something that occurred after the
10 commission of the crime, even if the conspiracy was
11 still going, could not be evidence of something that
12 would occur before the substantive crime.
13 Now, in terms of what you've asked with respect
14 to the definition of foreseeability let me say the
15 following. I've now tried to address the time frame
16 issue. I'm now going to try to address your question
17 with respect to the words reasonable foreseeability,
18 what does that mean.
19 There must be, for you to find element five has
20 been met, there must be some evidence from which you
21 can conclude beyond a reasonable doubt that the
22 Defendant foresaw the likelihood that the firearm would
23 be possessed in furtherance of a drug trafficking crime
24 or used, carried during or in relation to -- let me
25 restate that. It has to track the language of the

1 statute. That there must be some evidence from which
2 you can conclude beyond a reasonable doubt that the
3 Defendant foresaw the likelihood that the firearm would
4 be used or carried during or in relation to the crime
5 or possessed in furtherance of the commission of that
6 crime, that is, the drug trafficking crime, the
7 narcotics transaction that allegedly occurred on May 4,
8 2012.
9 Now, when we speak of reasonable foreseeability,
10 what we're saying is that the act must not be merely
11 possible but probable. So in terms of foreseeability,
12 we're talking about reasonable foreseeability and not
13 some sort of prophetic vision as to what might happen
14 in the future. So I hope that what I've given you is
15 responsive to your questions, and of course if you have
16 further questions, you can send out an additional note.
17 But I'm going to return you to the jury room with that
18 instruction and if you'd like, I will -- first of all,
19 is that instruction satisfactory to counsel for the
20 Government and counsel for the Defendant?
21 MS. GOLDSTEIN: It is to the Government, your
22 Honor.
23 MR. CALCAGNI: Same with the Defendant, your
24 Honor.
25 THE COURT: All right. I suggest if you're

1 willing to do this, to have that portion of the
2 transcript of what I just read to the jury printed and
3 sent in to the jury room along with the other
4 instructions. Is that agreeable to both?
5 MR. CALCAGNI: This Court is seeking to
6 supplement the written product given to the jurors in
7 that will be fine, your Honor.
8 THE COURT: Are you agreeable with that?
9 MS. GOLDSTEIN: Yes. That's fine, your Honor.
10 THE COURT: So I'll do what I can to have what I
11 just said to you printed up and sent in to you in case
12 you want to refer back to that. So with that I'm going
13 to return you to the jury room.
14 (The jury is not present for the following)
15 MS. GOLDSTEIN: Your Honor
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