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

* * * * * C.R. NO. 04-100ML
*
UNITED STATES OF AMERICA *
*
VS. * APRIL 27, 2005
* 9:30 A.M.
*
JOEL FRANCISCO *
*
* * * * * PROVIDENCE, RI

BEFORE THE HONORABLE MARY M. LISI,
DISTRICT JUDGE

(And a Jury)

APPEARANCES:

FOR THE GOVERNMENT: MARY E. ROGERS, ESQ.
STEPHEN G. DAMBRUCH, ESQ.
U.S. Attorney's Office
50 Kennedy Plaza
Providence, RI 02903

FOR THE DEFENDANT: DAMON D'AMBROSIO, ESQ.
160 Plainfield Street
Providence, RI 02909

Court Reporter: Karen M. Zinni, RPR-RMR-CRR
One Exchange Terrace
Providence, RI 02903

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KAREN M. ZINNI, RPR-RMR-CRR

1 THE COURT: To the people in the gallery, I am
2 now going to charge the jury. If you wish to leave,
3 you may leave now. If you choose to stay, you will not
4 be permitted to leave while I'm charging the jury. So
5 for those of you who wish to leave, now is the time for
6 you to go.

7 (Pause)

8 THE COURT: Members of the jury, I know that you
9 have been very attentive throughout this trial, and I
10 ask that you continue for the next several minutes. It
11 will take me approximately 35 or 40 minutes to provide
12 you those detailed instructions I told you about at the
13 beginning of the case.

14 Now, I was a schoolteacher in another life, and
15 so I know that some people learn better by hearing,
16 some better by seeing. I'll read these instructions to
17 you now; but I will also tell you that you will be
18 provided with a written copy of them so that if you
19 should find it necessary to refer to them during your
20 deliberations, you will have a copy to refer to.

21 For those of you who learn better by listening,
22 you will also be provided with an audio tape and a tape
23 player so that if you wish to listen to them again, you
24 may do so. For now, however, I do ask that you give me
25 your undivided attention.

1 We have now come to the end of this trial. This
2 case, like all criminal cases, is a serious one. I say
3 this because the Defendant and the United States have a
4 deep concern for your mature consideration of the
5 evidence as presented and the law which I am about to
6 give to you.

7 Although you, as the jury, are the sole judges
8 of the facts, you are duty-bound to follow the law as I
9 instruct you and to apply that law to the facts as you
10 find them to be from the evidence which has been
11 presented during the trial.

12 You are not to single out any one instruction as
13 stating the law. Rather, you must consider these
14 instructions in their entirety. You are not to be
15 concerned with the wisdom of any rule of law,
16 regardless of any opinion which you might have as to
17 what the law ought to be. It would be a violation of
18 your sworn duty to base your verdict upon any version
19 of the law other than that which I am about to give to
20 you.

21 You have been chosen and sworn as jurors in this
22 case to try the issues of fact presented by the
23 allegations of the Indictment and the denial made by
24 the not guilty plea of the Defendant. You are to
25 perform this duty without bias or prejudice as to any

1 party. The law does not permit jurors to be governed
2 by sympathy, prejudice or public opinion.

3 The accused and the Government are entitled to
4 an impartial consideration of all the evidence.
5 Moreover, the parties and the public expect that you
6 will carefully and impartially consider all the
7 evidence in the case, follow the law as stated by the
8 Court and reach a just verdict regardless of the
9 consequences.

10 The fact that the prosecution is brought in the
11 name of the United States of America entitles the
12 Government to no greater consideration than that
13 accorded to any other party to a litigation. By the
14 same token, it is entitled to no less consideration.
15 All parties, whether Government or individuals, stand
16 as equals at the bar of justice.

17 For the purposes of determining whether or not
18 the Government has sustained its burden of proof, you
19 must evaluate all of the evidence. The evidence in
20 this case consists of the sworn testimony of the
21 witnesses and all exhibits received in evidence.

22 Any proposed testimony or proposed exhibit to
23 which an objection was sustained by the Court, as well
24 as any testimony or exhibit ordered stricken by the
25 Court, must be entirely disregarded.

1 Anything you may have seen or heard outside the
2 courtroom is not proper evidence and must be entirely
3 disregarded.

4 In determining whether the Government has
5 sustained its burden of proof, you are to consider only
6 the evidence; but in your consideration of the
7 evidence, you are not limited to the statements of
8 witnesses or solely to what you see and hear as the
9 witnesses testify.

10 You are permitted to draw, from the facts which
11 you find have been proven, such reasonable inferences
12 as seem justified in light of your experiences.
13 Inferences are simply deductions or conclusions which
14 reason and common sense lead you to draw from facts
15 which have been established by the evidence in the
16 case.

17 As I told you in my preliminary instructions,
18 there are two types of evidence which you may consider.
19 One is direct evidence, such as the testimony of an
20 eyewitness. The other is indirect or circumstantial
21 evidence, which is a chain of circumstances pointing to
22 certain facts.

23 The law makes no distinction at all between the
24 weight to be given to either direct or circumstantial
25 evidence, nor is a greater degree of certainty required

1 of circumstantial evidence than of direct evidence.

2 In determining whether the Government has
3 sustained its burden of proof, you can and should weigh
4 all the evidence, both direct and circumstantial.

5 The fact that the Court may have admitted
6 evidence over objection should not influence you in
7 determining the weight that you will give such
8 evidence, nor should the statements made by counsel
9 either for or against the admission of offered evidence
10 influence your determination of the weight that you
11 will give the evidence if admitted.

12 In other words, you should determine the weight
13 you will give the evidence on the basis of your own
14 consideration of it and without regard to the
15 statements of counsel concerning the admissibility of
16 that evidence.

17 Now, if any reference by the Court or by counsel
18 to matters of evidence does not coincide with your own
19 recollection, it is your recollection which should
20 control during your deliberations.

21 In all criminal cases, there is a presumption of
22 innocence. Every Defendant under our system of law is
23 presumed to be innocent of the accusation which is
24 filed against him or her; and this presumption of
25 innocence must remain with the Defendant from the

1 moment the charge is brought, throughout the trial,
2 through the arguments of counsel, throughout the
3 instructions of the Court and throughout your
4 deliberations when you retire to consider your verdict
5 in the secrecy of the jury room.

6 The presumption of innocence remains unless and
7 until you find that a Defendant is guilty beyond a
8 reasonable doubt of a charge as stated in the
9 Indictment.

10 If you find, however, that the Defendant is
11 guilty beyond a reasonable doubt of each and every
12 element of a crime with which he is charged, the
13 presumption of innocence disappears and is of no
14 further avail to him.

15 In criminal cases, the law places the burden of
16 proof upon the Government. The Government has the
17 burden of proving each and every element of the offense
18 as charged beyond a reasonable doubt.

19 Now, what is meant by the term beyond a
20 reasonable doubt. Obviously, the obligation resting
21 upon the Government to prove a Defendant's guilt beyond
22 a reasonable doubt does not mean that it must do so
23 beyond all conceivable doubts, nor does it require the
24 Government to prove a Defendant's guilt to a
25 mathematical or scientific certainty.

1 Reasonable doubt means that the Government must
2 adduce evidence which, on examination, is found to be
3 so convincing and compelling as to leave in your minds
4 no reasonable doubt about a Defendant's guilt.

5 We know from experience what a doubt is, just as
6 we know when something is reasonable or unreasonable.
7 Reasonable doubt, by definition, means a doubt founded
8 upon reason and not speculation, that is, a doubt for
9 which you can give some sound reason.

10 If, therefore, after reviewing all the evidence
11 there remains in your mind a doubt about the
12 Defendant's guilt and this doubt appears in the light
13 of the evidence to be reasonable, your duty is to find
14 the Defendant not guilty.

15 If, however, at the end of your deliberations
16 you are convinced by the evidence beyond a reasonable
17 doubt that the Defendant is guilty, your duty would be
18 to return a verdict against him.

19 Ladies and gentlemen, you will have a copy of
20 the Indictment in the jury room. An Indictment is
21 nothing more than an accusation. It is a piece of
22 paper filed with the Court to bring a criminal charge
23 against a Defendant.

24 Here, the Defendant has pled not guilty and has
25 put in issue the charges alleged in the Indictment.

1 The Government, therefore, has the burden of proving
2 the allegations made against the Defendant.

3 The fact that an Indictment has been filed in
4 this case does not give rise to a presumption of guilt.
5 It does not even lead to an inference of guilt. The
6 Indictment simply brings this matter before you for
7 determination. Beyond that, it has no significance
8 whatsoever.

9 You will note that the Indictment charges that
10 the offenses were committed on or about a certain date.
11 The proof need not establish with certainty the exact
12 date of the alleged offense. It is sufficient that the
13 evidence in the case establishes beyond a reasonable
14 doubt that the offenses were committed on a date
15 reasonably near the date alleged in the Indictment.

16 The Indictment in this case contains two counts
17 or charges. You should consider each charge and the
18 evidence pertaining to it separately. The fact that
19 you may find the Defendant guilty or not guilty as to
20 one of the offenses charged should not control your
21 verdict as to the other offense charged.

22 Count I of the Indictment charges that on or
23 about October 24, 2004, in the District of Rhode
24 Island, the Defendant, Joel Francisco, did knowingly
25 and intentionally possess with intent to distribute

1 500 grams or more of a mixture or substance containing
2 a detectable amount of cocaine, a Schedule II
3 controlled substance, in violation of Title 21,
4 Sections 841(a)(1) and 841(b)(1)(B) of the United
5 States Code.

6 Count II of the Indictment charges that on or
7 about October 24, 2004, in the District of Rhode
8 Island, the Defendant, Joel Francisco, did knowingly
9 and intentionally possess with intent to distribute
10 50 grams or more of a mixture or substance containing a
11 detectable amount of cocaine base, a Schedule II
12 controlled substance, in violation of Title 21,
13 Sections 841(a)(1) and 841(b)(1)(A) of the United
14 States Code.

15 Section 841(a) of Title 21 of the United States
16 Code provides in part that it shall be unlawful for any
17 person knowingly or intentionally to possess with
18 intent to distribute a controlled substance.

19 You are instructed that, as a matter of law,
20 cocaine is a Schedule II controlled substance. For
21 simplicity, whenever I use the word "cocaine" in these
22 instructions, I mean a mixture or substance containing
23 a detectable amount of cocaine.

24 Crack is the street name for a form of cocaine
25 base. You are instructed that, as a matter of law,

1 cocaine base or crack is a Schedule II controlled
2 substance. Again, for simplicity, whenever I refer to
3 cocaine base or crack in these instructions, I am
4 referring to a mixture or substance containing a
5 detectable amount of cocaine base.

6 There are three essential elements which the
7 Government must prove beyond a reasonable doubt in
8 order to sustain its burden of proof on Count I:
9 First, that the Defendant possessed 500 grams or more
10 of cocaine; second, that the Defendant's possession was
11 knowing and intentional; and third, that the Defendant
12 possessed the cocaine with the specific intent to
13 distribute it.

14 There are also three essential elements which
15 the Government must prove beyond a reasonable doubt in
16 order to sustain its burden of proof on Count II:
17 First, that the Defendant possessed 50 grams or more of
18 cocaine base; second, that the Defendant's possession
19 was knowing and intentional; and third, that the
20 Defendant possessed the cocaine base with the specific
21 intent to distribute it.

22 The term "possession" means to exercise control
23 or authority over something at a given time. There are
24 several types of possession, actual and constructive,
25 sole and joint.

1 Possession is considered to be actual possession
2 when a person knowingly has direct physical control or
3 authority over something. Possession is called
4 constructive when a person does not have direct
5 physical control over something but can knowingly
6 control it and intends to control it, sometimes through
7 another person.

8 Possession may be knowingly exercised by one
9 person exclusively. This is called sole possession.
10 Possession may also be knowingly exercised by two or
11 more persons. This is called joint possession.

12 Whenever I use the term possession in these
13 instructions, I mean actual as well as constructive
14 possession, sole as well as joint possession.

15 You may find the element of possession is proved
16 if you find beyond a reasonable doubt that the
17 Defendant knowingly had actual or constructive
18 possession of a controlled substance, either alone or
19 with others.

20 I caution you, however, that mere proximity to
21 drugs or mere association with another person who
22 exercises control over drugs is insufficient to support
23 a finding of possession.

24 To sustain its burden of proof as to Count I,
25 the Government must prove beyond a reasonable doubt

1 that the controlled substance involved here was cocaine
2 and that the amount of cocaine that the Defendant
3 possessed with intent to distribute was 500 grams or
4 more.

5 To sustain its burden of proof as to Count II,
6 the Government must prove beyond a reasonable doubt
7 that the controlled substance involved here was cocaine
8 base and that the amount of cocaine base that the
9 Defendant possessed with intent to distribute was
10 50 grams or more.

11 The phrase "with intent to distribute" means to
12 have in mind or to plan in some way to deliver or to
13 transfer possession or control over a thing to someone
14 else. In this context, the phrase refers to the
15 specific intent to actually or constructively transfer
16 or to attempt to transfer the controlled substance
17 described in the Indictment.

18 In attempting to determine the intent of any
19 person, you may take into your consideration all the
20 facts and circumstances shown by the evidence received
21 in the case concerning that person.

22 In determining a person's intent to distribute a
23 controlled substance, you may consider, among other
24 things, the quantity of the controlled substance, the
25 presence or absence of packaging materials, scales,

1 cutting agents and large amounts of cash. The law does
2 not require you to draw the inference of intent from
3 this evidence, but you may do so.

4 The Government must prove beyond a reasonable
5 doubt that the Defendant intended to distribute the
6 controlled substance alleged in each count of the
7 Indictment.

8 The exhibits received into evidence by the Court
9 are properly before you and will be available to you
10 during your deliberations.

11 Now, let me just say you will have both bags of
12 the cocaine and cocaine base. They're sealed in
13 plastic bags. You're free to handle them, but please
14 don't puncture those bags in any way.

15 An exhibit marked by the Court for
16 identification is not evidence in the case unless or
17 until it was admitted by the Court as a full exhibit.
18 If it has not been admitted as a full exhibit, you may
19 not consider it. If it was admitted, however, it is
20 just as much a part of the evidence in the case as the
21 testimony which you have heard from the witness stand.

22 Now, some of the evidence admitted in this case
23 was obtained through the interception of telephone
24 communications and a search of a residence by law
25 enforcement officers. Such evidence is properly before

1 you for your consideration along with all the other
2 evidence in the case.

3 In determining whether the Government has proven
4 the Defendant's guilt beyond a reasonable doubt on
5 either of the counts of the Indictment, whether you
6 approve or disapprove of the manner in which any
7 evidence was obtained is not relevant to the case and
8 must not affect your evaluation of the evidence in the
9 case.

10 The remarks, statements or questions by counsel
11 are not evidence and are not to be considered by you as
12 evidence during your deliberations. Neither should you
13 permit objections by counsel to the admission of
14 evidence or the rulings of the Court create any bias or
15 prejudice toward counsel or the party whom he or she
16 represents.

17 It is the duty of counsel for both sides to
18 represent their clients vigorously and to defend their
19 clients' rights and interests. In the performance of
20 that duty, counsel freely may make objection to the
21 admission of offered evidence or to any other ruling of
22 the Court and should not be penalized for doing so.

23 If during trial or in instructing you I have
24 said or done anything that has caused you to believe
25 that I was indicating an opinion as to what the facts

1 are in this case, you should put that belief out of
2 your mind. I did not intend to indicate any such
3 opinion. In fact, I try not to have an opinion about
4 the case because you are the sole and exclusive judges
5 of the facts.

6 In determining the facts, you are to consider
7 only that evidence which has properly been placed
8 before you. It is the Court's duty to pass upon the
9 admissibility of offered evidence, that is, to decide
10 whether or not offered evidence should be considered by
11 you.

12 Evidence admitted by the Court is properly
13 before you for your consideration. Evidence which the
14 Court has refused to admit or may have stricken from
15 the record after you heard it is not a proper subject
16 for your deliberations and is not to be considered by
17 you.

18 The rules of evidence ordinarily do not permit
19 witnesses to testify as to opinions or conclusions. An
20 exception to this rule exists as to those whom we call
21 expert witnesses. Such witnesses who have special
22 training or experience in a technical field may state
23 an opinion concerning that technical matter and may
24 also state the reasons for their opinion.

25 Merely because an expert witness has expressed

1 an opinion, of course, does not mean that you have to
2 accept it. As with any other witness, you should
3 consider the testimony and give it such weight as you
4 think it deserves. Brian Hall, Thomas Verdi and Ronald
5 Alongis were presented as expert witnesses in this
6 case.

7 The law does not require you to accept or credit
8 the evidence I have admitted. In determining what
9 evidence you will accept, you must make your own
10 evaluation of the testimony given by each of the
11 witnesses and the weight you choose to give his or her
12 testimony.

13 In evaluating the testimony of witnesses, you
14 may consider several facts, the opportunity of the
15 witnesses to have acquired knowledge of that to which
16 they testified, their conduct and demeanor while
17 testifying, their interest or lack of interest, if any,
18 in the outcome of the case, their intelligence or lack
19 thereof and the probability or improbability of the
20 truth of their testimony.

21 Inconsistencies or discrepancies in the
22 testimony of a witness or between the testimony of
23 different witnesses may or may not cause you to
24 disbelieve or discredit such testimony. Two or more
25 persons witnessing an incident or transaction may

1 simply see or hear it differently.

2 Innocent misrecollection, like failure of
3 recollection, is not an uncommon experience. In
4 weighing the effect of a discrepancy, however, always
5 consider whether it pertains to a matter of importance
6 or an insignificant detail and consider whether the
7 discrepancy results from innocent error or intentional
8 falsehood.

9 From these circumstances and from all of the
10 other facts and circumstances proved at trial, you may
11 determine whether or not the Government has sustained
12 its burden of proof.

13 The law does not compel a Defendant in a
14 criminal case to take the witness stand and testify.
15 No presumption of guilt may be raised and no inference
16 of any kind may be drawn from the fact that a Defendant
17 did not testify. Further, the law never imposes upon a
18 Defendant in a criminal case the burden of calling any
19 witnesses or producing any evidence.

20 Now, if you'll indulge us for just a couple of
21 moments, I'm going to meet with counsel here at the
22 bench to make sure I haven't left anything out. So
23 just bear with us for a few moments. Counsel, please.

24 (Bench conference held on the record)

25 THE COURT: Mr. D'Ambrosio?

1 MR. D'AMBROSIO: No objection to the
2 instructions.

3 THE COURT: Okay.

4 MS. ROGERS: None from the Government, your
5 Honor.

6 THE COURT: Okay. Thank you.

7 (End of bench conference)

8 THE COURT: Miss Brown and Mr. Obert, you were
9 impaneled as alternate jurors in this case; and if one
10 of the other jurors had been taken ill or otherwise
11 incapacitated, you would have been called upon at this
12 time to begin deliberations. However, under the rules,
13 only 12 jurors may deliberate.

14 What that means is that your service as jurors
15 in this case has come to an end. I hope that this has
16 been a good experience for you and that it helped you
17 understand our system of justice maybe a little bit
18 better than you might have thought before becoming a
19 juror, and I also hope that at some point you'll have
20 another opportunity to serve as a juror and get to
21 deliberate on a verdict.

22 I thank you for the time that you've spent.
23 Please leave your notebooks here. They will be
24 collected and destroyed. You're now free to leave.
25 Jim, if you could see Mr. Obert and Miss Brown out,

1 please.

2 (Alternate jurors excused)

3 THE COURT: To render a verdict, all 12 of you
4 must agree; that is, your verdict must be unanimous.
5 Therefore, during your deliberations and in your
6 consideration of the evidence, you should exercise
7 reasonable and intelligent judgment.

8 It is not required that you yield your view
9 simply because a majority holds to the contrary view;
10 but in pursuing your deliberations, you should keep
11 your minds reasonably open with respect to any point in
12 dispute so that you will not be prevented from
13 achieving a unanimous verdict due to mere stubbornness.
14 It is your right, however, to maintain your view.

15 The vote of each juror is as important as the
16 vote of any other juror; and you need not give up your
17 view, sincerely held, simply because a majority holds
18 to the contrary view.

19 Do not approach your consideration of the case
20 in an intellectual vacuum. You are not required to
21 disregard your experiences and observations in the
22 ordinary, everyday affairs of life. Indeed, your
23 experiences and observations are essential to your
24 exercise of sound judgment and discretion, and it is
25 your right and duty to consider the evidence in light

1 of such experiences and observations.

2 It is hoped and anticipated that you will sift
3 all the evidence in this case through maturity and
4 common sense.

5 Of course, prejudice, sympathy or compassion
6 should not be permitted to influence you. All that any
7 party is entitled to or expects is a verdict based upon
8 your fair, scrupulous and conscientious examination of
9 the evidence and an application thereto of the law as I
10 have instructed you.

11 Now, you will be permitted to take your
12 notebooks with you into the deliberation room. I
13 remind you, however, that if you did take notes, those
14 notes are for your personal and individual use only.
15 They're not to be considered the record of these
16 proceedings. Remember, Karen has taken the official
17 notes of this proceeding.

18 You should not take with you, however, the black
19 binders that contained the transcripts. Remember,
20 those were not evidence. What you heard on the tapes
21 was the evidence. So please leave the black notebooks
22 here, and you may bring your other notebooks in with
23 you.

24 Now, if in the course of your deliberations you
25 should find it necessary to be further instructed or

1 assisted by the Court in any way, you may send a note
2 signed by your foreperson. The foreperson will then
3 hand such written request or question to the court
4 officer in whose charge you will be placed.

5 The officer will then bring any written
6 questions or requests to me, and I will attempt to
7 fulfill your request or answer your question. Other
8 than the method outlined, please do not attempt to
9 communicate privately or in any other way with the
10 Court.

11 Miss Danielian, am I pronouncing your name
12 correctly? I'm appointing you foreperson of this jury.
13 It will be your responsibility to moderate the
14 discussions of the jurors to make sure that each and
15 every one of your fellow jurors has an equal and ample
16 opportunity to voice his or her opinion.

17 It will also be your responsibility to sign any
18 questions or requests that the jury may have; and
19 finally, once the jury has reached a unanimous verdict,
20 it will be your responsibility to fill out the verdict
21 form which you'll see poses very simple questions and
22 has very simple instructions. Fill it out, sign it and
23 date it.

24 Members of the jury, bear in mind that you are
25 never to reveal to any person, not even to the Court,

1 how the jury stands, numerically or otherwise, on the
2 question of whether the accused is guilty or not guilty
3 until after you have reached a unanimous verdict. When
4 you have reached a verdict, you will return here and
5 make your verdict known.

6 Jim.

7 (Court security officer sworn)

8 THE COURT: Members of the jury, you may now
9 gather up your notebooks and commence your
10 deliberations.

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