

1 05-134

2 USA V VAN ANH - JURY CHARGE

3 5/4/06

4 THE COURT: Ladies and gentlemen, at this time,
5 it's my duty to explain to you the law that applies in
6 this case, and, as I previously told you, it's your
7 duty to apply the law as I explain it to you. And in
8 considering my explanation, you should look at or
9 listen to what I'm about to tell you in its entirety.
10 Don't pick out one or two points and focus on them to
11 the exclusion of everything else.

12 In order to apply the law fairly and accurately,
13 you must consider my explanation in its entirety and
14 the points that I am about to make in context.

15 Now, as you know, you may or may not, I think
16 you know, the indictment in this case contains two
17 counts or charges against the defendants, Van Anh,
18 Khuong Nguyen and Thinh Cao.

19 Count I charges the defendants with conspiring
20 to use extortionate means to collect an extension of
21 credit made to Tommy Nguyen and/or to punish Tommy
22 Nguyen for not repaying that extension of credit.

23 Count II charges the defendants with knowingly
24 participating in the use of extortionate means to
25 collect an extension of credit to Tommy Nguyen and/or

1 punishing, using extortionate means to punish Tommy
2 Nguyen for failing to repay the extension of credit.
3 And it also charges, Count II also charges the
4 defendants with aiding and abetting in the commission
5 of that offense.

6 Now, as I told you before, it's important to
7 remember that you have to look at each count or charge
8 against each defendant and the evidence that pertains
9 to that count or charge separately, and you must make
10 an independent determination as to whether a particular
11 defendant has or has not been proven guilty beyond a
12 reasonable doubt of each particular charge against that
13 defendant. And you shouldn't allow your decision as to
14 a count or charge against one defendant to affect
15 your -- or to automatically affect your decision as to
16 any other defendant. And you shouldn't assume that
17 just because you find one defendant guilty or not
18 guilty of a particular charge against that defendant,
19 that, therefore, he's automatically guilty or not
20 guilty of the other charge against him.

21 Now, I'm going to talk about these charges in
22 the reverse order in which they're listed in the
23 indictment, because I think it makes it easier to
24 explain, first of all, the offense of participating in
25 the use of extortionate means to collect an extension

1 of credit or punishing someone for not repaying an
2 extension of credit, before I explain to you what a
3 conspiracy to do that is.

4 So I'll start with Count II. Count II charges
5 on or about July 25th, 2005, the defendants knowingly
6 participated in use of extortionate means, namely, the
7 threat of violence and other criminal means, in an
8 attempt to collect on an extension of credit made to
9 Tommy Nguyen and/or to punish Tommy Nguyen for not
10 repaying an extension of credit, and that that was in
11 violation of Section 894 of Title 18 of the United
12 States Code.

13 And as I just said, Count II also charges the
14 defendants with aiding and abetting in the commission
15 of that crime, which would be a violation of another
16 federal statute, Section 2 of Title 18 of the United
17 States Code.

18 I'll start with the -- put aside the aiding and
19 abetting for a moment. Start with Section 894(a).
20 I'll read to you the pertinent portion of that statute.

21 Section 894(a) says, "Whoever knowingly
22 participates in any way in the use of any extortionate
23 means to collect, or attempt to collect, any extension
24 of credit, or to punish any person for the
25 non-repayment of extension of credit, shall be guilty

1 of an offense against the United States."

2 Now, as you can gather from my reading of the
3 statute, this offense may be committed in either of two
4 different ways. First, it could be committed by
5 participating in the use of extortionate means in
6 collecting or attempting to collect an extension of
7 credit, or it could be committed by participating in
8 the use of extortionate means to punish a person for
9 not repaying an extension of credit.

10 In this case, you cannot find a defendant guilty
11 of this offense unless all of you agree that the
12 defendant committed in offense and all of you agree as
13 to which way or ways the defendant committed the
14 offense.

15 So you can't return a guilty verdict against the
16 defendant as to this charge if some, but not all of
17 you, find that the defendant committed the offense by
18 participating in the use of extortionate means in order
19 to collect or attempt to collect an extension of
20 credit, and some, but not all of you, may agree that
21 the defendant committed the offense by participating in
22 the use of extortionate means to collect the extension
23 of credit.

24 You must all agree on at least the defendant
25 committed the offense in one of those ways, or you

1 might agree he committed the offense in both ways. But
2 point is, you can't find the defendant guilty if some
3 of think you he did it in one way, and some, but not
4 all of you, think he did it in another way. You have
5 to unanimously agree.

6 In order to establish that a defendant is guilty
7 of participating in the use of extortionate means,
8 either in an attempt to collect an extension of credit
9 made to Tommy Nguyen or to punish Tommy Nguyen for
10 failing to make repayment on an extension of credit,
11 the Government has to prove four things or what the law
12 refers to as elements beyond a reasonable doubt.

13 First, the Government has to prove that an
14 attempt was made to collect an extension of credit made
15 to Tommy Nguyen and/or that Tommy Nguyen was punished
16 for not repaying an extension of credit.

17 The second thing the Government has to prove is
18 that extortionate means were used in doing so. The
19 third thing it has to prove is that the defendant
20 participated in some way in the use of those
21 extortionate means for that purpose; and fourth, the
22 Government also must prove that the defendant acted
23 knowingly.

24 Let me explain or define for you what some of
25 these terms mean. I'll start with extension of credit.

1 To extend credit or to make an extension of
2 credit means to make or renew a loan or to agree to
3 defer or postpone repayment of an existing debt or an
4 amount that is claimed to be due and owing.

5 It doesn't matter what gave rise to the debt or
6 the claim. So a gambling debt, for example, whether
7 it's legal or illegal, may be the subject of an
8 extension of credit. Nor does it matter whether the
9 debt or the amount claimed is admitted or disputed, or
10 whether it's lawfully owed or whether it's an unlawful
11 debt. Any type of debt or claim may be the subject of
12 an extension of credit.

13 Furthermore, an agreement to defer or postpone
14 repayment doesn't have to be expressly stated. And it
15 doesn't have to be in any particular form. The
16 agreement may be verbal, and it may be implied from the
17 circumstances. But in order for there to be an
18 extension of credit there must be some kind of an
19 agreement, whether it's expressed or implied, there
20 must be some kind of agreement to defer or postpone
21 repayment. The mere fact that the person who claims
22 he's owed the money unilaterally delays in asking for
23 the money or delays in collecting or trying to collect
24 the amounts that he claims are due is not sufficient.
25 There has to be some kind of an agreement, either

1 express or implied, to defer the, or postpone the
2 repayment or the payment of that debt.

3 To collect or attempt to collect on an extension
4 of credit means to induce or attempt to induce a person
5 to make repayment of the loan or the amount that's
6 claimed to be due, the debt or the other claim.

7 Now, we used the term "extortionate means." I
8 told you that the Government has to show that
9 extortionate means were used. Extortionate means are
10 means that involved the use or threatened use of
11 violence or some other criminal means to cause harm to
12 a person or to a person's reputation or property.

13 So it's either the use of those means or the
14 threatened use of those means that constitutes
15 extortionate means.

16 Now, a threatened use of violence or other
17 criminal means, again, may be either express, that is
18 to say it may be specifically or explicitly stated, or
19 it may be implied. It doesn't have to be explicitly
20 stated. It may be communicated in some other way, but
21 there has to be some kind of a threat of violence or
22 other unlawful means or the actual use of violence or
23 some other unlawful means.

24 A threat may consist of actions or words that
25 are intended to indicate, and under the circumstances,

1 would indicate to a reasonable person that failure to
2 comply with the demands being made will result in harm
3 to that person, that person's reputation, that person's
4 property or family.

5 The Government doesn't have to prove that the
6 person to whom the threat was directed was actually
7 scared, but it has to prove that the threat was such
8 that a reasonable person would have been put in fear of
9 these consequences under the circumstances.

10 Keep in mind, too, that a simple demand for
11 payment without more is not a threat, even if it
12 relates to an illegal gambling debt or any type of an
13 illegal claim.

14 So simply asking for payment of an amount that
15 one claims is owed doesn't constitute the use of
16 extortionate means. There has to be evidence that
17 extortionate means were used, that is to say, the
18 Government has to prove that violence or other criminal
19 means were either threatened or actually employed.

20 I mentioned that the Government has to show --
21 the alternative way in which a defendant can be
22 convicted of guilty under Count I is by showing that
23 the defendant engaged in extortionate means to punish
24 someone, in this case, Tommy Nguyen, for not making
25 repayment of an extension of credit. Punishing is

1 pretty much explanatory, I think, but to punish a
2 person for not repaying an extension of credit means to
3 impose some negative consequence on that person for
4 failure to make repayment.

5 And I told you that another thing that has to be
6 shown is that the defendant, or a defedant,
7 participated in some way in the use of extortionate
8 means.

9 The Government is not required to prove that the
10 defendant himself directly engaged in or threatened the
11 acts of violence or the use of other criminal means.
12 What the Government must prove is that the defendant
13 directly or indirectly played a role in the use or
14 threatened use of the violence or the criminal means.

15 So a defendant, for example, who lends support
16 while another person engages in or threatens violent
17 acts or other criminal means, may be found to have
18 participate in the use of the extortionate means. And
19 similarly, a defendant who hires or dispatches other
20 persons to collect on an extension of credit, knowing
21 that they will resort to extortionate means to do so,
22 may be found to have participated in the use of the
23 extortionate means.

24 Now, I mentioned that the Government has to show
25 that a defendant acted knowingly, that was one of the

1 other elements that I mentioned. And to act knowingly
2 means to act voluntarily and with an awareness of the
3 nature of the act being committed and not because of
4 ignorance or accident or mistake.

5 And the purpose of requiring proof that a
6 defendant acted knowingly is to prevent someone from
7 being convicted for an act that he did not intend to
8 commit or the nature of which he did not understand.

9 Whether a defendant acted knowingly can be
10 inferred from the circumstances from what the defendant
11 said or did or from any other evidence that shows what
12 the defendant may have known at the time that the
13 defendant committed the act in question.

14 So those are the things the Government has to
15 prove in order to convict a defendant under Count II of
16 either participating or -- participating in the use of
17 extortionate means in order to collect or attempt to
18 collect an extension of credit, or participate in the
19 use of extortionate means in order to punish someone
20 for not repaying an extension of credit.

21 I also told you that Count II, in addition,
22 charges the defendants with aiding and abetting in the
23 commission of that offense. So let me explain a little
24 bit about aiding and abetting.

25 There's a statute that deals with aiding and

1 abetting. It's Section 2 of Title 18 of the United
2 States Code. Again, I'll read the relevant portion of
3 that statute to you. That statute says, "Whoever
4 commits an offense against the United States or aids,
5 abets, counsels, commands, induces or procures its
6 commission is punishable as a principal.

7 Whoever willfully causes an act to be done,
8 which if directly performed by him or another, would be
9 an offense against the United States is punishable as a
10 principal."

11 Now, that language may be a little bit obtuse,
12 so let me try to summarize it for you. What it,
13 basically, says is that a person who aids and abets in
14 the commission of a crime by someone else, or who
15 willfully causes that crime to be committed by another
16 person, may be found guilty of that crime to the same
17 extent as the individual who actually committed it.

18 So to put it another way, a person may be
19 convicted of a crime if that person personally
20 committed the crime, or if that person aided and
21 abetted someone else in committing the crime.

22 Now, in order to establish that a defendant is
23 guilty of aiding and abetting, again, there are several
24 things that the Government must prove.

25 In this case, there are three things or elements

1 that the Government must prove in order to convict
2 someone of aiding and abetting.

3 First, it has to prove that the crime in
4 question, in this case, participating in the use of
5 extortionate means in order to collect or attempt to
6 collect an extension of credit or participating in the
7 use of extortionate means in order to punish someone
8 for not repaying an extension of credit, the Government
9 has to prove that that crime was committed by somebody,
10 and you can't be guilty of aiding and abetting in the
11 commission of a crime that was never committed.

12 The second thing that the Government has to
13 prove is that the defendant willfully assisted in the
14 commission of the crime or that he caused it in some
15 way to be committed.

16 And third, the Government has to prove that the
17 defendant intended to assist in the commission of the
18 crime or to cause it to be committed.

19 As I said, you can't be guilty of aiding and
20 abetting unless the crime itself was committed. But if
21 the offense was committed, as I've indicated, the
22 Government doesn't have to prove that the defendant
23 personally committed it. What it must prove is that
24 someone committed that crime, and the defendant in
25 question willfully did something to help him or cause

1 the crime to be committed. Assisting in or causing the
2 commission of the crime is willful if it is done
3 knowingly and voluntarily and with the intent to cause
4 or help facilitate the commission of the crime in
5 question.

6 The mere presence of a defendant where the crime
7 is committed, even if the defendant knew that the crime
8 was being committed, is not by itself sufficient to
9 establish that the defendant aided and abetted in the
10 commission of the crime.

11 It's a fact you may consider, but merely the
12 fact that the defendant was present, even if he knew a
13 crime was being committed, if he did nothing to assist
14 in the commission, he's not guilty of aiding and
15 abetting. He has to do something to facilitate the
16 crime or to cause it to be committed. Or to put it
17 another way, he has to be a participant in the crime
18 and not simply a spectator. But, as I say, he doesn't
19 have to be actively engaged in the commission of the
20 crime.

21 Now, I've explained to you Count II, the two
22 different -- actually, I suppose, three different
23 aspects of Count II, the two ways in which the
24 defendant may be or a defendant could be convicted of a
25 crime, and the aiding and abetting aspect of Count II.

1 I'm going to turn now to Count I, the conspiracy
2 count. And again, I'll begin by reading to you the
3 relevant portion of the conspiracy statute. It's the
4 same statute that deals with the collecting or
5 attempting to collect the extension of credit. It's
6 Section 894(a) of Title 18, and the relevant portion of
7 that statute says, "Whoever conspires to participate in
8 the use of extortionate means to collect or attempt to
9 collect any the extension of credit or to punish any
10 person for the non-repayment of an extension of credit
11 shall be guilty of an offense against the United
12 States."

13 In order to establish that a defendant is guilty
14 of conspiring to participate in the use of extortionate
15 means to collect, or attempt to collect an extension of
16 credit, or to punish someone for non-repayment of an
17 extension of credit, the Government must prove three
18 things or elements, which aren't the same as the
19 elements that I've previously talked about.

20 The first thing the Government would have to
21 prove is that there was a conspiracy by two or more
22 persons to use extortionate means to collect, or
23 attempt to collect an extension of credit made to Tommy
24 Nguyen, and/or to punish Tommy Nguyen for failing to
25 repay an extension of credit.

1 The second thing the Government has to prove is
2 that the defendant voluntarily participated in the
3 conspiracy, or, put another way, that the defendant was
4 a member of the conspiracy.

5 And third, the Government must prove that the
6 defendant intended that the offense of using
7 extortionate means to collect, or attempt to collect,
8 or using extortionate means to punish Tommy Nguyen,
9 that he intended that one or both of those things be
10 done, that that offense be committed.

11 Now, what's a conspiracy? Well, a conspiracy is
12 a mutual understanding or agreement between two or more
13 persons to accomplish some unlawful purpose or to
14 accomplish a lawful purpose by unlawful means.

15 Conspiracy has sometimes been referred to as a
16 kind of a partnership for criminal purposes in which
17 each member of the conspiracy or each partner becomes
18 the agent of each other member.

19 It's important to remember that conspiracy to
20 commit a crime and the actual commission of the crime
21 are two things that are separate and distinct. They
22 are two different offenses. The gist of the offense of
23 conspiracy is an agreement to commit a crime or to
24 violate the law.

25 So a person can be guilty of conspiracy even

1 though the crime that was the object of the conspiracy
2 was never committed, unlike aiding and abetting. The
3 essence of the offense of conspiracy is participating
4 in a plan or scheme to do something that is unlawful.

5 So one may -- one who participates in such a
6 conspiracy or such a scheme may be guilty of conspiracy
7 even though the goal of the conspiracy is not
8 accomplished.

9 In order to establish that a conspiracy existed,
10 there must be proof that the alleged members reached
11 some mutual agreement or understanding to try to
12 accomplish a common, unlawful plan, but proof of a
13 conspiracy does not require evidence that they formally
14 or specifically stated the terms of the agreement, or
15 that they did so in writing, or even that they
16 specifically stated the terms of the agreement
17 verbally. An informal or unspoken agreement is
18 sufficient. What is required is some form of mutual
19 agreement or understanding to commit an unlawful act.

20 Again, the fact that a person may have, or
21 persons may have engaged in similar conduct or that
22 they may have associated with one another, or they may
23 have talked to one another are not by themselves
24 sufficient to establish the existence of a conspiracy.
25 There has to be evidence that they were parties to an

1 unlawful understanding or agreement. And the evidence
2 establishing a conspiracy doesn't have to be direct
3 evidence. A conspiracy can be proven by circumstantial
4 evidence. That is to say, sufficient facts from which
5 you may properly infer that there was a conspiracy.

6 Proof of a conspiracy doesn't require evidence
7 that everyone agreed on all of the details regarding
8 the methods to be used, or even that they all had
9 discussions with one another. It does require proof
10 beyond a reasonable doubt that the members of the
11 conspiracy somehow reached a mutual agreement or
12 understanding that they would try to accomplish a
13 common unlawful goal.

14 In order to establish the defendant is guilty of
15 conspiracy, there are two types of intent that the
16 Government must prove. First, it must prove that the
17 defendant had an intent to agree; and second, it must
18 prove that the defendant had an intent that the crime
19 that was the object of the conspiracy would ultimately
20 be committed.

21 As I told you, in this case, the crime that was
22 the -- or rather the object of the alleged conspiracy
23 was the crime of using extortionate means in order to
24 collect or attempt to collect extension of credit, or
25 using extortionate means in an attempt to punish

1 someone, Tommy Nguyen, for not repaying an extension of
2 credit.

3 Keep in mind, too, that the determination as to
4 whether or not the Government has proven that a
5 particular person was a member of the conspiracy
6 doesn't depend on the relative importance of that
7 person's role in the conspiracy. Each member of a
8 conspiracy may perform a separate and distinct role and
9 may do so at different times. Some conspirators may
10 play major roles in the conspiracy, may be involved in
11 every facet of the conspiracy; others may play
12 relatively minor roles in the conspiracy.

13 If the Government proves that the defendant
14 understood the unlawful nature of the plan or scheme
15 and that he knowingly and willfully became a party to
16 it, or assisted in the accomplishment of the unlawful
17 purpose, that defendant may be found to be a member of
18 the conspiracy even though he may have played a
19 relatively minor role in the conspiracy.

20 Also, it's not necessary that the defendant
21 participate in a conspiracy from its inception in order
22 to be considered a member of the conspiracy. A
23 defendant may join and become a member of a conspiracy
24 after the conspiracy has been formed. Once a defendant
25 joins a conspiracy, that defendant then becomes

1 responsible for the previous actions of the other
2 co-conspirators that were committed in furtherance of
3 the conspiracy, whether the defendant specifically
4 signed onto them or not.

5 The reason is that one who willfully joins an
6 existing conspiracy is considered to have adopted what
7 the other members of the conspiracy have done in
8 furtherance of that conspiracy.

9 In order to be considered a member of a
10 conspiracy, I mentioned that the defendant must have
11 joined it or participated in it knowingly, which means
12 that the Government must prove that the defendant was
13 aware of the conspiracy and it's illegal objective and
14 that he participated in it or joined it voluntarily.

15 A person who is unaware that a conspiracy exists
16 is not considered a member of the conspiracy simply
17 because that person happens to act in a way that
18 furthers some purpose of the conspiracy or happens to
19 associate with members of a conspiracy. By the same
20 token, a person who knows that a conspiracy exists but
21 doesn't participate in it in any way, doesn't agree to
22 be a member, that person is not considered a member of
23 the conspiracy simply because he may know about it.

24 But the Government does not have to prove, as I
25 said, that a defendant knows all of the details or knew

1 all of the details of the conspiracy in order to
2 establish that the defendant knowingly joined or
3 participated in the conspiracy.

4 One can be a member of a conspiracy even though
5 he doesn't know all of the steps that were going to be
6 taken in order to accomplish the unlawful goal. Nor is
7 the Government required to prove that a defendant
8 communicated with or even knew all of the other members
9 of the conspiracy. One may be a member of a conspiracy
10 even though he doesn't know or have direct dealings
11 with all of the other members of the conspiracy.

12 But, again, what must be proven is that the
13 defendant knew that a conspiracy existed, and he
14 knowingly and willfully joined that conspiracy.

15 I mentioned "willfully." In order to be -- an
16 act is considered willful, or a defendant is deemed to
17 have acted willfully if the defendant acted
18 voluntarily, purposely, and with a specific intent to
19 do something that he knew was unlawful. In other
20 words, he knew that what was going on violated the law
21 and that's what he intended.

22 If you find that the Government has proven a
23 defendant guilty of the conspiracy charge contained in
24 Count I, you may also find that defendant guilty of the
25 offense charged in Count II, the participating in the

1 use of extortionate means count, provided that the
2 Government proves five things.

3 So let me just back up a minute. I told you
4 what the Government has to prove in order to establish
5 that a defendant is guilty of using or participating in
6 the use of extortionate means to either collect a debt
7 or punish somebody for not repaying an extension of
8 credit. I told you what aiding and abetting is. Those
9 are both covered in Count II. I just explained to you
10 the conspiracy charge in Count I.

11 Now what I'm about to explain to you is that if
12 a defendant is convicted of conspiracy to commit an
13 offense, the defendant may be convicted of that offense
14 also if the Government proves five things. And the
15 five things the Government has to prove are, first,
16 that the offense charged, in this case the offense
17 charged in Count II, was committed; second, that the
18 person or persons who actually committed the offense
19 were members of the conspiracy to which the defendant
20 belonged; third, that the offense was committed
21 pursuant to the conspiracy; fourth, that the defendant
22 himself was a member of the conspiracy at the time the
23 offense was committed; and fifth, that the defendant
24 could have reasonably foreseen that the offense might
25 be committed by his co-conspirators.

1 So if you find that the Government has proven
2 all five of those things, you may, but you're not
3 required, to find the defendant guilty of the offense
4 that was the object of the conspiracy even though the
5 defendant didn't personally commit the offense. The
6 reason for this rule is, as I previously indicated,
7 when a conspirator commits an offense, that conspirator
8 is considered to be the agent of the other members of
9 the conspiracy. I told you conspiracy is like a
10 partnership for criminal purposes.

11 So if a member of a conspiracy commits an
12 offense, the other members of the conspiracy may be
13 liable for that offense as well, they may be found
14 guilty of that offense if all these requirements are
15 satisfied. The offense was committed by a member of
16 the conspiracy; it was committed in the course of in
17 furtherance of the conspiracy; and the defendant knew
18 that that was the purpose or could have reasonably
19 expected that this offense would have been committed.

20 Now, if you find that the Government has failed
21 to prove all five of these elements, then you cannot
22 find the defendant guilty of the offense charged in
23 Count II unless you're satisfied that the Government
24 has proven beyond a reasonable doubt that the defendant
25 either personally committed that offense or aided and

1 abetted in its commission.

2 I've tried to tell you what each charge is and
3 what things the Government has to prove with respect to
4 each charge, and I'll tell you that in order to find a
5 defendant guilty of any charge, you have to conclude
6 that the Government has proven each and every element
7 relating to that charge beyond a reasonable doubt. If
8 the Government fails to prove any element with respect
9 to a particular charge beyond a reasonable doubt, then
10 you should find the defendant not guilty of that
11 charge.

12 Conversely, if you're satisfied the Government
13 has proven each and every element of that charge beyond
14 a reasonable doubt, then you should find the defendant
15 guilty of that charge.

16 That brings us to the question of what's a
17 reasonable doubt. I'm afraid I can't be a great deal
18 of help to you on this one. It's a term that pretty
19 much defies definition. All I can say is that the
20 Government's obligation to prove these elements or to
21 prove the defendant guilty beyond a reasonable doubt
22 does not mean that the Government must prove the
23 defendant guilty beyond any shadow of a doubt or beyond
24 all doubt. What it means is that the Government must
25 prove the defendant guilty beyond a reasonable doubt.

1 And in determining whether a reasonable doubt exists,
2 you should use your common sense to determine what the
3 facts are.

4 A reasonable doubt may arise from the evidence
5 that's been presented to you, or it may arise from a
6 lack of evidence. I can't provide you with any better
7 definition than that. The reason you're here is you
8 know what a doubt is, and you know what's reasonable,
9 and it's up to you to decide whether you think the
10 Government has proven the things that it must prove
11 beyond a reasonable doubt.

12 I told you at the beginning of the trial about
13 the presumption of innocence, that a defendant starts a
14 trial presumed to be not guilty and that presumption
15 remains with him unless and until the Government
16 presents evidence that convinces you beyond a
17 reasonable doubt that he is guilty, and if the
18 Government doesn't present such evidence and the
19 presumption of innocence is sufficient to require you
20 to acquit the defendant. But as I also told you, if
21 the Government has presented evidence that proves the
22 defendant guilty beyond a reasonable doubt, the
23 presumption of innocence vanishes, cannot assist the
24 defendant in the face of evidence that proves him
25 guilty beyond a reasonable doubt.

1 I also told you that the defendant doesn't have
2 any obligation to present any evidence and doesn't have
3 any obligation to testify. In fact, he has a
4 constitutional right not to testify. And you shouldn't
5 penalize a defendant or draw any inference adverse to
6 the defendant simply because the defendant, as the
7 defendants in this case have chosen to do, have not
8 presented any evidence or not testified.

9 What you should do now is focus on the evidence
10 that has been presented by the Government and whether
11 that evidence proves the defendant guilty beyond a
12 reasonable doubt.

13 During the trial, a statement was made to the
14 effect that one of the defendants previously had served
15 a term of imprisonment. I told you at the time to
16 disregard that statement and to put it out of your
17 mind, and I want to repeat that now. I want to
18 emphasize that you should not allow that statement to
19 in any way affect your decision in this case.

20 First of all, you haven't heard any evidence on
21 this point. All you heard was that one statement, that
22 passing reference. But more importantly, under our
23 system of justice, a defendant must be judged based
24 upon the offense with which he is charged and the
25 evidence that pertains to that particular charge, and

1 not on the basis of anything that a defendant may or
2 may not have done in the past, particularly when it may
3 bear no relationship whatsoever to the charges for
4 which he is currently being tried.

5 So it would be improper for you to speculate
6 about what any defendant may or may not have done in
7 the past and to allow that speculation to influence
8 your decision as to whether or not the Government has
9 proven that defendant, or any other defendant, guilty
10 of an offense with which such defendant has been
11 charged in this case.

12 I told you -- let me back up a minute. I told
13 you at the beginning of the case that in deciding
14 whether the Government has proven the things that it's
15 required to prove, you must base your decision solely
16 on the evidence that has been presented to you during
17 the course of the trial. And I mentioned that the
18 evidence comes from the witnesses, the exhibits, and in
19 this case we had a number of stipulations by the
20 lawyers, agreements by the lawyers as to what is or is
21 not a fact.

22 I also told you that what the lawyers say is not
23 evidence. I just want to remind you of that, that
24 except for the stipulations that they have entered
25 into, you shouldn't consider anything the lawyers have

1 said as evidence, and there are a couple of occasions
2 when the witness answered a question before the lawyer
3 could object, and I told you to disregard the answer.
4 Again, that answer or those answers are not evidence on
5 which you should base your decision.

6 Now, let's look at the evidence or the
7 categories of evidence on which you may base your
8 decision. First of all, we have the testimony of the
9 witnesses. And your principal task with respect to the
10 testimony of the witnesses is to assess the credibility
11 of the witnesses, or the weight that you gave their
12 testimony in making your decision. And in making that
13 determination, there are a number of factors that you
14 can and should consider. This is not necessarily an
15 exhaustive list, but, certainly, one factor is the
16 opportunity or lack of opportunity the witness had to
17 have accurately observed the facts about which the
18 witness testified.

19 In other words, was the witness in a good
20 position to have accurately seen, heard or otherwise
21 perceived the things that the witness told you, or was
22 the witness' ability to observe somehow impaired. A
23 second factor is the witness' memory. Did it seem to
24 you that the witness, even if the witness was in a good
25 position to have seen or heard what happened, did it

1 seem to you that the witness had a clear and accurate
2 recollection of what it is that the witness saw or
3 heard, or did it seem to you that the witness' memory
4 was faulty or dim.

5 The third factor is the witness' appearance on
6 the stand. One reason that we generally require that
7 witnesses come in and testify before you rather than
8 have somebody tell you what somebody you've never seen
9 told them, is that it gives you an opportunity to size
10 up the source of the information, the witness who, the
11 person who claims to have seen or heard these things.
12 And from your observations, you can make some judgments
13 as to how reliable this witness is and how much weight
14 that witness' testimony deserves.

15 Another factor is the probability or
16 improbability of what the witness said. Just because a
17 witness says that a particular thing was so, and nobody
18 directly contradicts that, doesn't mean you have to
19 accept the testimony at face value.

20 If what the witness said seems to you to be
21 implausible or impossible, or if you believe a witness
22 was lying or mistaken, you don't have to accept that
23 witness' testimony simply because there was no evidence
24 to directly contradict it.

25 In assessing the credibility of witnesses, keep

1 in mind, too, that you've heard testimony from several
2 witnesses who are law enforcement officers or
3 Government agents, and remember that you shouldn't base
4 your decision as to the weight to be given to a
5 witness' testimony on what position or office that
6 individual holds. You should base your decision on
7 your assessment of that person or that witness as a
8 person.

9 So it doesn't matter whether they're law
10 enforcement officers or not law enforcement officers.
11 That shouldn't play any role in your assessment of
12 their credibility.

13 Now, you heard evidence in this case that
14 there's a charge pending in Georgia against Tommy
15 Nguyen, one of the Government's witnesses. And
16 accordingly, you should consider Mr. Nguyen's testimony
17 with greater care and caution than you might consider
18 the testimony of some other witness to determine
19 whether his testimony might have been influenced by
20 some expectation that he might gain favorable treatment
21 with respect to those Georgia charges or that Georgia
22 charge by falsely testifying against the defendants in
23 this case. That's up to you to decide whether you
24 think that he has such an expectation, and, if so,
25 whether his testimony should be discounted because of

1 that. That's entirely up to you.

2 You've also heard evidence that Tommy Nguyen
3 previously was convicted of a crime of unlawfully
4 entering an automobile, also in Georgia, I believe.
5 You can consider that evidence for the limited purpose
6 of helping you to assess his credibility.

7 Again, it's up to you to decide whether you
8 think that conviction should affect the weight to be
9 given to his testimony, and, if so, to what extent it
10 should affect the weight you give to his testimony.

11 You heard several attempts during the trial by
12 lawyers to impeach or contradict witnesses or to attack
13 their credibility by attempting to show that on some
14 previous occasion the witness gave a statement that
15 supposedly was different from the testimony a witness
16 gave at trial. If you can conclude that on some
17 previous occasion the witness did say something that
18 was significantly different from what the witness
19 testified to, you can take that into account in
20 assessing the witness' credibility. But, again, that's
21 up to you to decide, number one, whether you do think a
22 witness did say something inconsistent on a previous
23 occasion, and, if so, to what extent you should take
24 that into account in judging the weight to be given to
25 the witness' testimony.

1 Keep in mind, too, that it isn't the number of
2 witnesses who testifies on any side of an issue that
3 should govern your decision, but rather it's the
4 quality of the testimony. So you don't add up how many
5 witnesses said this or said that. What you should do
6 is look at the quality of the testimony in making your
7 decision.

8 The second category of evidence is the exhibits,
9 which I told you will go with you into the jury room.
10 You're free to examine them to your heart's content,
11 but keep in mind that simply because something has been
12 admitted as an exhibit in the case doesn't mean that
13 you have to accept it at face value. You should look
14 at the exhibits the same way as you look at the
15 testimony of the witnesses. You should assess them in
16 light of all of the evidence that's been presented
17 during the course of the trial and give them whatever
18 weight you think they deserve.

19 And speaking of exhibits, you've heard testimony
20 from Agent Degnan, the FBI agent, who testified that he
21 prepared certain summaries from telephone records that
22 are also in evidence. Both the records and the
23 summaries are in evidence, and you'll have them with
24 you in the jury room. Summaries are intended to assist
25 you in understanding and analyzing the evidence, but

1 it's up to you to decide whether the summaries
2 accurately reflect what's in the records, because
3 they're based on the records, and if they differ in any
4 way, if you see any discrepancy between what's in the
5 records themselves and what's in the summaries, then
6 you should base your decision on what's in the records.
7 The summaries are an aid to you in understanding them,
8 and you certainly may look at them and use them. But
9 if you find that there's any difference, you should
10 base your decision on the records.

11 I've told you that you can only consider the
12 evidence that's properly before you in reaching your
13 decision, but that doesn't mean that you are strictly
14 limited to the statements of the witnesses and the
15 contents of the exhibits in deciding what the facts
16 are.

17 In reaching your decision, you are permitted to
18 draw from facts which have been proven such reasonable
19 inferences as may be justified based on your common
20 sense and experience. And let me put it another way.
21 There are two ways in which any fact that must be
22 proven can be established. One way is to prove it by
23 direct evidence, that is to say, to have a witness who
24 claims to have directly observed the fact or to have an
25 exhibit that shows the thing itself introduced. That's

1 an example of proving the fact by direct evidence.

2 But a fact can also be proven by circumstantial
3 evidence, which means the proof of two or more facts by
4 direct evidence from which the existence or
5 non-existence of a third fact may be reasonably
6 inferred. And the law makes no distinction between the
7 two.

8 Now, let me explain to you, I'll give you an
9 example that maybe would make it clear, more clear what
10 I'm trying to say. It's a little hard to put into
11 words, but let me give you an example I think will
12 drive the point home.

13 Suppose on some winter night before you go to
14 bed, you look out the window and the ground is bare.
15 The next morning you wake up, and there's a foot of
16 snow on the ground. If someone asked you if it snowed
17 last night, you'd probably say yes. Now, if you had to
18 come into court and prove that it snowed, how would you
19 go about doing that.

20 One way you might do it is you might find
21 somebody who was awake when the snowflakes were
22 falling, bring them in as a witness, they could testify
23 that they actually saw the snowflakes falling from the
24 sky. That would be an example of proving that it
25 snowed by direct evidence, the direct observation of

1 the person who saw the snowflakes actually falling.

2 If you couldn't find somebody who was awake when
3 the snowflakes were falling, you could testify from
4 your own direct observation as to two facts. Number
5 one, before you went to bed, the ground was bare;
6 number two, when you woke up, there was a foot of snow
7 on the ground. You have proved those two facts by
8 direct evidence. And from those two facts, I would
9 suggest to you that it is eminently reasonable to
10 conclude that it snowed last night. That's an example
11 of proving that it snowed by circumstantial evidence.

12 But a big word of caution here. There's a huge
13 difference between proving something by circumstantial
14 evidence and guessing or speculating. And the
15 difference is that in order to prove something by
16 circumstantial evidence, the conclusion to be drawn
17 must be based on facts that are established by the
18 direct evidence and the conclusion must be a reasonable
19 conclusion.

20 So in my example, if someone asked you if it's
21 going to snow next Thursday night, it would not be
22 reasonable to infer from those facts that it was going
23 to snow next Thursday night. So keep that in mind.

24 Also keep in mind, as I said, that the law
25 doesn't make any distinction between whether a fact is

1 proven by direct evidence or by circumstantial
2 evidence, but the law does require that in a criminal
3 case any fact that must be proven in order to convict
4 the defendant must be proven beyond a reasonable doubt,
5 whether it's proven by direct evidence or
6 circumstantial evidence.

7 Now, I told you that you are the judges of the
8 facts in this case. It's up to you to decide what the
9 facts are. It's not my role. And you shouldn't
10 interpret anything that I may have said or done during
11 the course of the trial as indicating any opinion on my
12 part as to what the facts are. You shouldn't be
13 concerned about what you might think my opinion of the
14 facts is, because that's your job and your job alone to
15 decide the facts.

16 During the trial, there also have been occasions
17 when the attorneys have objected. I told you at the
18 beginning of the trial that the fact that they object
19 shouldn't detract from the weight that you give to
20 evidence. If I overruled the objection, you should
21 consider the evidence for whatever value you think it
22 has. I would also add at this time that you shouldn't
23 penalize the lawyers, or, more accurately, the lawyer's
24 clients because the lawyer may have found it necessary
25 to object to evidence. Each lawyer has a right or even

1 a responsibility to object to evidence that that lawyer
2 believes doesn't get through that filter I told you
3 about, the Rules of Evidence. And you shouldn't hold
4 it against the lawyer's client just because a lawyer
5 may have objected.

6 As you know, this case is brought in the name of
7 the United States of America, but that shouldn't play
8 any role in your decision either, because every party
9 who comes into this court comes in here as an equal and
10 is entitled to equal consideration by you and by me.
11 So the defendants are entitled to the same
12 consideration on this case as the Government is
13 entitled to. There's no -- neither one is entitled to
14 more or less consideration than the other.

15 I hope that it goes without saying that neither
16 bias in favor of any person or group or cause, or
17 prejudice against any person or group or cause, or
18 sympathy of any kind should play any role whatsoever in
19 your decision.

20 Your job very simply is to look objectively at
21 the evidence that's been presented, to apply -- to
22 determine from that evidence the facts, and to apply to
23 those facts the law as I have explained it to you.
24 That's all that either side of this case is entitled to
25 or expects, and that's what your role in this case is.

1 I'm going to ask the lawyers to briefly approach
2 the side bar and tell me whether they think I have
3 forgotten to tell you something I should have told you
4 or whether I misstated something I did tell you.

5 (Side-bar conference.)

6 THE COURT: One thing that I didn't mention to
7 you and could have. In assessing the credibility of
8 witnesses, another factor you might want to consider is
9 whether the witness who testified has a stake in the
10 outcome of the case, in other words, whether that
11 witness has something to gain or lose from your
12 decision.

13 Obviously, if a witness has something to gain or
14 lose from the decision, then that's something that you
15 can take into account in deciding what weight to give
16 to that witness' testimony.

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