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

* * * * * C.R. NO. 05-70T
*
UNITED STATES OF AMERICA *
*
VS. * OCTOBER 25, 2005
* 9:00 A.M.
*
PEDRO GONZALES and *
FRANKLIN SOTO PENA *
*
* * * * * PROVIDENCE, RI

BEFORE THE HONORABLE ERNEST C. TORRES,

CHIEF JUDGE

(Jury Trial)

APPEARANCES:
FOR THE GOVERNMENT: STEPHANIE BROWNE, AUSA
U.S. Attorney's Office
50 Kennedy Plaza
Providence, RI 02903

FOR THE DEFENDANT,
GONZALES: ALBERT E. MEDICI, ESQ.
1312 Atwood Avenue
Johnston, RI 02919

FOR THE DEFENDANT,
SOTO PENA: MATTHEW B. SMITH, ESQ.
1206 Westminster Street
Providence, RI 02903

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

Interpreter: Anna Farias

KAREN M. ZINNI, RPR-RMR-CRR

THE COURT: Ladies and gentlemen, this is the

1 time when I am to explain to you the principles of law
2 that apply in this case; and as I've told you, it's
3 your duty to apply the law as I explain it to you to
4 the facts as you determine the facts to be.

5 It's important in considering what I'm about to
6 tell you that you consider my explanation of the law in
7 its entirety. In other words, don't pick and choose
8 one or two of the points that I may make and focus on
9 them to the exclusion of everything else. In order to
10 apply the law fairly and accurately, you must consider
11 my explanation in context.

12 As you know -- well, as I think you know, the
13 Indictment in this case charges both of the Defendants
14 with conspiring to possess a mixture or substance
15 containing -- more than five kilograms of a mixture or
16 substance containing a detectable amount of cocaine
17 with intent to distribute it to others, and that's
18 Count I of the Indictment.

19 Count II of the Indictment charges Mr. Gonzales
20 with actually possessing more than five kilograms of a
21 mixture or substance containing a detectable amount of
22 cocaine with the intent to distribute it.

23 And as I told you earlier, since we do have two
24 Defendants and since there is more than one charge
25 leveled at Mr. Gonzales, it's important that you

1 consider each charge against each Defendant and the
2 evidence pertaining to that charge separately, so that
3 you must make an independent determination as to
4 whether either or both of the Defendants is guilty of
5 conspiracy and whether Mr. Gonzales is guilty of the
6 offense of possession with intent to distribute.

7 Now, you've heard testimony about Mr. Julian
8 Rodrigues, who was named in the Indictment as a
9 co-conspirator in the case, and he obviously is not a
10 Defendant in this case.

11 You shouldn't concern yourself with whether or
12 not Mr. Rodrigues is a Defendant here or why he isn't a
13 Defendant here. That shouldn't have any bearing on
14 your decision as to the guilt or innocence of
15 Mr. Gonzales or Mr. Soto Pena.

16 Your job is to determine whether the evidence
17 shows that either or both of them is guilty of an
18 offense with which they are charged. If you start
19 guessing as to why Mr. Rodrigues is not here, the
20 chances are good that you may guess incorrectly; and
21 that wouldn't be fair to anybody involved in this case,
22 and it's not relevant to the determination as to
23 whether the evidence does or does not prove these
24 Defendants guilty of the offenses with which they have
25 been charged.

1 Now, I'm going to start with Count II of the
2 Indictment, which is the possession charge against
3 Mr. Gonzales, because I think it's easier to explain
4 and to understand if I begin with the charge of
5 possession and then explain the conspiracy charge.

6 Count II, as I've said, charges that on or about
7 June 7, 2005, Mr. Gonzales knowingly and intentionally
8 possessed with intent to distribute more than five
9 kilograms of a mixture or substance containing a
10 detectable amount of cocaine, a Schedule II controlled
11 substance, in violation of Section 841(a)(1) and
12 (b)(1)(A) of Title 21 of the United States Code.

13 Now, in order to establish that Mr. Gonzales is
14 guilty of having possessed more than five kilograms of
15 a Schedule II controlled substance or a mixture or a
16 substance containing a detectable amount of cocaine,
17 specifically more than five kilograms of such a mixture
18 or substance, the Government has to prove three things
19 or what the law refers to as elements.

20 The first thing the Government has to prove is
21 that Mr. Gonzales possessed more than five kilograms of
22 a mixture or substance containing a detectable amount
23 of cocaine.

24 The second thing it has to prove is that
25 Mr. Gonzales had the specific intent to distribute that

1 mixture or substance to other persons.

2 And the third thing the Government has to prove
3 is that, in doing so, Mr. Gonzales acted knowingly and
4 intentionally.

5 Now, in this case, the parties have stipulated
6 or agreed, as you have heard, that the substance seized
7 from the Maxima automobile on June 7th was a mixture or
8 substance containing a detectable amount of cocaine and
9 that it weighed 61.44 kilograms in total. That's
10 agreed to.

11 Furthermore, you should know that the law
12 classifies cocaine as a Schedule II controlled
13 substance.

14 Now, I told you that the Government has to prove
15 that Mr. Gonzales possessed this mixture or substance;
16 and in determining whether the Government has proven
17 that, you should bear in mind that there are two kinds
18 of possession that the law recognizes.

19 The first is what's called actual possession,
20 and the second is what's called constructive
21 possession. And I'll explain those in a moment, but
22 proof of either type of possession is sufficient to
23 satisfy the possession requirement or element of this
24 offense.

25 Proof of possession, whether it's actual or

1 constructive, requires a showing that a Defendant knew
2 that the cocaine was there and had both the power and
3 the intention to exercise dominion or control over the
4 cocaine, either by himself or in conjunction with
5 another person.

6 When a Defendant has direct and immediate
7 control over a mixture or substance or an object, the
8 Defendant may be found to have actual possession of
9 that mixture or substance.

10 Direct and immediate control may exist when the
11 object is on the Defendant's person or is within his
12 reach.

13 When a Defendant has indirect power and control
14 over a mixture or substance, the Defendant may be said
15 to be in constructive possession of that mixture or
16 substance. Indirect control may exist when the mixture
17 or substance isn't actually on the Defendant's person
18 or within immediate reach but it's readily accessible
19 to the Defendant as long as, again, the Defendant has
20 the power and the intention to exercise control over
21 that substance, either alone or in conjunction with
22 someone else.

23 Knowledge and indirect control over an object
24 may, depending on the circumstances, be inferred from
25 dominion or control over the place or the area where

1 the object is found. And one of the factors in
2 determining whether such an inference is warranted is
3 whether the Defendant had sole ownership or dominion
4 and control over the place where the object was found
5 or whether he shared ownership or control over that
6 location with someone else.

7 In any event, the Government has to show that
8 the Defendant -- in order to prove that a Defendant
9 possessed a controlled substance, the Government has to
10 show that the Defendant exercised dominion and control
11 over it, that he knew it was there and that he
12 exercised dominion and control over it, either alone or
13 in conjunction with someone else.

14 The Government doesn't have to prove that an
15 individual owned the object or substance in question in
16 order to establish that he possessed it, but ownership
17 certainly is one factor that you can consider or lack
18 of ownership is a factor you can consider.

19 I've told you that possession may be sole or
20 joint, that is to say, a Defendant himself alone may
21 possess something or a Defendant may possess something
22 in conjunction with someone else.

23 If the Defendant alone had possession, that's
24 called sole possession. If the Defendant shared
25 possession with someone else, that's called joint

1 possession.

2 So to summarize, a person does not have to have
3 something on his person or within his immediate reach
4 to be deemed in possession of that object or substance,
5 but he must have both the knowledge that it's there and
6 the power and intention to exercise some control over
7 it in order to be deemed in possession.

8 Evidence that a Defendant was present near an
9 object or that the Defendant associated with somebody
10 who possessed it is not by itself sufficient. It may
11 be a factor to be considered in deciding whether that
12 Defendant himself possessed the object, but it's not by
13 itself sufficient to establish that the Defendant
14 possessed it.

15 Now, I mentioned to you, also, that one of the
16 things the Government has to prove in order to show
17 that Mr. Gonzales actually possessed the substance in
18 question is that he had the specific intent to
19 distribute it.

20 And in determining whether Mr. Gonzales
21 possessed a mixture or substance containing cocaine
22 with a specific intent to distribute it, bear in mind
23 that the type of intent that's required is an intent to
24 distribute the cocaine or controlled substance knowing
25 that it's cocaine or some other controlled substance

1 and knowing that distribution violates the law, knowing
2 that it's illegal to distribute it.

3 And the term "distribute," as I think I've
4 indicated, means to deliver or transfer possession to
5 another person. So if someone possesses something with
6 the intention that they're going to distribute it or
7 give it to somebody else, that would be possession with
8 intent to distribute.

9 Intent to distribute, particularly when you're
10 talking about a controlled substance, may be inferred
11 from the quantity that was possessed or from any other
12 evidence that indicates that the individual intended
13 not just to keep this for himself but to distribute it
14 to other persons.

15 And in deciding what intention, if any, the
16 accused person may have had, you can draw whatever
17 inferences or conclusions may be appropriate from the
18 facts, the evidence that's been presented; but you have
19 to find that such intent has been proven beyond a
20 reasonable doubt.

21 I've also told you that the Government has to
22 show that Mr. Gonzales possessed the substance in
23 question with intent to distribute and that he did so
24 knowingly, and the word "knowingly" means that he must
25 have done so voluntarily and intentionally and not

1 because of some mistake or accident.

2 An act is performed knowingly if it is performed
3 deliberately, voluntarily and with an awareness of the
4 nature and likely consequences of the act and not
5 because of ignorance, mistake, neglect or accident.

6 And the purpose of requiring proof that an act
7 be done knowingly in order to convict someone of a
8 criminal offense is to make sure that a person isn't
9 convicted for an act that he didn't intend to commit or
10 the nature of which he may not have understood.

11 And whether an act was committed knowingly also
12 is something that you can infer from the facts and the
13 evidence that's been presented regarding what the
14 Defendant knew at the time the act was committed; but,
15 once again, the proof the Defendant acted knowingly
16 must be made beyond a reasonable doubt.

17 Now, there's a second way in which Mr. Gonzales
18 could be found guilty of possession of the controlled
19 substance with intent to distribute in addition to --
20 one way, as I've explained, is if you find that he
21 actually possessed it with the intention to distribute
22 it. The other way is if he aided and abetted someone
23 who possessed the mixture or substance with intent to
24 distribute it.

25 And that would be a violation of another

1 criminal statute, and I'll read to you the portion of
2 the statute on aiding and abetting that would be
3 relevant here. It's Section 2 of Title 18 of the
4 United States Code, and it says, "Whoever commits an
5 offense against the United States or aids, abets,
6 counsels, commands, induces or procures its commission
7 is punishable as a principal. Whoever willfully causes
8 an act to be done, which if directly performed by him
9 or another would be an offense against the United
10 States, is punishable as a principal."

11 In other words, a person who aids or abets in
12 the commission of a crime or who willfully causes the
13 crime to be committed by someone else may be found
14 guilty of that crime even though that person may not
15 have directly committed the crime.

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

20 And in order to establish that a Defendant is
21 guilty of aiding and abetting, the Government has to
22 prove three things or elements. The first thing it has
23 to prove is that the crime in question, in this case
24 possession of a mixture of -- more than five kilograms
25 of a mixture or substance containing a detectable

1 amount of cocaine was committed, in other words, that
2 somebody committed that crime, possession with intent
3 to distribute that quantity of a controlled substance,
4 the Government has to prove, first of all, that
5 somebody committed that crime, somebody possessed more
6 than five kilograms of such a substance with intent to
7 deliver it.

8 Second, it has to prove that Mr. Gonzales
9 assisted in the commission of the crime or caused it to
10 be committed; and third, it has to prove that he
11 intended to assist in the commission of that crime.

12 So unless the crime was committed by someone,
13 you can't be guilty of aiding and abetting. You can't
14 be guilty of aiding and abetting the commission of a
15 crime that never took place.

16 But if the crime was committed, the Government
17 doesn't have to prove that Mr. Gonzales himself
18 committed it. It can prove, alternatively, that
19 someone else committed it and that Mr. Gonzales aided
20 and abetted that person in committing it.

21 I have now told you what it is that the
22 Government would have to prove in order to establish
23 that Mr. Gonzales is guilty of either possessing more
24 than five kilograms of a mixture or substance
25 containing cocaine with intent to distribute it or,

1 alternatively, aiding and abetting someone else in
2 possessing with intent to distribute more than five
3 kilograms of a mixture or substance containing cocaine
4 with the intent to distribute it.

5 I'm now going to move to the conspiracy charge.
6 Both Mr. Gonzales and Mr. Soto Pena are charged with
7 conspiracy or, more specifically, with conspiring to
8 possess to either distribute or possess with intent to
9 distribute more than five kilograms of a mixture or
10 substance containing a detectable amount of cocaine.

11 And in order to prove that the Defendants or
12 either of them is guilty of that offense, the
13 Government, again, must prove three things beyond a
14 reasonable doubt; but they're three different things.

15 First, the Government has to prove that there
16 was a conspiracy by two or more persons to distribute
17 or to possess with intent to distribute more than five
18 kilograms of a mixture or substance containing a
19 detectable amount of cocaine.

20 Second, the Government has to prove that
21 Mr. Gonzales and/or Mr. Soto Pena voluntarily agreed to
22 participate in that conspiracy, in other words, they
23 were members of that conspiracy.

24 And third, the Government has to prove that
25 either or both of them intended that the offense of

1 possessing -- of distributing the cocaine or possessing
2 it with intent to distribute was committed by someone.

3 A conspiracy has been defined as a mutual
4 agreement or understanding by two or more persons to
5 accomplish some unlawful purpose or to accomplish some
6 lawful purpose by unlawful means.

7 It's also referred to as a partnership for
8 criminal purposes in which each member of the
9 conspiracy becomes an agent of each other member of the
10 conspiracy; and they, therefore, become responsible for
11 the acts committed by one another.

12 Now, it's important to remember that the offense
13 of conspiracy to commit a crime and the actual
14 commission of the crime are two distinct offenses. The
15 gist of the offense of conspiracy is the agreement to
16 commit a crime, and one can be guilty of conspiracy
17 even though the crime that was the object of the
18 conspiracy was never committed.

19 The essence of the offense of conspiracy, as I
20 said, is participating in a plan or a scheme to do
21 something unlawful. So one can be guilty of conspiracy
22 even though the goal of the conspiracy may never be
23 accomplished.

24 It's also important to remember that while the
25 Government must prove that each Defendant conspired

1 with at least one other person in order to be guilty of
2 conspiracy, that person doesn't have to be the other
3 Defendant.

4 In other words, to prove a conspiracy, the
5 Government may prove that the Defendants conspired or
6 agreed with each other or the Government may prove that
7 either or both of the Defendants conspired or agreed
8 with someone else.

9 In either case, there would be a conspiracy; but
10 in order to prove a conspiracy, as I've said, there
11 have to be at least two individuals because you can't
12 have an agreement that only involves one person.

13 In order to establish that a conspiracy existed,
14 which is the first thing the Government has to show,
15 there has to be proof that the alleged members of the
16 conspiracy reached a mutual agreement or understanding
17 to accomplish some unlawful purpose; but proof of a
18 conspiracy doesn't require evidence that there was a
19 written contract among the members of the conspiracy or
20 that they -- even that they specifically agreed as to
21 all of the terms of the conspiracy.

22 An informal or unspoken agreement may be
23 sufficient, but some kind of an agreement or mutual
24 understanding to commit an illegal act must be shown.

25 The fact that various persons may have engaged

1 in similar conduct or that they may have associated
2 with one another or may have talked to one another is
3 not, by itself, sufficient to establish the existence
4 of a conspiracy. It may be some evidence that you can
5 consider, but by itself it's not enough. There has to
6 be evidence that the persons somehow reached a mutual
7 understanding or agreement to commit this unlawful act.

8 And a conspiracy doesn't have to be proven by
9 direct evidence. By that I mean one of the alleged
10 members of the conspiracy doesn't have to say, Yes, we
11 had this agreement. A conspiracy can be proven by
12 circumstantial evidence, that is to say, by proof of
13 sufficient facts from which you can reasonably infer
14 the existence of a conspiracy and which you can find
15 that a conspiracy has been established beyond a
16 reasonable doubt.

17 Proof of a conspiracy does not require evidence
18 that everyone involved knew every single detail of the
19 plan or agreed on every single detail of the plan, but
20 it does require proof beyond a reasonable doubt that
21 the members of the conspiracy somehow reached a mutual
22 agreement or understanding that they would attempt to
23 accomplish the unlawful purpose that was the object of
24 the conspiracy.

25 So there are two kinds of intent that have to be

1 shown in order to find someone guilty of conspiracy,
2 first of all, an intent to agree to be a member of the
3 conspiracy and, second, an intent that the crime or
4 unlawful act that was the object of the conspiracy be
5 committed by someone. Even if it's never committed,
6 the intention must be there that the act would be
7 committed, whether it's successful or not.

8 And in this case, as I've told you, the crime
9 that was the object of the conspiracy alleged in the
10 Indictment is distribution or possession with intent to
11 distribute more than five kilograms of a mixture or
12 substance containing a detectable amount of cocaine.

13 Now, I've explained to you what things the
14 Government has to prove in order to establish that
15 Mr. Gonzales is guilty of the offense of possession
16 with intent to distribute or aiding and abetting
17 possession with intent to distribute, and I've also
18 explained to you the things the Government has to prove
19 in order to establish that either of the Defendants is
20 guilty of the offense of conspiring to possess -- to
21 distribute or to possess with intent to distribute more
22 than five kilograms of a mixture or substance
23 containing cocaine.

24 One final point I should make with respect to
25 those things is, there's a difference between aiding

1 and abetting and conspiracy. You may have already
2 picked this up. They're similar in some ways, but they
3 are different in the sense that, as I've stated, proof
4 of aiding and abetting requires proof that the offense
5 that the Defendant is alleged to have aided and abetted
6 actually was committed.

7 As I said earlier, you can't be guilty of aiding
8 and abetting unless the offense that you are accused of
9 aiding or abetting was committed by someone.

10 On the other hand, you can be guilty of
11 conspiracy even if there is no evidence that the
12 offense that was the object of the conspiracy actually
13 was committed because, as I've said, the gist of the --
14 of conspiracy is the agreement and not whether the
15 offense was, in fact, later committed.

16 You know the things now that the Government has
17 to prove in order to convict either Defendant of any of
18 the charges against them. And I think I've mentioned,
19 if I haven't, I will now, that in order to convict a
20 Defendant of any offense with which a Defendant is
21 charged, the Government has to prove all of the
22 elements of that offense beyond a reasonable doubt.

23 If the Government, in your judgment, has failed
24 to prove any element of an offense with which a
25 Defendant is charged beyond a reasonable doubt, then

1 you should return a verdict of not guilty.

2 On the other hand, if you're satisfied that the
3 Government has proven each and every element of a
4 particular offense beyond a reasonable doubt, you are
5 to return a verdict of guilty with respect to that
6 offense and that Defendant.

7 Now, I told you that the Government has to prove
8 these things beyond a reasonable doubt. What does that
9 mean? Well, it's pretty difficult to define what it
10 means to prove something beyond a reasonable doubt. I
11 can tell you that it doesn't mean that the Government
12 has to prove these things beyond any conceivable shadow
13 of a doubt.

14 What it means is that the Government must prove
15 these things beyond a reasonable doubt. And in
16 determining whether a reasonable doubt exists, you may
17 use your common sense and you should look at the
18 evidence and you should know that a reasonable doubt
19 may arise from either the evidence that's been
20 presented or from a lack of evidence.

21 Now, I can't define the term "reasonable doubt"
22 for you any more precisely than that. You know what
23 the word "reasonable" means, and you know what a doubt
24 is. And all I can tell you is it's up to you to decide
25 whether the Government has proven the things that it

1 must prove beyond a reasonable doubt.

2 Now, you'll have the Indictment with you in the
3 jury room to help you remember what the nature of the
4 charges is; but remember, once again, that the
5 Indictment is not evidence in the case. It doesn't
6 prove anything. It simply tells you what the
7 accusations are, and it's up to you to decide whether
8 the Government has proven these things.

9 I also told you earlier that each Defendant is
10 entitled to a presumption of innocence, which means
11 that unless and until the Government presents evidence
12 that proves the Defendant guilty beyond a reasonable
13 doubt, you should presume that the Defendant is not
14 guilty.

15 But, on the other hand, if and when the
16 Government does present evidence that convinces you
17 that the Defendant is guilty beyond a reasonable doubt,
18 the presumption of innocence vanishes. It no longer
19 plays any role in the case.

20 I've also told you, and I want to remind you
21 once again, that the Defendant -- a Defendant has no
22 obligation to present evidence or to testify; and if a
23 Defendant chooses not to do so, you should not draw any
24 adverse inference from that.

25 What you should do instead is to focus on the

1 evidence the Government has presented and decide
2 whether that evidence proves guilt beyond a reasonable
3 doubt.

4 In this case, as you know, neither Defendant has
5 testified or presented any evidence, and you should not
6 consider that as a factor in reaching your decision.
7 Look at the Government's evidence and whether you
8 believe that it's sufficient to warrant conviction.

9 Now, I've told you what it is that the
10 Government has to prove, the burden of proof that
11 applies, the beyond-a-reasonable-doubt standard. The
12 next question is, how do you go about deciding whether
13 the Government has proven these things beyond a
14 reasonable doubt?

15 Well, again, as I've told you, you've got to
16 base that decision on the evidence that has been
17 presented during the course of the trial and not on
18 anything else, not on the testimony -- not on the
19 statements of lawyers or any exhibits that weren't
20 admitted into evidence.

21 You've got to look at the testimony of the
22 witnesses, the contents of the exhibits that have been
23 admitted and will go with you into the jury room and
24 the stipulations that the lawyers have entered, the
25 agreements, which are also in evidence.

1 As to the testimony of the witnesses, your
2 principal task is to assess the credibility of the
3 witnesses or, to put it another way, the weight that
4 the witness's testimony deserves, how heavily should it
5 weigh in your determination.

6 And in assessing the credibility of a witness,
7 there are several factors that you can and should
8 consider. One is the witness's opportunity to have
9 observed the facts about which the witness testified.
10 In other words, was the witness in a good position to
11 have accurately seen, heard or otherwise observed the
12 facts that the witness related to you or was the
13 witness's ability to perceive these things impaired in
14 some way.

15 The second factor is the reliability of the
16 witness's memory. These events happened some time ago;
17 and you can and should ask whether, even if the witness
18 was in a good position to have been able to tell what
19 happened, did the witness have a clear recollection of
20 what it is that the witness may have observed.

21 A third factor is the witness's appearance on
22 the stand. One reason that we generally require
23 witnesses to come in and testify in person rather than
24 have somebody tell you what someone you've never seen
25 may have told them is that it gives you a chance to

1 size up the person who's the source of the information;
2 and based on your observations, you can reach some
3 conclusions as to how much weight that person's
4 testimony deserves from their demeanor and the manner
5 in which they conduct themselves.

6 Another factor is the probability or
7 improbability of what the witness had to say. Just
8 because a witness says something and nobody directly
9 contradicted the witness doesn't mean you have to
10 accept what that witness said at face value.

11 If a witness says something that your common
12 sense and good judgment tells you is just not possible
13 or is highly improbable, you don't have to accept that
14 statement as being correct just because the witness
15 said it.

16 And the final factor, at least the one final
17 I'll mention, is the witness's stake in the outcome of
18 the case. Just because a witness may have some
19 interest in what you decide in the case doesn't mean
20 that you ought to disregard or even discount the
21 witness's testimony, but you can consider whether the
22 witness has a stake in the outcome in deciding how much
23 weight to give to that witness's testimony.

24 You've heard testimony in this case from
25 Government agents and law enforcement officers. Keep

1 in mind that the mere fact that they are Government
2 agents or law enforcement officers doesn't mean that
3 you should view their testimony in any way that is
4 different from the testimony of any other witness.

5 Your job in assessing the credibility of a
6 witness is to look at the individual testifying without
7 regard to what position or office that individual may
8 hold.

9 Also keep in mind that in determining what the
10 facts are, it isn't the number of witnesses testifying
11 on any side of an issue that controls; but, rather,
12 it's the quality of the testimony. So you may have two
13 or three witnesses who testify on one side of an issue.
14 One witness may testify to the contrary. That doesn't
15 necessarily mean that you ought to find the facts to be
16 as the two or three witnesses claim. If you think the
17 one witness was a very credible witness for whatever
18 reasons, you may accept that witness's version of what
19 occurred.

20 I told you that you'll have the exhibits with
21 you in the jury room. Keep in mind that exhibits, like
22 the testimony of the witnesses, are just tools to be
23 used by you in deciding the facts. Just because
24 something was admitted as an exhibit doesn't mean you
25 have to accept everything in it at face value.

1 You should look at the exhibits in light of all
2 of the evidence that's been presented and evaluate them
3 in that context.

4 I've told you that you may consider only the
5 evidence that has been admitted in the trial, but that
6 doesn't mean that in determining the facts you are
7 strictly limited to what the witnesses said and what's
8 in the exhibits.

9 In making your determination, you may draw from
10 facts that have been established by the direct evidence
11 any inferences that may be reasonable to draw from
12 those facts.

13 Inferences are conclusions that reason and
14 common sense may lead you to draw from facts that have
15 been established, and the facts that may give rise to
16 legitimate inferences or proof of something by
17 establishing facts from which an inference may be drawn
18 is sometimes -- that method of proof is sometimes
19 referred to as proof by circumstantial evidence.

20 To put it another way, any fact that has to be
21 proven in a case can be proven either by direct
22 evidence or by circumstantial evidence. Proving
23 something by direct evidence means proving it by the
24 testimony of a witness who claims to have directly
25 observed the fact or by introducing an exhibit that may

1 be the thing itself. That's proof by direct evidence.

2 Proof by circumstantial evidence means proving
3 two or more facts by direct evidence from which the
4 existence or nonexistence of a third fact may be
5 reasonably inferred.

6 And I think that probably the best way to
7 illustrate what's meant by proving something by
8 circumstantial evidence is to ask you to imagine that
9 on some winter night, before you go to bed, you look
10 out the window and the ground is bare. You wake up in
11 the morning, there's a foot of snow on the ground.

12 If someone asks you whether it snowed last
13 night, your answer undoubtedly would be yes. That's a
14 perfectly reasonable answer, it would seem.

15 If you had to come into court and prove that it
16 snowed last night, how would you go about doing that?
17 Well, one way you could do it is you could find someone
18 who was awake when the snowflakes were falling and
19 could come in here and testify that they actually
20 observed the snowflakes falling from the sky. That
21 would be proof by direct evidence, the testimony of an
22 individual who claims to have directly seen the
23 snowflakes falling.

24 If you couldn't find somebody who was awake when
25 the snowflakes were falling, you could testify as to

1 two facts that you directly observed, one, that before
2 you went to bed, the ground was bare; two, that when
3 you woke up, there was a foot of snow on the ground.
4 And from those two facts it would be reasonable to
5 infer that it snowed last night. That would be an
6 example of proving that it snowed by circumstantial
7 evidence, proof of two facts from which the existence
8 of a third fact could be reasonably inferred.

9 Now, the law recognizes that a fact may be
10 proven either by direct or by circumstantial evidence,
11 but it requires in a criminal case that any fact that's
12 necessary to convict the Defendant must be proven
13 beyond a reasonable doubt whether it's proven by direct
14 or circumstantial evidence.

15 One word of caution. There's a difference
16 between proving something by circumstantial evidence
17 and guessing. In the example I gave you, if someone
18 asked you whether it's going to snow next Tuesday, it
19 would not be reasonable to infer from those two facts
20 that it was going to snow next Tuesday.

21 In order to prove something by circumstantial
22 evidence, there are two requirements. Number one, the
23 underlying facts must be established by the direct
24 evidence; and two, the inference drawn from those facts
25 must be a reasonable inference.

1 Now, I've told you that it's up to you to decide
2 the facts in the case. It's not up to me to decide the
3 facts, and you shouldn't interpret anything that I may
4 have said or done during the course of this trial as
5 indicating an opinion on my part as to what the facts
6 are. I certainly have not intended to indicate any
7 such opinion, and you shouldn't be concerned with what
8 you might think my opinion may be because it's your job
9 to decide what the facts in the case are.

10 There have been times during the trial, not very
11 many, but there have been times when the lawyers have
12 objected to evidence that was offered by the opposing
13 lawyer. A lawyer has a right, even an obligation, to
14 object to evidence that the lawyer believes is not
15 admissible, doesn't satisfy the requirements of the
16 rules of evidence; and you shouldn't penalize the
17 lawyer or, more importantly, the lawyer's client
18 because the lawyer may have objected, nor should you
19 discount the evidence if it was admitted simply because
20 a lawyer may have objected.

21 If the evidence was admitted into evidence, you
22 can consider it for whatever value you think it has,
23 and you shouldn't discount it because somebody objected
24 to it.

25 As you know, this case is brought in the name of

1 the United States Government, but the Government is not
2 entitled to any more consideration than either of the
3 Defendants. Everyone who comes into this court comes
4 here as an equal and should be treated by you as an
5 equal. It doesn't make any difference who they are.
6 You should consider them as equals, and you should look
7 at the evidence and make your decision based on the
8 evidence alone and not who the parties are.

9 I hope that it goes without saying that neither
10 bias in favor of any person or group or cause or
11 prejudice against any person or group or cause or
12 sympathy should play any role whatsoever in your
13 deliberations.

14 Your duty is to look at the evidence objectively
15 to determine from that evidence what the facts are,
16 what happened or didn't happen, and to apply to those
17 facts the law as I have explained it to you. That's
18 all that anyone involved in this case expects or has
19 any right to.

20 I'm going to briefly now confer with the -- over
21 here with the lawyers at the sidebar to give them a
22 chance to tell me if they think I have forgotten to
23 tell you something I should have told you or if they
24 think that I misstated anything that I did tell you.

25 Counsel, would you approach the sidebar.

1 (Bench conference held on the record)

2 THE COURT: Does the Government have any
3 objections to the charge?

4 MS. BROWNE: No, your Honor.

5 THE COURT: Defendants have any objections?

6 MR. MEDICI: No, your Honor.

7 MR. SMITH: No, your Honor.

8 THE COURT: Have you had an opportunity to see
9 the verdict form?

10 MS. BROWNE: No.

11 MR. SMITH: No.

12 THE COURT: You can take a look at it. I'll
13 give you a few minutes before it goes in to the jurors.

14 (End of bench conference)

15 THE COURT: All right, Mr. Amaral, Miss Paolo
16 and Ms. Mark, you have all been alternates in this
17 case. I want to thank you very much for your time and
18 attention. I know it's difficult to be an alternate
19 because you're not sure if you're going to be called
20 upon. In this case, one of you was called upon, and so
21 it's very important the alternates do pay attention,
22 and I think all of you did.

23 So at this time you are excused. If you have
24 any items in the jury room, please retrieve them now.
25 You should not have any further contact with any of the

1 regular jurors until they have returned their verdict.

2 And I'll ask you to continue not to obtain any
3 information about this case from any source outside of
4 the courtroom because it is possible, although highly
5 unlikely, that one of you may be called upon if
6 something should happen that prevents one of the
7 regular jurors from continuing.

8 So please continue to follow the rules I
9 previously explained until this case is decided. Thank
10 you very much for your service.

11 (Alternates excused)

12 THE COURT: So the rest of you ladies and
13 gentlemen, you are the jurors who will decide this
14 case; and in order to return a verdict or verdicts in
15 this case, all of you must agree as to what that
16 verdict is. You cannot return a verdict either for the
17 Government or for a Defendant on any of the charges
18 unless you are unanimous as to what that decision
19 should be.

20 When you go into the jury room, there are two
21 things that you should keep in mind. The first is that
22 each of you should be prepared to approach the
23 deliberations with an open mind; and if you find that
24 other jurors disagree with your initial conclusion and
25 after -- you should listen with an open mind to what

1 those other jurors have to say, and you should be
2 humble enough to change your opinion if after listening
3 to what the other jurors have to say you become
4 convinced that they're correct and you are incorrect.

5 On the other hand, you should also remember that
6 you each have an independent responsibility to vote for
7 the verdict that you think is the correct verdict based
8 on your understanding of the evidence and the law as I
9 have explained it to you; and you should have the
10 courage to stick to your convictions after listening
11 with an open mind to what the other jurors have to say,
12 even if some or all of the other jurors should disagree
13 with you.

14 I know those two things sound like they are in
15 conflict, and I suppose to some degree they are; but my
16 experience over the years has been that jurors are
17 usually able to return unanimous verdicts without
18 violating either of those principles, and I'm confident
19 that you will be able to, also. But if you can't,
20 we'll cross that bridge if and when we get to it.

21 When you get into the jury room, the first thing
22 that you ought to do is select the foreman or forelady.
23 That person will have three basic responsibilities.
24 The first will be to act as a moderator of the
25 deliberations to make sure that they're conducted in an

1 orderly way and that everyone who wants to speak has a
2 fair opportunity to do so.

3 The second responsibility will be to complete
4 the verdict form, which will go with you into the jury
5 room. It's a very simple form. It just involves
6 checking a box "guilty" or "not guilty" with respect to
7 each of the charges. The foreman or forelady has the
8 duty of completing that form and signing it and
9 bringing it back here into the courtroom after the
10 jury's reached its verdict.

11 And the third duty which you may or may not have
12 to exercise is the foreman or forelady is the spokesman
13 or spokeswoman for the jury; and if it's necessary for
14 you to communicate with me for any reason, the
15 communication should be in the form of a brief note
16 from the foreman or forelady.

17 Just write down whatever it is your question or
18 problem is, give it to the security officer who will be
19 outside of your door, he'll give it to me, I'll discuss
20 it with the attorneys and I will respond as promptly as
21 I can, if I can properly do so.

22 And I emphasize the word "properly" because
23 there are some things I cannot do to properly help you.
24 One, for example, is I told you it's up to you to
25 decide the facts in the case. I can't help you in

1 deciding whether the evidence shows this or not.

2 That's up to you. You have to decide that on your own.

3 But if there are any things, any problems you
4 have that I can help you with, I certainly will try. I
5 don't expect that you will have problems; but you may
6 be glad to know that if you do, that I'll try to help
7 you.

8 If you do have to send me a note, please just be
9 very concise and don't tell us what the status of the
10 deliberations is. We don't want to know if you're 10
11 to 2 for this or against that. All we want to know is
12 what's your question and what's the problem that you
13 need help with.

14 As far as your hours are concerned, they're
15 pretty much whatever you want them to be. It's almost
16 lunchtime. Lunch should be waiting for you or will be
17 arriving shortly. If you have reached a verdict before
18 the usual adjournment time, all well and good. We'll
19 take that verdict, and you go home. If not, you can
20 either stay late or come back tomorrow. That would be
21 up to you.

22 If you do wish to stay late, though, we'll need
23 some advanced notice because we may have to make some
24 staffing arrangements to accommodate that. I'll have
25 the clerk check with you around the middle of the

1 afternoon to get an idea as to what you want to do.

2 There's no time limit on the deliberations. You
3 take as much time as you think is necessary to fairly
4 decide this case, and that's entirely up to you.

5 Is there anything further, counsel, before the
6 jury is sent out to deliberate?

7 MS. BROWNE: Not for the United States, your
8 Honor.

9 MR. MEDICI: Not for Mr. Gonzales, your Honor.

10 MR. SMITH: Nothing further, your Honor. Thank
11 you.

12 THE COURT: I'll ask the security officer, then,
13 to come forward. Before I ask the clerk to administer
14 the oath, I will mention that the exhibits will go with
15 you into the jury room with one exception. The six
16 kilograms will be retained by the clerk.

17 It's not that I don't trust any of you, but I
18 think it's best that we not have six kilograms of
19 cocaine floating back and forth between the courtroom
20 and the jury room.

21 If you do want to see the six kilograms for any
22 reason, let us know. We can arrange to have them
23 brought in for your examination and then take them
24 back.

25 I'll ask the clerk to administer the oath to the

1 security officer.

2 (Court security officer sworn)

3 THE COURT: All right, ladies and gentlemen,
4 this case is in your hands. You may return to the jury
5 room and begin your deliberations.

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