UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. Cr. No. 06-071-01T

SANDY BAEZ

Jury Charge
January 23, 2007

INTRODUCTION

AT THIS TIME, IT IS MY DUTY TO INSTRUCT YOU ON THE LAW APPLICABLE TO THIS CASE. YOU MUST ACCEPT THE RULES OF LAW THAT I GIVE YOU AND APPLY THEM TO THE FACTS IN THIS CASE AS YOU FIND THOSE FACTS TO BE.

IN APPLYING THE LAW THAT I AM ABOUT TO EXPLAIN TO YOU IN THESE INSTRUCTIONS, YOU MUST CONSIDER THE INSTRUCTIONS AS A WHOLE. YOU SHOULD NOT CHOOSE ONE PART AND DISREGARD ANOTHER. YOU MUST ACCEPT AND APPLY THE LAW AS I GIVE IT TO YOU IN ITS ENTIRETY.

YOU MUST ACCEPT AND APPLY THE RULES OF LAW THAT I GIVE TO YOU WHETHER YOU AGREE WITH THEM OR NOT. IT WOULD BE A VIOLATION OF THE OATH YOU TOOK AS JURORS TO BASE A DECISION ON ANY VERSION OF THE LAW OTHER THAN THAT CONTAINED IN MY INSTRUCTIONS JUST AS IT WOULD BE A VIOLATION OF THAT OATH TO RETURN A DECISION UPON ANYTHING BUT THE EVIDENCE IN THIS CASE. IT IS NOT UP TO YOU TO DECIDE WHAT THE LAW IS OR SHOULD BE. YOUR DUTY IS TO APPLY THE LAW AS I EXPLAIN IT TO YOU.

A 2.1

ABSENT DEFENDANTS AND/OR MISSING COUNTS

EVIDENCE HAS BEEN PRESENTED THAT MANUEL ALBERTO NOGUEIRA-RECIO MAY HAVE BEEN INVOLVED IN THE INCIDENT THAT IS THE SUBJECT OF THIS INDICTMENT.

MR. NOGUEIRA-RECIO IS NOT ON TRIAL IN THIS CASE AND YOU SHOULD NOT CONCERN YOURSELVES WITH WHY HE IS NOT.

THAT SHOULD HAVE NO BEARING ON YOUR DELIBERATIONS.

YOUR JOB IS TO DETERMINE WHETHER OR NOT MR. BAEZ, IS GUILTY OF THE CHARGES AGAINST HIM BASED UPON THE EVIDENCE THAT IS PROPERLY BEFORE YOU.

IF YOU SPECULATE OR GUESS AS TO WHY OTHER INDIVIDUALS ARE NOT ON TRIAL IN THIS CASE, THERE IS A VERY GOOD CHANCE YOU WILL BE INCORRECT AND THAT SUCH SPECULATION MIGHT AFFECT YOUR DECISION IN A WAY THAT IS UNFAIR TO ONE SIDE OR THE OTHER.

AUTHORITY

Adapted from United States v. Olivo, 05-70.

A 3.1(b)-4 **Modified**

SUMMARY OF INDICTMENT - ONE DEFENDANT - MULTIPLE COUNTS

THE INDICTMENT IN THIS CASE CONTAINS TWO COUNTS OR CHARGES AGAINST THE DEFENDANT, SANDY BAEZ.

COUNT ONE CHARGES MR. BAEZ, WITH ASSAULTING AND INJURING A FEDERAL OFFICER IN THE PERFORMANCE OF HIS DUTIES.

COUNT THREE CHARGES THE MR. BAEZ DISTRIBUTING 100 GRAMS OR MORE OF A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF HEROIN.

Modified A4.1(a)

MULTIPLE COUNTS

A DEFENDANT IS ENTITLED TO A SEPARATE DETERMINATION OF EACH CHARGE AGAINST HIM. IN OTHER WORDS, YOUR DETERMINATION WHETHER A DEFENDANT IS GUILTY OR NOT GUILTY WITH RESPECT TO ONE COUNT OR CHARGE SHOULD NOT INFLUENCE YOUR DETERMINATION AS TO WHETHER THAT DEFENDANT IS GUILTY OR NOT GUILTY WITH RESPECT TO ANY OTHER CHARGE. MERELY BECAUSE YOU FIND THE DEFENDANT GUILTY OR NOT GUILTY OF ONE CHARGE, YOU MAY NOT ASSUME THAT THE DEFENDANT IS LIKEWISE GUILTY OR NOT GUILTY OF ANOTHER CHARGE.

TO PUT IT ANOTHER WAY, YOUR DETERMINATION WITH RESPECT TO EACH COUNT OR CHARGE AGAINST THE DEFENDANT SHOULD BE BASED ON THE EVIDENCE APPLICABLE TO THAT COUNT OR CHARGE AND SHOULD NOT BE INFLUENCED BY YOUR DETERMINATION WITH RESPECT TO ANY OTHER COUNT OR CHARGE.

AUTHORITY
Adapted from United States v. Olivo, CR 05-70.
United States v. Andujar, 49 F.3D 16, 24 (1st Cir.1995)(Court should avoid framing the issue as determination of guilt or innocence. Instead, issue should be defined as whether government has proved guilt.

18 U.S.C. §111(b)

ASSAULTING, RESISTING, IMPEDING A GOVERNMENT OFFICER -OFFENSE CHARGED

MORE SPECIFICALLY, COUNT ONE CHARGES THAT ON OR ABOUT MAY 10, 2006, THE DEFENDANT, SANDY BAEZ, FORCIBLY ASSAULTED, IMPEDED OR INTERFERED WITH TASK FORCE AGENT MICHAEL NAYLOR AND INJURED AGENT NAYLOR WHILE HE WAS PERFORMING HIS OFFICIAL DUTIES, ALL IN VIOLATION OF 18 U.S.C. §111(b).

modified from United States v. Louis Abilheira, Cr. No. 92-0006

18 U.S.C. §111 ASSAULTING, RESISTING, OR IMPEDING CERTAIN OFFICERS OR EMPLOYEES - STATUTE

SECTION 111 OF TITLE 18 STATES IN SUBSECTION A:

"WHOEVER FORCIBLY ASSAULTS, RESISTS, OPPOSES, IMPEDES, INTIMIDATES, OR INTERFERES WITH"...A FEDERAL OFFICER..."WHILE ENGAGED IN OR ON ACCOUNT OF THE PERFORMANCE OF OFFICIAL DUTIES",...AND IN SO DOING "INFLICTS BODILY INJURY" SHALL BE GUILTY OF AN OFFENSE AGAINST THE UNITED STATES.

AUTHORITY

18 U.S.C. § 111(a)and (b)

18 U.S.C. §111(B) ASSAULTING, RESISTING, OR IMPEDING CERTAIN OFFICERS OR EMPLOYEES - ELEMENTS

IN ORDER TO ESTABLISH THAT MR. BAEZ IS GUILTY OF FORCIBLY ASSAULTING, RESISTING, OPPOSING, IMPEDING, INTIMIDATING, OR INTERFERING WITH A FEDERAL OFFICER AND INFLICTING BODILY INJURY ON HIM, AS CHARGED ON COUNT ONE OF THE INDICTMENT, THE GOVERNMENT MUST PROVE FOUR THINGS OR ELEMENTS:

FIRST: THAT MR. BAEZ, FORCIBLY ASSAULTED, RESISTED, OPPOSED, IMPEDED, INTIMIDATED OR INTERFERED WITH AGENT NAYLOR, AN OFFICER OF THE UNITED STATES;

SECOND: THAT, IN THE PROCESS, MR. BAEZ INFLICTED BODILY INJURY UPON AGENT NAYLOR;

THIRD: THAT, AT THE TIME IN QUESTION, MICHAEL NAYLOR WAS A FEDERAL OFFICER ENGAGED IN THE PERFORMANCE OF OFFICIAL DUTIES; AND

FOURTH: THAT MR. BAEZ INTENDED TO ASSAULT AGENT NAYLOR.[1]

[1] United States v. Charles, 456 F.3d 249, 255 (1st Cir. 2006)(setting forth elements, "with the intent to do the acts

AUTHORITY

"Section 111(b) defines a separate offense rather than simply a sentencing enhancement." United States v. Arrington, 309 F.3d 40 (C.A.D.C. 2002). See United States v. Yates, 304 F.3d 818, 823 (8th Cir. 2002)(ruling that "Apprendi requires a jury finding beyond a reasonable doubt of use of a weapon or bodily injury as a predicate for imposing a sentence over three[2] years" under § 111(b).

specified").

[2] The maximum penalties pursuant to 18 U.S.C. §111(a) and (b) were increased in a 2002 amendment.

18 U.S.C. § 111 - ASSAULTING A FEDERAL OFFICER

THERE IS NO DISPUTE THAT MICHAEL NAYLOR WAS AN OFFICER OF THE UNITED STATES BECAUSE HE WAS ACTING AS A SPECIAL TASK FORCE AGENT FOR THE UNITED STATES DRUG ENFORCEMENT AGENCY.

IT DOES NOT MATTER WHETHER MR. BAEZ KNEW THAT AGENT NAYLOR WAS AN OFFICER OR EMPLOYEE OF THE UNITED STATES.[3]

[3] United States v. Feola, 420 U.S. 671, 684 (1975)(" All the statute requires is an intent to assault, not an intent to assault a federal officer"). Figueroa-Torres v. Toledo-Davila, 232 F.3d 270 (1st Cir. 2000)(in determining defendant's liability for an assault on a federal officer, it was irrelevant that the assailant did not know that the victim was an officer). United States v. Robinson, 137 F3d 652 (1st Cir. 1998)("statute prohibiting assault against federal officers could not be interpreted as including a requirement that the assailant be aware that his victim is a federal officer").

18 U.S.C. § 111 - BODILY INJURY - DEFINITION

THE TERM "BODILY INJURY" MEANS AN INJURY THAT IS PAINFUL AND OBVIOUS, OR IS OF THE TYPE FOR WHICH MEDICAL ATTENTION ORDINARILY WOULD BE SOUGHT.

Authority:

Definition suggested by Government, taken from Fifth Circuit Pattern Jury Instruction 2.09. The language is based on the Federal Sentencing Guidelines §1B1. Application Note 1.(B)

See United States v. Myers, 972 F.2d 1566 (11th Cir. 1992)(upholding federal definition of "bodily injury" as "bodily injury means any injury to the body, no matter how temporary. Bodily injury also includes physical pain as well as any burn or abrasion.")

See United States v. Hamm, 13 F.3d 1126 (7th Cir. 1994) (holding that the guideline is "clearly worded in the disjunctive" and even if the victim does not seek medical attention, a bodily injury may be found.)

SELF-DEFENSE

MR. BAEZ CONTENDS THAT ANY FORCE THAT HE USED AGAINST AGENT NAYLOR WAS JUSTIFIED BECAUSE IT WAS NECESSARY TO PROTECT HIMSELF FROM UNREASONABLE FORCE BEING USED ON HIM BY AGENT NAYLOR.

AN INDIVIDUAL WHO IS BEING ARRESTED IS NOT ENTITLED TO USE FORCE IN ORDER TO RESIST ARREST BUT IS PERMITTED TO USE FORCE TO THE EXTENT NECESSARY TO PROTECT HIMSELF FROM THE INFLICTION OF EXCESSIVE OR UNREASONABLE FORCE BY AN OFFICER MAKING THE ARREST.

THE LEVEL OF FORCE USED BY THE INDIVIDUAL ARRESTED MUST BE NO MORE THAN REASONABLY NECESSARY, UNDER THE CIRCUMSTANCES, TO PROTECT HIMSELF.

Modified instruction requested by defendant.

21 U.S.C. § 841(a)(1) - CONTROLLED SUBSTANCE - DISTRIBUTION OF HEROIN - OFFENSE CHARGED

COUNT III CHARGES THAT, ON OR ABOUT MAY 10, 2006, MR. BAEZ KNOWINGLY AND INTENTIONALLY DISTRIBUTED 100 GRAMS OR MORE OF A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF HEROIN, IN VIOLATION OF 21 U.S.C. § 841(a)(1).

B 14.3(b) MODIFIED

21 U.S.C. § 841(a)(1) - CONTROLLED SUBSTANCE DISTRIBUTION - ELEMENTS

IN ORDER TO ESTABLISH THAT MR. BAEZ IS GUILTY OF DISTRIBUTING 100 GRAMS OR MORE OF A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF HEROIN, THE GOVERNMENT MUST PROVE THREE THINGS OR ELEMENTS:

FIRST: THAT MR. BAEZ DISTRIBUTED A MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF A CONTROLLED SUBSTANCE;

SECOND: THAT THE QUANTITY DISTRIBUTED WAS 100 GRAMS OR MORE;

THIRD: THAT, IN DOING SO, MR. BAEZ ACTED KNOWINGLY AND WITH THE INTENT TO DISTRIBUTE THE CONTROLLED SUBSTANCE.

AUTHORITY

Adapted from United States v. Olivo, CR 05-70; see also United States v. Valle, 72 F.3d 210, 217 (1st Cir. 1995) ("The elements of the [21 U.S.C. § 841(a)(1)] are knowing possession of a controlled substance (here crack) and intent to distribute the substance.")

HEROIN - CONTROLLED SUBSTANCE

UNDER FEDERAL LAW, HEROIN IS A CONTROLLED SUBSTANCE.

THEREFORE, ANY MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF HEROIN IS A CONTROLLED SUBSTANCE. THE MIXTURE OR SUBSTANCE NEED NOT CONTAIN ANY PARTICULAR PERCENTAGE OR QUANTITY OF HEROIN BUT, BASED ON THE CHARGE IN THIS CASE, THE MIXTURE OR SUBSTANCE CONTAINING HEROIN MUST HAVE WEIGHED 100 GRAMS OR MORE.

AUTHORITY

21 U.S.C §§ 802, 812

United States v. Campbell, 61 F.3d 976 (1st Cir. 1995)("The statute's absolute prohibition against the manufacture, use and possession of controlled substances provides an explicit warning against dealing with any quantity.")

21 U.S.C. 841(a)(1) -DISTRIBUTION - DEFINITION

TO “DISTRIBUTE” A CONTROLLED SUBSTANCE MEANS TO DELIVER A CONTROLLED SUBSTANCE INTO THE POSSESSION OF ANOTHER PERSON. AN EXCHANGE OF MONEY IS NOT NECESSARY FOR A DISTRIBUTION TO HAVE OCCURRED.

KNOWINGLY - DEFINITION

TO ACT "KNOWINGLY," MEANS TO ACT VOLUNTARILY, AND WITH AN AWARENESS OF THE NATURE AND LIKELY CONSEQUENCES OF THE ACT AND NOT BECAUSE OF IGNORANCE, BY MISTAKE OR ACCIDENT.

THE PURPOSE OF REQUIRING PROOF THAT AN ACT WAS PERFORMED KNOWINGLY IS TO PREVENT A PERSON FROM BEING CONVICTED FOR AN ACT THAT HE DID NOT INTEND TO COMMIT OR THE NATURE OF WHICH HE DID NOT UNDERSTAND.

WHETHER A DEFENDANT ACTED KNOWINGLY MAY BE INFERRED FROM WHAT THAT DEFENDANT SAID OR DID AND FROM ANY OTHER EVIDENCE THAT MAY ESTABLISH WHAT THE DEFENDANT KNEW AT THE TIME THAT THE ACT WAS PERFORMED, INCLUDING POSSESSION OF AN OBJECT OR OTHER SURROUNDING CIRCUMSTANCES.

HOWEVER, THE GOVERNMENT MUST PROVE KNOWLEDGE, LIKE ALL OF THE OTHER ELEMENTS OF A CRIME, BEYOND A REASONABLE DOUBT.

NEW SECTION

FLIGHT - CONSCIOUSNESS OF GUILT

DURING THE COURSE OF THIS TRIAL, EVIDENCE HAS BEEN PRESENTED THAT MR. BAEZ FLED FROM THE HONEY DEW DONUT SHOP PARKING LOT WHEN POLICE ARRIVED.

IF YOU FIND THAT THE GOVERNMENT HAS PROVEN, BEYOND A REASONABLE DOUBT, THAT MR. BAEZ FLED, YOU ARE PERMITTED, BUT NOT REQUIRED, TO CONSIDER THAT AS EVIDENCE THAT MR. BAEZ BELIEVED THAT HE HAD COMMITTED A CRIME.

IN DECIDING WHETHER MR. BAEZ'S FLIGHT INDICATED ANY SUCH BELIEF, YOU SHOULD CONSIDER ALL OF THE EVIDENCE AND YOU SHOULD BEAR IN MIND THAT THERE MAY BE MANY REASONS WHY AN INNOCENT PERSON MIGHT HAVE FLED UNDER THE CIRCUMSTANCES.

WHETHER OR NOT EVIDENCE OF FLIGHT JUSTIFIES AN INFERENCE THAT A DEFENDANT HAD FEELINGS OF GUILT AND THE SIGNIFICANCE, IF ANY, THAT YOU CHOOSE TO PLACE ON SUCH AN INFERENCE IS ENTIRELY UP

TO YOU AS THE SOLE JUDGES OF THE FACTS IN THIS CASE BUT YOU MUST REMEMBER THAT THE GOVERNMENT MUST PROVE GUILT BEYOND A REASONABLE DOUBT.

Taken from: United States v. Donald Desir, Cr. No. 97-87T; see also, United States v. Antoine, 125 F.3d 843, 1997 WL 571991 (1st Cir. 1997) (unpublished opinion)(citing cases)

E 1.1(_)

PROOF OF ALL ELEMENTS

I HAVE EXPLAINED THE OFFENSES WITH WHICH MR. BAEZ IS CHARGED AND THE ELEMENTS THE GOVERNMENT MUST PROVE IN ORDER TO ESTABLISH THAT THE DEFENDANT IS GUILTY OF ANY ONE OR MORE OF THOSE OFFENSES.

IN ORDER FOR THE GOVERNMENT TO PROVE THE DEFENDANT GUILTY OF AN OFFENSE, IT MUST PROVE, BEYOND A REASONABLE DOUBT, EACH AND EVERY ELEMENT OF THAT OFFENSE WITH REGARD TO THE DEFENDANT.

POSSIBILITIES OR EVEN PROBABILITIES ARE NOT SUFFICIENT.

IF THE GOVERNMENT FAILS TO PROVE ANY ONE OR MORE ELEMENTS OF AN OFFENSE BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY OF THAT PARTICULAR OFFENSE.

ON THE OTHER HAND, IF YOU ARE CONVINCED, BEYOND A REASONABLE DOUBT, THAT ALL ELEMENTS OF AN OFFENSE WITH WHICH THE DEFENDANT HAS BEEN CHARGED HAVE BEEN PROVEN, THEN YOU SHOULD FIND THE DEFENDANT GUILTY OF THAT OFFENSE.

BEAR IN MIND THAT THE REQUIREMENT THAT THE GOVERNMENT PROVE EVERY ELEMENT OF AN OFFENSE WITH WHICH A DEFENDANT IS CHARGED DOES NOT MEAN THAT THE GOVERNMENT IS REQUIRED TO PROVE EVERY STATEMENT CONTAINED IN THE INDICTMENT.

WHAT IT MEANS IS THAT THE GOVERNMENT MUST PROVE FACTS SUFFICIENT TO PROVE ALL OF THE ELEMENTS OF THE OFFENSE WITH WHICH THE DEFENDANT IS CHARGED AS I HAVE EXPLAINED THEM.

Authority

Taken from USA v. Olivo, CR 05-70

REASONABLE DOUBT

THE GOVERNMENT'S OBLIGATION TO PROVE A DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT DOES NOT MEAN THAT IT MUST DO SO BEYOND ALL DOUBT OR BEYOND ANY CONCEIVABLE SHADOW OF A DOUBT. WHAT IT MEANS IS THAT THE GOVERNMENT MUST PROVE THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

IN DETERMINING WHETHER A REASONABLE DOUBT EXISTS, YOU MAY USE YOUR COMMON SENSE TO DECIDE WHAT THE FACTS ARE, BUT KEEP IN MIND THAT THE EVIDENCE MUST ESTABLISH A DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

A REASONABLE DOUBT MAY ARISE FROM THE EVIDENCE PRESENTED OR FROM A LACK OF EVIDENCE.

I CANNOT PROVIDE YOU WITH A MORE PRECISE DEFINITION OF REASONABLE DOUBT. YOU KNOW WHAT "REASONABLE" MEANS AND YOU KNOW WHAT A "DOUBT" IS. THEREFORE, IT IS UP TO YOU TO DECIDE WHETHER

THE GOVERNMENT HAS PROVEN A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

AUTHORITY

US v. Munson, 819 F.2d 337 (1st Cir. 1987); See Attachment.
US v. Campbell, 874 F.2d 838, 842 (1st Cir. 1989) (Shouldn't use "fair doubt" to attempt to define "reasonable doubt."
U.S. v. Andujar, 49 F.3d 16, 23-24 (1st Cir. 1995.

Taken from United States v. Olivo, CR 05-70.

E 3.1 (_)

INDICTMENT - EFFECT

YOU WILL HAVE THE INDICTMENT WITH YOU IN THE JURY ROOM TO HELP YOU REMEMBER THE PRECISE NATURE OF THE CHARGES AGAINST THE DEFENDANT.

I REMIND YOU, ONCE AGAIN, THAT AN INDICTMENT IS NOTHING MORE THAN AN ACCUSATION. IT SHOULD NOT BE CONSIDERED AS EVIDENCE OF GUILT. IT MAY NOT EVEN BE THE BASIS OF AN INFERENCE OF GUILT. ALL THAT IT DOES IS TO BRING THIS MATTER BEFORE YOU FOR DETERMINATION. BEYOND THAT, IT HAS NO SIGNIFICANCE, WHATEVER. IT MERELY SETS FORTH THE ELEMENTS OF THE OFFENSES WHICH THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT.

AUTHORITY

Adapted from Tamarez, CR# 91-28.
Taken from USA v. Luciano, CR 01-16.

E 5.1(_)

PRESUMPTION OF INNOCENCE

AS I HAVE PREVIOUSLY TOLD YOU DURING THE COURSE OF THIS TRIAL, A DEFENDANT IS PRESUMED TO BE INNOCENT OF THE ACCUSATIONS AGAINST HIM OR HER. THIS PRESUMPTION OF INNOCENCE REMAINS WITH A DEFENDANT UNLESS AND UNTIL THE GOVERNMENT PRESENTS EVIDENCE SATISFYING YOU BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY.

THE PRESUMPTION OF INNOCENCE IS SUFFICIENT TO REQUIRE A NOT GUILTY VERDICT UNLESS YOU FIND THAT SUCH EVIDENCE HAS BEEN PRESENTED.

IF YOU FIND THAT THE GOVERNMENT HAS PROVED A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT, THE PRESUMPTION OF INNOCENCE DISAPPEARS AND IS OF NO FURTHER AVAIL TO HIM. HOWEVER, UNTIL THAT TIME, THE PRESUMPTION REMAINS WITH THE DEFENDANT.

AUTHORITY

METHOD OF ASSESSING EVIDENCE

NOW THAT YOU KNOW WHAT IT IS THAT THE GOVERNMENT MUST PROVE AND THE STANDARD OF PROOF TO BE APPLIED, THE NEXT QUESTION IS HOW DO YOU DETERMINE WHETHER THE GOVERNMENT HAS PROVEN THESE THINGS BEYOND A REASONABLE DOUBT?

OBVIOUSLY, YOU MUST MAKE YOUR DETERMINATION SOLELY FROM THE EVIDENCE PROPERLY BEFORE YOU AND FROM ALL REASONABLE AND LEGITIMATE INFERENCES TO BE DRAWN FROM THAT EVIDENCE.

THE EVIDENCE THAT IS PROPERLY BEFORE YOU CONSISTS OF:

1. THE TESTIMONY OF THE WITNESSES (INCLUDING THAT CONTAINED IN ANY DEPOSITIONS THAT WERE READ OR PLAYED BACK TO YOU);

2. THE EXHIBITS THAT I HAVE ADMITTED INTO EVIDENCE;

3. ANY STIPULATIONS AMONG THE ATTORNEYS IN WHICH THEY AGREE AS TO WHAT THE FACTS ARE.

FROM THAT EVIDENCE, YOU MAY DRAW WHATEVER CONCLUSIONS

ARE REASONABLE UNDER THE CIRCUMSTANCES.

THE EVIDENCE THAT IS PROPERLY BEFORE YOU DOES NOT INCLUDE:

1. COMMENTS OR STATEMENTS BY THE ATTORNEYS;

2. ANSWERS GIVEN BY WITNESSES WHICH I ORDERED STRICKEN AND INSTRUCTED YOU TO DISREGARD;

3. DOCUMENTS, PHOTOGRAPHS OR OTHER ITEMS WHICH MAY HAVE BEEN REFERRED TO BUT HAVE NOT BEEN ADMITTED INTO EVIDENCE. SINCE THEY ARE NOT PROPER EVIDENCE, YOU SHOULD NOT SPECULATE OR GUESS AS TO WHAT THEY MIGHT SAY OR SHOW AND YOU MAY NOT CONSIDER THEM EXCEPT TO THE EXTENT THAT AND FOR THE PURPOSE THAT THEY MAY HAVE BEEN READ OR SHOWN TO YOU DURING THE COURSE OF THE TRIAL.

4. ANYTHING YOU MAY HAVE HEARD OR SEEN OUTSIDE OF THIS COURTROOM REGARDING THE EVENTS IN QUESTION OR THE PARTICIPANTS IN THIS CASE.

AUTHORITY

Adapted from Salvatore & Bianco, CR# 89-73

E 8.1(_)

WITNESSES - CREDIBILITY - GENERAL FACTORS

AS TO THE TESTIMONY OF WITNESSES, YOUR PRINCIPAL TASK IS TO DETERMINE THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT YOU WILL GIVE TO THE TESTIMONY OF EACH.

IN MAKING THAT DETERMINATION, THERE ARE A NUMBER OF FACTORS THAT YOU MAY CONSIDER:

1. THE OPPORTUNITY OR LACK OF OPPORTUNITY THE WITNESS HAD TO ACQUIRE KNOWLEDGE OF THE FACTS ABOUT WHICH THE WITNESSES TESTIFIED. IN OTHER WORDS, WAS THE WITNESS IN A POSITION TO HAVE ACCURATELY PERCEIVED THE FACTS THAT THE WITNESS RELATED TO YOU.

2. THE RELIABILITY OR UNRELIABILITY OF THE WITNESS'S MEMORY. SOME PEOPLE HAVE VERY GOOD MEMORIES AND OTHERS HAVE POOR MEMORIES. ALTHOUGH A WITNESS MAY HAVE BEEN IN A GOOD POSITION TO OBSERVE OR PERCEIVE THE FACTS TO WHICH HE OR SHE TESTIFIED, YOU MAY DISCOUNT THAT TESTIMONY IF YOU DETERMINE THAT THE WITNESS DOES NOT CLEARLY OR ACCURATELY REMEMBER THE FACTS IN QUESTION.

3. THE WITNESS'S APPEARANCE ON THE STAND. ONE REASON WE

REQUIRE ALL WITNESSES TO COME IN AND TESTIFY IN FRONT OF YOU RATHER THAN LETTING ONE WITNESS TELL YOU WHAT OTHERS HAVE SAID IS THAT THE LAW FEELS THAT IT IS IMPORTANT FOR YOU TO OBSERVE THE WITNESS WHILE YOU HEAR THE TESTIMONY. FROM YOUR OBSERVATIONS, YOU CAN DRAW SOME CONCLUSIONS ABOUT THE WITNESS'S CREDIBILITY. THE WITNESS MAY HAVE APPEARED TO BE A PERSON WHO WAS TELLING THE COMPLETE AND UNADULTERATED TRUTH. ON THE OTHER HAND, YOU MAY HAVE FELT THAT THE WITNESS WAS SLANTING THINGS ONE WAY OR ANOTHER EITHER CONSCIOUSLY OR UNCONSCIOUSLY. YOU SHOULD TAKE THIS INTO ACCOUNT IN DETERMINING HOW MUCH WEIGHT TO GIVE TO EACH WITNESS'S TESTIMONY.

4. THE PROBABILITY OR IMPROBABILITY OF THE WITNESS'S TESTIMONY. YOU NEED NOT ACCEPT EVERYTHING THAT A WITNESS TESTIFIES TO EVEN THOUGH NO OTHER WITNESS CONTRADICTED THAT TESTIMONY. IF WHAT THE WITNESS HAD TO SAY SOUNDED HIGHLY UNLIKELY OR IMPOSSIBLE, YOU CAN TAKE THAT INTO ACCOUNT IN DECIDING HOW MUCH WEIGHT TO GIVE TO THAT TESTIMONY.

5. WHETHER THE WITNESS HAD ANYTHING TO GAIN OR LOSE FROM

THE OUTCOME OF THIS CASE. IN OTHER WORDS, WAS THE WITNESS TOTALLY IMPARTIAL OR DID THE WITNESS HAVE SOME STAKE IN THE OUTCOME OR SOME REASON TO FAVOR ONE SIDE OR THE OTHER? THAT DOESN'T MEAN THAT EVERY WITNESS WHO HAS A STAKE IN THE OUTCOME OF THE CASE IS NOT TO BE BELIEVED. THE INDIVIDUALS WHO ARE IN THE BEST POSITION TO OBSERVE EVENTS OFTEN STAND TO GAIN OR LOSE BY THE OUTCOMES OF LAWSUITS OR CRIMINAL PROSECUTIONS THAT ARISE FROM THOSE EVENTS. SO YOU SHOULD NOT AUTOMATICALLY DISCOUNT THE TESTIMONY OF A WITNESS WITH SOMETHING TO GAIN OR LOSE, BUT YOU SHOULD CONSIDER THAT FACTOR IN WEIGHING THAT WITNESS'S TESTIMONY, ESPECIALLY WHEN THAT TESTIMONY CONFLICTS WITH THE TESTIMONY OF OTHER WITNESSES WHO ARE TOTALLY DISINTERESTED OR IMPARTIAL.

AUTHORITY

A trial judge should not comment on the credibility of witnesses either by pointing out that a criminal defendant has a strong interest in the outcome of the case or by informing the jury that an immunized witness may still be prosecuted for perjury if he lies under oath. U.S. v. Dwyer, 843 F.2d 60 63-64 (1st Cir. 1988).

Taken from United States v. Olivo, CR 05-70.

E 8.2(_)

WITNESSES - CREDIBILITY - GOVERNMENT AGENTS

THE FACT THAT A WITNESS MAY BE EMPLOYED BY A LAW ENFORCEMENT AGENCY DOES NOT, BY ITSELF, MEAN THAT YOU SHOULD GIVE THAT WITNESS'S TESTIMONY ANY GREATER OR ANY LESSER WEIGHT SIMPLY BECAUSE OF THAT FACT. YOU SHOULD ASSESS THE CREDIBILITY AND TESTIMONY OF SUCH A WITNESS BY APPLYING THE SAME FACTORS AS YOU WOULD WITH RESPECT TO ANY OTHER WITNESS.

AUTHORITY

Adapted from Underwood, CR#88-41

WITNESSES - NUMBER - WEIGHT OF TESTIMONY

IN EVALUATING THE TESTIMONIAL EVIDENCE, REMEMBER THAT YOU ARE NOT REQUIRED TO BELIEVE SOMETHING TO BE A FACT SIMPLY BECAUSE A WITNESS HAS STATED IT TO BE A FACT AND NO ONE HAS CONTRADICTED WHAT THAT WITNESS SAID. IF, IN THE LIGHT OF ALL OF THE EVIDENCE, YOU BELIEVE THAT THE WITNESS IS MISTAKEN OR HAS TESTIFIED FALSELY OR THAT HE OR SHE IS PROPOSING SOMETHING THAT IS INHERENTLY IMPOSSIBLE OR UNWORTHY OF BELIEF, YOU MAY DISREGARD THAT WITNESS' TESTIMONY EVEN IN THE ABSENCE OF ANY CONTRADICTORY EVIDENCE.

YOU SHOULD ALSO BEAR IN MIND THAT IT IS NOT THE NUMBER OF WITNESSES TESTIFYING ON EITHER SIDE OF A PARTICULAR ISSUE THAT DETERMINES WHERE THE WEIGHT OF THE EVIDENCE LIES. RATHER, IT IS THE QUALITY OF THE WITNESSES' TESTIMONY THAT COUNTS.

THUS, JUST BECAUSE ONE WITNESS TESTIFIES ON ONE SIDE OF AN ISSUE AND ONE WITNESS TESTIFIES ON THE OTHER SIDE DOES NOT

NECESSARILY MEAN THAT YOU MUST CONSIDER THE EVIDENCE EVENLY BALANCED. IF YOU FEEL THAT ONE OF THE WITNESSES WAS MORE CREDIBLE THAN THE OTHER, FOR WHATEVER REASON, YOU MAY FIND THAT THE WEIGHT OF THE EVIDENCE LIES ON THE SIDE OF THAT WITNESS.

SIMILARLY, JUST BECAUSE THERE MAY BE MORE WITNESSES TESTIFYING ON ONE SIDE OF AN ISSUE THAN ON THE OTHER DOES NOT MEAN THAT THE WEIGHT OF THE EVIDENCE LIES IN FAVOR OF THE GREATER NUMBER OF WITNESSES. ONCE AGAIN, IT IS THE CREDIBILITY OR QUALITY OF THE TESTIMONY THAT DETERMINES WHERE THE WEIGHT OF THE EVIDENCE LIES.

E 10.1(_)

EXHIBITS

IN ADDITION TO ASSESSING THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT TO BE GIVEN TO THEIR TESTIMONY, YOU SHOULD ALSO EVALUATE THE EXHIBITS WHICH YOU WILL HAVE WITH YOU IN THE JURY ROOM. EXAMINE THEM AND CONSIDER THEM CAREFULLY.

HOWEVER, BEAR IN MIND THAT MERELY BECAUSE AN EXHIBIT HAS BEEN ADMITTED INTO EVIDENCE DOES NOT MEAN THAT YOU ARE REQUIRED TO ACCEPT IT AT FACE VALUE. LIKE THE TESTIMONY OF A WITNESS, THE SIGNIFICANCE OF AN EXHIBIT OR THE WEIGHT YOU ATTACH TO IT WILL DEPEND UPON YOUR EVALUATION OF THAT EXHIBIT IN LIGHT OF ALL THE FACTS AND CIRCUMSTANCES OF THE CASE.

AUTHORITY

Taken from USA v. Underwood, CR 88-041

CIRCUMSTANTIAL EVIDENCE

AS I MENTIONED PREVIOUSLY, YOU MAY CONSIDER ONLY THE EVIDENCE THAT IS PROPERLY BEFORE YOU. HOWEVER, THAT DOES NOT MEAN THAT, IN DETERMINING THE FACTS, YOU ARE LIMITED TO THE STATEMENTS OF THE WITNESSES OR THE CONTENTS OF THE EXHIBITS.

IN REACHING YOUR CONCLUSIONS, YOU ARE PERMITTED TO DRAW, FROM FACTS WHICH YOU FIND HAVE BEEN PROVEN, SUCH REASONABLE INFERENCES AS SEEM JUSTIFIED IN THE LIGHT OF YOUR EXPERIENCE.

INFERENCES ARE DEDUCTIONS OR CONCLUSIONS WHICH REASON AND COMMON SENSE LEAD YOU TO DRAW FROM FACTS WHICH HAVE BEEN ESTABLISHED BY THE EVIDENCE IN THE CASE.

SUCH EVIDENCE IS SOMETIMES CALLED CIRCUMSTANTIAL EVIDENCE.

TO PUT IT ANOTHER WAY, A FACT MAY BE PROVED EITHER BY DIRECT EVIDENCE OR BY CIRCUMSTANTIAL EVIDENCE. DIRECT EVIDENCE INCLUDES SUCH THINGS AS THE TESTIMONY OF AN EYEWITNESS WHO PERSONALLY

OBSERVED THE FACT IN QUESTION OR A PHOTOGRAPH OR DOCUMENT SHOWING THE ACTUAL THING DESCRIBED.

CIRCUMSTANTIAL EVIDENCE CONSISTS OF PROOF OF A SERIES OF FACTS OR CIRCUMSTANCES FROM WHICH THE EXISTENCE OR NONEXISTENCE OF ANOTHER FACT MAY BE REASONABLY INFERRED.

THE LAW MAKES NO DISTINCTION BETWEEN THE WEIGHT TO BE GIVEN TO DIRECT AND CIRCUMSTANTIAL EVIDENCE. HOWEVER, IT DOES REQUIRE THAT ANY FACT REQUIRED TO CONVICT A DEFENDANT BE PROVEN BEYOND A REASONABLE DOUBT.

GIVE EXAMPLE OF CIRCUMSTANTIAL EVIDENCE: FIRE IN THE BUILDING.

AUTHORITY

Adapted from Salvatore & Bianco, CR# 89-73; Tamarez, CR# 91-28; Tamarez, CR# 91-28; Garcia, CR#91-71.

Note: The court should not give an instruction that where facts are susceptible to two reasonable inferences, one of which points to innocence and the other to guilt, the jury must acquit the defendant. Such an instruction is confusing and unnecessary when the jury has been property instructed with respect to reasonable doubt. Taglianetti v. U.S., 398 F.2d 558, 568 (1st Cir. 1968).
Note: The court need not give a charge to the effect that a finding of guilty cannot be based on circumstantial evidence unless such evidence cannot be reconciled with any rational conclusion of innocence. U.S. v. Hicks, ___ F.2d ___ (1st Cir. 5/27/88)

E 13.1(_)

CONDUCT OF COURT - GENERAL

AS I HAVE SAID BEFORE, IT IS UP TO YOU TO DETERMINE THE FACTS IN THIS CASE. YOU SHOULD NOT INTERPRET ANYTHING I HAVE SAID OR DONE DURING THIS TRIAL AS EXPRESSING AN OPINION ON MY PART AS TO WHAT THE FACTS IN THIS CASE ARE. I HAVE NOT INTENDED TO EXPRESS ANY SUCH OPINION AND YOU SHOULD NOT BE CONCERNED ABOUT WHAT MY OPINIONS MIGHT BE REGARDING THE FACTS. THAT IS A MATTER FOR YOU TO DECIDE.

AUTHORITY

OBJECTIONS BY COUNSEL

DURING THIS TRIAL THERE HAVE BEEN OCCASIONS WHEN THE ATTORNEYS HAVE OBJECTED TO A QUESTION THAT WAS ASKED OF A WITNESS. YOU SHOULD NOT PENALIZE AN ATTORNEY, OR MORE IMPORTANTLY, HIS OR HER CLIENT, FOR OBJECTING. IT IS THE ATTORNEY'S RIGHT AND DUTY TO PROTECT A CLIENT'S INTERESTS BY OBJECTING TO WHAT THE ATTORNEY MAY BELIEVE IS EVIDENCE THAT DOES NOT SATISFY THE REQUIREMENTS OF THE RULES OF EVIDENCE.

IF I SUSTAINED THE OBJECTION, IT IS IMPORTANT THAT YOU NOT SPECULATE ABOUT WHAT THE ANSWER TO THE OBJECTED TO QUESTION MIGHT HAVE BEEN. BY SUSTAINING THE OBJECTION, THE COURT HAS DETERMINED THAT THE EVIDENCE SHOULD NOT BE CONSIDERED BY YOU.

AUTHORITY

THE GOVERNMENT AS A PARTY

THE MERE FACT THAT THIS CASE IS BROUGHT IN THE NAME OF THE UNITED STATES OF AMERICA DOES NOT ENTITLE THE PROSECUTION TO ANY GREATER CONSIDERATION THAN THAT ACCORDED TO THE DEFENDANT. BY THE SAME TOKEN, IT DOES NOT MEAN THAT THE PROSECUTION IS ENTITLED TO ANY LESS CONSIDERATION. ALL PARTIES, WHETHER GOVERNMENT OR INDIVIDUALS, STAND AS EQUALS AT THE BAR OF JUSTICE.

AUTHORITY

E 16.1(_)

BIAS AND PREJUDICE

NEITHER BIAS IN FAVOR OF ANY PERSON OR CAUSE, PREJUDICE AGAINST ANY PERSON OR CAUSE, NOR SYMPATHY OF ANY KIND SHOULD BE PERMITTED TO INFLUENCE YOU IN THE COURSE OF YOUR DELIBERATIONS.

ALL THAT ANY PARTY HERE IS ENTITLED TO, OR, FOR THAT MATTER EXPECTS, IS A VERDICT BASED UPON YOUR FAIR, SCRUPULOUS AND CONSCIENTIOUS EXAMINATION OF THE EVIDENCE BEFORE YOU AND YOUR APPLICATION OF THE LAW AS I HAVE EXPLAINED IT TO YOU.

AUTHORITY

E 17.1(_)

VERDICT - UNANIMITY REQUIRED

IN ORDER TO RETURN A VERDICT IN THIS CASE, ALL TWELVE OF YOU MUST AGREE AS TO WHAT THAT VERDICT WILL BE. YOU CANNOT RETURN A VERDICT OF EITHER GUILTY OR NOT GUILTY WITH RESPECT TO ANY CHARGE AGAINST ANY DEFENDANT UNLESS YOUR DECISION IS UNANIMOUS.

THERE ARE TWO THINGS THAT YOU SHOULD KEEP IN MIND DURING THE COURSE OF YOUR DELIBERATIONS.

FIRST, YOU HAVE A DUTY TO CONSULT WITH EACH OTHER IN AN EFFORT TO REACH AGREEMENT IF THAT CAN BE DONE WITHOUT SACRIFICING YOUR INDIVIDUAL JUDGMENTS.

THEREFORE, IN THE EVENT OF DISAGREEMENT, YOU SHOULD LISTEN TO WHAT YOUR FELLOW JURORS HAVE TO SAY AND YOU SHOULD BE WILLING TO RE-EXAMINE YOUR OPINION AND TO CHANGE IT IF YOU BECOME CONVINCED THAT YOUR OPINION WAS INCORRECT.

ON THE OTHER HAND, YOU MUST RECOGNIZE THAT EACH OF YOU HAS AN INDIVIDUAL RESPONSIBILITY TO VOTE FOR THE VERDICT THAT YOU BELIEVE IS THE CORRECT ONE BASED ON THE EVIDENCE THAT HAS BEEN PRESENTED AND THE LAW AS I HAVE EXPLAINED IT.

THEREFORE, YOU SHOULD NOT SURRENDER YOUR HONEST BELIEF AS TO WHAT THE VERDICT SHOULD BE EVEN THOUGH SOME OR EVEN ALL OF THE OTHER JURORS MAY DISAGREE.

IN OTHER WORDS, YOU SHOULD NOT CHANGE YOUR VOTE SIMPLY FOR THE PURPOSE OF RETURNING A VERDICT.

AUTHORITY

See, Davitt & Blackmar § 20.01
A.B.A. project on minimum standards for criminal justice.

JURY - POST-CHARGE CHECKLIST

1. TAKE OBJECTIONS TO CHARGE

2. HAVE ATTORNEYS CHECK EXHIBITS

3. EXCUSE ALTERNATES - THEY ARE TO LEAVE THE BUILDING

4. APPOINT FOREPERSON AND EXPLAIN DUTIES

   - MODERATOR

   - SPOKESPERSON IF NECESSARY TO COMMUNICATE BEFORE VERDICT

   - SIGN VERDICT FORMS AND INTERROGATORIES

   - DELIVER VERDICT

5. EXPLAIN PROCEDURE TO BE FOLLOWED IF ANY QUESTIONS OR OTHER REASON TO COMMUNICATE

   - PUT IT IN WRITING

   - BE SPECIFIC

   - DO NOT INDICATE HOW YOU ARE LEANING OR RESULTS OF STRAW VOTES

6. WILL HAVE COPY AND TAPE OF CHARGE IN JURY ROOM

7. EXPLAIN HOURS OF DELIBERATION

   - LUNCH BREAKS

   - PERIODIC INQUIRIES RE: PROGRESS NOT INTENDED AS PRESSURE

8. SWEAR MARSHAL

9. TELL JURY CASE IN THEIR HANDS AND SEND THEM OUT

10. TELL ATTORNEYS O.K. TO LEAVE BUILDING ON 2 CONDITIONS

    - TELL CLERK WHERE YOU CAN BE REACHED

    - BE ABLE TO RETURN ON 10 MINUTES NOTICE

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