UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. CR No. 09-59

ALEJANDRO SANTANA

JURY INSTRUCTIONS

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PART I: GENERAL INSTRUCTIONS

1. INTRODUCTION

Members of the jury, we have now come to the end of this trial. This case, like all criminal cases, is a serious one. I say this because the defendant and the United States have a deep concern for your mature consideration of the evidence as presented and the law which I am about to give you.

Although you as the jury are the sole judges of the facts, you are duty bound to follow the law as I instruct you, and to apply that law to the facts as you find them to be from the evidence which has been presented during this trial. You are not to single out any one instruction as stating the law. Rather, you must consider these instructions in their entirety. You are not to be concerned with the wisdom of any rule of law, regardless of any opinion which you might have as to what the law ought to be. It would be a violation of your sworn duty to base your verdict upon any version of the law other than that which I am about to give to you.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denials made by the "not guilty" plea of the defendant. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the government are entitled to a fair and impartial consideration of all the evidence. Moreover, the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

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

2. EVIDENCE RECEIVED IN THIS CASE

For the purpose of determining whether or not the government has sustained its burden of proof, you must evaluate all of the evidence. The evidence in this case consists of the sworn testimony of the witnesses and all exhibits received in evidence.

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

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

3. INFERENCES – DEFINED

In determining whether the government has sustained its burden of proof, you are to consider only the evidence. But in your consideration of the evidence, you are not limited to the statements of witnesses, or solely to what you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been proven, such reasonable inferences as seem justified in light of your experiences.

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. You may not, however, draw an inference from another inference.

4. EVIDENCE – DIRECT AND CIRCUMSTANTIAL

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness that the witness saw something. Circumstantial evidence is indirect evidence, that is, proof of a fact or facts from which you could draw the inference, by reason and common sense, that another fact exists, even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

5. OBJECTIONS AND WEIGHT OF THE EVIDENCE

The fact that the Court may have admitted evidence over objection should not influence you in determining the weight that you will give such evidence. Nor should statements made by counsel, either for or against the admission of offered evidence, influence your determination of the weight that you will give the evidence if admitted. In other words, you should determine the weight that you will give such evidence on the basis of your own independent consideration of it and without regard to the statements of counsel concerning the admissibility of such evidence.

6. JURY'S RECOLLECTION CONTROLS

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

7. PRESUMPTION OF INNOCENCE

It is a cardinal principle of our system of justice that every person accused of a crime is presumed to be innocent unless and until his guilt is established beyond a reasonable doubt. The presumption is not a mere formality. It is a matter of the utmost importance.

The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant. The defendant before you has the benefit of that presumption throughout the trial, and you are not to convict him of these charges unless you are unanimously persuaded of his guilt on each charge beyond a reasonable doubt.

This presumption was with the defendant when the trial began and remains with the defendant even now as I speak to you and will continue with him into your deliberations unless and until you are convinced that the government has proven the defendant's guilt beyond a reasonable doubt.

8. BURDEN OF PROOF

As I have said, the burden is upon the government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilty. A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two

conclusions–one that a defendant is guilty as charged, the other that the defendant is not guilty–you will find the defendant not guilty.

It is not sufficient for the government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond a reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

I instruct you that what the government must do to meet its heavy burden is to establish the truth of each element of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against the defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

9. INDICTMENT – DEFINED

An indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. The indictment was returned by a grand jury, which heard only the government's side of the case.

The fact that the defendant had an indictment filed against him is no evidence whatsoever of his guilt. An indictment is nothing more than an accusation. It is a piece of paper filed with the Court to bring a criminal charge against a defendant. Here, Defendant Santana has pleaded not guilty to both counts. The government therefore has the burden of proving the allegations made against the defendant beyond a reasonable doubt.

10. DEFINITION OF "ON OR ABOUT"

You will note that the indictment charges that the offenses were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient that the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged in the indictment.

PART II: THE OFFENSES CHARGED

11. CHARGES CONTAINED IN THE INDICTMENT

The indictment in this case contains two counts or "charges." You should consider each charge and the evidence pertaining to it separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to the other offense charged.

12. COUNT ONE: CONSPIRACY TO DISTRIBUTE AND TO POSSESS WITH INTENT TO DISTRIBUTE

Count One of the indictment charges the defendant with a violation of Section 846 of Title 21 of the United States Code. Specifically, Count One charges that from a time unknown up to on or about June 4, 2008, in the District of Rhode Island, the defendant did knowingly, intentionally, and willfully combine, conspire, confederate, and agree with others known and unknown to the grand jury, to knowingly and intentionally distribute, and to posses with intent to distribute, over 500 grams of a mixture and substance containing a detectable amount of cocaine, a Schedule II Controlled Substance

13. 21 U.S.C. § 846

Section 846 provides that "[a]ny person who ... conspires to commit... [the crime of possession with intent to distribute a controlled substance]" is guilty of a crime against the United States.

14. 21 U.S.C. § 846 – ELEMENTS OF THE OFFENSE

To sustain its burden of proof on Count One, the government must prove beyond a reasonable doubt each of the following two essential elements:

One: That in or about the period described in the indictment, there existed an agreement to distribute and to possess with intent to distribute 500 grams or more of cocaine; and

Two: That the defendant willfully joined in that agreement.

15. CONSPIRACY GENERALLY

A conspiracy is an agreement or combination of two or more persons to violate the law. It is a kind of partnership in which each member of the conspiracy, just by being a member of the conspiracy, becomes an agent of every other member of the conspiracy. What this means is that each conspirator not only acts for himself, but also acts for the other conspirators. In other words, a conspiracy is a combination or an agreement to disobey or disregard the law to achieve the unlawful purpose.

In this case, the conspiracy alleged is an agreement to distribute and to possess with intent to distribute 500 grams or more of cocaine. It is not necessary that the government prove that the unlawful purpose of the conspiracy actually was achieved in order to prove that the conspiracy existed. It must prove, however, that the members in some way or manner, or through some means, came to a mutual understanding to try and accomplish their common unlawful purpose and that they did so knowingly, willfully, and intentionally.

16. CONSPIRACY—TIME PERIOD

The indictment alleges that the conspiracy began at a time unknown and continued up until and including on or about June 4, 2008. In determining whether the defendant conspired as charged, you need not find that a conspiracy existed during the entire period charged. It is sufficient that you find that a conspiracy was in existence for any period of time reasonably included by the period alleged in the indictment, and that the defendant was a member of that conspiracy during that period.

17. EXISTENCE OF THE CONSPIRACY

In your consideration of the conspiracy offense alleged in Count One, you should first determine, from all of the testimony and evidence in the case, whether or not a conspiracy existed as charged. To establish the existence of a conspiracy, the evidence need not show that the conspirators entered into any express or formal agreement, or even that they directly, by spoken or written words, stated between themselves just what their object or purpose was, or the details of the scheme, or the means by which they would succeed. It is sufficient if an agreement is shown by conduct evidencing a silent understanding to share a purpose to violate the law.

Since a conspiracy, by its very nature, is often secret, neither the existence of the common agreement or scheme nor the fact of a defendant's participation in it need be proven by direct evidence. Both may be inferred from the development and course of dealings between a defendant and other conspirators. However, mere similarity of conduct among various persons and the fact that they may have been associated together or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. However, these may be factors for you to consider.

18. WILLFULLY"—DEFINED

In addition to proving that an unlawful agreement existed, the government must also prove that the defendant willfully entered into that agreement. To act "willfully" means to act voluntarily and intelligently and with the specific intent to do something that the law forbids, and not to act by ignorance, accident, or mistake.

19. SPECIFIC INTENT

To establish that a defendant willfully joined a conspiracy, the government must prove two types of intent beyond a reasonable doubt: (1) an intent to agree, and (2) an intent that the underlying crime be committed. It is not necessary that the government prove that each conspirator agreed to commit the underlying offense personally. It is sufficient that each conspirator intended that the offense be committed, if not by himself, then by a co-conspirator.

20. PROOF OF AGREEMENT

Proof of a defendant's agreement must be based upon evidence of his own actions. You need not find that the defendant agreed specifically to, or knew about all of the details of the crime, or that he participated in every aspect of the agreement or even played a major role. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way that furthers some object or purpose of the conspiracy, is not thereby a conspirator.

Mere presence at the scene of a crime, mere association with others or merely knowing that a crime is being committed or is about to be committed is not enough to establish a person's agreement to participate in a conspiracy. An individual's intent may be inferred from all of the surrounding circumstances.

21. CONSPIRACY—IDENTITIES OF CO-CONSPIRATORS AND DETAILS OF CONSPIRACY

A member of a conspiracy need not know the names, identities or even the number of all his co-conspirators. Nor need the government prove that the defendant was aware of all the details of the conspiracy. An individual who joins a criminal venture with an indefinite outline takes his chances as to its membership and content, so long as they fall within the common purposes as they understand them.

22. CONSPIRACY—LIABILITY FOR PRIOR ACTS

Moreover, a conspirator need not become a member of the illegal agreement at its inception. Once he joins, he effectively adopts the previous acts and declarations of his fellow conspirators, whether he knows about them or not. This is because one who willfully joins an existing conspiracy is charged with the same responsibility for its acts as if he had been one of the originators or instigators of the conspiracy.

23. CONSPIRACY—RELATIVE ROLES

The extent of a defendant's participation and role in the conspiracy is not determinative of whether that defendant is guilty or not. Indeed, two persons may be found to have conspired even though the evidence of one's role is greater than the evidence of the other's role. However, as to the defendant, the government must prove beyond a reasonable doubt that he knowingly and willfully became a member of the conspiracy. If the government fails to establish beyond a reasonable doubt that the defendant willfully agreed to participate in the conspiracy, then you must find the defendant not guilty on this charge.

24. "POSSESSION"—DEFINED

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

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

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

Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession, sole as well as joint possession. I caution you, however, that mere proximity to drugs or mere association with another person who exercises control over drugs is insufficient to support a finding of possession.

25. "WITH INTENT TO DISTRIBUTE"—DEFINED

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

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

In determining a person's "intent to distribute" controlled substances, you may consider, among other things, the quantity of the controlled substance, the presence or absence of packaging materials, scales, cutting agents, and large amounts of cash. The law does not require you to draw the inference of intent from this evidence, but you may do so.

26. COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE

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

27. NATURE AND AMOUNT OF CONTROLLED SUBSTANCE

To sustain its burden of proof as to Count One, the government must prove beyond a reasonable doubt that the controlled substance involved here was cocaine and that the amount of cocaine that the defendant conspired to distribute and to possess with the intent to distribute was 500 grams or more.

You must determine what amount, if any, the government has proven that the defendant conspired to distribute and to possess with intent to distribute. You need not determine the precise amount but you are required to find beyond a reasonable doubt whether the amount involved was 500 grams or more of cocaine.

28. COUNT II: POSSESSION WITH INTENT TO DISTRIBUTE

Count Two of the indictment charges the defendant with a violation of Section 841(a)(1) and (b)(1)(B) of Title 21 of the United States Code and Section Two of Title 18 of the United States Code. Specifically, Count Two charges that on or about June 4, 2008, in the District of Rhode Island, the defendant did knowingly and intentionally posses with intent to distribute over 500 grams of a mixture and substance containing a detectable amount of cocaine, a Schedule II Controlled Substance.

29. 21 U.S.C. § 841

Section 841(a) of Title 21 of the United States Code provides, in part, that:

"[I]t shall be unlawful for any person knowingly or intentionally –
(1) to . . . possess with intent to . . . distribute . . . a controlled substance . . . ."

30. 21 U.S.C. § 841—ELEMENTS OF THE OFFENSE

There are three essential elements which the government must prove beyond a reasonable doubt in order to sustain its burden of proof on Count Two:

One: That the defendant possessed 500 grams or more of cocaine;

Two: That the defendant's possession was knowing and intentional; and

Three: That the defendant possessed the cocaine with the specific intent to distribute it.

31. "POSSESSION"—DEFINED

I have already instructed you on the definition of "Possession." You are to apply the same instructions here in determining whether the government has proven beyond a reasonable doubt that the defendant possessed the cocaine.

32. "WITH INTENT TO DISTRIBUTE"—DEFINED

I have already instructed you on the definition of "With Intent to Distribute." You are to apply those same instructions here in determining whether the government has proven that the defendant had the requisite intent to distribute the cocaine.

33. COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE

I have already instructed you that cocaine is a Schedule II Controlled Substance. You are to apply the same instructions here.

34. NATURE AND AMOUNT OF CONTROLLED SUBSTANCE

I have already instructed you on the law regarding the nature and amount of controlled substance. You are to apply those same instructions here in determining whether the government has proven the nature and amount of the controlled substance beyond a reasonable doubt.

35. AIDING AND ABETTING

Count 2 additionally charges the defendant with a violation of 18 U.S.C. § 2, or aiding and abetting another in the commission of the crime. To "aid and abet" means to intentionally help someone else commit a crime. Someone who "aids and abets" another to commit a crime is as guilty of the crime as the person who actually commits the crime.

To establish aiding and abetting, the government must prove beyond a reasonable doubt each of the following essential elements:

One:	That someone else committed the crime of possession with intent to distribute cocaine, and
Two:	That the defendant willfully associated himself with the crime of possession with intent to distribute cocaine, and willfully participated in the endeavor, seeking to make it succeed

This means that the government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him. The defendant need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its execution to be guilty of aiding and abetting. A general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting.

An act is done "willfully" if done voluntarily and intentionally with the intent that something the law forbids be done—that is to say with bad purpose, either to disobey or disregard the law.

PART III: CONSIDERATION OF THE EVIDENCE

36. EXHIBITS

Exhibits admitted into evidence by the Court are properly before you, and will be available to you during your deliberations. An exhibit marked by the Court for identification is not evidence in the case unless or until it was admitted by the Court as a full exhibit. If it has not been admitted as a full exhibit, you may not consider it. If it was admitted, however, it is just as much a part of the evidence in the case as the testimony which you have heard from the witness stand.

37. REMARKS OF COUNSEL

Remarks, statements, or questions by counsel are not evidence and are not to be considered by you as evidence during your deliberations. Neither should you permit objections by counsel to the admission of evidence, or the rulings of the Court, create any bias or prejudice toward counsel or the party whom he represents. It is the duty of counsel for both sides to represent their clients vigorously and to defend their client's rights and interests. In the performance of that duty, counsel freely may make objection to the admission of offered evidence, or to any other ruling of the Court, and should not be penalized for doing so.

38. CONDUCT OF COURT AND COUNSEL

If during trial, or in instructing you, I have said or done anything that has caused you to believe that I was indicating an opinion as to what the facts are in this case, you should put that belief out of your mind. I did not intend to indicate any such opinion. In fact, I try not to have an opinion about the case because you are the sole and exclusive judges of the facts.

In determining the facts, you are to consider only that evidence which has properly been placed before you. It is the Court's duty to pass upon the admissibility of offered evidence, that is, to decide whether or not offered evidence should be considered by you. Evidence admitted by the Court is properly before you for your consideration; evidence which the Court has refused to admit, or may have stricken from the record after you heard it, is not a proper subject for your deliberations and is not to be considered by you.

PART IV: CREDIBILITY OF WITNESSES

39. TESTIMONY OF WITNESSES

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

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

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.

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

40. OPINION EVIDENCE—EXPERT WITNESS

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

Merely because an expert witness has expressed an opinion, of course, does not mean that you must accept it. As with any other witness, you should consider the testimony and give it such weight as you think it deserves. In this case, Michael Liberto was offered as an expert witness.

PART V: THE DELIBERATIONS AND VERDICT

41. UNANIMOUS VERDICT—JURY CONDUCT

To render a verdict, all twelve of you must agree, that is, your verdict must be unanimous.

Therefore, during your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your view simply because a majority holds to the contrary view, but in pursuing your deliberations, you should keep your minds reasonably open with respect to any point in dispute so that you will not be prevented from achieving a unanimous verdict due to mere stubbornness. It is your right, however, to maintain your view. The vote of each juror is as important as the vote of any other juror, and you need not give up your view, sincerely held, simply because a majority holds to the contrary view.

Do not approach your consideration of the case in an intellectual vacuum. You are not required to disregard your experiences and observations in the ordinary everyday affairs of life. Indeed, your experiences and observations are essential to your exercise of sound judgment and discretion, and it is your right and duty to consider the evidence in light of such experiences and observations. It is hoped and anticipated that you will sift all of the evidence in this case through maturity and common sense.

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

42. COMMUNICATIONS BETWEEN COURT AND JURY DURING DELIBERATIONS

If it becomes necessary during your deliberations to communicate with the Court, you may send a note signed by your foreperson, or by one or more members of the jury. The foreperson may then hand such written request or question to the marshal in whose charge you will be placed. The marshal will bring any written questions or requests to me. I will have you brought into the courtroom and will attempt to fulfill your request or answer your question. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Bear in mind also that you are never to reveal to any person—not even to the Court—how the jury stands, numerically or otherwise, on the question of whether the accused is guilty or not guilty, until after you have reached a unanimous verdict.

You may now retire with the marshal to enter upon your deliberations. When you have reached a verdict, you will return here and make your verdict known.