

Jury Instructions:

**United States of America v. Rolando Rojas
(11-125-M)**

I intend to give you a copy of these instructions for use in the jury room, so feel free to simply listen and not worry about note taking

Introduction

At this time, it is my duty to instruct you on the law applicable to this case. 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, and this is true whether you personally agree with the law 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.

Presumption of Innocence

As I told you at the start of this trial, Mr. Rojas is presumed to be innocent of the accusations against him. This presumption of innocence remains with Mr. Rojas unless and until the government presents evidence satisfying you beyond a reasonable doubt that he 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 proven Mr. Rojas guilty beyond a reasonable doubt, the presumption of innocence disappears and is of no further avail to him. However, unless and until that time, the presumption remains with Mr. Rojas.

Defendant's Constitutional Right Not to Testify

A Defendant in a criminal trial has a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that Mr. Rojas did not testify. For you to draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

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 Mr. Rojas. 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.

Proof of All Elements

I will shortly explain the offenses with which Mr. Rojas is charged and the elements the government must prove in order to establish that Mr. Rojas is guilty of any of those three offenses.

In order for the government to prove Mr. Rojas guilty of an offense, it must convince you, beyond a reasonable doubt, that it has proved each and every element of that offense. 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, then you must find Mr. Rojas 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 Mr. Rojas has been charged have been proven to you beyond a reasonable doubt, then you should find him guilty of that offense.

Reasonable Doubt

As I have said, the burden is upon the government to prove beyond a reasonable doubt that Mr. Rojas is guilty of the charges made against him. It is a strict and heavy burden, but it does not mean that Mr. Rojas' guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning Mr. Rojas' guilt.

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, Mr. Rojas 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 Mr. Rojas is guilty as charged, the other that Mr. Rojas is not guilty — then you must find Mr. Rojas 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 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.

Concluding my instructions on the burden, then, I instruct you that what the government must do to meet its heavy burden is to establish the truth of each part 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 Mr. Rojas, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether Mr. Rojas is guilty of a particular offense, then you must give Mr. Rojas the benefit of the doubt and find Mr. Rojas not guilty of that offense.

Consider Each Count Separately

You must consider each count separately. The fact that you find the defendant guilty or not guilty on one count does not mean that you should find the defendant guilty or not guilty on any other count.

Counts I, II, and III

In Counts I, II, and III, Mr. Rojas is accused of violating Section 841 of Title 21 of the United States Code. This Section provides, in relevant part:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to distribute, . . . or possess with intent to . . . distribute. . . a controlled substance.

Mr. Rojas is charged with three counts of distributing cocaine base. It is against federal law to distribute, that is, to transfer, cocaine base to another person.

In Count I, Mr. Rojas is accused of distributing a mixture and substance containing a detectable amount of cocaine base in Rhode Island on or about January 10, 2011.

In Count II, Mr. Rojas is accused of distributing 28 grams or more of a mixture and substance containing a detectable amount of cocaine base in Rhode Island on or about February 17, 2011.

In Count III, Mr. Rojas is accused of distributing 28 grams or more of a mixture and substance containing a detectable amount of cocaine base in Rhode Island on or about March 1, 2011.

You will note that each count happened on a different date, and that the second two counts, Count II and Count III, involve a quantity of cocaine base of 28 grams or more. Other than that, the elements of each count are the same.

For you to find Mr. Rojas guilty of any of these crimes, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that on the date alleged, Mr. Rojas transferred a mixture and substance containing a detectable amount of cocaine base to another person;

Second, that he knew the substance was a controlled substance;

Third, that Mr. Rojas acted intentionally, that is, that it was his conscious object to transfer the controlled substance to another person;

And Fourth, as to Count II and Count III only, you must find that the amount of the mixture and substance containing a detectable amount of cocaine base was 28 grams or more.

It is not necessary that Mr. Rojas benefitted in any way from the transfer of the cocaine base.

Possession

The term “possess” means to exercise authority, dominion or control over something. The law recognizes different kinds of possession. “Possession” includes both actual and constructive possession.

A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term “possession” in these instructions, I mean actual as well as constructive possession.

Knowingly

The word “knowingly,” as that term is used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

Cocaine Base, a Schedule II Controlled Substance

I instruct you as a matter of law that cocaine base is a Schedule II controlled substance. Whenever I refer to cocaine base in these instructions, I am referring to a mixture and substance containing a detectable amount of cocaine base.

Knowledge of the Controlled Substance

The government must prove that the offense involved a particular type and quantity of drug, and that Mr. Rojas knew that the offense involved a controlled substance. However, the

government does not have to prove that Mr. Rojas knew that he was distributing or possessing with the intent to distribute that particular drug type or that particular quantity.

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 proved 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; and
2. The exhibits that I have admitted into evidence.

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. Documents, photographs or other items which may have been referred to but have not been admitted into evidence; or
3. Anything you may have heard or seen outside of this courtroom regarding the events in question or the participants in this case.

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 witness 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. In other words, did the witness have a clear recollection of what happened or was the witness's memory uncertain or unclear.
3. The witness's appearance on the stand. Did the witness appear to be a person who was telling the complete and unadulterated truth, or did it appear that the witness was slanting things one way or another either consciously or unconsciously.
4. The probability or improbability of the witness's testimony. Did what the witness had to say sound reasonable or plausible or did it appear to be highly unlikely or impossible.
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.

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.

Undercover Agent

You have heard testimony that an undercover agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives worked undercover during this investigation. There is nothing illegal or improper with the government employing this technique. Whether or not you approve the use of an undercover agent to detect criminal acts is not to enter into your deliberation in any way. If you are satisfied beyond a reasonable doubt that Mr. Rojas committed the offenses charged in the indictment, the circumstance that the government made use of an undercover agent is irrelevant to your determination.

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 is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness's testimony even in the absence of any contradictory evidence.

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.

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.

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 proved, 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. (Example: rain on the pavement.)

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 proved beyond a reasonable doubt.

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.

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 client, for objecting. It is the attorney's right and duty to protect the 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.

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.

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 Mr. Rojas unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it 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. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

Foreperson And Duty to Deliberate

Juror # 1 Ms. Gill will be the foreperson. She will preside over the deliberations and speak for you here in court.

You will discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous, meaning all of you must agree. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

Return of Verdict

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign it and date it, and advise the Court that you are ready to return to the courtroom.

Copy of Instructions

I have instructed you on the law that governs your deliberations. I will send into the jury room a written copy of my instructions.