

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v.

CR No. 14-110 ML

ELIX JAVIER

JURY INSTRUCTIONS

TABLE OF CONTENTS

PART I: GENERAL INSTRUCTIONS

1. INTRODUCTION1

2. FUNCTION OF A JURY2

3. JURY’S RECOLLECTION CONTROLS2

4. PRESUMPTION OF INNOCENCE 2

5. BURDEN OF PROOF3

6. CONSIDER EACH COUNT SEPARATELY4

7. DEFENDANT’S RIGHT NOT TO TESTIFY OR INTRODUCE EVIDENCE 4

PART II THE OFFENSES CHARGED

8. INDICTMENT5

9. “ON OR ABOUT” – DEFINED5

10. CHARGES CONTAINED IN THE INDICTMENT5

11. COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE6

12. 21 U.S.C. §§ 846 AND 841(a)(1)6

13. DISTRIBUTION OF COCAINE – ESSENTIAL ELEMENTS6

14. POSSESSION WITH THE INTENT TO DISTRIBUTE COCAINE – ESSENTIAL ELEMENTS7

15. “KNOWINGLY” – DEFINED7

16. “POSSESSION” – DEFINED8

17. “WITH INTENT TO DISTRIBUTE” – DEFINED8

18. “DISTRIBUTION” – DEFINED9

19.	<u>CONSPIRACY TO DISTRIBUTE AND POSSESS WITH THE INTENT TO DISTRIBUTE COCAINE – ESSENTIAL ELEMENTS</u>	9
20.	<u>PROOF MAYBE CONJUNCTIVE OR DISJUNCTIVE</u>	9
21.	<u>CONSPIRACY – GENERALLY</u>	10
22.	<u>CONSPIRACY – TIME PERIOD</u>	11
23.	<u>EXISTENCE OF THE CONSPIRACY</u>	11
24.	<u>MEMBERSHIP IN THE CONSPIRACY</u>	12
25.	<u>INTENT</u>	13
26.	<u>CONSIDERATION OF ACTS AND STATEMENTS OF CO-CONSPIRATORS</u>	13
27.	<u>21 U.S.C. §§ 846 & 841(a)(1)</u>	14
28.	<u>ATTEMPT TO POSSESS WITH THE INTENT TO DISTRIBUTE COCAINE – ESSENTIAL ELEMENTS</u>	14
29.	<u>18 U.S.C. § 2 – AIDING AND ABETTING</u>	15
30.	<u>AIDING AND ABETTING – ESSENTIAL ELEMENTS</u>	15
31.	<u>NATURE OF CONTROLLED SUBSTANCE MUST BE PROVED BEYOND A REASONABLE DOUBT.</u>	16

PART III: CONSIDERATION OF THE EVIDENCE

32.	<u>EVIDENCE RECEIVED IN THIS CASE</u>	17
33.	<u>INFERENCES – DEFINED</u>	17
34.	<u>EVIDENCE – DIRECT AND CIRCUMSTANTIAL</u>	17
35.	<u>OBJECTIONS AND WEIGHT OF THE EVIDENCE</u>	18
36.	<u>EXHIBITS</u>	18
37.	<u>REMARKS OF COUNSEL</u>	19

38. CONDUCT OF COURT AND COUNSEL 19

39. TESTIMONY OF WITNESSES 20

40. OPINION EVIDENCE – EXPERT WITNESS 21

41. FLIGHT/CONSCIOUSNESS OF GUILT 21

PART IV: DELIBERATIONS AND VERDICT

42. UNANIMOUS VERDICT – JURY CONDUCT 23

43. COMMUNICATIONS BETWEEN COURT AND JURY DURING
DELIBERATIONS 24

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 denial 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. The accused and the government are entitled to an 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 government or individuals, stand as equals at the bar of justice.

2. FUNCTION OF A JURY

Ladies and gentlemen, you are the trier of facts; you alone must determine what the facts are in this particular case. My function and duty is to instruct you on the law that applies to this case. It is your duty to accept the law as I give it to you—whether or not you agree with it—and to apply that law to the facts as you find them.

3. 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.

4. PRESUMPTION OF INNOCENCE

In all criminal cases, there is a presumption of innocence. Every defendant under our system of law is presumed to be innocent of the accusation which is filed against him or her, and this presumption of innocence must remain with the defendant from the moment the charge is brought, throughout the trial, through the arguments of counsel, throughout the instructions of the Court, and throughout your deliberations when you retire to consider your verdict in the secrecy of the jury room.

The presumption of innocence remains unless and until you find that the defendant is

guilty beyond a reasonable doubt of a charge as stated in the indictment. If you find, however, that the defendant is guilty beyond a reasonable doubt of each and every element of the crime with which he is charged, the presumption of innocence disappears and is of no further avail to him.

5. BURDEN OF PROOF

In criminal cases, the law places the burden of proof upon the government. The government has the burden of proving each and every element of the offense as charged beyond a reasonable doubt.

What is meant by the term “beyond a reasonable doubt?” Obviously, the obligation resting upon the government to prove a defendant’s guilt beyond a reasonable doubt does not mean that it must do so beyond all conceivable doubts. Nor does it require the government to prove a defendant’s guilt to a mathematical or scientific certainty. Reasonable doubt means that the government must adduce evidence which, on examination, is found to be so convincing and compelling as to leave in your minds no reasonable doubt about the defendant’s guilt. We know from experience what a doubt is, just as we know when something is reasonable or unreasonable. Reasonable doubt by definition means a doubt founded upon reason and not speculation, that is, a doubt for which you can give some reason.

If, therefore, after reviewing all the evidence, there remains in your mind a doubt about the defendant’s guilt, and this doubt appears in the light of the evidence to be reasonable, your duty is to find the defendant not guilty. If, however, at the end of your deliberations, you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty, your duty

would be to return a verdict against him.

6. CONSIDER EACH COUNT SEPARATELY

You must consider each charge 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 the other count.

7. DEFENDANT'S RIGHT NOT TO TESTIFY OR INTRODUCE EVIDENCE

A defendant does not have to testify or introduce any evidence at all. This principle is related to the fact that the burden of proof is upon the government and not on the defendant.

A defendant in a criminal case need not say anything. It is the right of every defendant not to testify. This right is guaranteed by the Constitution. If the defendant chooses not to testify, you may not draw any adverse inference from that fact. By that I mean you may not say, "Well, he must have something to hide, otherwise he would have testified," or, "He must be guilty because he did not get up on the stand and tell me that he was not guilty." It is absolutely prohibited for you to draw such inferences in this case.

PART II: THE OFFENSES CHARGED

8. INDICTMENT

This case, like most criminal cases, began with the filing of an indictment. You will have the indictment before you in the course of your deliberations in the jury room. An indictment is not evidence. 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. The indictment simply brings this matter before you for determination. Beyond that, it has no significance whatsoever. Here, the defendant has pleaded not guilty and has put in issue the charges alleged in the indictment. The government therefore has the burden of proving the allegations made against the defendant.

9. “ON OR ABOUT” – DEFINED

You will note that the indictment charges that the offenses were committed “on or about” certain dates. 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 offense was committed on a date reasonably near the date alleged in the indictment.

10. CHARGES CONTAINED IN THE INDICTMENT

The indictment in this case contains two counts or “charges.” The defendant in this case is Elix Javier.

Count One of the indictment charges that from an unknown time through on or about July 7, 2014, in the District of Rhode Island and elsewhere, the defendant, Elix Javier, along with Juan C. Maldonado and others, known and unknown to the Grand Jury, did knowingly,

intentionally and willfully combine, conspire, confederate and agree with each other, to knowingly and intentionally distribute and possess with intent to distribute cocaine, a Schedule II Controlled Substance, in violation of Title 21, sections 841(a)(1) and 846 of the United States Code.

Count Two of the indictment charges that on or about July 7, 2014, in the district of Rhode Island, the defendant Elix Javier, did knowingly and intentionally, and aiding and abetting Juan C. Maldonado, attempt to possess with the intent to distribute cocaine, a Schedule II Controlled Substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 18 U.S.C. § 2.

11. COCAINE, A SCHEDULE II CONTROLLED SUBSTANCE

For simplicity, whenever I refer to cocaine in these instructions, I am referring to a mixture or substance containing a detectable amount of cocaine. I instruct you that cocaine is a Schedule II controlled substance.

12. 21 U.S.C. §§ 846 and 841(a)(1)

In Count One of the indictment, the defendant is charged with violating sections 846 and 841(a)(1) of Title 21 of the United States Code which provide that it is unlawful to conspire to distribute cocaine and possess with the intent to distribute cocaine.

13. DISTRIBUTION OF COCAINE – ESSENTIAL ELEMENTS

In Count One of the indictment the defendant is charged with conspiracy to distribute cocaine. In order to prove the crime of distribution of cocaine, the government must prove the

following three elements beyond a reasonable doubt:

One: That the defendant transferred a mixture or substance containing a detectable amount of cocaine to another person;

Two: That the defendant knew that the substance was a controlled substance; and

Three: That the defendant acted intentionally, that is, that it was his conscious object to transfer the controlled substance to another person

It is not necessary that the defendant have benefitted in any way from the transfer.

14. POSSESSION WITH THE INTENT TO DISTRIBUTE COCAINE – ESSENTIAL ELEMENTS

In Count One of the indictment the defendant is also charged with conspiracy to possess with the intent to distribute cocaine. In order to prove the crime of possession with the intent to distribute cocaine, the government must prove the following three elements beyond a reasonable doubt:

One: That the defendant possessed cocaine;

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

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

15. “KNOWINGLY” – DEFINED

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.

16. “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. You may find that the element of possession is proved if you find beyond a reasonable doubt that the defendant knowingly had actual or constructive possession of a controlled substance either alone or with others. 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.

17. “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" a controlled substance, 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 that you draw the inference of intent from this evidence, but you may do so.

18. "DISTRIBUTION" – DEFINED

The term "distribute" means to deliver a controlled substance. The term "deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance.

19. CONSPIRACY TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE COCAINE – ESSENTIAL ELEMENTS

To sustain its burden of proof as to the offense charged in Count One, conspiracy, the government must prove each of the following two elements beyond a reasonable doubt:

First, that in or about the period described in the indictment, there existed an agreement to distribute and to possess with intent to distribute cocaine; and

Second, that the defendant knowingly and willfully joined in that agreement.

20. PROOF MAY BE CONJUNCTIVE OR DISJUNCTIVE

In Count One the defendant is charged in the conjunctive. In other words, that count

charges the defendant with conspiracy to distribute cocaine and conspiracy to possess with intent to distribute cocaine. In order to establish guilt on this count, the government need not prove that the defendant agreed to both distribute cocaine and to possess with the intent to distribute cocaine. Guilt is established if the government, beyond a reasonable doubt, proves either that defendant agreed to distribute cocaine or possess with intent to distribute cocaine, as long as you are unanimous as to which of the two has been proven beyond a reasonable doubt. Guilt, of course, is also established where you unanimously find that defendant agreed both to distribute cocaine and to possess with intent to distribute cocaine, beyond a reasonable doubt.

Therefore, I instruct you that in Count One it is not necessary for the government to prove that the defendant both conspired to distribute cocaine and conspired to possess with intent to distribute cocaine. In order to establish guilt, it is sufficient for the government to prove that the defendant agreed to either distribute or possess with intent to distribute cocaine.

21. 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, 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 accomplish their common unlawful purpose and that they did so knowingly, willfully, and intentionally.

22. CONSPIRACY-TIME PERIOD

The indictment charges that the conspiracy existed from a time unknown until on or about July 7, 2014. In determining whether the defendant conspired as charged, you need not find the precise time frame in which the conspiracy was in existence. Instead, it is sufficient that you find that a conspiracy was in existence for any period of time reasonably described by the period alleged in the indictment, and that the defendant was a member of that conspiracy during that period.

23. EXISTENCE OF THE CONSPIRACY

In your consideration of the conspiracy offense alleged in Count One, you should first determine, from all the testimony and evidence in the case, whether or not a conspiracy existed as charged. A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details. However, the government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests, does not necessarily, in and of itself, establish proof of the existence of a

conspiracy, but you may consider such factors.

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 circumstances of the case and course of dealings between the defendant and the other people named in the indictment.

24. MEMBERSHIP IN CONSPIRACY

In addition to proving that the conspiracy charged in the indictment existed, the government must also prove beyond a reasonable doubt that the defendant willfully joined in that agreement. To act "willfully" means to act voluntarily and intelligently, and with the specific intention that the underlying crime-here, to distribute and/or to possess with intent to distribute, cocaine - be committed. In other words, to act willfully means to act with bad purpose, either to disobey or disregard the law-not to act by ignorance, accident, or mistake.

Proof that the defendant willfully joined in the agreement must be based upon evidence of the defendant's own words and/or actions. You need not find that the defendant agreed specifically to or knew about all of the details, or the scope, of the conspiracy, or knew every other co-conspirator or that the defendant participated in each act of the agreement or played a major role. However, the government must prove beyond a reasonable doubt that the defendant knew the essential features and general aims of the venture. 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, does not thereby become a conspirator.

Mere knowledge of or acquiescence in an unlawful plan, without participation in it, is not

sufficient. More is required under the law. What is necessary is that a defendant participated with knowledge of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those objectives.

The extent of a defendant's participation in a conspiracy has no bearing on the issue of that defendant's guilt. A conspirator's liability is not measured by the extent or duration of that conspirator's participation.

25. INTENT

To establish that the defendant willfully joined in 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, in this case, distribution and/or possession with intent to distribute cocaine, be committed. The government need not prove that the defendant agreed to commit the underlying offense personally. It is sufficient that the defendant intended that the offense be committed, if not by himself, then by a co-conspirator. An individual's intent may be inferred from all of the surrounding circumstances.

26. CONSIDERATION OF ACTS AND STATEMENTS OF CO-CONSPIRATORS

In deciding whether the defendant was a member of the conspiracy, you should first consider the evidence of the defendant's own acts and statements. You may also consider any other evidence in the case as it bears on the issue of the defendant's membership. Specifically, you may consider the acts and statements of the other alleged co-conspirators, even if the defendant was not present at the time the acts were done or the statements were made. However,

you may do so only if you find that the acts were done and the statements were made by a person whom you find to be a member of the conspiracy during the conspiracy's existence and in furtherance of one of its purposes. If the acts were performed or the statements were made at a time when the defendant was not a member of the conspiracy, or were performed or made by someone whom you do not find to have been a member of the conspiracy, or if they were not done or said in furtherance of the conspiracy, then they may be considered as evidence only against the conspiracy member who did or said them and not against the defendant.

27. 21 U.S.C. §§ 846 and 841(a)(1)

In Count Two of the indictment, the defendant is charged with violating sections 846 and 841(a)(1) of Title 21 of the United States Code which provide that it is unlawful to attempt to possess with intent to distribute cocaine.

28. ATTEMPT TO POSSESS WITH THE INTENT TO DISTRIBUTE COCAINE –
ESSENTIAL ELEMENTS

In order to prove the crime of attempt to possess with the intent to distribute cocaine as charged in Count Two of the indictment, the government must prove the following two elements beyond a reasonable doubt:

First, that the defendant intended to commit the crime of possession with the intent to distribute cocaine; and

Second, that the defendant engaged in a purposeful act that, under the circumstances as he believed them to be, amounted to a substantial step toward the commission of that crime and strongly corroborated his criminal intent.

A “substantial step” is an act in furtherance of the criminal scheme. A “substantial step” must be something more than mere preparation, but less than the last act necessary before the substantive crime is completed.

The “substantial step” may itself prove the intent to commit the crime, but only if it unequivocally demonstrates such an intent.

29. 18 U.S.C. § 2 - AIDING AND ABETTING

In Count Two of the indictment, the defendant is also charged with violating Title 18, Section 2 of the United States Code.

Title 18, Section 2 of the United States Code provides that “[w]hoever . . . aids [or] abets” the commission of an offense against the United States is punishable as a principal.

30. AIDING AND ABETTING – ESSENTIAL ELEMENTS

To “aid and abet” means intentionally to help someone else commit the charged crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt:

First, that someone else committed the charged crime, i.e., attempt to possess with intent to distribute cocaine; and

Second, that the defendant had advance knowledge that someone else would commit the crime of attempt to possess with intent to distribute cocaine; that the defendant intended to help him; and, that the defendant and took part in the endeavor, seeking to make it succeed.

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. You may, however, consider these among other factors to determine whether the defendant aided and abetted the attempt to possess with intent to distribute cocaine.

31. NATURE OF CONTROLLED SUBSTANCE MUST BE PROVEN BEYOND A REASONABLE DOUBT

To sustain its burden of proof as to Counts One and Two, the government must prove beyond a reasonable doubt that the controlled substance involved here was cocaine.

PART III: CONSIDERATION OF THE EVIDENCE

32. 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.

33. 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.

34. EVIDENCE—DIRECT AND CIRCUMSTANTIAL

There are, generally speaking, two types of evidence. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, which is a chain of

circumstances pointing to certain facts.

The law makes no distinction at all between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. In determining whether the government has sustained its burden of proof you can and should weigh all the evidence, both direct and circumstantial.

35. 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 consideration of it and without regard to the statements of counsel concerning the admissibility of such 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 the 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 proper subject for your deliberations and is not to be considered by you.

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 or her 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.

The testimony of a witness may be discredited or impeached by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. These statements may be used to impeach the credibility of that witness. It is within your province to assess the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

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.

41. FLIGHT/CONSCIOUSNESS OF GUILT

Intentional flight by a defendant may be considered by you in the light of all the other evidence in the case. The burden is upon the government to prove intentional flight. Intentional flight is not alone sufficient to conclude that the defendant is guilty. Flight does not create a presumption of guilt. At most, it may provide the basis for an inference of consciousness of guilt. But flight may not always reflect feelings of guilt. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. In your consideration of the evidence of flight, you should consider that there may be reasons for defendant's actions that are fully consistent with innocence.

It is up to you as members of the jury to determine whether or not evidence of intentional flight shows a consciousness of guilt and the weight or significance to be attached to any such

evidence.

PART IV: DELIBERATIONS AND VERDICT

42. 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 of the law to that evidence as I have instructed you.

43. 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 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.