

**IN THE UNITED STATE DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

UNITED STATES OF AMERICA, )

Plaintiff, )

Criminal No. 97-CR-XXXX

v. )

**JURY INSTRUCTIONS**

Defendant, )

Defendant. )

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## **INTRODUCTION**

Members of the jury, now it is time for me to instruct you about the law you must follow in deciding this case.

I will start by explaining your duties and the general rules that apply in every criminal case.

Then I will explain the elements, or parts, of the crime that the defendant is accused of committing.

Then I will explain some rules that you must use in evaluating particular testimony and evidence.

And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

Please listen very carefully to everything I say.

## JURORS' DUTIES

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second job is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt of the particular count at issue. It is my job to instruct you about the law, and you are bound by the oath you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

The lawyers have talked about the law during the trial. But if what they said is different from what I tell you, you must follow what I say. What I say about the law controls.

Do your jobs fairly. Do not let any bias, sympathy or prejudice that you may feel toward either side influence your decision in any way.

## PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

As you know, the defendant, Defendant, has pleaded not guilty to the crimes charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells a defendant what crimes he is accused of committing. It does not even raise any suspicion of guilt.

Instead, a defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty.

This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

The government must prove every element of the crimes charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

Proof beyond a reasonable doubt means proof which is so convincing that

you would rely and act on it without hesitation in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

## EVIDENCE DEFINED

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; the stipulations that the lawyers agreed to; and the facts that I have judicially noticed.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not speculate about what a witness might have said. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Make your decision based only on the evidence, as I have defined it here, and nothing else.

## CONSIDERATION OF EVIDENCE

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

## DIRECT AND CIRCUMSTANTIAL EVIDENCE

Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.



## CREDIBILITY OF WITNESSES

Part of your job as jurors is to decide how believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

Let me suggest some things for you to consider in evaluating each witness's testimony.

First, ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to clearly see or hear what was happening, and may make a mistake.

Next, ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

Next, ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

Next, ask yourself how the witness looked and acted while testifying. Did the witness seem to honestly be trying to tell you what happened? Or did the witness seem to be lying?

Next, ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant testimony in favor of one side or the other.

Next, ask yourself if the witness testified inconsistently while on the witness

stand, or if the witness said or did something [or failed to say or do something] at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.

Finally, ask yourself how believable the witness's testimony is in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

## NUMBER OF WITNESSES

One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

## DEFENDANT'S FAILURE TO TESTIFY

A defendant has an absolute right not to testify. The fact that he did not testify cannot be considered by you in any way. Do not even discuss it in your deliberations.

Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

## LAWYERS' OBJECTIONS

There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

SEPARATE CONSIDERATION--  
SINGLE DEFENDANT CHARGED WITH MULTIPLE CRIMES

The defendant has been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence of each charge, and return a separate verdict for each one. One by one, you must decide whether the government has presented evidence proving the defendant guilty of that particular charge.

Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on the other charges.

CONSIDER ONLY OFFENSE CHARGED

The defendant is not on trial for any act or conduct not alleged in the indictment.

PENALTY NOT TO BE CONSIDERED

As I told you at the beginning of this trial, the consideration of any penalty must not enter into your consideration or discussions at any time during your deliberations.



## COUNT ONE OF THE INDICTMENT

Count One of the indictment charges Defendant with conspiracy to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base (crack cocaine), in violation of Title 21 of the United States Code, sections 841(a)(1) and 846.

This means that the government alleges that from on or about 1989, or earlier, and continuing thereafter up to and including February 1997, the defendant committed the crime of conspiracy to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base (crack cocaine).

The defendant has pleaded not guilty to this charge.

### Elements of Count One of the Indictment

For you to find the defendant guilty of this “conspiracy” offense, the government must prove all of the following three essential elements to you beyond a reasonable doubt:

One, from on or about 1989, or earlier, and continuing thereafter up to and including February 1997, two or more persons reached an agreement or came to an understanding to pursue the objective of distributing cocaine and/or cocaine base (crack cocaine).

The phrase "on or about" is part of this first element. The government does

not have to prove that the crimes happened on those exact dates. But the government must prove that the crime happened reasonably close to those dates.

You must also keep in mind that the prosecution must prove that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether the person is named in the indictment or otherwise charged with a crime.

Furthermore, the “agreement or understanding” need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

Also keep in mind that in the “conspiracy” charge in the indictment, the grand jury charges that the defendant conspired to commit this offense, not that this offense was actually committed by the defendant or anyone else. Therefore, to find the defendant guilty of the “conspiracy” as charged in the indictment, you do not have to find that the offense identified as the objective of the conspiracy (distributing 5 kilograms or more of cocaine and 50 grams or more of cocaine base) was actually committed by the defendant or anyone else.

Another term that is used here is “distribute.” The term “distribute” means to deliver a controlled substance to the actual or constructive possession of another person.

You should also read an instruction I will explain to you shortly, which is

labeled “Objective of the Conspiracy: Possession with Intent to Distribute” in order to help you determine whether the government has proven this first element beyond a reasonable doubt.

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect.

When considering this second element, you should understand that merely being present at the scene of an event, or merely acting in the same way as others, or merely associating with others does not prove that person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way that advances some purpose of a conspiracy, does not thereby become a member. Similarly, mere knowledge of the existence of a conspiracy is not enough to prove that the defendant joined in the conspiracy; rather, the prosecution must establish some degree of knowing involvement and cooperation.

On the other hand, a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further, it is not necessary that a person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person

has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

In deciding whether the defendant knowingly and intentionally joined in the agreement, you must consider only evidence of his own actions and statements. You may not consider actions and pretrial statements of others, except to the extent that pretrial statements of others describe something that the defendant said or did.

Three, at the time the defendant joined in the agreement or understanding, the defendant knew the purpose of the agreement or understanding.

In considering this element, remember that the defendant must know of the existence and purpose of the conspiracy.

\* \* \*

To assist you in determining whether there was an agreement to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, you should consider the elements of the offense of possession with intent to distribute, which I will explain to you now.

Objective of the Conspiracy Charged in Count One:

Possession with Intent to Distribute

The government alleges that the “conspiracy” charged in Count One of the

indictment had the following objective: to possess with intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base.

In determining whether there was an agreement to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, you must also consider the elements of the offense of possession with intent to distribute cocaine. In relation to the charge of conspiracy, you must consider whether the agreement intended that:

(A) the defendant or another conspirator would knowingly possess a controlled substance;

(B) that the substance would be cocaine or cocaine base (crack cocaine); and

(C) that the defendant or another conspirator would possess the substance with the intent to distribute it.

“Possess with intent to distribute” simply means possession with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

\* \* \*

Remember that for you to find the defendant guilty of the “conspiracy” offense charged in Count One of the indictment, the prosecution must prove beyond a reasonable doubt all of the essential elements listed above. Otherwise, you must find the defendant not guilty of the “conspiracy” charged in the indictment.

If you find the defendant not guilty of the “conspiracy” offense, your deliberations are over. You should record a “not guilty” finding for Counts One, Two, and Three, then the foreperson should sign his or her name in the appropriate places and notify the court that you have finished your deliberations.

If you find the defendant guilty of the “conspiracy,” then you must also determine beyond a reasonable doubt what kind of controlled substance or substances, and the quantity of that controlled substance or substance, was actually involved in the conspiracy for which you have determined the defendant can be held responsible. I will now explain those instructions to you.

Quantity of the Cocaine and/or Cocaine Base Charged in Count One

A defendant who is found guilty of conspiracy to distribute cocaine and/or cocaine base is responsible for quantities that he actually distributed or agreed to distribute.

Such a defendant can also be held responsible for those quantities of cocaine and/or cocaine base that fellow conspirators distributed or agreed to distribute, if you find that the defendant could have reasonably foreseen, at the time he joined the conspiracy or while the conspiracy lasted, that those prohibited acts were a necessary or natural consequence of the conspiracy.

You will need to decide whether a quantity of cocaine was involved in the conspiracy for which the defendant can be held responsible. If you decide that the

government has proven beyond a reasonable doubt that the defendant can be held responsible in the conspiracy for a quantity of cocaine, you must then decide if the quantity of *cocaine* was:

- (1) less than 500 grams,
- or
- (2) more than 500 grams but less than 5 kilograms,
- or
- (3) 5 kilograms or more.

You will also need to decide whether a quantity of cocaine base (crack cocaine) was involved in the conspiracy for which the defendant can be held responsible. If you decide that the government has proven beyond a reasonable doubt that the defendant can be held responsible in the conspiracy for a quantity of cocaine base, you must then decide if the quantity of *cocaine base (crack cocaine)* was:

- (1) less than 5 grams,
- or
- (2) more than 5 grams but less than 50 grams,
- or
- (3) 50 grams or more.

## ACTS AND STATEMENTS OF CO-CONSPIRATORS

If you find beyond a reasonable doubt that a conspiracy existed, and that the defendant was one of its members, then you may consider the acts knowingly done and statements knowingly made by the defendant's co-conspirators during the existence of the conspiracy and in furtherance of the conspiracy as evidence pertaining to the defendant, even though they were done or made in the defendant's absence or without the defendant's knowledge. This includes acts done or statements made before the defendant joined the conspiracy.



## INFERRING REQUIRED MENTAL STATE

Next, I want to explain something about proving a defendant's state of mind.

Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what a defendant said, what he did, how he acted, and any other facts or circumstances in evidence that show his state of mind.

You may also consider the natural and probable results of acts that he knowingly did, and whether it is reasonable to conclude that he intended those results. This, of course, is all for you to decide.

## COUNT TWO OF THE INDICTMENT

Count Two of the indictment charges Defendant with aiding and abetting others in the first-degree firearms murder of Victim One during or in relation to a drug trafficking crime, in violation of Title 18 of the United States Code, Section 924(j) and Section 2.

This means that the government alleges that on or about [DATE], in the Eastern District of Michigan, Southern Division, Defendant aided and abetted others by knowingly causing others to carry and use a firearm (specifically, a 9mm handgun) during and in relation to the drug trafficking crime of conspiracy to distribute cocaine base (crack cocaine) – as set forth in Count One of the indictment. Count Two of the indictment further charges that during this violation, Defendant, with malice aforethought, caused the unlawful, deliberate, malicious, and premeditated killing of Victim One, by causing him to be shot with the firearm.

The defendant has pleaded not guilty to this charge.

### Elements of Count Two of the Indictment

For you to find the defendant guilty of aiding and abetting others in the first-degree firearms murder of Victim One during or in relation to a drug trafficking crime, the government must prove all of the following six essential elements to you beyond a reasonable doubt:

One, Defendant committed the drug offense charged in Count One of the indictment.

Two, during and in relation to the commission of the offense charged in Count One of the indictment, Defendant used a firearm.

When considering this element, keep in mind that “firearm” means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an explosive; and the term includes the frame or receiver of any such weapon or any firearm muffler or firearm silencer.

Also keep in mind that to “use” a firearm means more than mere possession of a firearm. It must be shown that Defendant actively employed the firearm by brandishing, displaying, bartering, striking with, or firing or attempting to fire the firearm; but it may also include the mere mention or disclosure of the firearm’s presence in a manner intended to intimidate or influence others.

The phrase “during and in relation to” the commission of an offense means that there must be a connection between Defendant, the firearm, and the crime of violence so that the firearm facilitated the crime by serving some important function or purpose of the criminal activity.

Three, Defendant used the firearm knowingly.

An act is done “knowingly” if it is done voluntarily and intentionally, and

not because of mistake or accident or other innocent reason.

Four, Defendant killed Victim One through the use of a firearm.

Five, Defendant killed Victim One with malice aforethought.

“Malice” is the state of mind that would cause a person to act without regard to the life of another. The phrase “malice aforethought” means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life.

Six, The killing of Victim One was premeditated.

An act is done with premeditation if it is done upon deliberation. In order to satisfy this element, the government must prove beyond a reasonable doubt that Defendant killed Victim One only after thinking the matter over, deliberating whether to act before committing the crime. There is no requirement that the government prove that the defendant deliberated for any particular period of time in order to show premeditation. It is sufficient to satisfy this element if you find that before he acted, Defendant had a period of appreciable time to become fully aware of what he intended to do and to think it over before he acted.

\* \* \*

Remember that for you to find Defendant guilty of the “first-degree

firearms murder of Victim One during or in relation to a drug trafficking crime,” the prosecution must prove all of the six essential elements listed above beyond a reasonable doubt.

Otherwise, you must find Defendant not guilty of the “first-degree firearms murder of Victim One during or in relation to a drug trafficking crime,” and you should proceed to consider the lesser-included offense of “second-degree murder of Victim One during or in relation to a drug trafficking crime,” which I will explain next.

## LESSER-INCLUDED OFFENSE OF COUNT TWO

A lesser-included offense of the “first-degree firearms murder of Victim One during or in relation to a drug trafficking crime” is “second-degree firearms murder of Victim One during or in relation to a drug trafficking crime.”

For you to find the defendant guilty of the second-degree murder of Victim One during or in relation to a drug trafficking crime, the government must prove all of the following five essential elements to you beyond a reasonable doubt. As I read the five essential elements to you, you will notice that they are the same as the first five elements for “first degree.” The difference is that the elements for “second degree” do not require the government to prove the sixth element of premeditation.

One, Defendant committed the drug offense charged in Count One of the indictment.

Two, during and in relation to the commission of the offense charged in Count One of the indictment, Defendant used a firearm.

(When considering this instruction, you should refer to the definitions under element two in the “first-degree murder” instruction).

Three, Defendant used the firearm knowingly.

(When considering this instruction, you should refer to the definitions under element three in the “first-degree murder” instruction).

Four, Defendant killed Victim One through the use of a firearm.

Five, Defendant killed Victim One with malice aforethought.

(When considering this instruction, you should refer to the definitions under element five in the “first-degree murder” instruction).

\* \* \*

Remember that the elements for “second-degree murder” do not require the government to prove the final element required for “first-degree murder” – namely, premeditation.

For you to find Defendant guilty of “second-degree firearms murder during or in relation to a drug trafficking crime,” the prosecution must prove all of the five essential elements listed above beyond a reasonable doubt. Otherwise, you must find Defendant not guilty of “second-degree firearms murder during or in relation to a drug trafficking crime.”

### COUNT THREE OF THE INDICTMENT

Count Three of the indictment charges Defendant with aiding and abetting others in the first-degree firearms murder of Victim Two during or in relation to a drug trafficking crime, in violation of Title 18 of the United States Code, Section 924(j) and Section 2.

This means that the government alleges that on or about [DATE], in the Eastern District of Michigan, Southern Division, Defendant aided and abetted others by knowingly causing others to carry and use a firearm (specifically, a 9mm handgun and a .45 caliber gun) during and in relation to the drug trafficking crime of conspiracy to distribute cocaine base (crack cocaine) – as set forth in Count One of the indictment. Count Three of the indictment further charges that during this violation, Defendant, with malice aforethought, caused the unlawful, deliberate, malicious, and premeditated killing of Victim Two, by causing him to be shot with the firearm.

The defendant has pleaded not guilty to this charge.

### Elements of Count Three of the Indictment

For you to find the defendant guilty of aiding and abetting others in the first-degree firearms murder of Victim Two during or in relation to a drug trafficking crime, the government must prove all of the following six essential elements to you beyond a reasonable doubt:



One, Defendant committed the drug offense charged in Count One of the indictment.

Two, during and in relation to the commission of the offense charged in Count One of the indictment, Defendant used a firearm.

When considering this element, keep in mind that “firearm” means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an explosive; and the term includes the frame or receiver of any such weapon or any firearm muffler or firearm silencer.

Also keep in mind that to “use” a firearm means more than mere possession of a firearm. It must be shown that Defendant actively employed the firearm by brandishing, displaying, bartering, striking with, or firing or attempting to fire the firearm; but it may also include the mere mention or disclosure of the firearm’s presence in a manner intended to intimidate or influence others.

The phrase “during and in relation to” the commission of an offense means that there must be a connection between Defendant, the firearm, and the crime of violence so that the firearm facilitated the crime by serving some important function or purpose of the criminal activity.

Three, Defendant used the firearm knowingly.

An act is done “knowingly” if it is done voluntarily and intentionally, and

not because of mistake or accident or other innocent reason.

Four, Defendant killed Victim Two through the use of a firearm.

Five, Defendant killed Victim Two with malice aforethought.

“Malice” is the state of mind that would cause a person to act without regard to the life of another. The phrase “malice aforethought” means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life.

Six, The killing of Victim Two was premeditated.

An act is done with premeditation if it is done upon deliberation. In order to satisfy this element, the government must prove beyond a reasonable doubt that Defendant killed Victim Two only after thinking the matter over, deliberating whether to act before committing the crime. There is no requirement that the government prove that the defendant deliberated for any particular period of time in order to show premeditation. It is sufficient to satisfy this element if you find that before he acted, Defendant had a period of appreciable time to become fully aware of what he intended to do and to think it over before he acted.

\* \* \*

Remember that for you to find Defendant guilty of the “first-degree

firearms murder of Victim Two during or in relation to a drug trafficking crime,” the prosecution must prove all of the six essential elements listed above beyond a reasonable doubt.

Otherwise, you must find Defendant not guilty of the “first-degree firearms murder of Victim Two during or in relation to a drug trafficking crime,” and you should proceed to consider the lesser-included offense of “second-degree murder of Victim Two during or in relation to a drug trafficking crime,” which I will explain next.

LESSER-INCLUDED OFFENSE OF COUNT THREE

A lesser-included offense of the “first-degree firearms murder of Victim Two during or in relation to a drug trafficking crime” is “second-degree firearms murder of Victim Two during or in relation to a drug trafficking crime.”

For you to find the defendant guilty of the second-degree murder of Victim Two during or in relation to a drug trafficking crime, the government must prove all of the following five essential elements to you beyond a reasonable doubt. As I read the five essential elements to you, you will notice that they are the same as the first five elements for “first degree.” The difference is that the elements for “second degree” do not require the government to prove the sixth element of premeditation.

One, Defendant committed the drug offense charged in Count One of the indictment.

Two, during and in relation to the commission of the offense charged in Count One of the indictment, Defendant used a firearm.

(When considering this instruction, you should refer to the definitions under element two in the “first-degree murder” instruction).

Three, Defendant used the firearm knowingly.

(When considering this instruction, you should refer to the definitions under

element three in the “first-degree murder” instruction).

Four, Defendant killed Victim Two through the use of a firearm.

Five, Defendant killed Victim Two with malice aforethought.

(When considering this instruction, you should refer to the definitions under element five in the “first-degree murder” instruction).

\* \* \*

Remember that the elements for “second-degree murder” do not require the government to prove the final element required for “first-degree murder” – namely, premeditation.

For you to find Defendant guilty of “second-degree firearms murder during or in relation to a drug trafficking crime,” the prosecution must prove all of the five essential elements listed above beyond a reasonable doubt. Otherwise, you must find Defendant not guilty of “second-degree firearms murder during or in relation to a drug trafficking crime.”

Additional Definition for Counts Two and Three Only:  
AIDING AND ABETTING

For you to find a defendant guilty of the crimes charged in Counts Two and Three of the indictment, it is not necessary for you to find that he personally committed the crimes in Counts Two and Three of the indictment himself. You may also find him guilty if he intentionally helped or encouraged someone else to commit the crime. A person who does this is called an aider and abettor.

But for you to find a defendant guilty as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

- (A) First, that the crime charged in the particular count of the indictment (Count Two and/or Three) was committed.
- (B) Second, that the defendant helped to commit the crime or encouraged someone else to commit the crime.
- (C) And third, that the defendant intended to help commit or encourage the crime.

Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor in Count Two and/or Count Three, but without more it is not enough.

What the government must prove is that the defendant did something to

help or encourage the crime with the intent that the crime be committed.

If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on either Count Two and/or Count Three. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty as an aider and abettor in Count Two and Count Three.

## INTRODUCTION TO NEXT SECTION

That concludes the part of my instructions explaining the elements of the crimes charged in the indictment. Next I will explain some rules that you must use in evaluating particular testimony and evidence.



TESTIMONY OF A WITNESS UNDER GRANT OF IMMUNITY OR  
REDUCED CRIMINAL LIABILITY

You have heard the testimony of witnesses who have been given special consideration by the Government in exchange for their testimony. The government has promised them that they will not be prosecuted for certain crimes in exchange for their testimony against the defendant.

It is permissible for the government to make such a promise. But you should consider their testimony with more caution than the testimony of other witnesses. Consider whether their testimony may have been influenced by the government's promise.

Do not convict the defendant based on the unsupported testimony of such witnesses, standing alone, unless you believe their testimony beyond a reasonable doubt.

## TESTIMONY OF AN ACCOMPLICE

You have heard the testimony of certain witnesses who were involved in the same crimes that the defendant is charged with committing. You should consider this testimony with more caution than the testimony of other witnesses.

Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

The fact that a witness has pleaded guilty to a crime is not evidence that the defendant is guilty, and you cannot consider this against the defendant in any way.

TESTIMONY OF AN ADDICT-WITNESS  
UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY

You have also heard that some witnesses were using certain drugs during the time that they testified about, and that the government has promised them that they will not be prosecuted in exchange for testimony against the defendant.

It is permissible for the government to make such a promise. But you should consider these witnesses' testimony with more caution than the testimony of other witnesses. A person who is an addict may have a constant need for drugs, and for money to buy drugs, and may also have a greater fear of imprisonment because his supply of drugs may be cut off. Think about these things and consider whether these witnesses' testimony may have been influenced by the government's promise.

Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe that witness's testimony beyond a reasonable doubt.

## INTRODUCTION TO NEXT SECTION

That concludes the part of my instructions explaining the rules for considering particular testimony and evidence. Now let me explain some things about your deliberations in the jury room, and your possible verdicts.

The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

Once you start deliberating, do not talk to the jury officer or to me or to anyone else about the case. We must communicate in writing. Write down your message, sign it, and then give it to the jury officer. He will give it to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Your messages should normally be sent to me through your foreperson.

If you want to see any of the exhibits that were admitted into evidence, you may send me a message, and those exhibits will be provided to you.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

## EXPERIMENTS, RESEARCH AND INVESTIGATION

Remember that you must make your decision based only on the evidence that you saw and heard here in court. This means that you must not try to gather any information about the case on your own while you are deliberating.

For example, do not conduct any experiments inside or outside the jury room; do not bring any books, like a dictionary, or anything else with you to help you with your deliberations; do not conduct any independent research, reading or investigation about the case; and do not visit any of the places that were mentioned during the trial.

Make your decision based only on the evidence that you saw and heard here in court.

## UNANIMOUS VERDICT

Your verdict, whether it is guilty or not guilty, must be unanimous.

To find the defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

To find the defendant not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

Either way, guilty or not guilty, your verdict must be unanimous.

## DUTY TO DELIBERATE

Now that all the evidence and arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and your original position was wrong.

But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what everyone else has to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

## VERDICT FORM

I have prepared a verdict form that you should use to record your verdict. The form reads as follows: [See form].

If you decide that the government has proved the charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Each of you should then sign the form, put the date on it, and return it to me.



VERDICT LIMITED TO CHARGES AGAINST THIS DEFENDANT

Remember that the defendant is only on trial for the particular crimes charged in the indictment. Your job is limited to deciding whether the government has proved one or more of the charges in the indictment.

Also remember that whether anyone else should be prosecuted and convicted for this crime is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved the defendant guilty. If it has, say so. If it has not, say so. Do not let the possible guilt of others influence your decision in any way.

## COURT HAS NO OPINION

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt as to one or more of the charges.

IN THE UNITED STATE DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 ) Criminal No. 97-CR-XXXX  
 )  
 v. )  
 )  
 )  
 Defendant, )  
 )  
 Defendant. )

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COUNT ONE:

As to the offense of Conspiracy to Possess with Intent to Distribute Cocaine and Cocaine Base (Crack Cocaine), we unanimously find that Defendant is:

Not Guilty \_\_\_\_\_

Guilty \_\_\_\_\_

If the finding on Count One is guilty, we further unanimously find:

That the conspiracy involved cocaine \_\_\_\_\_

That the conspiracy did not involve cocaine \_\_\_\_\_

If the finding on Count One is guilty and the conspiracy involved cocaine, we further unanimously find that the quantity of cocaine involved in the conspiracy was:

less than 500 grams \_\_\_\_\_

more than 500 grams but less than 5 kilograms \_\_\_\_\_

5 kilograms or more \_\_\_\_\_

If the finding on Count One is guilty, we further unanimously find:

That the conspiracy involved cocaine base (crack cocaine) \_\_\_\_\_

That the conspiracy did not involve cocaine base (crack cocaine) \_\_\_\_\_

If the finding on Count One is guilty and the conspiracy involved cocaine base, we further unanimously find that the quantity of cocaine base (crack cocaine) involved in the conspiracy was:

less than 5 grams \_\_\_\_\_

more than 5 grams but less than 50 grams \_\_\_\_\_

50 grams or more \_\_\_\_\_

COUNT TWO:

As to the offense of the first-degree firearms murder of Victim One, during or in relation to a drug trafficking crime, we unanimously find that Defendant is:

Not Guilty\_\_\_\_\_

Guilty\_\_\_\_\_

If the finding on Count Two (above) is not guilty, we have also considered the lesser-included offense of the second-degree firearms murder of Victim One, during or in relation to a drug trafficking crime. As to this offense, we unanimously find that Defendant is:

Not Guilty\_\_\_\_\_

Guilty\_\_\_\_\_

COUNT THREE:

As to the offense of the first-degree firearms murder of Victim Two, during or in relation to a drug trafficking crime, we unanimously find that Defendant is:

Not Guilty\_\_\_\_\_

Guilty\_\_\_\_\_

If the finding on Count Three (above) is not guilty, we have also considered the lesser-included offense of the second-degree firearms murder of Victim Two, during or in relation to a drug trafficking crime. As to this offense, we unanimously find that Defendant is:

Not Guilty\_\_\_\_\_

Guilty \_\_\_\_\_

So say we all, this \_\_\_\_\_ day of August, 2003.

Foreperson: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_

Juror: \_\_\_\_\_