IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>JOSE RAMOS-CARABALLO, and FRANK ALVAREZ-GAYAN,<br><br>Defendants. | ) | CASE NO. 8:02CR178<br><br>COURT'S CHARGE TO THE JURY |

INSTRUCTION NO. 1

INTRODUCTION

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of or during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

DUTY

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

Eighth Circuit Instruction 3.02

INSTRUCTION NO. 3

NO INVESTIGATION

You are reminded that you are not to engage in any independent investigation of this case. For instance, you are not to consult a dictionary or any other like reference.

INSTRUCTION NO. 4

JUDGE – NO OPINION

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

INSTRUCTION NO. 5

DESCRIPTION OF CHARGES; SUPERSEDING INDICTMENT NOT EVIDENCE;
PRESUMPTION OF INNOCENCE; BURDEN OF PROOF
(MULTIPLE DEFENDANTS, SINGLE COUNTS)

The Superseding Indictment in this case charges that the Defendants committed the crime of possession with intent to distribute a mixture or substance containing a detectable amount of cocaine.

As I told you at the beginning of trial, a Superseding Indictment is simply an accusation. It is not evidence of anything. To the contrary, each Defendant is presumed to be innocent. Thus, each Defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the Defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crime charged.

Keep in mind that you must give separate consideration to the evidence about each individual Defendant. Each Defendant is entitled to be treated separately, and you must return a separate verdict for each Defendant.

There is no burden upon a Defendant to prove that he is innocent.

Eighth Circuit Model Instruction 3.07

INSTRUCTION NO. 6

COUNT I: ELEMENTS OF OFFENSE; BURDEN OF PROOF

The crime of possession with intent to distribute a mixture or substance containing a detectable amount of cocaine, as charged against the Defendant, Jose Ramos-Caraballo, in Count I of the Superseding Indictment, has three essential elements, which are:

*One*, the Defendant, Jose Ramos-Caraballo, was in possession of a mixture or substance containing a detectable amount of cocaine;

*Two*, the Defendant, Jose Ramos-Caraballo, knew that he was in possession of a controlled substance; and

*Three*, the Defendant, Jose Ramos-Caraballo, intended to distribute some or all of the mixture or substance containing a detectable amount of cocaine to another person.

If the government has proved all of these essential elements beyond a reasonable doubt as to the Defendant, Jose Ramos-Caraballo, then you must find the Defendant, Jose Ramos-Caraballo, guilty of the crime charged under Count I of the Superseding Indictment. Otherwise, you must find the Defendant, Jose Ramos-Caraballo, not guilty of this crime charged in Count I of the Superseding Indictment.

Eighth Circuit Model Instruction 6.21.841A

INSTRUCTION NO. 7

COUNT I: ELEMENTS OF OFFENSE; BURDEN OF PROOF

The crime of possession with intent to distribute a mixture or substance containing a detectable amount of cocaine, as charged against the Defendant, Frank Alvarez-Gayan, in Count I of the Superseding Indictment, has three essential elements, which are:

*One*, the Defendant, Frank Alvarez-Gayan, was in possession of a mixture or substance containing a detectable amount of cocaine;

*Two*, the Defendant, Frank Alvarez-Gayan, knew that he was in possession of a controlled substance; and

*Three*, the Defendant, Frank Alvarez-Gayan, intended to distribute some or all of the mixture or substance containing a detectable amount of cocaine to another person.

If the government has proved all of these essential elements beyond a reasonable doubt as to the Defendant, Frank Alvarez-Gayan, then you must find the Defendant, Frank Alvarez-Gayan, guilty of the crime charged under Count I of the Superseding Indictment. Otherwise, you must find the Defendant, Frank Alvarez-Gayan, not guilty of this crime charged in Count I of the Superseding Indictment.

INSTRUCTION NO. 8

POSSESSION

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word "possession" has been used in these instructions it includes actual as well as constructive possession and also sole as well as joint possession.

Eighth Circuit Model Instruction 8.02

INSTRUCTION NO. 9

INTENT OR KNOWLEDGE

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the Defendant, and all the facts and circumstances in evidence which may aid in a determination of Defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Eighth Circuit Model Instruction 7.05

INSTRUCTION NO. 10

"ON OR ABOUT"

The Superseding Indictment charges that the offense was committed "on or about" a certain date or period of time. It is not necessary that the proof establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence shows beyond a reasonable doubt that the offense was committed on a date reasonably near the alleged date.

INSTRUCTION NO. 11

REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Eighth Circuit Model Instruction 3.11

INSTRUCTION NO. 12

EVIDENCE

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits, the facts that have been stipulated -- that is, formally agreed to by the parties, the facts that have been judicially noticed -- that is, facts which I say you may, but are not required to, accept as true, even without evidence.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered. All parties have agreed that certain portions of Exhibits 103, 7 and 8 should be redacted or stricken as not germane to the issues in this case. You must not speculate regarding those portions that have been stricken.

4. Anything you saw or heard about this case outside the courtroom is not evidence.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Eighth Circuit Model Instruction 1.03

INSTRUCTION NO. 13

STATEMENT OF ONE DEFENDANT IN MULTI-DEFENDANT TRIAL

You may consider evidence of the statements of Defendant Frank Alvarez-Gayan only in the case against him, and not in the case against Jose Ramos-Caraballo. What that means is that you may consider evidence of Defendant Frank Alvarez-Gayan's statement against him and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that evidence in any way when you are deciding if the government has proved, beyond a reasonable doubt, its case against Jose Ramos-Caraballo.

Eighth Circuit Model Instruction No. 2.15

INSTRUCTION NO. 14

STATEMENT OF ONE DEFENDANT IN MULTI-DEFENDANT TRIAL

You may consider evidence of the statements of Defendant Jose Ramos-Caraballo only in the case against him, and not in the case against Frank Alvarez-Gayan. What that means is that you may consider evidence of Defendant Jose Ramos-Caraballo's statement against him and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that evidence in any way when you are deciding if the government has proved, beyond a reasonable doubt, its case against Frank Alvarez-Gayan.

Eighth Circuit Model Instruction No. 2.15

INSTRUCTION NO. 15

CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 16

EXPERT TESTIMONY

You have heard testimony from a person described as an expert. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

Eighth Circuit Model Instruction 4.10

INSTRUCTION NO. 17

DEFENDANT'S RIGHT NOT TO TESTIFY

There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that a Defendant exercises his constitutional right not to testify must not be considered by you in any way, or even discussed, in arriving at your verdict.

INSTRUCTION NO. 18

EXHIBITS

Exhibits have been admitted into evidence and are to be considered along with all the other evidence to assist you in reaching a verdict. You are not to tamper with the exhibits or their contents, and each exhibit should be returned, along with your verdict, in the same condition as it was when received by you.

INSTRUCTION NO. 19

NOTES

Some of you may have taken notes during the trial; others of you may have chosen not to take notes. If you did take notes, remember that these notes are not themselves evidence, but are instead merely memory aids. You must reach a verdict based upon your independent recollection of the evidence presented during the trial, not upon your notes or another juror's notes. Notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

INSTRUCTION NO. 20

"UNANIMOUS" DEFINED

Your verdict must be agreed to by all twelve of you, that is, it must be unanimous.

INSTRUCTION NO. 21

ELECTION OF FOREPERSON; DUTY TO DELIBERATE

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict - whether guilty or not guilty - must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if a Defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the Marshal or courtroom deputy, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fifth, each of your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. A verdict, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be - that is entirely for you to decide.

Finally, each verdict form is simply the written notice of the decisions that you reach in this case. You will take the verdict forms to the jury room, and when each of you has agreed on the verdicts, your foreperson will fill in the forms, sign and date them, and advise the Marshal or courtroom deputy that you are ready to return to the courtroom.

Eighth Circuit Model Instruction 3.12