(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND THREE: PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AND VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHTS BY FAILING TO ADEQUATELY ADVISE PETITIONER REGARDING HIS RIGHT TO TESTIFY.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner was adamant from the beginning that he would testify in his own defense. He spent hours going over his testimony with his chosen trial attorney, Nuzzi. He repeatedly made it known to the attorney for co-defendant Baskerville, Troy Archie, that he was adamant about testifying. And he made it known to his counsel, Plaisted, that he wanted to testify. However, Plaisted improperly insisted that his view that Petitioner not testify prevail, without making it clear to Petitioner that the right to testify was his and his alone to waive.

Plaisted admitted to the Court that he did not even speak to his client at any length about Petitioner testifying until late in the trial. He further told the Court numerous times that he and Petitioner had differing views on whether Petitioner should testify. Moreover, Plaisted improperly asked the Court to intervene by putting Petitioner's waiver of his right to testify on the record, before he had even spoken at length to Petitioner about the issue. Plaisted told the Court that he wanted Petitioner "to agree on the record" not to testify, as soon as he "confirm[ed] my decision with Mr. Curry." And he repeatedly expressed the hope on the record that Petitioner would "adhere" to his point of view, instead of "insisting" on testifying.

Even the government expressed serious concern over whether or not Petitioner's waiver was voluntary. After Petitioner stated on the record that he was "taking [his] attorney's advice," the government conferred with appellate counsel, and requested that the Court again put Petitioner's waiver on the record. Petitioner once again simply noted that he was taking his attorney's advice, and the Court asked Plaisted, not Petitioner, whether Petitioner knew it was his right to waive, to which Plaisted said yes. But immediately after Plaisted's answer, Petitioner stated "I don't understand." His comment was ignored, and when the Court asked if anyone had anything else to say, Petitioner stated "I do." Once again, he was ignored.

It was not until sometime later, when counsel for the government informed the Court that Petitioner wanted to say something that Petitioner finally had the opportunity to speak. Petitioner then indicated, on the record, that he had not made this decision, did not have appellate counsel with whom he could consult and was just taking his attorney's advice. The Court then suggested that Petitioner be sworn and questioned, but Plaisted intervened, after which the Court simply found that the waiver was voluntary.

Had Petitioner testified, he would have specifically rebutted numerous crucial aspects of Walker's testimony. Further, Petitioner would have explained the only other supposed evidence of alleged drug dealing that directly involved him, most particularly, the wiretaps. For example, there was a wiretap between Walker and Ishmael Pray where

Walker asks Pray to talk to "dough boy" for him. Petitioner would have testified that the "dough boy" referenced in that conversation was not him and that there were a number of other persons known as "dough boys" in the area to whom Walker must have been referring.

In another example, a co-conspirator asked Petitioner to get him the "bag" they had discussed. The government's expert opined that the call was a drug related call and that the reference to the "bag" was a reference to drugs. Petitioner would have testified that the "bag" was not a bag of drugs, but rather a travel bag. Without this testimony, however, this exculpatory version of events was never presented to the jury.

In a final example, there was a wiretap involving Petitioner and Rasheed Pryor, in which Pryor asked Petitioner if he had any "work." The government expert testified that Pryor was asking for drug dealing work, when Petitioner would have explained that Pryor worked part time for Petitioner in his legitimate business, the Closet. In fact, Petitioner could have explained every single one of the wiretaps introduced at trial; Plaisted's unilateral actions did not permit him to do so.

Petitioner would have also testified about his exchange with Walker at the time of his arrest, rebutting Walker's testimony as to Petitioner's state of mind (which was admitted without objection by Petitioner's counsel, as is discussed further below). Petitioner would have testified that he was saying whatever he could to get Walker out of the vehicle. He would have testified that he was terrified at the prospect of having drugs in his vehicle and that he was afraid of Walker, whom he knew had a history of violence. He would have further testified that he knew Walker had a gun, which is why he inquired as to the whereabouts of the gun. This testimony would have rebutted Walker's incriminating testimony that Petitioner ordered him out of the vehicle because the vehicle was not fast enough.

Additionally, Petitioner would have offered explanatory testimony as to the vehicles described at trial, to Petitioner's great prejudice. Thus, he would have testified that the two Mercedes were not purchased by him, but rather, that he simply facilitated their acquisition for a rapper whom he promoted. He would have testified that the Range Rovers were Eric Shuler's, a close friend of his, and that since he was extremely close with Shuler and had no car himself, Shuler often let him borrow the vehicles. He would have also testified that he was making thousands of dollars a month selling clothing at the kiosks in Newark, and thousands more hosting events for DJs and rappers. In sum, he would have denied in front of the jury the government's allegations. Plaisted's decision not to call him for these purposes and in not sufficiently explaining to him that the decision as to whether to testify was his and his alone to make constituted the ineffective assistance of counsel, and violated his Fifth Amendment right to testify in his own behalf.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ( ). No (X).

(2) If you did not raise this issue in your direct appeal, explain why:

A claim of ineffective assistance must be raised in a motion under 28 U.S.C. § 2255, and ought not be included as a claim on direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ( ). No (X).

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application? N/A

Yes ( ). No ( ).

(4) Did you appeal from the denial of your motion, petition, or application? N/A

Yes ( ). No ( ).

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal? N/A

Yes ( ). No ( ).

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FOUR: PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CALL CRITICAL DEFENSE WITNESSES.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner's trial counsel failed to call numerous critical witnesses to testify on Petitioner's behalf. Those critical witnesses include:

(A) Walker's former girlfriend, who was the listed resident of the "dungeon," who could and would have testified that the "dungeon" was Walker's residence, that Walker paid the rent for the "dungeon," and that the "dungeon" was in no way Petitioner's apartment;

(B) Jason Hannibul, an indicted co-conspirator who signed an affidavit stating that Petitioner was not part of the drug conspiracy to which he pleaded guilty, that the drugs with which he was arrested had nothing to do with Petitioner, and that he was threatened by the government lawyers that they would take punitive action against him if he provided exculpatory testimony for Petitioner;

(C) Ishmael Pray's girlfriend, who could and would have testified that the government tried to get Pray to testify because they were convinced that Walker was lying;

(D) Raheem Webb, who could and would have testified that Petitioner in no way paid for his legal services as alleged by the government, that his family paid, and that there was a record of the transaction;

(E) Latera Howard Lowe, the Liberty Travel agent who booked the trips at issue who could and would have testified that Petitioner did not pay for his alleged underlings trips to the NBA All Star Game and to Miami as alleged by the government, and who could and would have said she was not aware of Petitioner dealing drugs;

(F) Abdul Madison, who could and would have testified that he and Petitioner threw DJ and rap concerts, together and separately, starting in the late 1990s and charged $50 to $60 per person, with as many as 1000 to 1500 people attending, and running as many as four events a night;

(G) Abdul Gordon, who could and would have testified that Petitioner ran several clothing stalls in Newark starting in 1999, and that he looked at Petitioner as a business partner;

(H) the woman who raised Petitioner, who knew from pre-arrest interactions with Petitioner that Petitioner had changed his life and stopped dealing drugs due to the birth of his son, and who knew the relationship between this resolve and the fact that Petitioner had no adult male influence growing up;

(I) the mother of Petitioner's son, who could and would have testified about how Petitioner changed after the birth of his son, and what a great father Petitioner was to his son; and

(J) Petitioner's brother, who could and would have testified that Petitioner was a father to him and how Petitioner changed his life after the birth of his son.[7]

Petitioner repeatedly told Plaisted to call these witnesses, to no avail. In fact, Plaisted, on the record, told the Court that Petitioner wanted him to call numerous witnesses, but that he wanted to put on a "short" defense. Plaisted noted several times that he and Petitioner were not on the same page regarding witnesses, and that (given that he was not prepared for trial) he did not have the opportunity to speak with all these witnesses, and therefore did not want to call them.

Had these witnesses been called, the jury would have heard testimony directly refuting key aspects of Walker's testimony. In addition, they would have heard from family and friends that Petitioner was not a drug dealer; that the government itself did not believe its star witness; that Petitioner did not pay for an alleged co-conspirator's attorneys' fees, as alleged by the government; that Petitioner did not pay for lavish trips for his underlings, as alleged by the government; and that Petitioner made a very substantial amount of money as a legitimate businessman. Finally, they would have heard touching testimony about how Petitioner came to change his life, corroborated by three witnesses who knew him well. The failure to call these witnesses and to elicit this testimony constituted the ineffective assistance of counsel. The fact that the jury was deprived of this testimony constitutes sufficient prejudice to warrant the relief here sought.

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ( ). No (X).

(2) If you did not raise this issue in your direct appeal, explain why:

A claim of ineffective assistance must be raised in a motion under 28 U.S.C. § 2255, and may not be included as a claim on direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ( ). No (X).

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:
Name and location of the court where the motion or petition was filed:

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[7] There are other potential witnesses that Curry's investigator is currently attempting contact.

Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application? N/A

Yes ( ). No ( ).

(4) Did you appeal from the denial of your motion, petition, or application? N/A

Yes ( ). No ( ).

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal? N/A

Yes ( ). No ( ).

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FIVE: PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO PROPERLY PREPARE FOR, AND EXECUTE COMPETENT CROSS-EXAMINATION OF KEY WITNESSES.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The key witness in this case was Lachoy Walker. Walker was the government's star witness, and the witness who provided the basis for most of the other evidence in the case, including that he identified the members of the conspiracy. While Plaisted did attack Walker's credibility through the most obvious methods, like pointing to the benefits Walker was receiving for testifying, he failed to take advantage of other significant impeachment opportunities, to Petitioner's great prejudice. Indeed, the cross examination he did conduct hurt Petitioner more than it helped him. In this regard as well, he failed to provide Petitioner with effective assistance of counsel, in violation of his Sixth Amendment rights.

More specifically, Plaisted missed a glaring reason for Walker to lie: his jealousy of Petitioner. In fact, Petitioner informed counsel that he was told by friends and family that Walker, just days before his arrest, became enraged at Petitioner because he suspected that Petitioner was romantically involved with the mother of Walker's child, ranting that he hated Petitioner and was going to kill him.[8] Even without that explosive allegation, there was ample reason to suspect that Walker was jealous of Petitioner. Yet Walker was never asked if he was jealous of Petitioner; if it was true that Petitioner was better liked than he was, and if that bothered him; if Petitioner's success and relationships with women were a source of resentment and jealousy. Most significantly, he was never asked if he suspected Petitioner was romantically involved with the mother of Walker's child; whether he hated Petitioner, or ever said he hated Petitioner; or if he ever threatened to kill Petitioner. This critical evidence was never presented in any other manner, though Plaisted was aware of it.

Further, there were several instances where Walker was obviously lying which were not addressed on cross, including at least two instances in which documentary evidence could have been presented to rebut facts to which Walker testified. For example, Walker testified that Petitioner spent lavishly at the NBA All Star games, sitting in exclusive seats; however, among the documents found on Petitioner at the time of his arrest was a ticket stub for the NBA All Star game listing the price of the ticket at $83.00. The government also introduced the title to Walker's car, found at Walker's apartment, which contradicted Walker's testimony about how he obtained the vehicle. Walker was never cross-examined on either document.

There are numerous other examples which Petitioner made known to counsel. For instance, Walker testified that Petitioner introduced Atif Amin to Walker, and then the

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[8] Curry's current investigators are continuing to investigate this allegation, which has been made difficult by the passage of time.

three started dealing drugs together. However, Amin has known Walker since he was a small child; they grew up together in the Georgia King Village section of Newark. Proper cross-examination would have caught Walker in the lie; instead, Plaisted apparently relied on calling Amin himself to testify to that fact. Amin's attorney instructed his client not to testify, and the lie was never exposed.

Further, in an ill-advised attempt to establish the benefits that Walker received for testifying, Plaisted introduced through cross-examination, Walker's application for admission to the Witness Protection Program. He did this despite the Court's repeatedly warnings that entry into the Witness Protection Program was not a benefit, and that it would open the door to the introduction of evidence as to why Walker was applying for the Witness Protection Program. As a result, on redirect examination, Walker was permitted to testify that he was applying for the Witness Protection Program because he believed (falsely) that Petitioner was going to kill him, and also provided a basis for the admission of further prejudicial evidence later in the case.

While the cross examination of Walker was bad, the cross examination of Agent Gregory Hilton, also a key government witness, was even worse. Agent Hilton was the DEA agent most involved in the task force that investigated the matter, and the witness through whom the vast majority of the wiretaps were introduced. This made effective cross-examination of his testimony absolutely essential to Petitioner's case. However, the cross of Hilton was a complete disaster. It was unorganized, without direction, and totally ineffective. Indeed, the District Court repeatedly chastised Plaisted, in front of the jury and at side bar, during this cross-examination, and Plaisted himself admitted, in front of the jury, that he himself did not know where his cross was going, a truly extraordinary statement, albeit a candid one and one that followed from his understandable lack of preparation.

Further, as a specific example of how the cross examination of Hilton prejudiced Petitioner, Plaisted spent considerable time, in his examinations of other witnesses, attempting to demonstrate that key testimony about the day of Petitioner's arrest was inaccurate, and specifically that Petitioner was not turned over to the U.S. Marshalls as Hilton testified. However, he failed to fully explore this significant contradiction on cross examination of Hilton himself, greatly weakening his ability to impeach Hilton's testimony.[9] Therefore, Plaisted's cross examination was constitutionally ineffective, and prejudiced Petitioner such that the judgment of conviction must be vacated.

(b) Direct Appeal of Ground Five:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ( ). No (X).

(2) If you did not raise this issue in your direct appeal, explain why:

[9] There were several other examples in which Plaisted's cross examination of other witnesses was ineffective as well.

A claim of ineffective assistance must be raised in a motion under 28 U.S.C. § 2255, and ought not be included as a claim on direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ( ). No (X).

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application? N/A

Yes ( ). No ( ).

(4) Did you appeal from the denial of your motion, petition, or application? N/A

Yes ( ). No ( ).

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal? N/A

Yes ( ). No ( ).

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND SIX: PETITIONER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO PROPELY OBJECT TO CRITICAL EVIDENCE ADDUCED BY THE PROSECUTION, LEADING TO THE ADMISSION OF EVIDENCE THAT WAS IMPROPER AND PREJUDICIAL.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The lack of preparation by Petitioner's counsel was again evident in his failure to object to the admissibility of key evidence at trial. Some examples of the failure to object that were particularly blatant and prejudicial to Petitioner are included here, but there were many other incidents, all of which led to the admission of critical evidence against Petitioner.

First, and perhaps most importantly, Petitioner's counsel placidly allowed Walker to testify as to Petitioner's state of mind during the crucial testimony about the day of Petitioner's arrest.[10] This failure to object to Walker's testimony, and the previously discussed failure to call Petitioner to testify on his own behalf, allowed the jury to hear Walker's inappropriate and inadmissible version of what Petitioner was thinking at the time of his arrest. As noted above, Petitioner would have refuted Walker's version of events during the alleged drug transaction. He would have testified that he just wanted to get out of there, because he was afraid of Walker, who he knew had a gun. Walker's testimony, which never should have been admitted, was to the effect that Petitioner made certain statements because he (Petitioner) felt that his car was too slow, and that he was trying to get co-conspirators to come pick up his drugs in a faster car. But, of course, a witness can never testify as to what is in the mind of another person, as that is not a matter that can ever be within the witness's personal knowledge; as such, Plaisted's failure to object to this highly prejudicial testimony engendered the ineffective assistance of counsel.[11]

Another example of counsel's failure to object to witness testimony that led to the admission of highly prejudicial evidence occurred at the outset of trial. Prior to trial, the Court ruled that the prosecution could elicit testimony about pre-indictment bad acts, with a limiting instruction. Notwithstanding, Plaisted should have objected in front of the jury to the introduction of Petitioner's prior bad acts and he should have asked for the limiting instruction to be given at the beginning of Walker's testimony, the first witness at trial. Walker immediately set the tone, painting Petitioner as a vicious criminal since birth and describing bad acts committed by Petitioner when he was only 16 years old. Indeed, Walker described seven years of claimed collaboration with Petitioner, and testified for a day and a half, covering well over 200 pages of transcripts, before his account reached the year 2000, the earliest year covered by the indictment. None of this evidence was corroborated by the prosecution. While the Court's ruling (affirmed on

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10 In fact, the government successfully objected to similar testimony several times during the course of trial.

11 Plaisted likewise failed to object when Palmer Yarborough, a witness for the government, testified as the state of mind of Anthony Massenberg, a defense witness.

appeal) did allow testimony of prior bad acts, the Court could not have anticipated the breadth and scope of such testimony which demanded an objection from any effective counsel.

As a third example, Plaisted failed to object when co-counsel opened the door to the admission of highly prejudicial evidence. The Court itself noted that Plaisted should have objected, and that he should have known of his obligation to do so, even going so far as to suggest that counsel was purposefully holding back objections to gain an unfair advantage. As a direct result of Plaisted's failure to object, highly prejudicial evidence about the criminal records of alleged co-conspirators, which would not have been allowed otherwise, was introduced.

Additional examples include the failure to object to: (1) irrelevant and highly prejudicial descriptions of the destructive power of weapons, and specifically of hollow point bullets; (2) prejudicial pictures; (3) certain instances of violence which led to the admission of prejudicial evidence; and (4) numerous leading questions. There were numerous other instances in which Petitioner's counsel should have objected but did not, or objected after it was too late. Taken together, as well as separately, these failures to object constituted the ineffective assistance of counsel, which resulted in the conviction here obtained. This motion should accordingly be granted.

(b) Direct Appeal of Ground Six:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ( ). No (X).

(2) If you did not raise this issue in your direct appeal, explain why:

A claim of ineffective assistance must be raised in a motion under 28 U.S.C. § 2255, and ought not be included as a claim on direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ( ). No (X).

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application? N/A

Yes ( ). No ( ).

(4) Did you appeal from the denial of your motion, petition, or application? N/A

Yes ( ). No ( ).

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal? N/A

Yes ( ). No ( ).

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND SEVEN: PETITIONER'S COUNSEL'S NUMEROUS OTHER TRIAL ERRORS DEMONSTRATE THAT COUNSEL WAS TOTALLY UNPREPARED FOR TIRAL AND THEREFORE WAS CONSTITUTIONALLY INEFFECTIVE.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner has not, and will not argue that Plaisted was or is a bad attorney, and he is in fact grateful to Plaisted for the time and effort he put into this case. Rather, it is Petitioner's contention that no attorney could possibly have provided the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States when thrust into a case this complicated just a day before the start of trial, particularly one who had never previously tried a drug conspiracy case like this one. It was Plaisted's lack of preparation that made him ineffective, and that lack of preparation showed throughout trial, as has been amply described above. However, there were many other incidents that occurred during trial as well.

For example, Plaisted called Gregory Lee as an expert witness to testify as to Drug Enforcement Agency procedure. However, he did so without properly preparing Lee; in fact, he did not even provide Lee with proper discovery materials related to the case. As a result, Lee had absolutely no opinion whatsoever on the appropriateness of the DEA procedures employed in this case, rendering his testimony virtually worthless. To make matters worse, as a direct result of Plaisted's failure to prepare Lee, on cross examination the government turned Lee into a highly effective witness for the prosecution.

The glaring error in calling Lee was further exacerbated by Plaisted's failure to properly investigate and review the government's expert reports or seek rebuttal experts.[12] Further, after arguing at length for the introduction of the government's appraisers, to demonstrate the value of the jewelry involved in the case, he failed to even seek an appraiser in order to establish the value himself.

Plaisted's direct examination also demonstrated his unpreparedness. For example, in his direct examination of Tahirou Ndiaye, he inexplicably questioned with regard to the extensive construction necessary to open the Closet, Petitioner's clothing store, opening the door[13] for the government to delve into the costs of the project. In the direct of Kamisha Holmen, Walker's girlfriend, he "forgot" to ask key questions, and the Court's denial of his request to re-open the direct examination was upheld on appeal.

These are but a few of numerous examples that demonstrate Plaisted's unpreparedness, and further support Petitioner's contention that he received

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[12] In fact, there was a decided lack of investigation and development of strategy by Plaisted generally, again due to the lack of time afforded him for preparation.

[13] This was just one of many examples of Plaisted opening the door to otherwise inadmissible and prejudicial evidence.

Constitutionally ineffective assistance, all of which will be amply demonstrated at the hearing that the Court must and should conduct in this case.

(b) Direct Appeal of Ground Seven:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ( ). No (X).

(2) If you did not raise this issue in your direct appeal, explain why:

A claim of ineffective assistance must be raised in a motion under 28 U.S.C. § 2255, and ought not included as a claim on direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ( ). No (X).

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application? N/A

Yes ( ). No ( ).

(4) Did you appeal from the denial of your motion, petition, or application? N/A

Yes ( ). No ( ).

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal? N/A

Yes ( ). No ( ).

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:

Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND EIGHT: PETITIONER'S COUNSEL'S CUMULATIVE ERRORS VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

While each of counsel's errors was unreasonable, the totality of the errors without question rendered counsel's performance as a whole constitutionally ineffective. Because of counsel's errors, inter alia, no taint hearing was conducted. which would have resulted in the suppression of important evidence, including the testimony of the government's star witness; Petitioner was not able to testify on his own behalf; numerous helpful and exculpatory witnesses were not called: the government's star witnesses were not properly impeached or examined: and highly prejudicial and normally inadmissible evidence was presented to the jury, among other things. Thus, counsel's performance as a whole was objectively unreasonable, and the cumulative effect of these errors prejudiced Petitioner.

(b) Direct Appeal of Ground Eight:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ( ). No (X).

(2) If you did not raise this issue in your direct appeal, explain why:

A claim of ineffective assistance must be raised in a motion under 28 U.S.C. § 2255, and ought not be included as a claim on direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ( ). No (X).

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?
N/A

Yes ( ). No ( ).

(4) Did you appeal from the denial of your motion, petition, or application? N/A

Yes ( ). No ( ).

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal? N/A

Yes ( ). No ( ).

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND NINE: THAT PETITIONER'S COUNSEL'S ERRORS PREJUDICED PETITIONER IS FURTHER DEMONSTRATED BY NEWLY DISCOVERED EVIDENCE THAT IMPEACHES THE TESTIMONY OF TWO KEY GOVERNMENT WITNESSES.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

In addition to the prejudice set forth in the other grounds described above, new evidence has come to light that calls into question the testimony of two key government witnesses, Lachoy Walker and Task Force Officer George Snowden of the Newark Police Department. If not time barred by Federal Rule of Criminal Procedure 33, Petitioner will file an appropriate motion addressing this newly discovered evidence. However, whether or not it provides an independent basis for relief, this new evidence helps demonstrate the prejudice required for Petitioner to prevail on this claim, as it shows that there is a reasonable probability that Petitioner was in fact innocent.

The credibility of Walker and Snowden was a major issue at trial. Walker's evidence was the key to the government's case, and the majority of his testimony was uncorroborated, and would have been directly contradicted by Petitioner, had Petitioner testified at trial. Snowden's credibility was also a major issue, given that he was the head of the Task Force investigation and the man who signed a number of the search warrant and wiretap affidavits.

First, the defense has obtained evidence that the government's attorneys approached Ishmael Pray, an alleged co-conspirator, in an attempt to get him to testify, and that government attorneys told Pray that the reason they needed him to testify was that they did not believe Walker was telling the truth. Shawnette Alexander, Ishmael Pray's girlfriend and the mother of his child, told Petitioner's investigators that she herself was personally approached by a government attorney seeking to have her pressure Pray into testifying. She further stated that the same individuals told Pray that they believed Walker was lying. Had the jury been presented with evidence that the government's own lawyers did not trust Walker, it would have changed the case completely.

Second, in approximately September of 2008, more than two years after Petitioner's conviction, Petitioner learned that the government had failed to disclose potential impeachment material with respect to Snowden, one of the government's critical witnesses. The government disclosed that Snowden had several temporary restraining orders filed against him in the late 1990s by a former girlfriend and, indeed, that Snowden was still under a domestic violence restraining order during trial. Such damaging evidence, against the man who headed the investigation of Petitioner, again could have changed the outcome of the case. This new evidence shows that there is a reasonable probability that the errors of trial counsel caused Petitioner to be convicted of a crime he did not commit.

(b) Direct Appeal of Ground Nine:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ( ). No (X).

(2) If you did not raise this issue in your direct appeal, explain why:

The evidence that forms the basis of this ground was not discovered until after trial, and therefore was not an appropriate basis for direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ( ). No (X).

(2) If your answer to Question (c)(1) is "Yes," state: N/A

Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application? N/A

Yes ( ). No ( ).

(4) Did you appeal from the denial of your motion, petition, or application? N/A

Yes ( ). No ( ).

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal? N/A

Yes ( ). No ( ).

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Eight of the nine grounds in this motion are for ineffective assistance of counsel. Such claims of ineffective assistance of counsel must be raised in a motion under 28 U.S.C. § 2255, and ought not be included as issues on direct appeal. The one ground that is not related to ineffective assistance, Ground Nine, was not previously raised because it involves newly discovered evidence, which again, would not be appropriate on direct appeal.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ( ). No (X).

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Vincent Nuzzi
(b) At arraignment and plea: Vincent Nuzzi
(c) At trial: James Plaisted, Walder Hayden & Brogan
(d) At sentencing: Walder Hayden & Brogan
(e) On appeal: Lawrence S. Lustberg, Gibbons P.C.
(f) In any post-conviction proceeding: Andrew Smith, Smith + Schwartzstein
(g) On appeal from any ruling against you in a post-conviction proceeding: Smith + Schwartzstein

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (X). No ( ).

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ( ). No (X).

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A
(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A
(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? N/A

Yes ( ). No ( ).

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Petitioner's petition for certiorari to the Supreme Court of the United States was denied on October 4, 2010. Under 28 U.S.C. § 2255, the one year statute of limitations runs from the date of denial of a petition for certiorari, which, in this case, would be October 4, 2011.

*** The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that: A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —**
(1) the date on which the judgment of conviction became final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

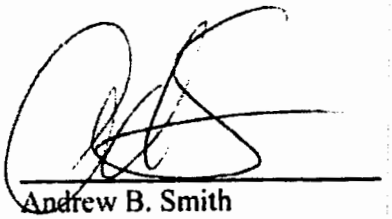
Petitioner requests that his sentence be vacated, and he be granted a new trial; or, that his sentence be set aside, and he be granted a taint hearing; or, that his sentence be corrected. In the alternative, a hearing should be conducted to evaluate Petitioner's claims.

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was electronically filed on October 4, 2011, with hard copies mailed via Federal Express Overnight the same day.

Executed (signed) on October 4, 2011.



Andrew B. Smith
Smith + Schwartzstein LLC
Attorney for Movant
Hakeem Curry

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Andrew B. Smith, attorney for movant Hakeem Curry, is signing for movant because these papers were prepared by Mr. Smith in New Jersey, and movant is a prisoner in a maximum security facility in Florence, Colorado. Given the complex nature of this matter and the massive volume of documents involved, it was simply not feasible to get Petitioner's signature in time to timely file this motion.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 09-cr-369-DMC
v.	:	
PAUL W. BERGRIN,	:	TRANSCRIPT OF TRIAL PROCEEDINGS
Defendant.	:	VOLUME 33

Newark, New Jersey
March 12, 2013

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.,
AND A JURY

Reported by:
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

APPEARANCES:

JOHN GAY, Assistant United States Attorney,
STEVEN G. SANDERS, Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07102
On behalf of the Government

GIBBONS, PC
One Gateway Center
Newark, New Jersey 07102
BY: LAWRENCE S. LUSTBERG, ESQ., and
AMANDA B. PROTESS, ESQ.,
Standby counsel for Defendant

(Defendant not present)

(Jury out)

THE COURT CLERK: All rise.

THE COURT: Good afternoon. Okay.

MR. LUSTBERG: Judge, I brought an extra copy for you.

THE COURT: I'm glad you did, because I wasn't -- I got the one that the Government sent, but I wasn't sure.

MR. LUSTBERG: So I think --

THE COURT: We'll work off this?

MR. LUSTBERG: We'll work off this one because this one has my changes.

THE COURT: And how about the Government? They've got the same copy?

MR. LUSTBERG: Yes, they do.

And, Your Honor, just to tell you, this has been the easiest, most collegial process I've ever been through with regard to a jury charge.

THE COURT: I'm happy to hear that.

MR. LUSTBERG: What we've done is, I sent that red -- the one with all those red markups to the Government yesterday. Mr. Sanders went through, and we only -- we're down to like 10 issues that you have, just literally 10, and some of them are extremely minor, 10 items in dispute, and so we don't -- and the rest of them, the Government will

control the document, so then they'll accept the changes that are not in dispute, they'll make whatever adjustments are necessary in light of today's conference, and we'll be done.

THE COURT: Okay. Let me just get something on the record.

We're here today in the matter of United States v. Bergrin.

Mr. Bergrin requested yesterday to not be present so that he could use the time to prepare his summation.

Counsel will be summing up beginning tomorrow morning at nine o'clock. The jury was advised on Monday that they would be off today, and we have decided to use today to resolve the jury requests and any other last-minute requests.

I also just wanted to mention, my clerk mentioned to me today, Mr. Lustberg, what is your plan about Rule 29?

MR. LUSTBERG: We were going to brief it after the verdict.

THE COURT: After the verdict.

MR. LUSTBERG: Right.

THE COURT: Any objection?

MR. SANDERS: No. I think Rule 29(a) permits --

THE COURT: Okay.

MR. SANDERS: -- and Rule 29(c) as well.

MR. LUSTBERG: (c).

THE COURT: Okay. No problem.

So we're here now to go over these Government requests, and I think I've already mentioned this, and I'm sure, Mr. Sanders, you're aware, maybe you even did it, I couldn't tell, but since I'm going to be turning over a copy, maybe two copies of the charge to the jury, I want all references to the Government's request or whoever taken out. Also, get rid of all footnotes. I don't want them looking up and giving them any reason to think that they might have to go look at something.

MR. SANDERS: Absolutely, Judge. And I discussed this with Mr. Lustberg. When I get done with it, it will look as much like Judge Martini's final instructions, which I e-mailed, which just say Jury Instructions and Instruction Number One --

THE COURT: That's fine. That's fine. With the --

MR. SANDERS: Table.

THE COURT: -- the table, yes.

MR. SANDERS: Yes.

THE COURT: Okay. That's fine. That's the way I want to do it.

All right. So why don't we do this?

Mr. Lustberg, since you're the one with the

objections, to the extent there are any, why don't you -- I mean, is it necessary that we go through each one --

MR. LUSTBERG: No.

THE COURT: -- and get "no objection" on the record?

MR. LUSTBERG: No.

THE COURT: So unless I hear an objection, the form that you submitted to me will be the one that we will use. Okay?

Okay. So what's your first one that we have to look at, Mr. Lustberg?

MR. LUSTBERG: Actually, it probably makes sense in light of where we are for Mr. Sanders to go first.

THE COURT: Okay. I don't care. That's okay.

MR. LUSTBERG: He'll comment, because he's in agreement with my changes, other than as set forth in his objection, when he has an objection.

THE COURT: I have no problem with that. Go ahead. Whatever is easiest. If you're in agreement, it's okay with me.

Go ahead, Mr. Sanders.

MR. SANDERS: And with respect to request number two, which is a request regarding pro se Defendants --

THE COURT: Just hold on. You've got to let me --

MR. SANDERS: Sure. Page 14.

THE COURT: Pro se Defendant. Okay. What about it?

MR. SANDERS: I mean, our objection here is just that it deviates from the language Judge Martini used and --

THE COURT: Wait, wait. I'm sorry. Say that again.

MR. SANDERS: I said our objection here is that the language, the alterations by Mr. Lustberg deviate from the instruction that Judge Martini gave last year, and we don't see why that's necessary.

MR. LUSTBERG: And the response, Judge, is that the language that we had provided is verbatim from the 3rd Circuit model charge.

THE COURT: Just so I understand, the portions in red are the ones that you want added?

MR. LUSTBERG: Yes.

THE COURT: That's the -- okay. I agree with the portions in red, so I think we'll use the one -- to tell you the truth, I think it's six of one, half dozen of the other, but to the extent it's a 3rd Circuit model, I'm more than happy to go along with that. I think that takes a lot of problems out.

Next?

MR. SANDERS: All right. Next would be for the same reason, request number five, Not All Evidence, Not All

Witnesses Needed.

THE COURT: Okay. Hold on.

And what did you say? There is a change?

MR. SANDERS: I'm just saying, I mean, it's minor, but it just deviates from the language Judge Martini used, and again, I thought that was what we were using for those instructions. It's not a big deal.

THE COURT: The only change I see is the word "however" and "was."

MR. SANDERS: That's fine. It's not a big deal.

THE COURT: Okay. We'll leave that the way it is here. Okay.

Next?

MR. LUSTBERG: Told you this was going to be easy.

THE COURT: I hope so. Next? Well, you know, if you follow the models, it really does make it easy.

MR. LUSTBERG: There's a few here where there aren't 3rd Circuit models.

THE COURT: I understand.

MR. SANDERS: I'll skip the next one for the same reason.

THE COURT: Well, hold it. Just tell me where we're going next.

MR. LUSTBERG: You don't care because it's so --

THE COURT: Tell me the next one that we have to

talk about.

MR. SANDERS: Request number 27, which is --

THE COURT: Hold on. Let me just find it first. Twenty-seven.

You threw me a curve here by giving me the charges on both front and back. The final one I don't want written on front and back.

MR. SANDERS: No, it will be one-sided.

THE COURT: I'm sorry. Twenty-seven?

MR. SANDERS: Yes, instruction number -- request number 27, page 47, at the bottom.

THE COURT: Page 47. Hold on. Hold on. I'm still trying to find it. Page 47, number 27.

Okay. What about it?

MR. LUSTBERG: You mean 46. I think on yours, Judge, page 46.

THE COURT: Okay. Well, request 47 starts at 45 and goes over to 46.

What's the problem?

MR. SANDERS: Okay. At the end, I had added -- this was the model 3rd Circuit instruction. I had added a sentence from a 2nd Circuit case that's at the very end of the instruction, and Mr. Lustberg objects to that.

THE COURT: Is this "An enterprise is also not limited to groups whose crimes are sophisticated, diverse,

complex, or unique"?

MR. LUSTBERG: No, it's just the final sentence, Judge, that said -- and you can see it under the "Deleted" there in the margin: "Finally, the fact that membership may have changed over time does not negate the existence of an enterprise."

THE COURT: Wait. I don't see that in mine.

MR. LUSTBERG: Okay.

THE COURT: The final sentence I have is the one I just read.

MR. LUSTBERG: Okay. Let's try again. So this is request 27 --

THE COURT: Request 27, page 46.

MR. LUSTBERG: -- page 46, at the very end.

THE COURT: The last sentence on the line is "An enterprise is also not -- " --

MR. LUSTBERG: Okay. If you look in the margins, you'll see a little box which says "Deleted."

THE COURT: Oh.

MR. LUSTBERG: So that's the dispute. My change was that to delete that sentence, which is supported by a 2nd Circuit case but is not in the 3rd Circuit model charge.

THE COURT: I will follow the 3rd Circuit model, with all due respect to the 2nd Circuit.

Next?

MR. SANDERS: The next is an instruction -- or request number 33A.

THE COURT: Hold on. Hold on. 33A. That's page 58. Yes?

MR. SANDERS: And then starting about six pages in, Mr. Lustberg has proposed a lengthy instruction on --

THE COURT: Okay. Wait. You're not helping me, though. I need a page -- give me a page number.

MR. LUSTBERG: At page 64.

THE COURT: Page 64, all right, conspiracy?

MR. LUSTBERG: And it's the one beginning halfway down, conspiracy, single or multiple conspiracies.

THE COURT: Okay. Now, what is that? You are asking to have that put in, Mr. Lustberg?

MR. LUSTBERG: Yes, Your Honor.

THE COURT: And the Government's objecting.

MR. LUSTBERG: Yes.

MR. SANDERS: Well, I mean, it is a 3rd Circuit model instruction, but it depends on whether there's evidence to support the instruction, so I asked Mr. Lustberg what conspiracy he thinks there is that would justify that.

THE COURT: Okay. Let me read this and then we'll talk about it.

I'll tell you one thing I find: I find it confusing, which I find some of these -- Mr. Lustberg,

what's your position here?

MR. LUSTBERG: Yes. So it's particularly apposite, I think, in RICO cases like this for the jury to be instructed that in order for them to find him guilty of a single conspiracy, whether it's the drug conspiracy, whether it's the RICO conspiracy, whatever, they have to find that agreement as opposed to finding numerous different agreements, and so the multiple conspiracy charge is always in a situation where they've charged a single conspiracy and there may be multiple conspiracies.

In this case, I mean, there could never be a case that would be -- where that would be a more appropriate thing for them to have to think about because, after all, you know, there's all these different plots. But yet the Government argues that really -- well, there's several. There's two single conspiracies, there's a single RICO conspiracy, and a single drug conspiracy. And our argument is that, no -- although I will tell you Mr. Bergrin -- it's certainly not going to be a big theme of his summation, to be completely candid with the Court. The defense here is not that this was -- that they have a right other than it was multiple conspiracies instead of a single conspiracy, but the jury should be requested to find the single conspiracy that the Government alleges, which is what this model instruction provides.

THE COURT: What's the Government's objection?

MR. SANDERS: Well, I think its location here, where it says "The indictment charges that Paul Bergrin and the other alleged co-conspirators were all members of one single conspiracy to commit several Federal crimes," there are seven different conspiracies charged in the indictment, and I think this would mislead the jury, and I don't know that Mr. Lustberg would rather have this charge located with the instruction on the RICO conspiracy for Count 2 and whether -- with the charge for Count 5, which is the drug conspiracy, but I think having it -- I mean, I know that it's part of the drug conspiracy here.

THE COURT: Does that solve the problem?

MR. LUSTBERG: I think Mr. Sanders is absolutely right, and I think where it belongs is after the Count 2.

THE COURT: Okay. I'll allow it. I'll allow it, and I'll let you move it to the appropriate place that you agree upon.

MR. LUSTBERG: Okay. No problem.

THE COURT: Next?

MR. SANDERS: Yes, and the other thing, in the same instruction, Mr. Lustberg toward the end had proposed some changes which seemed to require us to prove the identity --

THE COURT: Wait. Wait. I don't know where

you're talking about. What are we referring to?

MR. SANDERS: Okay. I'm now to the second-to-last page of the instruction.

MR. LUSTBERG: I'm going to give you a page, Judge. Mr. Sanders's pagination is somehow different.

It's the -- yes, page -- it's page 68 of Your Honor's.

THE COURT: Sixty-eight. Yes? Okay. And what is it, Mr. Sanders?

MR. SANDERS: You'll see that Mr. Lustberg has proposed a fourth and fifth element that we need to prove which involves proving that the substance at issue is cocaine and that the weight exceeded five kilograms. And for the Count 5 conspiracy, that's -- you know, we don't have those similar instructions. The jury doesn't have to find that it was cocaine and five kilograms in order to convict Mr. Bergrin.

THE COURT: So you're suggesting that we again move this and adjust it accordingly?

MR. SANDERS: Well, I think whatever the law is -- this was for the racketeering predicate, which covers the drug conspiracy. It should be the same as the Count 5 instruction.

MR. LUSTBERG: No objection, but the requirement that the drug be specified and that the quantity be

specified in addition to creating an Apprendi issue if you don't have it in there is as the -- is in the 3rd Circuit model.

MR. SANDERS: Right, but our Count 5 instruction addresses the Apprendi issue by requiring --

THE COURT: So what is it that you want to do, Mr. Sanders?

MR. SANDERS: I would like to just have the first, second and third elements here, --

THE COURT: Yes?

MR. SANDERS: -- which is, the jury will find whether Mr. Bergrin conspired to distribute a controlled substance.

THE COURT: Okay. Go ahead.

MR. SANDERS: If they do that, he will be guilty of that racketeering predicate. When they get to Count 5, they will then answer interrogatories that say whether it was cocaine and the amount.

THE COURT: Should this then be in Count 5?

MR. SANDERS: Well -- right. The second -- the fourth and fifth elements are in Count 5 in the form of special interrogatories.

MR. LUSTBERG: But, Judge, you can't have them in the interrogatories and not have them in the instructions.

THE COURT: No, it's got to be in the charge.

MR. SANDERS: But it is in the instructions for -- I mean, we have it here.

MR. LUSTBERG: I think it should be consistent as between the two. So I agree with Mr. Sanders that it should be consistent as between the two, and I think it should be in both.

MR. GAY: Well, but -- sorry to interrupt here, but I mean, the difference, though, is that if they do not find the five-kilogram weight, he still is convicted of that racketeering act. So that's -- I think that -- that's the difference as I would see it, Larry.

THE COURT: Well, that goes to the fifth. How about the fourth?

MR. GAY: To the --

MR. SANDERS: They don't have to find that it was cocaine in order to find him guilty of an 841 or an 846 conspiracy. It just has to be any controlled substance.

THE COURT: Well, but what other controlled substance have we talked about with him?

MR. GAY: No, no, I would agree. I do think -- I mean, I don't have as much of an issue with the cocaine, but I do think the weight is an issue because they can't find him guilty of the straight conspiracy --

THE COURT: I think that's correct, Mr. Lustberg, about the weight.

MR. LUSTBERG: Well, unfortunately, I don't have the indictment with me, but I believe that the predicate act that's alleged is identical to the count, Count 5. And so if that's the case, the way that RICO typically works --

(A document was handed to standby defense counsel.)

MR. LUSTBERG: Thank you. Thank you.

MR. SANDERS: It is identical, but for Count 1 purposes, the quantity is not going to have any effect on the sentence. In other words, it's not going to matter based on the RICO predicates with five kilograms. It only matters whether they find him guilty of conspiring to distribute a controlled substance.

MR. LUSTBERG: I understand, so there may not be an Apprendi problem with regard to the RICO count. That's fine. But the model charge requires these elements, the five elements that I've added. Those are in the model charge. There's no authority for eliminating any of those elements. I understand that it may compromise the Government's ability to prove him guilty with regard to that predicate act, but this is the offense that they've charged as a predicate act, and those are the elements of the offense, period.

THE COURT: Except that I think Mr. Sanders is saying that while he agrees that this is an appropriate model charge that under the facts as we have them here, this

portion is not necessary.

Is that correct?

MR. SANDERS: Well, I'm saying it's not necessary for Racketeering Acts 1A. When they get to Count 5, which overlaps with it, we don't have to prove that he conspired to distribute more than five kilograms in order to prove him guilty. They can find that he conspired to distribute a detectable quantity, and that would just change the sentencings.

THE COURT: How about that, Mr. Lustberg?

MR. LUSTBERG: That's a hundred percent true. I mean, if you look at the way the charges usually work under this, the jury is given all kinds of alternatives as to how much. That would make this already --

MR. SANDERS: You know what? I'll cut this short. We'll agree to move the special interrogatories that are in Count 5 back into Count 1, which is going to make it a little more cumbersome for the jury, but then when we get to Count 5, it will simply refer back to what they've already done.

THE COURT: Does that solve it?

MR. LUSTBERG: Solves it.

THE COURT: That's fine with me.

Next?

MR. LUSTBERG: The next one is going to be on page

72 of yours, Judge.

THE COURT: Okay. And what's the issue?

MR. SANDERS: Mr. Lustberg has added language I guess from a 6th Circuit case about the purpose for which a defendant must use or maintain an apartment or a place of business.

THE COURT: Is there no 3rd Circuit model on this?

MR. SANDERS: There is not. But I told Mr. Lustberg as a compromise that I would agree that the purpose had to be a significant one. It doesn't have to be -- under our law it doesn't have to be a primary or even exclusive purpose of using a dwelling or apartment for, you know, distributing or using a controlled substance, but I haven't heard his response on that.

MR. LUSTBERG: Okay. Now I understand it, okay, because I didn't understand your point. But I have no objection to that. We can do it that way.

THE COURT: Okay. So you've resolved it.

MR. LUSTBERG: Yes.

THE COURT: Next?

MR. SANDERS: The next one we've already taken care of, I believe.

MR. LUSTBERG: Yes. Yes, I agree with that.

MR. SANDERS: And then 34C will be the next one.

THE COURT: Hold on one second. I've got to find

it. This is page 80?

MR. SANDERS: Yes.

MR. LUSTBERG: Hold on. It says specific --

THE COURT: Eighty-two.

MR. LUSTBERG: The specific section -- it's the causation section on page 84.

THE COURT: Causation, so that's -- okay.

All right. So what's the problem?

MR. SANDERS: Well, look at where -- this instruction is located within the predicate that covers conspiracy to murder under New Jersey law, and to have -- you know, causation is usually an element like where someone is badly wounded and they're on life support, you take them off life support and they die, or if you leave someone out in the middle of nowhere and then they're run over by a truck or something like that. That's an issue of causation.

Here, Mr. Bergrin is charged with a conspiracy to murder someone. If he knowingly and intentionally joined that conspiracy, he can't later come back and claim when the conspiracy achieved its object that that was somehow unforeseeable or not a but-for cause of the victim's death.

So I think it has no basis in the evidence and will confuse the jury.

THE COURT: Mr. Lustberg?

MR. LUSTBERG: I mean, there's certainly --

Mr. Sanders is right that, most often, the causation issue comes up in the context of those sorts of contexts that he's discussed.

But the causation -- the causation is -- let me just say, the language here is directly from the New Jersey model charge, since this was a New Jersey crime.

THE COURT: Right.

MR. LUSTBERG: Causation is part of that in any event. You know, I think that what Mr. Sanders is doing is taking away something that should be argued to the jury. But certainly, you know, Mr. Bergrin's defense is in part that, you know, with respect the Kemo murder, all of this was in operation regardless of his actions. And what Mr. Sanders says is, well, you know, if he joined the conspiracy, then he's responsible. There is an instruction that says that elsewhere, but causation is something that the Court is required to charge in a murder case.

MR. SANDERS: Well, can I just point this out?

What Mr. Lustberg said about -- what's on the New Jersey web site where I got these charges from, there's a parenthetical that says, If causal relationship between conduct and result is not at issue, charge the following paragraph.

So in other words, there has to be an issue that causation is disputed.

Now, with respect to what Mr. Lustberg said, he's talking about the aiding and abetting charge, not the conspiracy charge. Mr. Bergrin's theory is that nothing he did or said to this group could have altered Kemo McCray's fate, that they were going to kill him anyway. Our argument, and we made this to Judge Martini in a Rule 29 motion after the mistrial, which Judge Martini accepted, is that that's not a proper argument under the law. If your advice in any way nudges or assists or helps someone in pursuing a course of conduct they've already determined to do, you're still guilty of aiding and abetting.

So I think introducing this causation concept has no basis in evidence and is simply going to confuse the jury. At the very least, it does not belong in the conspiracy instruction.

MR. LUSTBERG: We'll agree to move it to the -- just to have it in the aiding and abetting section.

THE COURT: Okay. Thank you.

Next?

MR. SANDERS: Judge, to me, that's not an acceptable compromise, because I don't believe it belongs in the aiding and abetting section either. In other words, as I said --

THE COURT: Well, where does it belong?

MR. SANDERS: It doesn't belong in this case.

That's why we object to it. It certainly didn't belong in the conspiracy part, for the reasons I said earlier, but it also doesn't belong in the aiding and abetting instruction under New Jersey law because there is no causation issue in this case. The allegations are for aiding and abetting liability, that Mr. Bergrin solicited or induced somebody to commit this crime and they went out and did it.

Mr. Bergrin's defense, he's trying to argue that this -- no matter what I said to this group, they were -- Kemo McCray's fate was sealed. And for the reasons I stated, and I haven't provided to the Court, in my Rule 29 brief that we submitted to Judge Martini, that's not a viable argument. And to have him charge on causation I think is going to confuse the jury.

That's our position.

THE COURT: Mr. Lustberg?

MR. LUSTBERG: I mean, our position is -- I think Mr. Sanders has succinctly set forth our position.

Our position is that Mr. Bergrin -- I understand with respect to conspiracy, once you join the conspiracy, you're responsible for whatever acts they take, so that's why I agree we should take this out of the conspiracy charge.

With respect to the substantive charge, as Your Honor knows, there's no difference substantively between an aiding and abetting charge on the one hand and a murder charge on the

other.

THE COURT: If Bergrin is going to argue this in his summation, why wouldn't the jury get the charge?

MR. SANDERS: Because that's not the kind of causation that this refers to. He's arguing that, no matter what I said to this group, they already had determined to kill him, so my advice didn't matter. That's an argument he can make regardless of its causation instruction.

This is sort of like, you know, when you have two like actual causes of death - in other words, you have someone who throws somebody out of the car and at the same time another car comes along, you know, where you have two things operating at the same time.

Anthony Young is the shooter here. He's the one who caused the death, and there's no doubt about that his actions caused the death. The only question the jury has to decide is whether anything Mr. Bergrin did or --

THE COURT: So you're afraid that the jury could infer from this charge or place a burden upon the Government that the Government can't meet.

MR. SANDERS: Well, I think --

THE COURT: With respect to causation.

MR. GAY: Well, I think it's that -- it's that, and it's also the confusion part, Judge. I mean, the causation in this respect is really -- is related to the act

of the murder. It's the act of Anthony Young's shooting that's the causation. So the issue of Mr. Bergrin's involvement is, did he aid and abet. If there was an issue here about whether or not Anthony Young shooting Kemo McCray in the head three times was what caused his death, then that might be an appropriate charge, but that's not what we have here, Judge.

So we believe it's confusing --

THE COURT: Let me read it once again. Hold on.

What did Judge Martini do with this?

MR. LUSTBERG: This was not -- what Mr. Sanders is referring to is post-trial briefing, which, frankly, I haven't looked at that. And I don't think that we were having -- I don't think that -- listen, I shouldn't say it. That's not my recollection.

THE COURT: Did he give a charge on causation?

MR. SANDERS: No, and to be fair, this didn't come up in this format last time because there wasn't a New Jersey predicate.

MR. LUSTBERG: Right.

MR. SANDERS: But the argument that I'm talking about is one that was made in the Rule 29 brief by Mr. Lustberg.

THE COURT: Right. I understand that.

MR. SANDERS: And that was essentially that

nothing that Mr. Bergrin said could have affected or altered Kemo's fate, the Curry group had already determined to kill him irrespective of what Mr. Bergrin did. And our response to that was, well, number one, that's not what the jury instructions on Federal aiding and abetting liability require. They don't require proof of a but-for causal relationship, they just have to show you gave the advice, they followed it, and if there was sufficient evidence for a rational jury to find that, then that's it.

But I can send to the Court my Rule 29 brief, and Judge Martini in a pretty long opinion adopted our argument on that.

MR. LUSTBERG: I think the argument that he adopted was that there was sufficient evidence from which a jury could infer that Mr. Bergrin's actions did cause the murder, that, you know, his saying No Kemo, no case and his making the phone call to Curry that you've heard about were, in fact, the causation. The causation is an element, and I haven't seen any case law, you know, they certainly don't cite any here that stands for the proposition that the causation element is only limited to circumstances in which, you know, it's a matter of what proximally that caused the death, whether, you know, that shot or some other shot. I think that Mr. Bergrin is entitled under the New Jersey law to -- what he raises a causation issue, and I can't

understand what other thing he's doing than raising a causation issue when he says, as he always has, that the events were in motion for this witness to be killed and whatever he did had no bearing. That is a causation argument. And I think he's entitled -- I think he's raised it, and as a result of raising it, the Court is required to charge it. The jury can decide. These are going to be the arguments. I mean, the arguments are going to have to do with the facts. The Government is going to argue that Mr. Bergrin's actions were designed to and did, in fact, contribute to the commission of the murder, and Mr. Bergrin's going to say no, they didn't. That's what causation is, and he's entitled to the instruction.

MR. GAY: Judge, if I could just -- if -- and I haven't looked at the exact language of this, but it's the Government's position that if the Court is inclined to provide this instruction, that the instruction relates to the causation of the death, meaning did Anthony Young's -- the person that Mr. Bergrin aided and abetted in his murder, did Mr. Young's actions, were they the proximate cause of the death. That's the proper --

THE COURT: Not Bergrin's --

MR. GAY: Not Bergrin's. Bergrin either aided and abetted him or he didn't. And so the proximate causation relates to, did Anthony Young's actions, the one who

actually pulled the trigger and caused the death, were they the proximate cause of his death, and if the Court wants to instruct -- give an instruction relating to that, I think that would relieve the confusion that the Government feels would be, you know, would inure from what Mr. Lustberg wants to charge.

MR. LUSTBERG: If that's the law --

MR. SANDERS: Can I read to you, Your Honor -- because we're not looking at the conspiracy instruction. I want to read to you what the elements are of aiding and abetting under New Jersey law, because the jury can't find these four elements beyond a reasonable doubt and not find that Mr. Bergrin's conduct contributed to the death.

The first one is that Anthony Young committed the crime of murder, as I previously explained to you; two, that this Defendant, Mr. Bergrin, solicited him to commit it and did agree or attempt to aid him in planning and committing it; three, that this Defendant Mr. Bergrin's purpose was to promote or facilitate the commission of the offense, and, fourth, that this Defendant, Mr. Bergrin, possessed the criminal state of mind that is required to be proved against the person who actually committed the act, that is, knowingly and purposely.

I know why Mr. Lustberg wants the causation instruction. That's because aiding and abetting liability

can attach simply if you advise somebody to engage in a course of conduct and they follow your advice. They actually -- the jury has to find those four elements, and they have to find that Anthony Young actually committed the crime of murder in order for Mr. Bergrin to be guilty of aiding and abetting. Providing that causation I think raises our burden above what the law of aiding and abetting --

THE COURT: I think Mr. Gay's comments just a moment ago clarified this a bit. I think this causation goes to the shooter and not Mr. Bergrin. And I tend to agree that this -- that's why I asked the question earlier, are you objecting because you believe this is imposing a burden upon you that you otherwise wouldn't have. That was the purpose of that.

MR. SANDERS: Yes.

THE COURT: And I think it does, Mr. Lustberg.

Now, you may, although it might confuse things, be entitled to some kind of a causation regarding the shooter.

MR. LUSTBERG: I don't think that there's -- I mean --

THE COURT: But I don't --

MR. LUSTBERG: I don't think there's a dispute in this case --

THE COURT: I think I'm going to agree with the

Government on this one.

MR. LUSTBERG: Okay. Just so our objection is preserved.

THE COURT: Yes. I just think you're placing a burden that otherwise wouldn't be there under these circumstances.

MR. LUSTBERG: So I just want to make -- as long as it's preserved.

THE COURT: Next?

MR. SANDERS: Next would be request 35A.

MR. LUSTBERG: Okay. For you, Judge, this is the specific issue on page 92.

THE COURT: Ninety-two?

MR. LUSTBERG: Right. It's the fifth element that we added.

THE COURT: That the Defendant did something that was a substantial step toward committing the crime.

MR. SANDERS: Yes, and our objection is that that substantial step element is not an element of 3rd Circuit law.

And if I can hand up this case which actually went against the Government on a Rule 29 --

THE COURT: Well, before you hand it up, does Mr. Lustberg have it?

MR. SANDERS: He has it.

It's page 774, Larry.

MR. LUSTBERG: He just handed it to me.

THE COURT: Okay. Let him take a look.

How about it, Mr. Lustberg?

MR. LUSTBERG: The substantial step language has to do with the fact that I believe -- I'm just confused as to -- I'm just trying to remember which act this is.

This is -- let me just quickly look at the indictment again to clarify this.

Sorry, Judge. Just give me one second.

THE COURT: Go ahead.

MR. LUSTBERG: We actually only have a few more.

THE COURT: No, that's okay. Go ahead.

MR. LUSTBERG: So we took this from a 9th Circuit model charge.

THE COURT: Right, Judge Hornby's --

MR. LUSTBERG: I haven't seen this 3rd Circuit case yet, which appears not to contain that element.

THE COURT: Right. I see the footnote about Judge Brock Hornby's 2011 revisions. But that's not the 3rd Circuit.

MR. LUSTBERG: Right. There's no 3rd Circuit model charge for this, which is why we have this issue in the first place. But Mr. Sanders is bringing to Your Honor's attention a 3rd Circuit case.

THE COURT: Right. I understand that.

MR. SANDERS: And I think there's supporting 2nd Circuit law, a case called Jenkins from 1991, which says, "Unlike the crime of attempt, the Travel Act does not require that the Government establish that the accused took a substantial step in furtherance of the intended unlawful activity."

THE COURT: So it specifically says it does not --

MR. LUSTBERG: In the 2nd Circuit.

MR. SANDERS: That's the 2nd Circuit.

THE COURT: I understand.

MR. SANDERS: Yes.

MR. LUSTBERG: So the 9th Circuit does, the 2nd Circuit doesn't. We have requested the 9th Circuit charge, and that's our position.

THE COURT: Except we have 3rd Circuit law that --

MR. LUSTBERG: Well, the 3rd Circuit law lists the elements. It doesn't appear that this issue was specifically raised. That's just a listing of the elements. It's not there. I see that. But our position is that it should be in, the charge ought to be consistent with the 9th Circuit charge.

THE COURT: Well, I'm not so sure that I'm going to be doing things that the 9th Circuit directs.

Since I'm given a copy of the 3rd Circuit case --

and what's that, the Zolicoffer case?

MR. SANDERS: I don't know if I can pronounce it: Zolicoffer.

THE COURT: That's at 869 F.2d 771, a 1989 3rd Circuit case.

I'm going to agree with the Government on this.

Next?

MR. SANDERS: The next one is 36A.

THE COURT: Again, I need a page.

MR. SANDERS: It will be 106.

MR. LUSTBERG: Hold it.

THE COURT: 103?

MR. LUSTBERG: Hold on one second, Judge.

MR. SANDERS: I have actually two objections to this.

THE COURT: Well, let me get to where we're supposed to be first.

Is this page 103?

MS. PROTESS: That's where the charge starts, Your Honor, the request.

MR. LUSTBERG: Hold on one second.

Okay. It's page 106.

THE COURT: Page 106, and this pertains to charge 36A.

Okay. And what's the issue?

MR. SANDERS: If you look, the second full paragraph at the end, we had a sentence that says: "The Government does not have to show that Muhammad actually committed perjury, only that he agreed or promised to do so."

And we think that's important, because this is a bribery crime. It's not a perjury crime, right? And bribery doesn't punish the actual doing of the act that you've promised to do; it just punishes you for promising or agreeing to do something in return for illicit consideration.

And I think it's important to stress to the jury that once you agree to testify falsely in exchange for consideration, you're guilty of bribery under this New Jersey statute whether you actually go forward and testify falsely or not. And without that -- and I mean, bribery instructions make that clear. The 3rd Circuit has a case called Oczelik, and it's in the 201 instructions on the model instructions, that makes clear you do not have to actually perform the promised act to be guilty of a bribery offense.

THE COURT: All right. Now, again, this came from the New Jersey criminal model charges for perjury?

MR. LUSTBERG: The way we have it is verbatim from the New Jersey model charge.

THE COURT: Okay. And the Government wants to add that sentence, quote: "The Government does not have to show that Muhammad actually committed perjury, only that he agreed or promised to do so," close quote.

MR. LUSTBERG: Right.

MR. SANDERS: Which I don't think Mr. Lustberg will dispute is an accurate statement of the law, the bribery law.

MR. LUSTBERG: Well, I think it's confusing because, elsewhere, the -- I'm trying to find it -- there's a place where it says the Government must prove beyond a reasonable doubt that the statement made by Jamal Muhammad was false and that he did not believe it to be true.

MR. SANDERS: We have objected to those instructions as well for the same reason, which --

MR. LUSTBERG: But that was your language.

MR. SANDERS: No, we agreed that we have to -- we have to prove that Jamal Muhammad agreed to commit perjury, that is, making a knowingly false statement, and I don't think there's -- again, in this case, there's no view of the evidence that Mr. Muhammad mistakenly believed that he was carrying the gun that Abdul Williams was charged with possessing, and he either lied about it or he didn't, and Mr. Bergrin either knew that he was lying about it or he didn't. Those are the two issues.

indictment, as all indictments do, those are pled with using the word "and," right, because we use "and" instead of "or." But 3rd Circuit law and I think the Supreme Court makes clear when it comes time for the jury instructions, those become alternatives again.

THE COURT: Yes, we have a charge to that --

MR. SANDERS: Right.

THE COURT: -- in the disjunctive context, yes.

MR. SANDERS: But I think Mr. Lustberg's additions to this make us or force us to prove those in the conjunctive; in other words, we have to prove and, and, and, and I don't know that --

THE COURT: And you don't think that's -- you don't accept it.

MR. SANDERS: Right.

MR. LUSTBERG: No problem. I mean, really, I mean, the truth of the matter is, even if it said "and," you're going to give them an instruction that says "and" means "or" anyway.

THE COURT: Correct.

MR. LUSTBERG: So it doesn't matter. But I agree that Mr. Sanders's reading of the statute is correct, and if the Court thinks that would make it clear --

THE COURT: I do.

MR. LUSTBERG: -- we're fine with that.

THE COURT: Okay. Anything else?

MR. LUSTBERG: No, that's it.

Or, no, no, there's two additional -- I'm sorry.

MR. SANDERS: No, there's two, and there's the other two that I had in here.

THE COURT: What else? Two more in this charge?

MR. LUSTBERG: No, we're done. The other two we agreed on.

MR. SANDERS: No, actually, no, you agreed --

MR. LUSTBERG: We agreed on 42 and 64.

(Off the record discussion)

THE COURT: Okay. So what else do we have?

MR. LUSTBERG: So all we have is two additional charges that Mr. Sanders had proposed --

THE COURT: Okay.

MR. LUSTBERG: -- which are not -- I don't know if the Court has this.

THE COURT: I may or may not, but let me --

MR. LUSTBERG: I only have one copy, Judge.

THE COURT: Let me have what it is, and I'll talk about it.

MR. SANDERS: I had proposed also not only moving the affirmative defense instruction that we just told Your Honor you didn't need to rule on, it's going to be moved back to where those offenses are charged, the Federal

witness tampering one. But I had proposed adding language -- because the end of that instruction says, you know, if you agree that Mr. Bergrin had specific intent to tamper with a Federal witness, this defense doesn't apply. And I had proposed to add to that a cross reference to the Rule 404(b) instruction that will come later in the instruction so that the jury can know how to evaluate his intent. And I don't know whether you have a position on that or not.

MR. LUSTBERG: I don't think it belongs there. This is a substantive defense to the charges -- it was charged -- where we placed it here was where Judge Martini put it. That's why I put it there. I have no problem with moving it back to where there's more discussion of good faith and intent, but I think it would be very confusing to put it in the 404(b) section.

THE COURT: What does this pertain to?

MR. LUSTBERG: So in other words -- and it's a little more confusing than last time. This is a charge that has to do with the fact that part of Mr. Bergrin's defense with regard to some of the charges is that he was just acting as a lawyer.

THE COURT: Acting as a lawyer. And that's in here.

MR. LUSTBERG: We asked for it, Judge Martini gave

it to us. All we're arguing about now is where it gets placed.

I have no problem with it going somewhere near the intent section having to do with the particular offense, but I don't -- Mr. Sanders is saying -- I'm not sure I understand his point. He's saying something having to do with the 404(b).

MR. SANDERS: And just to be clear, this instruction arises from the Federal witness tampering statute. It's actually codified, so it actually only applies to the two witness murder --

MR. LUSTBERG: Right.

THE COURT: Okay. Wait. I'm getting confused. My law clerk just handed me request number 68.

MR. LUSTBERG: That's something else.

MR. SANDERS: That's next. That's next.

THE COURT: Okay. Now, we're talking about here the charge that says a defense of --

MR. LUSTBERG: It's charge number, I'm sorry, 64.1 in your packet, which is --

THE COURT: It's toward the end, I know. Here it is. Page 167.

MR. LUSTBERG: I hope you have lots of water tomorrow.

THE COURT: I know. I've already looked at that.

This is regarding request number 64.1, bona fide legal representation --

MR. LUSTBERG: Right.

THE COURT: -- as an affirmative defense.

MR. LUSTBERG: Right.

THE COURT: Okay. And you're saying what, Mr. Sanders?

MR. SANDERS: Now, we've agreed that should be moved to where the witness murder statute that this arises from, where those counts are, that's Racketeering Act 4A and 4B. It will come right after that.

MR. LUSTBERG: No objection. That's why I said I didn't object to it.

THE COURT: And now you want to add something else to it?

MR. SANDERS: Well, I proposed adding to the end, where the last sentence says: "If the Government proves beyond a reasonable doubt that Mr. Bergrin acted with the intent of preventing Mr. McCray from testifying in an official proceeding, then this defense is not available." And my proposed sentence after that is: "In considering whether this defense applies, you may consider the testimony of Richard Pozo, Vicente Esteves, Oscar Cordova, and Thomas Moran for the limited purposes that I set forth in instruction -- " --

THE COURT: No, I'm not going to add that.

MR. SANDERS: Okay.

THE COURT: I find that as soon as we start adding specifics, we get confusion, and the whole purpose here is no confusion.

I will agree, then, to move it to wherever you say it should be moved.

MR. LUSTBERG: No problem.

THE COURT: What else?

MR. LUSTBERG: The last two instructions that the Government has submitted are requests number 68 and 69.

THE COURT: Right. Okay. Let's look at 68.

MR. LUSTBERG: Let's get rid of 69 first. We have no objection to 69.

THE COURT: Okay. Good. Then that's not an issue.

Next?

MR. LUSTBERG: Sixty-eight we vigorously object to.

THE COURT: Okay. Let me read it first.

Do you have a copy for Chuck, by the way?

All right. What's your position here, Mr. Sanders?

MR. SANDERS: Well, the reason we're requesting this, Your Honor, is because, during the last trial, both in

opening and summation, and in this trial in opening statements, Mr. Bergrin argued, essentially, I would have no reason to murder Kemo McCray because I knew how strong the Government's case was against him and I knew they didn't need the testimony.

And that is fundamentally misleading because what Mr. Bergrin leaves out is, in the Baskerville trial, we had to make a special application under the hearsay rule, Rule 804(b)(6), in which we had to prove that Mr. Baskerville by clear and convincing evidence was responsible for the death of Kemo McCray, and therefore that McCray's statements to the agent and Mr. Baskerville's statements to Mr. McCray as relayed to the agent could come in despite the fact that they were hearsay and offered for the truth of the matter asserted because that's the forfeiture --

THE COURT: Well, why should that now be the subject matter of a charge to the jury? Shouldn't that have been the subject matter of either testimony at trial or some kind of offer at trial?

MR. LUSTBERG: And it was. And it was, and we -- the Court may recall, we had litigated this before Judge Martini. He agreed with the Government. I can't remember, we may have even conceded it, I don't remember. But either way, it came in in the first trial, and it came

in again here. The evidence is in. That's not the point. I don't think that's the point that Mr. Sanders is making.

MR. SANDERS: No.

MR. LUSTBERG: What Mr. Sanders is saying, if I understand correctly, is, Mr. Bergrin -- he's a hundred percent correct. Part of the defense here is that, I would never have had this witness killed because, really, it wasn't No Kemo, no case, they had lots of other evidence.

THE COURT: Right. He brought forth --

MR. LUSTBERG: Right. And that is the position he's taking. I simply don't understand how this instruction, which actually seems to dramatically undercut what is a critical aspect of the defense, is even the least bit applicable.

THE COURT: I don't understand why -- it seems to me that this is a matter of evidence and not a matter of instruction to the jury. I don't know why -- I mean, if we start doing this, we can be picking apart the whole case and putting in paragraphs or charges about all kinds of things.

I don't think that is what a jury charge is for. A jury charge, theoretically, is so the jury understands the law and they can apply the law to the facts of the case as they've heard it; and the intent, our goal in putting this together is to clarify and simplify.

MR. LUSTBERG: 170 pages isn't --

THE COURT: And I've got to tell you, this gets to the point that it just gets -- I mean, I --

MR. SANDERS: I hear you.

THE COURT: I don't know what we can do, but I don't want to make it any more complicated.

I'm not going to charge this about Baskerville. I just don't see it. I don't think it belongs in the charge.

And as I said, it is my intention to give copies of the charge to the jury so that they can refer to it, because this is just too much for someone to grasp.

So there's one other -- so is that it for the charge?

MR. LUSTBERG: That is.

THE COURT: I don't have the verdict form.

MR. LUSTBERG: Oh, there is one other issue, Judge, that we were not able to resolve just because Mr. Bergrin wasn't here, which is, Mr. Sanders inadvertently just, I guess, forgot or whatever to provide jury charges with regard to forfeiture.

As you know, the way that would work is that the jury would return a verdict and then you would send them back out, there would be a little minitrial on forfeiture, even though there's nothing to forfeit here, and they would be sent back out, and there would have to be new jury instructions.

THE COURT: Forfeiture for what?

MR. LUSTBERG: That's a great question.

MR. SANDERS: Well, there are forfeiture allegations stemming from the RICO count. I mean, if you use property, you know, in order to conduct a RICO offense, those items become forfeitable, and there are forfeiture allegations at the back of the indictment.

MR. GAY: Basically, Judge, it's 710 Summer Avenue is really the --

THE COURT: What's that? The restaurant?

MR. GAY: That's the restaurant, yes. That's what the forfeiture allegations relate to, you know, the drugs seized in there, there was a forfeiture, the grand jury -- you know, we pled forfeiture allegations in the indictment, so that --

THE COURT: Okay. So what do you want me to do?

MR. SANDERS: Well, what I proposed to Mr. Lustberg, I was going to submit, there are 3rd Circuit model charges on this, but I had asked him if he would ask Mr. Bergrin if he would consent to waiving a jury trial on the forfeiture issue in the event he's convicted and allowing Your Honor to make the findings at sentencing. You would apply the same burden.

MR. LUSTBERG: And I e-mailed him about that, and you'll be unsurprised to know that that was not the first

thing on his mind, and he hasn't gotten back to me. I don't think it's the kind of thing that I can decide for him.

THE COURT: All right. Here's what we'll do. I'll have you ask him before I give the charge.

MR. LUSTBERG: Yes.

THE COURT: In the meantime, I guess the alternative would be, what, to give it after the fact? You don't want me to --

MR. LUSTBERG: No, the way I think it would work is that -- let's say he's convicted. Then you say to the jury, Sorry, guys, you're not quite done, there's also this forfeiture issue; here's the issue, here's some new instructions. And you don't even need this before you do this charge.

THE COURT: No, I was just going to say --

MR. LUSTBERG: So we have plenty of time.

THE COURT: Let's hope that he will agree to do it the other way.

MR. LUSTBERG: Yes. I suspect he will, but I can't speak for him.

THE COURT: Okay. So that's no problem.

Now, what else?

MR. SANDERS: You mentioned the verdict form.

THE COURT: Yes.

MR. SANDERS: Mr. Minish asked me to relay two

requests, Your Honor, regarding that, and I don't think there's any objection to the form now that we've switched not guilty-guilty.

THE COURT: Not guilty-guilty.

MR. SANDERS: And with that being the case, Mr. Minish would like to refer to the verdict form during his summation to show the jury the organization of the indictment, and I want to --

MR. LUSTBERG: No objection.

THE COURT: Wait. Who's doing the summation?

MR. GAY: Mr. Minish is going to do the summation, Judge, and I'm going to do the rebuttal.

THE COURT: Okay.

MR. LUSTBERG: The very brief rebuttal.

(Laughter)

MR. LUSTBERG: I think it was limited --

MR. GAY: Listen, I will say that I heard the Court's instructions on this loud and clear yesterday.

THE COURT: The truth of the matter is, if it were up to me, there would be no rebuttals.

MR. LUSTBERG: Me, too.

(Laughter)

THE COURT: But I'll grant you, Mr. Gay, a brief rebuttal. We'll see what happens.

MR. GAY: Understood. Understood, Judge.

THE COURT: Listen, I am serious, by the way, gentlemen, on the length of the summation.

MR. GAY: I can tell you, Judge, that Mr. Minish is not here now because he is complying with Your Honor's instructions on that.

THE COURT: And what I think I'm doing is helping both sides for the jury, because, believe me, if you think they're going to want to listen to more than three and a half hours from either side or that they're going to absorb any more -- you know, I teach a trial course, and the first thing we say is you've got to get them early because people just don't have the ability to have that, the average person, at least. Anyway, and I think three and a half hours is ample time to hit all the points that you've got to hit here.

So what I'm going to do is, at the end of three hours, if you're still going, I'm going to have my clerk advise you that there's a half hour left, because, after three and a half hours, it will be over.

All right. What else?

MR. SANDERS: I just want to put one more thing on the record.

The other thing Mr. Minish would like to use on his summation is a chart that has two columns. It's simply an outline of the indictment, saying Count 1 with the title.

Mr. Lustberg thought -- I forgot to print it out, but he has no objection.

THE COURT: I can't imagine why there would be an objection.

MR. LUSTBERG: No objection.

THE COURT: What else? Anything else?

MR. LUSTBERG: No.

MR. GAY: Well, there is a couple of brief things, Judge, but not related to the charges, but just --

THE COURT: Go ahead.

MR. GAY: So I don't know --

THE COURT: Why don't you tell me the subject matter, and if you think it's something that Mr. Bergrin --

MR. GAY: I think it will go to something that we need to really discuss with Mr. Bergrin more.

MR. LUSTBERG: I'm concerned, Judge, because the scope of his waiver of his presence --

THE COURT: All right. Let's stop. Let's stop.

MR. GAY: Okay.

THE COURT: The only other thing I will say is perhaps -- not about the substance of the case.

Maybe before you leave today, you can just check the evidence.

MR. LUSTBERG: Ms. Protess has been working with Arabelys, the paralegal for the Government, who is

fantastic, and I think there's a couple -- there's some areas -- I think there actually may be some additional exhibits that the Government failed to move.

THE COURT: That's kind of my point. I want you to make sure you've got everything in you're supposed to and nothing goes in that wasn't supposed to be in. I don't want to have to finish my charge to the jury and then have the lawyers scurrying around taking 45 minutes looking at the evidence. I want this done. You've got a perfect opportunity, you can do it now, so -- that's it.

MR. GAY: Yes.

THE COURT: Now, is there anything else that you can think of that we have to worry about?

MR. LUSTBERG: Just to give you a heads up, and again, these are things that should await, I think, probably the issue -- I don't know what issues Mr. Gay was going to raise, but there's a couple of things that are just out there.

One was, if you remember, we filed a motion and the Government filed a response with regard to striking certain evidence from the -- having to do with Mr. Bergrin's request for an adjournment in the Norberto Velez case.

THE COURT: I ruled on it.

MR. LUSTBERG: Oh, okay. I don't think I saw that. Did you issue an order?

THE COURT: No, I read it into the record, didn't I?

MR. SANDERS: No, I don't think we got to that one. You ruled on our motion to put in -- that was a --

THE COURT: Wait a second. I'm pretty sure I did.

MR. LUSTBERG: Maybe it was when I wasn't here.

(Off the record discussion)

THE COURT: Okay. We have something prepared.

I thought I read it. But you know what?

I didn't?

THE COURT CLERK: I thought you read it, too.

THE COURT: I'm almost positive I did, but I'll know -- let me just look a second.

MR. LUSTBERG: It's possible. I'm not here all the time, so it's possible it was read. Ms. Protess is here all the time, and she doesn't --

MR. SANDERS: I don't recall hearing that ruling.

THE COURT: This was the issue of striking the --

MR. LUSTBERG: It was the letter. It was Exhibit 644, if I recall.

THE COURT: All right. You know what we'll do? We'll find where it is, and if I didn't rule on it, I will. But I thought I did, and we have something prepared.

MR. LUSTBERG: I just wanted to make sure it didn't slip between the cracks, whatever the ruling is.

THE COURT: Because when I read these things, I usually write on them, read into the record, and the date.

Just give me one second.

MR. LUSTBERG: I kind of doubt it's going to be a centerpiece of either party's summation, but --

MR. SANDERS: You never know.

MR. LUSTBERG: -- you never know.

THE COURT: Mr. Lustberg, I recall that. This is about the striking of Gutierrez's testimony, and about Mr. Bergrin asking --

MR. LUSTBERG: Right. This was the issue --

THE COURT: -- about an adjournment in front of McCormick or Lombardi or whatever.

MR. LUSTBERG: Correct.

THE COURT: And I'm denying it, I denied it, but I just can't find what I read into the record.

If not, I'll find it and read it into the record.

Anything else?

MR. LUSTBERG: Again, I think that there is some issues with regard to -- there may be one or two issues with regard to exhibits, I just don't know, but, unfortunately, Judge, I think Mr. Bergrin has to be present for those.

THE COURT: Yes. Okay. Let's not do anything.

All right. Anything else, counsel?

MR. LUSTBERG: Judge, I was just going to say, one

other thing that we're going to do for the jury, I assume that the Court would want this, we're just discussing this because the Court did want this last time, is, we're going to each side prepare an exhibit list so that the jurors can easily find -- you know, they may want to look at an exhibit or whatever, so each side will prepare their own exhibit list that can go in to the jury as well.

THE COURT: Okay.

MR. SANDERS: And the final thing, and I promise it is the final thing, is that I sent to Mr. Lustberg a redacted indictment in which we are going to replace counts and Defendants that are out of the case with, you know, omitted by agreement. There are some overt acts and other allegations that we chose not to prove in this trial, and I assume the defense will want those redacted in the same manner, but I think Your Honor should have a colloquy, respectfully, with Mr. Bergrin to make sure that he agrees with that, and that there's no grand jury clause issue with submitting a redacted version.

THE COURT: Okay. Well, you remind me of that before you do.

MR. LUSTBERG: Again, I'm afraid with that one --

THE COURT: We'll wait for Mr. Bergrin.

MR. LUSTBERG: We'll have to, Judge.

THE COURT: I'd prefer to wait on anything further

until Mr. Bergrin is here.

All right. We'll see you tomorrow morning, and we'll be ready to go. Why don't we get here a little bit earlier?

MR. LUSTBERG: Why don't we get here at 8:30 so that if there's any issues, we can --

THE COURT: Okay. See you tomorrow.

MR. LUSTBERG: Thanks, Judge.

MR. GAY: Okay. Thanks, Judge.

THE COURT: All set?

MR. GAY: Yes.

(Matter adjourned until Wednesday, March 13, 2013, commencing at 8:30 a.m.)

7.02 Accomplice Liability: Aiding and Abetting (18 U.S.C. § 2(a))

A person may be guilty of an offense*(s)* because *(he) (she)* personally committed the offense*(s) (himself) (herself)* or because *(he) (she)* aided and abetted another person in committing the offense. A person who has aided and abetted another person in committing an offense is often called an accomplice. The person whom the accomplice aids and abets is known as the principal.

In this case, the government alleges that *(name of defendant)* aided and abetted *(name of alleged principal, if known)* in committing *(state offense(s))* as charged in the indictment. In order to find *(name of defendant)* guilty of *(state offense(s))* because *(he) (she)* aided and abetted *(name of alleged principal)* in committing *(this) (these)* offense*(s)*, you must find that the government proved beyond a reasonable doubt each of following four (4) requirements:

First: That *(name of alleged principal)* committed the offense*(s)* charged by committing each of the elements of the offense*(s)* charged, as I have explained those elements to you in these instructions. ***((Name of alleged principal) need not have been charged with or found guilty of the offense(s), however, as long as you find that the government proved beyond a reasonable doubt that (he) (she) committed the offense(s)).***

Second: That *(name of defendant)* knew that the offense*(s)* charged *(was) (were)* going to be committed or *(was) (were)* being committed by *(name of alleged principal)*, and

Third: That ***(name of defendant)*** **knowingly did some act for the purpose of** ***[aiding] [assisting] [soliciting] [facilitating] [encouraging] (name of alleged principal)*** **in committing the specific offense*(s)* charged and with the intent that** ***(name of alleged principal)*** **commit that** ***[those]*** **specific offense*(s)*, and**

Fourth: That ***(name of defendant)*** **performed an act*(s)* in furtherance of the offense*(s)* charged.**

In deciding whether ***(name of defendant)*** **had the required knowledge and intent to satisfy the third requirement for aiding and abetting, you may consider both direct and circumstantial evidence including** ***(name of defendant)*****'s words and actions and the other facts and circumstances. However, evidence that** ***(name)*** **merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense*(s)* is not enough for you to find** ***(name)*** **guilty as an aider and abetter. If the evidence shows that** ***(name)*** **knew that the offense was being committed or was about to be committed, but does not also prove beyond a reasonable doubt that it was** ***(name)*****'s intent and purpose to** ***[aid] [assist] [encourage] [facilitate]*** **or otherwise associate** ***(himself) (herself)*** **with the offense, you may not find** ***(name)*** **guilty of the offense*(s)* as an aider and abettor. The government must prove beyond a reasonable doubt that** ***(name)*** **in some way participated in the offense committed by** ***(name of alleged principal)*** **as something** ***(name of defendant)*** **wished to bring about and to make succeed.**

To show that ***(name of defendant)*** **performed an act*(s)* in furtherance of the**

offense*(s)* charged, to satisfy the fourth requirement, the government needs to show some affirmative participation by *(name)* which at least encouraged *(name of alleged principal)* to commit the offense. That is, you must find that *(name of defendant)*'s act*(s)* did, in some way, *[aid,] [assist,] [facilitate,] [encourage,] (name of alleged principal)* to commit the offense*(s)*. *(Name of defendant)*'s act*(s)* need not further *[aid,] [assist,] [facilitate,] [encourage,]* every part or phase *(or element)* of the offense*(s)* charged; it is enough if *(name of defendant)*'s act*(s)* further *[aid,] [assist,] [facilitate,] [encourage,]* only one *(or some)* part*(s)* or phase*(s) (elements)* of the offense*(s)*. Also, *(name of defendant)*'s acts need not themselves be against the law.

Comment

See 1A O'Malley et al., supra, § 18.01. For variations in other Circuits, *see* First Circuit §4.02, Fifth Circuit § 2.06, Sixth Circuit § 4.01, Eighth Circuit § 5.01, Ninth Circuit § 5.1.

18 U.S.C. § 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Although some Third Circuit opinions conflate the elements of aiding and abetting liability into two or three, this instruction reflects the Third Circuit's more precise articulation of four elements in *United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983).

Ordinarily, where the principal is also being prosecuted for the offenses, the principal and the accomplice will be tried jointly. However, if the principal has not yet been prosecuted, or has been acquitted, or is not known, the trial judge should include the bracketed language in the *First* requirement. Also, if the alleged principal is known by name, the trial judge should use his or her name when referring to the principal in this instruction, but if the name of the alleged principal is not known, the judge should substitute "another person" or "the other person" for the name of the principal wherever that appears in this instruction. Finally, the judge should use the appropriate word(s) in describing the nature of the defendant's alleged participation (aid, assist, encourage, facilitate, etc), in accordance with the government's theory of the case.

Aiding and Abetting Compared to Co-conspirator's (*Pinkerton*) Liability. In *Nye & Nissen v. United States*, 336 U.S. 613 (1949), the Supreme Court explained: "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wished to bring about, that he seek by his action to make it succeed.' L. Hand, J., in United States v. Peoni, 100 F.2d 401, 402." 336 U.S. at 618. The Third Circuit has called this the "classic definition" of accomplice liability. *United States v. Nolan*, 718 F.2d at 591. The Supreme Court in *Nye & Nissen* also discussed the differences and similarities between accomplice liability and co-conspirator's liability under *Pinkerton v. United States*, 328 U.S. 640 (1946). Although a defendant may be guilty as an accomplice and also guilty of conspiracy, aiding and abetting and conspiracy are separate theories of criminal responsibility. *See, e.g., United States v. Nolan*, 718 F.2d at 594. A defendant may aid and abet the commission of an offense without conspiring with the principal, *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978), and a jury may acquit a defendant on a conspiracy charge yet convict on an aiding and abetting theory. *See, e.g., United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir. 1981); *United States v. McCrane*, 527 F.2d 906, 912 (3d Cir. 1975).

No Need to Indict for Aiding or Abetting. A defendant need not be indicted specifically as an aider and abettor (accomplice) in order to be convicted on that theory. *United States v. Donahue*, 885 F.2d 45, 48 (3d Cir. 1989). Aiding and abetting is implied in every indictment for a substantive offense. *United States v. Frorup*, 963 F.2d 41, 52 n.1 (3d Cir. 1992) (the Third Circuit also stated, as to the requirement that the accomplice must in fact render some aid or assistance to the principal, that aiding and abetting requires "some affirmative participation which at least encourages the principal offender to commit the offense," 963 F. 2d at 43 quoting *United States v. Raper*, 676 F. 2d 841, 850 (D.C. Cir. 1982)).

Conduct Requirement for Accomplice Liability. The "Fourth" requirement in this Instruction states the conduct element of accomplice liability (aiding and abetting). As the Supreme Court recognized in *Rosemond v. United States*, – U.S. – , 134 S. Ct. 1240 (2014), "[t]he common law [and therefore 18 U.S.C. § 2(a)] imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part – even though not every part – of a criminal venture." *Id.* at 1246. The amount of aid or assistance is immaterial; it is enough that the accomplice aided or otherwise helped bring about only one or some part, or phase, or element of the offense committed by the principal. In *Rosemond* specifically, the Court held that the defendant's conduct would be sufficient for aiding and abetting the compound or combination offense of using or carrying a firearm during and in relation to a crime of violence or drug trafficking offense (18 U.S.C. §924(c)) where the defendant's acts furthered the drug or violent crime part of the offense, even if he or she took no action with respect to the firearm part. *Id.* at 1247-48.

This instruction is phrased in terms of "act(s)." A defendant may also be responsible as an accomplice (aider and abetter) based on his or her failure to act despite having a legal duty to act. When the government's theory is that the defendant was an accomplice through failure(s) to act or omission(s), the court should give Instruction 5.10 (Failure to Act, Omission).

Mental State Requirement for Accomplice Liability. As for the mental state element of accomplice liability, Third Circuit case law is clear that the defendant must know that the principal is committing or will commit an offense and must intend to aid the principal in some way. *See, e.g., United States v. Carbo*, 572 F.3d 112, 118 (3d Cir. 2009) ("Our conclusion is merely an application of the rule that, 'in order to convict a defendant of aiding and abetting, the government must prove that "the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it." ' " Citing *United States v. Kemp*, 500 F.3d 257, 293 (3d Cir. 2007), quoting *United States v. Dixon*, 658 F.2d 181,189 n. 17 (3d Cir. 1981)). Indeed, the Third Circuit has specifically stated that, "When the charge of aiding and abetting is submitted to the jury, the court must include in its instructions that mere knowledge of the crime is insufficient to bring about a conviction." *United States v. Bey*, 736 F.2d 891, 895-96 (3d Cir. 1984). The requirement of intentional participation means that it must be the accomplice's purpose (conscious objective) or specific intent that the principal commit the offense and that the accomplice help bring it about. *See, e.g., United States v. Soto*, 539 F. 3d 191, 194-97 (3d Cir. 2008); *United States v. Wexler*, 838 F.2d 88, 92 (3d Cir. 1988); *United States v. Bey*, 736 F.2d at 895; *United States v. Newman*, 490 F.2d 139, 143 (3d Cir. 1974). As stated in Judge Learned Hand's oft quoted explanation in *United States v. Peoni*, 100 F. 2d 401, 402 (2d Cir. 1938), quoted in, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949), the defendant must wish to bring about the offense and desire that it succeed. *See, e.g., United States v. Bey*, 736 F.2d at 895; *United States v. Newman*, 490 F.2d at 143.

In *United States v. Mercado*, 610 F.3d 841 (3d Cir. 2010), which the Third Circuit admitted was a close case, the court held "that a defendant's presence on multiple occasions during critical moments of drug transactions may, when considered in light of the totality of the circumstances, support an inference of the defendant's [intentional] participation in the criminal activity," "particularly . . . because [the principal] and [the defendant] switched cars on three occasions during the day; thus, [defendant] got out of one of [principal's] cars and chose to get into another car on three separate instances to continue accompanying [the principal] at important junctures during a prolonged drug transaction. . . . in conjunction with the phone call patterns, which establish[ed] [defendant's] association with [the principal]." *Id.* at 848-49. The court explained that:

> [W]e require proof that the defendant had the specific intent to facilitate the crime. *United States v. Garth*, 188 F.3d 99, 113 (3d Cir.1999). . . . We have emphasized that "facilitation" for aiding and abetting purposes is "'more than associat[ion] with individuals involved in the criminal venture.'" *Soto*, 539 F.3d at 194 (quoting *United States v. Dixon*, 658 F.2d 181, 189 (3d Cir.1981)). Rather, the defendant must "participate in" the criminal enterprise. *Id.* Neither mere presence at the scene of the crime nor mere knowledge of the crime is sufficient to support a conviction. *Id.* Thus, to convict for aiding and abetting, the Government must prove the defendant associated himself with the venture and sought by his actions to make it succeed. *United States v. Powell*, 113 F.3d 464, 467 (3d Cir.1997). The Government need only show some affirmative participation which, at least, encourages the principal offender to commit the offense. *United States v. Frorup*, 963 F.2d 41, 43 (3d Cir.1992). An aiding and abetting conviction can be supported solely with circumstantial evidence as long as there is a " 'logical and convincing connection between the facts established and the conclusion inferred.' " *Soto*,

539 F.3d at 194 (quoting *Cartwright*, 359 F.3d at 287).

United States v. Mercado, 610 F.3d at 846.

In *United States v. Peterson*, 622 F.3d 196 (3d Cir. 2010), the Third Circuit rejected the defendant's argument that, because its precedent stated that the government must prove the accomplice had the "specific intent" of facilitating the crime, the aiding and abetting instruction must contain the words "specific intent." The court reasoned (622 F.3d at 208-09) that:

> [The] argument fails for two reasons. First, the district court used the Third Circuit's Model Criminal Jury Instructions § 7.02 for aiding and abetting. The district court's instruction on intent is taken verbatim from those model instructions. We have a hard time concluding that the use of our own model jury instruction can constitute error, and nothing that [defendant] says removes our doubt that use of such an instruction can constitute error. Moreover, [defendant] does not even contend that the model instruction is wrong. Second, we believe that the phrases "the defendant's intent and purpose to aid or otherwise associate himself with the offense" and "that the defendant in some way participated in the offense as something the defendant wished to bring about and make succeed" sufficiently informed the jury that it had to find that [defendant] had the specific intent to aid and abet the crime charged in the indictment.

See also United States v. Berscht, 370 Fed. Appx. 325, 329 (3d Cir. 2010) (non-precedential) (where the Third Circuit upheld an aiding and abetting instruction stated in the words of this instruction, without citing to the Model Instructions.).

The instructions also need to be clear that the accomplice must intend to aid and abet the specific offense or criminal scheme charged in the indictment. *See, e.g., United States v. Kemp*, 500 F.3d 257, 299-300 (3d Cir. 2007); *United States v. Dobson*, 419 F.3d 231, 236 (3d Cir.2005). In *Kemp* the Third Circuit concluded that the trial court's instructions "left no danger that [defendant] would be convicted for aiding and abetting some other scheme. Accordingly, we conclude that the instructions are consistent with *Dobson*'s teaching. . . ." The trial judge had instructed in *Kemp* that the government must prove "the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime. . . . [T]hat the defendant: First, knew that the crime charged was to be committed or was being committed. Second, knowingly did some act for the purpose of aiding the commission of that crime. And third, acted with the intention of causing the crime charged to be committed." *Id.* *See also United States v. Rawlins*, 606 F.3d 73, 80-82 (3d Cir. 2010) (evidence of the involvement of defendant (an airport baggage handler) in the cocaine conspiracy, including his tag-switching activities and serving as a lookout, supported a reasonable inference that defendant knowingly and intentionally aided and abetted possession of cocaine with intent to distribute).

Some Third Circuit opinions have also used "willfully" in describing the mental element. For example, in *United States v. Waller*, 607 F.2d 49, 51-52 (3d Cir. 1979), the Third Circuit rejected a challenge to an instruction which stated that it was "necessary that the accused willfully

associate himself in some way with the criminal venture, and willfully participate in it, as he would in something he wishes to bring about; that is to say, that he willfully would seek, by some act or omission of his, to make the criminal venture successful." The defendant in *Waller* asserted that the instruction did not explicitly state that unknowing participation was insufficient, but the Third Circuit responded that, "the trial judge's charge viewed in its entirety was a correct statement of the law. Having earlier stressed the requisite willfulness and intent for an aiding and abetting conviction, the trial judge's latter explanation was neither misleading nor erroneous." *Id.* at 52. Also *see, e.g., United States v. Bey*, 736 F.2d at 895 (rejecting defendant's contention that there was plain error in the jury charge because it did not include "willfully;" without stating specifically that "willfully" was required and defining "willfully" merely as "doing a voluntary, deliberate or intentional act;" the Third Circuit reasoned that the instructions were sufficient because "the trial court's charge makes clear that Bey's mere presence and knowledge of the crime would not constitute aiding and abetting, but on the contrary, that his intentional involvement was required."); *United States v. Newman*, 490 F.2d at 143 (concluding that it was error not to charge the jury that aiding and abetting required willful participation, where, "Consistent with the court's instructions, the jury might have convicted Garca on the basis of a conclusion that the defendant participated in the activities charged without knowing of their criminal objective. Unknowing participation is not sufficient to constitute an offense under the aiding and abetting statute. Rather, the government must prove beyond a reasonable doubt that the defendant participated in a substantive crime with the desire that the crime be accomplished.").

It is not clear, however, whether the Third Circuit used the word "willfully" in these cases simply to require a purpose or an intent to bring about the principal's commission of an offense, or also to require that the alleged accomplice must be aware that the principal's conduct was against the law and have a "bad purpose" to violate or disobey the law. *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002) (concluding that the federal circuits have defined the mental state required for accomplice liability in several different ways, including specific intent or purpose to bring about commission of the offense and bad purpose to disobey the law (what is often called willfully); noting a distinction between the language of the aiding and abetting section,18 U.S.C.§ 2(a), which does not include an explicit mens rea, and 18 U.S.C. § 2(b), prohibiting causing another to commit a crime, which explicitly requires that the defendant "willfully cause").

This distinction may seem a fine one, and it is an issue in few cases. One consequence of the distinction is that mistake or ignorance of the law would disprove the mental state requirement if bad purpose to violate the law is required (*see* Instruction 5.05 (Willfully) and Comment), but would not disprove the mental state requirement where purpose only to bring about commission of the offense is used. The Third Circuit has recognized that, "with respect to most specific-intent crimes . . . ignorance of the law is no excuse. There is an exception to this rule, however, when intent to violate a legal duty is an element of a crime." *United States v. Carbo*, 572 F.3d 112, 116, 117-18 (3d Cir, 2009) (footnote omitted) (Holding that, "when a private citizen is charged with aiding and abetting or conspiracy to commit honest services fraud by a public official, the prosecution must prove that the defendant knew that the public official was required by law to disclose the conflict of interest. Without the knowledge that the failure to disclose the conflict of

interest is illegal, we cannot be certain that the defendant formed the specific intent to defraud the public.")

In the model instruction we avoid this confusion by not using the word "willfully" and by explaining the mental state requirement in the traditional sense of specific intent or purpose.

Scope of Accomplice Responsibility for Additional Offenses. Once the government proves the defendant was an accomplice to an offense, the scope of the defendant's responsibility for additional offenses is often said to depend on application of the "natural and probable consequences doctrine." Under this doctrine, an accomplice is responsible for all crimes committed by the principal that were the "natural and probable consequence" of the crime aided and abetted. This doctrine for accomplice liability has a "close counterpart in the well-established *Pinkerton* doctrine" for co-conspirator's liability. Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002). Indeed, the "natural and probable consequences doctrine" and the *Pinkerton* doctrine would seem to be essentially the same. *See* Instruction 7.03 regarding the *Pinkerton* doctrine.

Although the federal courts, like their state counterparts, are split on the acceptability of the "natural and probable consequences doctrine," one commentator noted that, "[m]ost of the circuits have adopted, or at least recognized the existence of" the doctrine. *Id.* In *United States v. Green*, 25 F.3d 206, 209 (3d Cir.1994), the Third Circuit only recognized the existence of the doctrine, but did not decide whether to adopt it. That was unnecessary in *Green*, because the additional offense there was not in any event the natural and probable consequence of the offense aided and abetted. *See* Weiss, *id.* at 1425, n. 388. The Third Circuit stated, "Whatever the scope of the doctrine of foreseeability in connection with aiding and abetting generally, *compare* view set out in Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.8(b), at 157 (1986) ("accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided") *with* that at *id.* at 158 (" 'natural and probable consequences' rule of accomplice liability ... is inconsistent with more fundamental principles of our system of criminal law," the view adopted by the Model Penal Code), we believe it inapplicable here." 25 F.3d at 209.

In addition to being split on the acceptability of this rule, the circuits also disagree on its meaning – what is the standard for determining natural and probable or foreseeable consequences? *See* Weiss, at 1424-36. Because the Third Circuit has not adopted the natural and probable consequences doctrine, this point is not covered in the model instruction.

Accomplice Liability (Aiding and Abetting) Instructions in Cases Charging 18 U.S.C. §924(c) Offenses. With respect to accomplice liability (aiding and abetting) for the specific offense of using or carrying a firearm during or in relation to a crime of violence or drug trafficking offense (18 U.S.C. §924(c)), the Supreme Court held in *Rosemond v. United States*, __ U.S. __, 134 S. Ct. 1240, 1243 (2014), "that the Government makes its case by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." Although the Court

is clear that for aiding and abetting a § 924(c) offense, "advance knowledge" of the firearm is the mental state requirement for the uses or carries a firearm, the Court's opinion does not seem to change the traditional requirement of specific intent or purpose to further offenses other than the compound § 924(c) offense. "Actively participated in the underlying" crime of violence or drug trafficking offense requires proof that the defendant intended to further the commission of that offense with the purpose that the principal succeed in committing it; "advance knowledge" is applies to the use or carrying of the firearm. The Court reasoned that the alleged accomplice "manifests that greater intent" – the intent to facilitate "a drug deal carried out with a gun" – "when he chooses to participate in a drug transaction knowing that it will involve a firearm," as long as the knowledge of the firearm comes at a time when the accomplice is "reasonably able to act upon it." *Id.* at 1251.

Where the government asserts an aiding and abetting theory for a § 924(c) charge, the trial judge should make the following three modifications, specific to the § 924(c) context, in this accomplice liability (aiding and abetting) instruction.

First, as to the mental state component of accomplice liability, in a § 924(c) case the trial court should give the following instruction in place of the "Third" requirement stated in the instruction above:

> **Third: That** *(name of defendant)* **was an active participant in the** *(name of crime of violence or drug trafficking offense)* **and also had advance knowledge that** *[one of]* **the principal***[s]* **would** *(use) (carry)* **a firearm during and in relation to the** *(name of offense)*.

Second, the following paragraph should be added to the instruction right after the listing of the four requirements that the government must prove:

> **To find that** *(name of defendant)* **was an active participant in the** *(name of crime of violence or drug trafficking offense)* **you must find that the government proved** *(name of defendant)* **knowingly did some act for the purpose of** *[aiding] [assisting] [soliciting] [facilitating] [encouraging] (name of alleged principal)* **in committing the** *(name of crime of violence or drug trafficking offense)* **and with the intent that** *(name of alleged principal)* **commit that offense. To find that** *(name of defendant)* **had advance knowledge that** *[one of]* **the principal***[s]* **would** *(use) (carry)* **a firearm during and in relation to the** *(name of offense)*, **you must find that the government proved that** *(name of defendant)* **had knowledge of the firearm at a time when** *(he) (she)* **could do something with that knowledge, such as walking away from the criminal venture.**

Finally, as to the "Fourth" requirement (the conduct component) stated in this instruction, in a § 924(c) case the court should add the following sentence right before the last sentence of the instruction:

> **Thus,** *(name of defendant)***'s acts need not further** *[aid,] [assist,] [facilitate,] [encourage,]* **the** *[use]* **or** *[carrying]* **of a firearm; it is enough if** *(name of defendant)***'s**

acts further *[aid,] [assist,] [facilitate,] [encourage,]* **the underlying** *(name of crime of violence or drug trafficking offense).*

(Revised 11/10; 7/14)

7.03 Responsibility For Substantive Offenses Committed By Co-Conspirators (*Pinkerton* Liability)

Count*(s)* *(no.)* of the indictment charge*(s)* that on or about the___ day of _____, 2__, in the _____ District of _____, *(name of defendant)* committed *(state offense(s))*.

The government may prove *(name)* guilty of *(this) (these)* offense*(s)* by proving that *(name)* personally committed it *(them)*. The government may also prove *(name)* guilty of *(this) (these)* offense*(s)* based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to *(name)* as a necessary or natural consequence of the agreement. In other words, under certain circumstances the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by any one or more of them, even though they did not all personally participate in that crime themselves.

In order for you to find *(name)* guilty of *(state offense(s))* charged in Count*(s)* *(no.)* based on this legal rule, you must find that the government proved beyond a reasonable doubt each of the following four (4) requirements:

First: That *(name)* was a member of the conspiracy charged in the indictment;

Second: That while *(name)* was still a member of the conspiracy, one or more of the other members of the conspiracy committed the offense*(s)* charged in

Count*(s) (no)*, by committing each of the elements of *(that) (those)* offense*(s)*, as *(I explained) (will explain)* those elements to you in these instructions.

[However, the other member(s) of the conspiracy need not have been found guilty of (or even charged with) the offense(s), as long as you find that the government proved beyond a reasonable doubt that the other member(s) committed the offense(s).]

Third: That the other member*(s)* of the conspiracy committed *(this) (these)* offense*(s)* within the scope of the unlawful agreement and to help further or achieve the objective*(s)* of the conspiracy; and

Fourth: That *(this) (these)* offense*(s) (was) (were)* reasonably foreseeable to or reasonably anticipated by *(name)* as a necessary or natural consequence*(s)* of the unlawful agreement.

The government does not have to prove that *(name)* specifically agreed or knew that *(this) (these)* offense*(s)* would be committed. However, the government must prove that the offense*(s) (was) (were)* reasonably foreseeable to *(name)*, as a member of the conspiracy, and within the scope of the agreement as *(name)* understood it.

[As I have instructed you, in order to prove that (name) was a member of the conspiracy charged in the indictment, the government must prove that (name) knew of the objective(s) of the conspiracy to commit an offense(s) against the United States, namely the offense(s) of (state the offense(s) alleged as the object(s) of the conspiracy), and intended

to join together with at least one other alleged conspirator to achieve (that) (these) objective(s). However, for you to find name guilty of (state offense(s)) charged in Count(s) (no.) based on the rule that each member of a conspiracy is responsible for crimes committed by the other members, the government does not have to prove that (name) specifically agreed or knew that (this) (these) offense(s) would be committed, as long as the government proves that the offense(s) (was) (were) reasonably foreseeable to (name), as a member of the conspiracy, and within the scope of the agreement as (name) understood it.]

Comment

See 1A O'Malley et al., supra, § 31.10. For variations in other Circuits, *see* Fifth Circuit § 2.22, Sixth Circuit § 3.10, Seventh Circuit § 5.09 & 5.10, Ninth Circuit § 8.20.

The *Pinkerton* doctrine applies to conspiracies charged under the general conspiracy statute, 18 U.S.C. § 371, and also under specific conspiracy statutes. *See, e.g., United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999) (general conspiracy § 371); *United States v. Turcks*, 41 F.3d 893 (3d Cir. 1994) (conspiracy to commit access device fraud under 18 U.S.C. § 1029(b)(2)); *United States v. Gonzalez*, 918 F.2d 1129 (3d Cir. 1990) (conspiracy to commit federal drug offenses under 21 U.S.C. § 846); *United States v. American Investors of Pitsburgh, Inc.*, 879 F.2d 1087 (3d Cir. 1989) (general conspiracy to defraud the United States under § 371). *Pinkerton v. United States*, 328 U.S. 640 (1946), was tried under 18 U.S.C. § 88, the predecessor to 18 U.S.C. § 371.

The Third Circuit has sometimes said that there are three exceptions to the *Pinkerton* rule: that the substantive offense was not within the scope of the unlawful project; or that the offense was not committed in furtherance of the conspiracy; or that the offense was not reasonably foreseeable to the defendant. *See, e.g., United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990), citing *Pinkerton*, 328 U.S. at 647-48. However, these "exceptions" are merely statements of situations in which the evidence does not prove the requirements of the rule. The trial judge should be careful to consider these requirements or exceptions in deciding when to give a *Pinkerton* instruction.

The trial judge must be careful to explain that the defendant can be convicted of substantive offenses under the *Pinkerton* doctrine only if a co-conspirator committed the offenses "both 'in

furtherance of' *and* 'as a foreseeable consequence of' the conspiracy." Thus, in *United States v. Turcks*, 41 F.3d 893, 897-98 (3d Cir. 1994), the Third Circuit held that the trial judge erred in using the disjunctive "or" rather than the conjunctive "and," thereby failing to make clear that both prongs of the *Pinkerton* doctrine had to be met, though the Court ultimately held the error was harmless.

To be guilty of conspiracy to commit an offense against the United States, the evidence must prove that the defendant "joined the agreement or conspiracy knowing of its objective*(s)* to commit an offense*(s)* against the United States and intending to join together with at least one other alleged conspirator to achieve *(that) (those)* objective*(s)*." Instruction 6.18.371A (Conspiracy to Commit an Offense Against the United States Basic Elements (18 U.S.C. § 371)). However, to be guilty of a substantive offense committed by a co-conspirator that was not the objective of the conspiracy, the defendant need not know of that offense before it is committed; that offense need only be in furtherance of and within the scope of the conspiracy, and reasonably foreseeable as a necessary or probable consequence of the conspiracy. If the trial judge is concerned that this difference might confuse the jury, the judge may give the bracketed alternative final paragraph of this instruction.

In *Gonzalez*, the Third Circuit rejected a rule or presumption that carrying a firearm during a drug deal was foreseeable, noting that "the very term 'foreseeability' implies a prediction about uncertain events in terms of probability.... We should, however, be wary of importing into criminal law the expansive notions the term foreseeability has acquired from its talismanic use in defining duty for purposes of liability in tort." 918 F.2d at 1136 n.5. Further, "reasonable foreseeability" under the *Pinkerton* doctrine means that the substantive offense must have been reasonably foreseeable to the defendant as a necessary or natural consequence of the conspiracy. *See id.* at 1136. It is not enough that the offense may be reasonably foreseeable to the jury; the jury must find beyond a reasonable doubt that the offense was reasonably foreseeable to the defendant.

If the other member(s) of the conspiracy alleged to have committed the substantive offense(s) have not yet been prosecuted or charged, or has (have) been acquitted, or is (are) not known, the trial judge should include the bracketed language within the second requirement.

Conspiracy Need Not Be Charged for *Pinkerton* Liability. In *United States v. Lopez*, 271 F.3d 472 (3d Cir. 2001), the Third Circuit held that, "[[i]t is not required that a conspiracy be charged in the indictment for *Pinkerton* liability to apply, as long as the evidence at trial establishes beyond a reasonable doubt that a conspiracy existed and that the substantive offense was committed in furtherance of the conspiracy." *Id.* at 480-81. ("Though this is our first opportunity to address this issue, we have little difficulty following our sister circuit courts of appeals in determining that a conspiracy need not be charged in order for *Pinkerton's* doctrine to apply.") (citations omitted). The instruction provided here assumes that the indictment does charge conspiracy. In cases where the government asserts *Pinkerton* co-conspirator's responsibility without a separate conspiracy charge, the trial judge should modify the *First* requirement to state: "*First*, a conspiracy existed and *(name)* was a member of that conspiracy," and should also give the jury Instructions with respect to the elements of conspiracy. *See*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL W. BERGRIN	Crim. No. 09-369 (DMC) Hon. Dennis M. Cavanaugh, U.S.D.J.

FINAL JURY INSTRUCTIONS

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INSTRUCTION NO. 1

ROLE OF JURY

Members of the jury, you have seen and heard all the evidence and the arguments of the lawyers. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence that you have heard and seen in court during this trial. That is your job and yours alone. I play no part in finding the facts. You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think about what your verdict should be.

Your second duty is to apply the law that I give you to the facts. My role now is to explain to you the legal principles that must guide you in your decisions. You must apply my instructions carefully. Each of the instructions is important, and you must apply all of them. You must not substitute or follow your own notion or opinion about what the law is or ought to be. You must apply the law that I give to you, whether you agree with it or not.

Whatever your verdict, it will have to be unanimous. All of you will have to agree on it or there will be no verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up his or her own mind. This is a responsibility that each of you has and that you cannot avoid.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or

computer, the Internet, any Internet service, any text or instance messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community.

INSTRUCTION NO. 2

***PRO SE* DEFENDANT**

Defendant Paul Bergrin has decided to represent himself in this trial and not to use the services of a lawyer. He has a constitutional right to do that. His decision has no bearing on whether he is guilty or not guilty, and it must not affect your consideration of the case.

Because Mr. Bergrin decided to act as his own lawyer, you heard him speak at various times during the trial. He made an opening statement and closing argument. He asked questions of witnesses, made objections, and argued to the Court. I want to remind you that when Mr. Bergrin spoke in these parts of the trial he was acting as a lawyer in the case, and his words are not evidence. The only evidence in this case comes from witnesses who testify under oath on the witness stand and from the exhibits that are admitted.

INSTRUCTION NO. 3

INTERVIEWS BY ATTORNEYS

During the trial, you have heard testimony that the attorneys (including Mr. Bergrin) or their agents or investigators have interviewed or attempted to interview some witnesses who testified at trial. No adverse inference should be drawn from that conduct. Indeed, the attorneys had a right, duty, and obligation to conduct and attempt to conduct those interviews, and prepare this case as thoroughly as possible, and they might have been derelict in the performance of their duties if they had not questioned the witnesses as the investigation progressed and during their preparation for this trial. Indeed, it would be negligent on the part of any lawyer not to interview or attempt to interview a witness whom he called to testify.

INSTRUCTION NO. 4

SPECIFIC INVESTIGATION TECHNIQUES NOT REQUIRED

During the trial you heard testimony of witnesses and argument by counsel that the Government did not use specific investigative techniques. You may consider these facts in deciding whether the Government has met its burden of proof, because as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendants are guilty. However, there is no legal requirement that the Government use any specific investigative techniques or all possible techniques to prove its case.

Your concern, as I have said, is to determine whether or not the evidence admitted in this trial proves the defendants' guilt beyond a reasonable doubt.

INSTRUCTION NO. 5

NOT ALL EVIDENCE, NOT ALL WITNESSES NEEDED

Although the Government is required to prove the defendant guilty beyond a reasonable doubt, the Government is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case. In addition, as I have explained, the defendant is not required to present any evidence or produce any witnesses.

In this case, defendant Paul Bergrin presented evidence and produced witnesses. Mr. Bergrin is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case.

INSTRUCTION NO. 6

EVIDENCE

You must make your decision in this case based only on the evidence that you saw and heard in the courtroom. 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 from which you are to find the facts consists of the following:

(1) The testimony of the witnesses;

(2) Documents and other things received as exhibits;

(3) Any fact or testimony that was stipulated – that is, formally agreed to by the parties; and

(4) Any facts that have been judicially noticed – that is, facts which I say you may accept as true even without other evidence.

The following are not evidence:

(1) The indictment;

(2) Statements and arguments of the lawyers for the parties in this case;

(3) Questions by the lawyers and questions that I might have asked;

(4) Objections by lawyers, including objections in which the lawyers stated facts;

(5) Any testimony I struck or told you to disregard; and

(6) Anything you may have seen or heard about this case outside the courtroom.

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 and common sense tells you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.

As I told you in my preliminary instructions, the rules of evidence control what can be received into evidence. During the trial the lawyers objected when they thought that evidence was offered that was not permitted by the rules of evidence. These objections simply meant that the lawyers were asking me to decide whether the evidence should be allowed under the rules.

You should not be influenced by the fact that an objection was made. You should also not be influenced by my rulings on objections or any sidebar conferences you may have overheard. When I overruled an objection, the question was answered or the exhibit was received as evidence, and you should treat that testimony or exhibit like any other. When I allowed evidence (testimony or exhibits) for a limited purpose only, I instructed you to consider that evidence only for that limited purpose and you must do that.

When I sustained an objection, the question was not answered or the exhibit was not received as evidence. You must disregard the question or the exhibit entirely. Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown. Sometimes a witness may have already answered before a lawyer objected or before I ruled on the objection. If that happened and if I sustained the objection, you must disregard the answer that was given.

Also, if I ordered that some testimony or other evidence be stricken or removed from the record, you must disregard that evidence. When you are deciding this case, you

must not consider or be influenced in any way by the testimony or other evidence that I told you to disregard.

Although the lawyers may have called your attention to certain facts or factual conclusions that they thought were important, what the lawyers said is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision in this case. Also, do not assume from anything I may have done or said during the trial that I have any opinion about any of the issues in this case or about what your verdict should be.

INSTRUCTION NO. 7

RECORDINGS – TRANSCRIPTS

You have heard recordings that were received in evidence, and you were given written transcripts of the recordings.

Keep in mind that, except for transcripts containing English translations of conversations that occurred in Spanish, the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read.

And if you could not hear or understand certain parts of the recordings you must ignore the transcripts as far as those parts are concerned.

INSTRUCTION NO. 8

STIPULATION OF FACTS

A stipulation of fact is an agreement between the parties that a certain fact is true. Whenever the Government and a defendant have reached a stipulation of fact, you may treat that fact as having been proved. You are not required to do so, however, since you are the sole judge of the facts.

INSTRUCTION NO. 9

EXPERT WITNESSES

The rules of evidence ordinarily do not permit witnesses to state their own opinions about important questions in a trial, but there are exceptions to these rules.

In this case, you heard testimony from Dr. Patrick Hinfey, Detective Louis Alarcon, Dr. Junaid Shaikh, Attila Mathe and James Reames. Because of their knowledge, skill, experience, training, and education in the fields of firearms identification, forensic pathology, or audio recording technology, they were permitted to offer opinions in those fields and the reasons for those opinions.

The opinions these witnesses stated should receive whatever weight you think appropriate, given all the other evidence in the case. In weighing this opinion testimony you may consider the witnesses' qualifications, the reasons for the witnesses' opinions, as well as the other factors discussed in these instructions for weighing the testimony of witnesses. You may disregard the opinions entirely if you decide that the witnesses' opinions are not based on sufficient knowledge, skill, experience, training, or education. You may also disregard the opinions if you conclude that the reasons given in support of the opinions are not sound, or if you conclude that the opinions are not supported by the facts shown by the evidence, or if you think that the opinions are outweighed by other evidence.

INSTRUCTION NO. 10

SUMMARIES AND CHARTS ADMITTED INTO EVIDENCE

Certain charts or summaries were admitted as evidence. You may consider the charts and summaries as you would any other evidence admitted during the trial and give them such weight or importance, if any, as you believe they deserve.

INSTRUCTION NO. 11

SUMMARIES AND CHARTS NOT ADMITTED INTO EVIDENCE

Both sides presented certain charts or summaries during the course of their summations in order to help explain the facts which they contend are established by the evidence in this case. These charts or summaries are not themselves evidence or proof of any facts. Rather, they were presented to you solely in order to assist the parties in presenting their closing arguments. To the extent that the charts or summaries do not reflect the evidence in the case, you should disregard them and determine the facts from the underlying evidence.

INSTRUCTION NO. 12

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Two types of evidence may be have been used in this trial, "direct evidence" and "circumstantial (or indirect) evidence." You may use both types of evidence in reaching your verdict.

"Direct evidence" is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses – something the witness has seen, touched, heard, or smelled.

"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts. A reasonable inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. A reasonable inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.

For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could reasonably find or conclude that it was raining. You would not have to find that it was raining, but you could.

Sometimes different inferences may be drawn from the same set of facts. The Government may ask you to draw one inference, and the defense may ask you to draw

another. You, and you alone, must decide what reasonable inferences you will draw based on all the evidence and your reason, experience and common sense.

You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

INSTRUCTION NO. 13

CREDIBILITY OF WITNESSES

As I stated in my preliminary instructions at the beginning of the trial, in deciding what the facts are you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Was the witness truthful? Was the witness' testimony accurate? You may believe everything a witness says, or only part of it, or none of it.

You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.

In deciding what to believe, you may consider a number of factors:

(1) The opportunity and ability of the witness to see or hear or know the things about which the witness testified;

(2) The quality of the witness' knowledge, understanding, and memory;

(3) The witness' appearance, behavior, and manner while testifying;

(4) Whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;

(5) Any relation the witness may have with a party in the case and any effect the verdict may have on the witness;

(6) Whether the witness said or wrote anything before trial that was different from the witness' testimony in court;

(7) Whether the witness' testimony was consistent or inconsistent with other evidence that you believe; and

(8) Any other factors that bear on whether the witness should be believed.

Inconsistencies or discrepancies in a witness' testimony or between the testimony of different witnesses may or may not cause you to disbelieve a witness' testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should also consider whether it was about a matter of importance or an insignificant detail. You should also consider whether the inconsistency was innocent or intentional.

You are not required to accept testimony even if the testimony was not contradicted and the witness was not impeached. You may decide that the witness is not worthy of belief because of the witness' bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.

After you make your own judgment about the believability of a witness, you can then attach to that witness' testimony the importance or weight that you think it deserves.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testified or the quantity of evidence that was presented. What is more important than numbers or quantity is how believable the witnesses were, and how much weight you think their testimony deserves.

INSTRUCTION NO. 14

CREDIBILITY OF WITNESSES — LAW ENFORCEMENT OFFICER

You have heard the testimony of law enforcement officers. The fact that a witness is employed as a law enforcement officer does not mean that his or her testimony necessarily deserves more or less consideration or greater or lesser weight than that of any other witness.

At the same time, it is quite legitimate for the defense to try to attack the believability of a law enforcement witness on the ground that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

You must decide, after reviewing all the evidence, whether you believe the testimony of the law enforcement witnesses who were called and how much weight, if any, it deserves.

INSTRUCTION NO. 15

CREDIBILITY OF WITNESSES – COOPERATING WITNESSES

You have heard evidence that certain witnesses entered into plea agreements with the Government. This testimony was received in evidence and may be considered by you. The Government is permitted to present the testimony of someone who has reached a plea agreement with the Government in exchange for his or her testimony, but you should consider his or her testimony with great care and caution. In evaluating such a witness's testimony, you should consider this factor along with the others I have called to your attention. Whether or not his or her testimony may have been influenced by the plea agreement is for you to determine. You may give his or her testimony such weight as you think it deserves.

You must not consider a witness's guilty plea as evidence of the guilt of the defendant charged in the Indictment. A witness's decision to plead guilty was a personal decision about his or her own guilt. Such evidence is offered only to allow you to assess the credibility of the witness, to eliminate any concern that the defendant has been singled out for prosecution, and to explain how the witness came to possess detailed first-hand knowledge of the events about which he testified. You may consider the witness's guilty plea only for these purposes.

INSTRUCTION NO. 16

IMPEACHMENT OF WITNESSES – PRIOR INCONSISTENT STATEMENTS

You have heard the testimony of certain witnesses. You have also heard that before this trial they made statements that may be different from their testimony in this trial. It is up to you to determine whether these statements were made and whether they were different from the witnesses' testimony in this trial. These earlier statements were brought to your attention only to help you decide whether to believe the witnesses' testimony here at trial. You cannot use it as proof of the truth of what the witnesses said in the earlier statements. You can only use it as one way of evaluating the witnesses' testimony in this trial.

You also heard evidence that certain witnesses made statements before this trial that were made under oath at a prior proceeding and that may be different from their testimony here. When a statement was made under oath, you may not only use it to help you decide whether you believe the witness's testimony in this trial but you may also use it as evidence of the truth of what the witness said in the earlier statements. But when a statement is not made under oath, you may use it only to help you decide whether you believe the witness's testimony in this trial and not as proof of the truth of what the witness said in the earlier statements.

INSTRUCTION NO. 17

FALSE IN ONE, FALSE IN ALL

If you believe that a witness knowingly testified falsely concerning any important matter, you may distrust the witness's testimony concerning other matters. You may reject all of the testimony or you may accept such parts of the testimony that you believe are true and give it such weight as you think it deserves.

INSTRUCTION NO. 18

IMPEACHMENT OF WITNESSES – PRIOR BAD ACTS

You heard evidence that a number of witnesses committed certain offenses or other bad acts probative of their character for truthfulness. You may consider this evidence, along with other pertinent evidence, only in deciding whether to believe these witnesses and how much weight to give their testimony.

INSTRUCTION NO. 19

IMPEACHMENT OF WITNESSES – PRIOR CONVICTION

You have heard evidence that a number of witnesses were previously convicted of crimes punishable by more than one year in jail and/or involving dishonesty or false statements. You may consider this evidence, along with the other pertinent evidence, in deciding whether or not to believe these witnesses and how much weight to give to their testimony.

INSTRUCTION NO. 20

DEFENDANTS' CHOICE NOT TO TESTIFY

Defendant Paul Bergrin did not testify in this case. A defendant has an absolute constitutional right not to testify. The burden of proof remains with the prosecution throughout the entire trial and never shifts to a defendant. A defendant is never required to prove that he is innocent. You must not attach any significance to the fact that Mr. Bergrin did not testify. You must not draw any adverse inference against him because he did not take the witness stand. Do not consider, for any reason at all, the fact that Mr. Bergrin did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

INSTRUCTION NO. 21

PRESUMPTION OF INNOCENCE; BURDEN OF PROOF REASONABLE DOUBT

The defendant Paul Bergrin pleaded not guilty to the offenses charged. Mr. Bergrin is presumed to be innocent. He started the trial with a clean slate, with no evidence against him. The presumption of innocence stays with Mr. Bergrin unless and until the Government has presented evidence that overcomes that presumption by convincing you that he is guilty of the offenses charged beyond a reasonable doubt. The presumption of innocence requires that you find Mr. Bergrin not guilty, unless you are satisfied that the Government has proved his guilt beyond a reasonable doubt.

The presumption of innocence means that Mr. Bergrin has no burden or obligation to present any evidence at all or to prove that he is not guilty. The burden or obligation of proof is on the Government to prove that Mr. Bergrin is guilty and this burden stays with the Government throughout the trial.

In order for you to find Mr. Bergrin guilty of the offenses charged, the Government must convince you that he is guilty beyond a reasonable doubt. That means that the Government must prove each and every element of the offenses charged beyond a reasonable doubt. The defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

If, having now heard all the evidence, you are convinced that the Government proved each and every element of the offense charged beyond a reasonable doubt, you should return a verdict of guilty for that offense. However, if you have a reasonable doubt about one or more of the elements of the offense charged, then you must return a verdict of not guilty of that offense.

INSTRUCTION NO. 22

NATURE OF THE INDICTMENT

As you know, defendant Paul Bergrin is charged in the Indictment with violating federal law, specifically in Count 1 with racketeering, in Count 2 with conspiring to commit racketeering, and in Counts 3 and 4 with violent crimes in aid of racketeering. Counts 5, 8 through 10, and 12 through 26 charge substantive offenses, many of which duplicate the racketeering acts alleged in Count 1. As I explained at the beginning of trial, an indictment is just the formal way of specifying the exact crimes the defendant is accused of committing. An indictment is simply a description of the charges against a defendant. It is an accusation only. An indictment is not evidence of anything, and you should not give any weight to the fact that Mr. Bergrin has been indicted in making your decision in this case.

INSTRUCTION NO. 23

PERSONS NOT ON TRIAL

You are here to decide whether the Government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. Defendant Paul Bergrin is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial. You may not draw any inference, favorable or unfavorable, towards the Government or the defendant, from the fact that certain persons were not named as defendants in the Indictment. Why certain persons were not indicted or are not on trial here must play no part in your deliberations. It should be of no concern to you, and you should not speculate as to the reason for their absence.

Whether a person should be named as a defendant is a matter within the sole discretion of the United States Attorney and the grand jury. Therefore, you may not consider it in any way in reaching your verdict as to defendant Paul Bergrin.

INSTRUCTION NO. 24

ON OR ABOUT

You will note that the Indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

INSTRUCTION NO. 25

SEPARATE CONSIDERATION – SINGLE DEFENDANT CHARGED WITH MULTIPLE OFFENSES

The defendant, Paul Bergrin, is charged with 23 offenses; each offense is charged in a separate count of the Indictment.

The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the Government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.

With the exception of those racketeering acts that duplicate other crimes charged in the Indictment, your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.

INSTRUCTION NO. 26

COUNT ONE – RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Count One of the Indictment charges defendant Paul Bergrin with violating the Racketeer Influenced and Corrupt Organizations Act, also known as "RICO." Under this statute, it is a federal crime for any person who is employed by or associated with an enterprise that is engaged in or affects interstate or foreign commerce, to conduct or to participate in the conduct of the affairs of that enterprise through a pattern of racketeering activity.

In order to find Paul Bergrin guilty of this offense, you must find that the Government proved each of the following five elements beyond a reasonable doubt:

First: The existence of an enterprise;

Second: That the enterprise was engaged in or its activities affected interstate or foreign commerce;

Third: That Paul Bergrin was employed by or associated with that enterprise;

Fourth: That Paul Bergrin knowingly conducted that enterprise's affairs or knowingly participated, directly or indirectly, in the conduct of that enterprise's affairs; and

Fifth: That Paul Bergrin knowingly conducted or participated, directly or indirectly, in the conduct of that enterprise's affairs through a pattern of racketeering activity, as alleged in the indictment.

I will now explain the law that applies to these elements.

INSTRUCTION NO. 27

RICO – "ENTERPRISE" DEFINED GENERALLY

The first element that the Government must prove beyond a reasonable doubt for the offense charged in Count 1 is the existence of an "enterprise," as alleged in the indictment. An enterprise may be: (1) a legal entity, such as a corporation or partnership; or (2) a group of individuals associated in fact although not a legal entity. In this case, the enterprise alleged in the indictment is a group of individuals and corporations associated in fact although not a legal entity.

The term enterprise includes both legitimate enterprises and also illegitimate or completely illegal enterprises. Thus, the enterprise need not have a purpose other than the commission of or facilitating the commission of the racketeering activity alleged in the indictment.

Although the Government must prove that Paul Bergrin was employed by or associated with the enterprise, the enterprise must itself be an entity separate and distinct from the defendant.

INSTRUCTION NO. 28

RICO – "ENTERPRISE;" ASSOCIATION IN FACT DEFINED

The Indictment alleges that the enterprise in this case was a group of individuals and legal entities associated together in fact. As I already told you, an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals and legal entities. A group or association of individuals and legal entities can be an enterprise if they have associated together for a common purpose of engaging in a course of conduct. This is referred to as an "association in fact enterprise."

In order to find the existence of an "association in fact enterprise," you must find that the government proved beyond a reasonable doubt each of the following:

First: That the group had purposes and longevity sufficient for the members of the group to pursue its purposes;

Second: That the group had an ongoing organization, formal or informal, with some sort of framework for carrying out its objectives;

Third: That there was a relationship among the members of the group and that the members of the group functioned as a continuing unit to achieve common purposes; and

Fourth: That the enterprise existed separate and apart from the alleged pattern of racketeering activity.

To find that the enterprise was an entity separate and apart from the alleged pattern of racketeering activity, you must find that the government proved that the enterprise had an existence beyond what was necessary merely to commit the charged racketeering activity. However, the government does not have to prove that the enterprise had some function wholly unrelated to the racketeering activity; the enterprise may be formed solely for the purpose of carrying out a pattern of racketeering activity. The existence of an association-in-fact enterprise is often proved by what it does, rather than by abstract analysis of its structure. Evidence that shows a pattern of racketeering activity may be considered in determining whether the government has proved the existence of an enterprise beyond a reasonable doubt, and proof of a pattern of racketeering activity may be sufficient for you to infer the existence of an association-in-fact enterprise. Also, evidence showing the oversight or coordination of the commission of several different racketeering acts and other activities on an ongoing basis may be considered in determining whether the enterprise had a separate existence.

To prove an association-in-fact enterprise, the government need not prove that the group had a hierarchical structure or a chain of command; decisions may be made on an ad hoc basis and by any number of methods. The government also need not prove that members of the group had fixed roles; different members may perform different roles at different times. The government need not prove that the group was a business-like entity, or that it had a name, or regular meetings, or established rules and regulations, or the like.

interfere with interstate or foreign commerce, or that the purpose of the alleged crime generally was to affect interstate or foreign commerce. Moreover, you do not have to decide whether the effect on commerce was harmful or beneficial.

In addition, the Government does not have to prove that the pattern or the individual acts of racketeering activity themselves affected interstate or foreign commerce. Rather, it is the enterprise and its activities considered as a whole that must be shown to have that effect. On the other hand, this effect on interstate or foreign commerce may be established through the effect caused by the pattern or the individual acts of racketeering activity.

INSTRUCTION NO. 30

RICO – "EMPLOYED BY OR ASSOCIATED WITH ANY ENTERPRISE" DEFINED

The third element that the Government must prove beyond a reasonable doubt for the offense charged in Count 1 is that Paul Bergrin was either "employed by" or "associated with" the enterprise. The Government need not prove both.

If you find that Paul Bergrin was employed by the enterprise, that is enough to satisfy this element. You should give the phrase "employed by" its common, ordinary meaning. For example, a person is employed by an enterprise when he or she is on the payroll of the enterprise, or performs services for the enterprise, or holds a position in the enterprise.

Alternatively, you may find that Paul Bergrin was "associated with" the enterprise, if you find that the Government proved that he was aware of the general existence and nature of the enterprise, that it extended beyond his individual role, and with that awareness participated in, aided, or furthered the enterprise's activities or had an ownership interest in the enterprise.

It is not required that Paul Bergrin be employed by or associated with the enterprise for the entire time the enterprise existed. The Government also is not required to prove that Paul Bergrin had a formal or managerial position in the enterprise, or participated in all the activities of the enterprise, or had full knowledge of all the activities

of the enterprise, or knew about the participation of all the other members of the enterprise. What the Government must prove beyond a reasonable doubt is that at some time during the existence of the enterprise as alleged in the indictment, Paul Bergrin was employed by or associated with the enterprise within the meaning of those terms as I have just explained.

To prove that Paul Bergrin was either employed by or associated with an enterprise, the Government must prove beyond a reasonable doubt that he was connected to the enterprise in some meaningful way, and that he knew of the existence of the enterprise and of the general nature of its activities.

INSTRUCTION NO. 31

RICO – "CONDUCT OR PARTICIPATE, DIRECTLY OR INDIRECTLY, IN THE CONDUCT OF SUCH ENTERPRISE'S AFFAIRS" DEFINED

The fourth element that the Government must prove beyond a reasonable doubt for the offense charged in Count 1 is that Paul Bergrin knowingly conducted the affairs of the enterprise or that he knowingly participated, directly or indirectly, in the conduct of the affairs of the enterprise. In order to prove this element, the Government must prove a connection between Paul Bergrin and the conduct of the affairs of the enterprise. The Government must prove that Paul Bergrin took some part in the operation or management of the enterprise or that he had some role in directing the enterprise's affairs.

Evidence that Paul Bergrin held a managerial position within the enterprise or exerted control over the enterprise's operations is enough to prove this element.

INSTRUCTION NO. 32

RICO – "THROUGH A PATTERN OF RACKETEERING ACTIVITY" DEFINED

The fifth element that the Government must prove beyond a reasonable doubt for the offense charged in Count 1 is that Paul Bergrin knowingly conducted the enterprise's affairs or knowingly participated, directly or indirectly, in the conduct of the enterprise's affairs "through a pattern of racketeering activity."

To establish this element, the Government must prove each of the following beyond a reasonable doubt:

First: That Paul Bergrin committed at least two of the acts of racketeering activity alleged in the Indictment and that the last act of racketeering activity occurred within ten years after the commission of a previous act of racketeering activity;

Second: That the acts of racketeering activity were related to each other, meaning that there was a relationship between or among the acts of racketeering activity (referred to as the "relatedness" requirement);

Third: That the acts of racketeering activity amounted to or posed a threat of continued criminal activity (referred to as the "continuity" requirement); and

Fourth: That Paul Bergrin conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs "through" the pattern of racketeering activity.

With respect to the second requirement, acts of racketeering activity are "related" if the acts had the same or similar purposes, results, participants, victims or methods of

commission, or were otherwise interrelated by distinguishing characteristics. Acts of racketeering activity are not related if they are disconnected, sporadic, or widely separated and isolated acts.

As to the third requirement, the Government must prove that the racketeering acts themselves amounted to continuing racketeering activity or that the acts otherwise posed a threat of continuing racketeering activity. Continuing racketeering activity may be proved by evidence showing a closed period of repeated racketeering activity; that is, by evidence of a series of related racketeering acts committed over a substantial period of time. Acts of racketeering activity committed over only a few weeks or months and which do not threaten future criminal conduct do not satisfy this requirement. Continuing racketeering activity or a threat of continuing racketeering activity may also be proved by evidence showing past racketeering activity that by its nature projects into the future with a threat of repetition; for example, when the acts of racketeering activity are part of a long-term association that exists for criminal purposes or when the acts of racketeering activity are shown to be the regular way of conducting the affairs of the enterprise.

In deciding whether the Government proved a pattern of racketeering activity, you may consider evidence regarding the number of acts of racketeering activity, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.

You may find that separately performed, functionally different, or directly unrelated acts of racketeering activity form a pattern of racketeering activity if you find that the Government proved beyond a reasonable doubt that they were all undertaken in furtherance of one or more of the purposes of the enterprise.

To prove the fourth requirement, that Paul Bergrin conducted or participated in the conduct of the enterprise's affairs *"through"* a pattern of racketeering activity, the Government must prove that the acts of racketeering activity had a relationship or a meaningful connection to the enterprise. This relationship or connection may be established by evidence that Paul Bergrin was enabled to commit the racketeering activity by virtue of his position with or involvement in the affairs of the enterprise, or by evidence that Paul Bergrin's position with or involvement in the enterprise facilitated his commission of the racketeering activity, or by evidence that the racketeering activity benefited the enterprise, was authorized by the enterprise, promoted or furthered the purposes of the enterprise, or was in some other way related to the affairs of the enterprise.

INSTRUCTION NO. 33

RICO – "RACKETEERING ACTIVITY" DEFINED

"Racketeering activity," as defined by the RICO statute, includes any acts that involve or that may be charged as any of a wide range of crimes under state or federal law. Count 1 of the Indictment alleges that Paul Bergrin committed six acts of racketeering activity. Five of those six acts allege more than one crime. I instruct you that you may find a racketeering act proved so long as you agree that the Government has proved at least one of the crimes alleged beyond a reasonable doubt; but you unanimously agree on the same particular crime.

I will now define the elements of those crimes for you. Please be aware that many, but not all, of the offenses I will define for you now are also charged as substantive offenses in Counts Five through Twenty-Six. When a racketeering act overlaps with a substantive offense, I will point that out so that I do not have to repeat all of these instructions later. So please pay careful attention to the following instructions.

Also, you will see that some racketeering acts and some substantive counts have been omitted from the Indictment. There will be no instructions regarding those acts or counts, and they will not be listed on the Verdict Form. Those acts and counts have been omitted by agreement of the parties and the court and are irrelevant to the acts and counts that are charged in the Indictment.

INSTRUCTION NO. 34

RICO – UNANIMITY AS TO ACTS OF RACKETEERING ACTIVITY

The indictment alleges that Paul Bergrin committed six acts of racketeering activity. As I have instructed, you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin committed at least two of the alleged acts of racketeering activity within the prescribed time period.

You must unanimously find that the Government proved beyond a reasonable doubt that Mr. Bergrin committed each of at least two of the same particular acts of racketeering activity alleged. It is not enough that some members of the jury find that Mr. Bergrin committed two of the particular racketeering acts alleged while other members of the jury find that Mr. Bergrin committed two different racketeering acts. In order for you to find Paul Bergrin guilty, there must be at least two specific racketeering acts that all of you find were committed by Paul Bergrin.

INSTRUCTION NO. 35

RICO – RACKETEERING ACT ONE

The first act of racketeering activity alleged in Count 1, which relates to the trafficking and storage of cocaine, alleges that Paul Bergrin committed four separate offenses, any one of which is sufficient to prove Racketeering Act One. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following four offenses.

INSTRUCTION NO. 35A

RACKETEERING ACT 1(a)
(Conspiracy to Distribute a Controlled Substance)
(as also charged in Count 5)

Racketeering Act 1(a) and Count 5 allege that from at least in or about January 2003 through on or about May 21, 2009, Paul Bergrin conspired with others to distribute, and to possess and distribute, five or more kilograms of a controlled substance.

It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.

In order for you to find Paul Bergrin guilty of conspiracy to distribute, or to possess with the intent to distribute, a controlled substance, you must find that the Government proved beyond a reasonable doubt each of the following three (3) elements:

First: That two or more persons agreed to distribute or possess with the intent to distribute a controlled substance.

Second: That Paul was a party to or member of that agreement; and

Third: That Paul Bergrin joined the agreement or conspiracy knowing of its objectives to distribute or possess with the intent to distribute a controlled substance and intending to join together with at least one other alleged conspirator to achieve those objectives; that is, that Paul Bergrin and at least one other alleged conspirator shared a unity of purpose and the intent to achieve those objectives.

I will now explain these elements in more detail. Please note that several other racketeering acts and substantive offenses charge conspiracy offenses as well. As a result, I am going to define conspiracy law in full now, and will refer back to these instructions later so that I do not have to repeat these instructions again and again. So, again, please pay close attention. Also, many of the instructions I will give you use the terms "knowingly," "intentionally," or "wilfully." I will define those terms later.

CONSPIRACY – EXISTENCE OF AN AGREEMENT

The first element of the crime of conspiracy is the existence of an agreement. The Government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy.

The Government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The Government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objectives, or agreed to all the details, or agreed to what the means were by which the objectives would be accomplished. The Government is not even required to prove that all the people named in the Indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the Government must prove beyond a reasonable doubt is that two or more persons in some

way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.

You may consider both direct and circumstantial evidence in deciding whether the Government has proved beyond a reasonable doubt that an agreement or mutual understanding existed. You may find the existence of a conspiracy based on reasonable inferences drawn from the actions and statements of the alleged members of the conspiracy, from the circumstances surrounding the scheme, and from evidence of related facts and circumstances which prove that the activities of the participants in a criminal venture could not have been carried out except as the result of a preconceived agreement, scheme, or understanding.

The indictment charges various conspiracies to commit several federal crimes. The Government does not have to prove that the alleged conspirators agreed to commit all of these crimes. The Government, however, must prove that they agreed to commit at least one of the object crimes, and you must unanimously agree on which crime. You cannot find Paul Bergrin guilty of conspiracy unless you unanimously agree that the same federal crime was the objective of the conspiracy. It is not enough if some of you agree that one of the charged crimes was the objective of the conspiracy and others agree that a different crime was the objective of the conspiracy.

CONSPIRACY – MEMBERSHIP IN THE AGREEMENT

If you find that a criminal agreement or conspiracy existed, then in order to find Paul Bergrin guilty of conspiracy you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin knowingly and intentionally joined that agreement or conspiracy during its existence. The Government must prove that Mr. Bergrin knew the goal or objectives of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve that common goals or objectives and to work together with the other alleged conspirators toward those goals or objectives.

The Government need not prove that Mr. Bergrin knew everything about the conspiracy or that he knew everyone involved in it, or that he was a member from the beginning. The Government also does not have to prove that a defendant played a major or substantial role in the conspiracy.

You may consider both direct evidence and circumstantial evidence in deciding whether Mr. Bergrin joined the conspiracy, knew of its criminal objectives, and intended to further the objectives. Evidence which shows that a defendant only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that that defendant was a member of the conspiracy even if he approved of what was happening or did not object to it. Likewise, evidence showing that a defendant may have done something that happened to help a conspiracy does not necessarily prove that that he joined the conspiracy. You may, however, consider this

evidence, with all the other evidence, in deciding whether the Government proved beyond a reasonable doubt that defendant Paul Bergrin joined the conspiracy.

CONSPIRACY – MENTAL STATES

In order to find a defendant guilty of conspiracy, you must find that the Government proved beyond a reasonable doubt that defendant Paul Bergrin joined the conspiracy knowing of its objectives and intending to further or achieve that objective. That is, the Government must prove that Mr. Bergrin (1) knew of the objective or goal of the conspiracy; (2) joined the conspiracy intending to help further or achieve that goal or objective; and (3) shared with at least one other alleged conspirator a unity of purpose toward that objective or goal.

You may consider both direct and circumstantial evidence, including a defendant's words or conduct and other facts and circumstances, in deciding whether each defendant had the required knowledge and intent. For example, evidence that a defendant derived some benefit from the conspiracy or had some stake in the achievement of the conspiracy's objective might tend to show that the defendant had the required intent or purpose that the conspiracy's objectives be achieved.

CONSPIRACY – ACTS AND STATEMENTS OF CO-CONSPIRATORS

Evidence has been admitted in this case that certain persons, who are alleged to be co-conspirators of defendant Paul Bergrin, did or said certain things. The acts or

statements of any member of a conspiracy are treated as the acts or statements of all the members of the conspiracy, if these acts or statements were performed or spoken during the existence of the conspiracy and to further the objectives of the conspiracy.

Therefore, you may consider as evidence against defendant Paul Bergrin any acts done or statements made by any members of the conspiracy, during the existence of and to further the objectives of the conspiracy. You may consider these acts and statements even if they were done and made in the absence and without his knowledge. As with all the evidence in this case, it is for you to decide whether you believe this evidence and how much weight to give it.

Acts done or statements made by an alleged co-conspirator before Mr. Bergrin joined the alleged conspiracy may also be considered by you as evidence against Mr. Bergrin. However, acts done or statements made before the alleged conspiracy began or after it ended may only be considered by you as evidence against the person who performed that act or made that statement.

CONSPIRACY – SUCCESS IMMATERIAL

The Government is not required to prove that any of the members of the conspiracy were successful in achieving any or all of the objectives of the conspiracy. You may find Paul Bergrin guilty of conspiracy if you find that the government proved beyond a reasonable doubt the elements I have explained, even if you find that the Government did not prove that any of the co-conspirators actually committed any other

offense against the United States. Conspiracy is a criminal offense separate from the offenses that were the objectives of the conspiracy; conspiracy is complete without the commission of those offenses.

CONSPIRACY – OBJECT

Now let me now discuss the object of the conspiracy that is alleged in both Racketeering Act 1(a) of Count 1 and in Count 5 of the Indictment. The Government must prove beyond a reasonable doubt that the object of the conspiracy was to distribute or possess with intent to distribute a controlled substance. Some of these terms require definition.

To "possess" a controlled substance means to have it within a person's control. The Government does not have to prove that defendant Paul Bergrin physically held the controlled substance, that is, had actual possession of it as long as object of the conspiracy was to bring the controlled substance within Mr. Bergrin's control. Proof of ownership of the controlled substance is not required.

The law also recognizes that possession may be sole or joint. If one person alone possesses a controlled substance, that is sole possession. However, more than one person may have the power and intention to exercise control over a controlled substance. This is called joint possession. If you find that Mr. Bergrin had such power and intention, then he possessed the controlled substance even if he possessed it jointly with another.

Mere proximity to the controlled substance, or mere presence on the property where it is located, or mere association with the person who does control the controlled substance or the property is not enough to support a finding of possession.

To "distribute," as used in the offenses charged, means to deliver or to transfer possession or control of a controlled substance from one person to another. To distribute includes the sale of a controlled substance by one person to another, but does not require a sale. Distribute also includes a delivery or transfer without any financial compensation, such as a gift or trade.

You are instructed that, as a matter of law, cocaine is a controlled substance, that is, some kind of prohibited drug. It is solely for you, however, to decide whether the Government has proved beyond a reasonable doubt that Paul Bergrin conspired to distribute and possess with the intent to distribute a mixture or substance containing cocaine.

Possession of a controlled substance with intent to distribute means that the object of the conspiracy was to distribute a mixture or substance containing a controlled substance. To find that the object of the conspiracy was to possess the controlled substance with the intent to distribute, you must find that the Government proved each of the following four elements beyond a reasonable doubt:

First: That Mr. Bergrin possessed a mixture or substance containing a controlled substance;

Second: That Mr. Bergrin possessed the controlled substance knowingly or intentionally;

Third: That Mr. Bergrin intended to distribute the controlled substance

CONSPIRACY - KNOWLEDGE OF DRUG
TYPE & QUANTITY NOT REQUIRED

In order to find the defendant guilty of the conspiracy charged in Racketeering Act 1(a) and in Count 5, the United States must prove beyond a reasonable doubt that the defendant conspired to distribute or possess with intent to distribute a controlled substance. The United States does not have to prove that the defendant knew the type of drugs that he conspired about or the exact quantity of drugs involved. It is enough that the United States prove that the defendant knew that the conspiracy involved some type and some amount of a controlled substance and that the conspiracy involved the type and amount of drugs alleged in the Indictment.

You will see on the Verdict Form that, if you find that the Government has proven Racketeering Act 1(a) beyond a reasonable doubt, you will be asked to answer several additional questions regarding the type and quantity of the controlled substance involved in the conspiracy. Your answers to these questions must be unanimous, and in order to find that the offense involved a certain weight or quantity of controlled substances, you must all be satisfied that the Government proved the weight or quantity beyond a reasonable doubt. Weight or quantity means the total weight of any mixture or substance which contains a detectable amount of the controlled substance charged.

The first question asks whether you unanimously find beyond a reasonable doubt that the weight or quantity of cocaine which was involved in the conspiracy was 5 kilograms or more. In determining the type and amounts of controlled substances involved in the conspiracy, you may consider all evidence in the case that may help you make that determination, including, the physical and documentary exhibits, the testimony of any witness or the contents of any audio or video recording.

If your answer to this question is "yes," you should proceed to Racketeering Act 1(b). If your answer is "no," you must then answer the second question, whether you unanimously find beyond a reasonable doubt, that the quantity of cocaine which was involved in the conspiracy was 500 grams or more.

As long as you find that the Government proved beyond a reasonable doubt that the conspiracy involved five kilograms or more of cocaine, specifically, and that Mr. Bergrin knew that what he conspired to distribute and possess was a controlled substance, you need not find that Mr. Bergrin knew that the controlled substance was cocaine or that Mr. Bergrin knew that the weight of the controlled substance was five kilograms or more.

INSTRUCTION NO. 35B

RACKETEERING ACT 1(b)
(Maintaining drug-involved premises)
(as also charged in Count 8)

Both Racketeering Act 1(b) of Count 1 and Count 8 allege that from at least as early as in or about October 2004 through on or about May 21, 2009, defendant Paul Bergrin and others, as an owner and occupant, managed or controlled a building located at 710 Summer Avenue, Newark, New Jersey, and he knowingly opened, leased, rented, used, profited from, made available for use such place for the purpose of unlawfully storing and distributing a controlled substance, *i.e.*, cocaine, in violation of Title 21, United States Code, Section 856(a)(2), and Title 18, United States Code, Section 2.

In order for you to find the defendant guilty of this charge, the Government must prove the following elements beyond a reasonable doubt:

First: The defendant managed or controlled a place; and

Second: The defendant was an owner; lessee; agent; employee; occupant; or mortgagee of that place; and

Third: The defendant knowingly rented; leased the place; profited from the place; made the place available for use, with or without compensation; and

Fourth: The defendant did so for the purpose of unlawfully storing or distributing a controlled substance. The Government is not required to prove that that was the defendant's sole purpose.

INSTRUCTION NO. 35C

RACKETEERING ACT 1(c)
(Maintaining drug-involved premises)
(as also charged in Count 9)

Both Racketeering Act 1(c) of Count 1 and Count 9 allege that from at least as early as in or about September 2004 through October 2005, defendant Paul Bergrin and others knowingly opened, leased, rented, used, and maintained a building located at 572 Market Street, Newark, New Jersey for the purpose of distributing a controlled substance, that is, cocaine.

In order for you to find the defendant guilty of this charge, the Government must prove beyond a reasonable doubt the same four elements I just described for you.

INSTRUCTION NO. 35D

RACKETEERING ACT 1(d)
(Maintaining drug-involved premises)
(as also charged in Count 10)

Both Racketeering Act 1(d) of Count 1 and Count 10 allege that from at least as early as in or about 2008 through on or about May 20, 2009, defendant Paul Bergrin and others opened, leased, rented, used and maintained a building located at 50 Park Place, Newark, New Jersey for the purpose of distributing a controlled substance, that is, cocaine, in violation of Title 21, United States Code, Section 856(a)(1), and Title 18, United States Code, Section 2.

In order for you to find the defendant guilty of this charge, the Government must prove beyond a reasonable doubt the following two elements:

First: The defendant knowingly opened, leased, rented, used, or maintained a place, whether permanently or temporarily; and

Second: The defendant did so for the purpose of manufacturing, distributing, or using any controlled substance.

The Government must prove that manufacturing, distributing, or using any controlled substance was a significant purpose for leasing, renting, using or maintaining the place.

INSTRUCTION NO. 36

RICO – RACKETEERING ACT FOUR

The fourth act of racketeering activity alleged in Count 1, which relates to the murder of Kemo McCray, alleges that Paul Bergrin committed four separate offenses, any one of which constitutes the commission of Racketeering Act Four. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following four offenses.

INSTRUCTION NO. 36A

RACKETEERING ACT 4(a)
(Conspiracy to Murder a Witness)
(as also charged in Count 12)

Both Racketeering Act 4(a) of Count 1 and Count 12 alleged that from on or about November 25, 2003 through on or about March 2, 2004 defendant Paul Bergrin knowingly and intentionally conspired and agreed with others to murder a witness to prevent his testimony at an official proceeding.

Title 18, United States Code, Section 1512(k), provides that: "Whoever conspires to commit any offense under . . . [Section 1512]. . . is guilty of a crime against the United States." One of the offenses listed, in Section 1512(a), provides that: "Whoever kills . . . another person, with intent to prevent the attendance or testimony of any person in an official proceeding" is guilty of a crime against the United States.

In order to prove the existence of the conspiracy charged in Racketeering Act 4(a) and in Count 12, the Government must establish two elements beyond a reasonable doubt, first, that two or more persons formed, reached, or entered into an unlawful agreement to murder Kemo McCray with the intent to prevent Mr. McCray's attendance or testimony at an official proceeding and, second, that at some time during the existence or life of that unlawful agreement, defendant Paul Bergrin knew the purpose of that agreement and intentionally joined in it.

I have already given you detailed instructions about what the Government must prove to show a conspiracy and the defendant's membership in that conspiracy. I will now give you instructions about the object of the particular conspiracy charged in Racketeering Act 4(a) and in Count 12.

The Government must prove beyond a reasonable doubt that the object of the illegal agreement charged in Racketeering Act 4(a) and in Count 12 was to murder Kemo McCray, with the specific intent of preventing his testimony at an official proceeding. Murder is defined in Title 18, section 1111(a), and requires the Government to prove that the murder was both premeditated and committed with malice aforethought.

Let me define some of these terms for you.

An act is done with premeditation if it is done upon planning or deliberation. In order to satisfy this element the Government must prove that the defendant killed the victim 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. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the defendant, after forming the intent to kill, to be fully conscious of his intent, and to have thought about the killing.

"Malice aforethought" means an intent, at the time of a killing, willfully to take the life of a human being, or an intent to act in callous and wanton disregard of the

consequences to human life; but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.

In determining whether the object of the unlawful agreement charged in Racketeering Act 4(a) and in Count 12 was to murder Kemo McCray with malice aforethought, you should consider all the evidence concerning the facts and circumstances preceding, surrounding and following the murder which tend to shed light upon the question of intent.

"Official proceeding" means a proceeding before a judge or court of the United States. I instruct you that a federal criminal trial is an "official proceeding" within the meaning of section 1512.

It is not necessary that the victim be under subpoena or a scheduled witness in a case. The statute purposely uses the term "person" instead of "witness."

and circumstances. However, evidence that Mr. Bergrin merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense is not enough for you to find him guilty as an aider and abetter. If the evidence shows that defendant knew that the offense was being committed or was about to be committed, but does not also prove beyond a reasonable doubt that it was his intent and purpose to aid, assist, encourage, facilitate, or otherwise associate himself with the offense, you may not find Mr. Bergrin guilty of the offense as an aider and abetter. The Government must prove beyond a reasonable doubt that defendant in some way participated in the murder of Kemo McCray as something defendant wished to bring about and to make succeed. The Government needs to show some affirmative participation by Mr. Bergrin which at least encouraged another to murder Mr. McCray.

BONA FIDE LEGAL REPRESENTATION AS AN AFFIRMATIVE DEFENSE

As you know, defendant Paul Bergrin was a licensed practicing attorney at the time of the conduct alleged in Racketeering Acts 4(a) and 4(b), and in Counts 12 and 13. Mr. Bergrin contends that certain aspects of his alleged conduct constituted lawful and legitimate legal representation of a client in connection with or in anticipation of an official proceeding.

I instruct you that it is a defense to the charges in the Indictment that the defendant's acts constituted lawful and legitimate legal representation of a client. The

burden is on the Government to prove beyond a reasonable doubt that the defendant was not engaged in lawful and legitimate legal representation of a client in connection with or in anticipation of an official proceeding. If the Government proves beyond a reasonable doubt that Mr. Bergrin acted with the specific intent of preventing Mr. McCray from testifying at an official proceeding, then this defense is not available to Mr. Bergrin.

INSTRUCTION NO. 36C

RACKETEERING ACT 4(c)
(Conspiracy to Commit Murder under New Jersey Law)

Racketeering Act 4(c) of Count 1 charges that defendant Paul Bergrin did knowingly and intentionally conspire and agree with others to cause the death and serious bodily injury resulting in death of another person, namely, Kemo McCray, in violation of sections 2C:5-2 and 2C:11-3(1) & (2) of New Jersey's statutes.

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

In order for you to find a defendant guilty of the crime of conspiracy, the Government must prove beyond a reasonable doubt the following elements:

(1) That the defendant agreed with another person or persons that they or one or more of them would engage in conduct which constitutes a crime or an attempt or solicitation to commit such crime;

(2) That the defendant's purpose was to promote or facilitate the commission of the crime of murder.

A person acts purposely with respect to the nature of his conduct or a result thereof, if it is his conscious object to engage in conduct of that nature or cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist.

In order to find a defendant guilty of the crime of conspiracy, the Government does not have to prove that he actually committed the crime of murder. However, to decide whether the Government has proven the crime of conspiracy you must understand what constitutes the crime of murder.

A person is guilty of murder if he:

(1) caused the victim's death or serious bodily injury that then resulted in the victim's death; and

(2) the defendant did so purposely or knowingly.

In order for you to find the defendant guilty of murder, the Government is required to prove each of the following elements beyond a reasonable doubt:

(1) that the defendant caused Kemo McCray's death or serious bodily injury that then resulted in Kemo McCray's death, and

(2) that the defendant did so purposely or knowingly.

One element that the Government must prove beyond a reasonable doubt is that the defendant acted purposely or knowingly.

A person acts purposely when it is the person's conscious object to cause death or serious bodily injury resulting in death.

A person acts knowingly when the person is aware that it is practically certain that his conduct will cause death or serious bodily injury resulting in death.

The nature of the purpose or knowledge with which the defendant acted toward Kemo McCray is a question of fact for you the jury to decide. Purpose and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences form conduct, words or acts. It is not necessary for the Government to produce a witness or witnesses who could testify that the defendant stated, for example, that his purpose was to cause death or serious bodily injury resulting in death; or that he knew that his conduct would cause death or serious bodily injury resulting in death. It is within your power to find that proof of purpose or knowledge has been furnished beyond a reasonable doubt by inferences which may arise from the nature of the acts and the surrounding circumstances. Such things as the place where the acts occurred, the weapon used, the location, number and nature of wounds inflicted, and all that was done or said by the defendant preceding, connected with, and immediately succeeding the events leading to the death of Kemo McCray are among the circumstances to be considered.

Although the Government must prove that the defendant acted either purposely or knowingly, the Government is not required to prove a motive. If the Government has proved the essential elements of the offense beyond a reasonable doubt, the defendant

must be found guilty of that offense regardless of the defendant's motive or lack of motive. If the Government, however, has proved a motive, you may consider that insofar as it gives meaning to other circumstances. On the other hand, you may consider the absence of motive in weighing whether or not the defendant is guilty of the crime charged.

The other element that the Government must prove beyond a reasonable doubt is that the defendant caused Kemo McCray's death or serious bodily injury resulting in death.

As I previously advised you, in order to convict the defendant of murder, the Government must prove beyond a reasonable doubt that the defendant either purposely or knowingly caused the victim's death or serious bodily injury resulting in death. In that regard, "serious bodily injury" means bodily injury that creates a substantial risk of death. A substantial risk of death exists where it is highly probably that the injury will result in death.

In order for you to find the defendant guilty of purposeful serious bodily injury murder, the Government must prove beyond a reasonable doubt that it was the defendant's conscious object to cause serious bodily injury that then resulted in the victim's death; that the defendant knew that the injury created a substantial risk of death; and that it was highly probable that death would result. In order for you to find the defendant guilty of knowing serious bodily injury murder, the Government must prove

beyond a reasonable doubt that the defendant was aware that it was practically certain his conduct would cause serious bodily injury that then resulted in the victim's death; that the defendant knew that the injury created a substantial risk of death; and that it was highly probable that death would result.

Whether the killing is committed purposely or knowingly, causing death or serious bodily injury resulting in death must be within the design or contemplation of the defendant.

You have to decide whether the defendant's purpose was that he or a person with whom he was conspiring would commit the crime of murder. For Mr. Bergrin to be found guilty of conspiracy, the Government has to prove beyond a reasonable doubt that when he agreed it was his conscious object or purpose to promote or make it easier to commit murder.

INSTRUCTION NO. 36D

RACKETEERING ACT 4(d)
(Murder under New Jersey Law)

Racketeering Act 4(d) of Count 1 charges that defendant Paul Bergrin is legally responsible for the criminal conduct of Anthony Young, in violation of section 2C:2-6 of New Jersey's statutes, which reads in pertinent part as follows:

"A person is guilty of an offense if it is committed by his own conduct or the conduct of another person for which he is legally accountable, or both."

A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of an offense.

A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, he (a) solicits such other person to commit it and/or (b) aids or agrees or attempts to aid such other person in planning or committing it.

This provision of the law means that not only is the person who actually commits the criminal act responsible for it but one who is legally accountable as an accomplice is also responsible as if he committed the crime himself.

In this case, the Government alleges that the defendant is guilty of the crime committed by Anthony Young because he acted as his accomplice. In order to find the

defendant guilty, the Government must prove beyond a reasonable doubt each of the following elements:

1. That Anthony Young committed the crime of murder, as I previously explained to you.

2. That this defendant (Mr. Bergrin) solicited him to commit it and did aid or agree or attempt to aid him in planning or committing it.

3. That this defendant's (Mr. Bergrin's) purpose was to promote or facilitate the commission of the offense.

4. That this defendant (Mr. Bergrin) possessed the criminal state of mind that is required to be proved against the person who actually committed the act, that is knowingly and purposely.

Remember that one acts purposely with respect to his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result.

"Solicit" means to strongly urge, suggest, lure or proposition. "Aid" means to assist, support or supplement the efforts of another. "Agrees to aid" means to encourage by promise of assistance or support. "Attempt to aid" means that a person takes substantial steps in a course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of a substantive offense.

If you find that the defendant, with the purpose of promoting or facilitating the commission of the murder of Kemo McCray, solicited Anthony Young to commit it or aided or agreed or attempted to aid him in planning or committing it, then you should consider him as if he committed the crime himself.

Mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him a participant in the crime. It is, however, a circumstance to be considered with the other evidence in determining whether he was present as an accomplice. Presence is not in itself conclusive evidence of that fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt there must exist a community of purpose and actual participation in the crime committed.

While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is possible for the jury to infer that he assented thereto, lent to it his countenance and approval and was thereby aiding the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.

An accomplice may be convicted on proof of the commission of a crime or of his complicity therein even though the person who it is claimed committed the crime has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity from prosecution or conviction of has been acquitted.

In order to convict the defendant as an accomplice to the crime charged, you must find that the defendant had the purpose to participate in that particular crime. He must act

with the purpose of promoting or facilitating the commission of the substantive crime with which he is charged.

It is not sufficient to prove only that the defendant had knowledge that another person was going to commit the crime charged. The Government must prove that it was defendant's conscious object that the specific conduct charged be committed.

In sum, in order to find the defendant guilty of committing the crime of murder, the Government must prove each of the elements beyond a reasonable doubt.

If you find that the Government has proven each and every one of the elements that I have explained to you beyond a reasonable doubt, then you must find the defendant guilty. If on the other hand you find that the Government has failed to prove one or more of these elements beyond a reasonable doubt, then you must find the defendant not guilty. As I have previously instructed, your verdict must be unanimous. All twelve jurors must agree as to guilty or not guilty.

INSTRUCTION NO. 37

RICO – RACKETEERING ACT FIVE

The fifth act of racketeering activity alleged in Count 1, which relates to the interstate travel and transportation in aid of a prostitution business, alleges that Paul Bergrin committed two separate offenses, either of which is sufficient to prove Racketeering Act Five. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following two offenses.

INSTRUCTION NO. 37A

RACKETEERING ACT 5(a)
(Interstate travel to promote prostitution in violation of New York law (December 10, 2004 letter)
(as also charged in Count 15)

Both Racketeering Act 5(a) of Count 1 and Count 15 charge that on December 10, 2004, in the counties of Essex, Hudson and Mercer, in the District of New Jersey, and elsewhere, defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and use of the mail and facilities in interstate commerce, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, prostitution, contrary to New York Law, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and Section 2, which is the aiding and abetting statute I described previously.

Now a number of the remaining racketeering acts allege the violation of Title 18, Section 1952, which I will refer to as the Travel Act for convenience. So please pay attention to these instructions as I will repeat for additional Travel Act offenses only as necessary.

Title 18, United States Code, Section 1952(a)(3) provides

> Whoever travels in interstate or foreign commerce or uses . . . any facility in interstate or foreign commerce, with intent to . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform . . . an act described in paragraph . . . (3)

commits a crime against the United States.

As used in Section 1952(a)(3), the term "unlawful activity" includes "prostitution . . . in violation of the laws of the State in which committed."

In order to prove the crime of traveling in interstate commerce or using a facility in interstate commerce to distribute the proceeds of an unlawful activity or to promote an unlawful activity, the Government must prove the following elements beyond a reasonable doubt:

First: That on or about the dates and between the places alleged in the Indictment, the defendant Paul Bergrin traveled or caused the travel from one state to another, or used or caused the use of a facility in interstate commerce;

Second: That defendant Paul Bergrin did so with the specific intent to promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of the unlawful activity alleged in the Indictment;

Third: The unlawful activity alleged in Racketeering Act 5(a) of Count 1 and Count 15 was prostitution, contrary to the laws of the State of New York; and

Fourth: Either while traveling or after the interstate travel or use of a facility in interstate commerce, defendant Paul Bergrin knowingly and deliberately performed an act, or attempted to perform an act, in furtherance of promoting, managing, establishing, carrying on or facilitating the promotion, management, establishment, or carrying on of the unlawful activity.

First element – Travel or Use of Facility in Interstate Commerce

The first element is that defendant Paul Bergrin traveled or caused the travel, in interstate commerce, or used, or cause the use of, a facility in interstate commerce. The term "travels in interstate commerce" means simply travel or transportation from one state to another. The term "uses any facility in interstate commerce" means employing or utilizing any method of communication or transportation between one state and another. The term "uses any facility in interstate commerce," for example, includes the use of the telephone or a fax machine. The Government does not have to prove that a telephone call or fax actually crossed state lines.

It is not necessary for the Government to prove that any travel from one state to another or any use of a facility in interstate commerce was contemplated or planned at the time that the course of activity began or that the defendant knew that he was actually traveling in interstate commerce, or using a facility in interstate commerce. It is not necessary for the government to prove that the promotion or facilitation of the activity alleged to be unlawful was the only reason for the interstate travel or use of an interstate facility, or that the travel, the use of an interstate facility was essential to that activity.

The Government must prove beyond a reasonable doubt, however, that the defendant traveled in interstate commerce or used a facility in interstate commerce with the specific intent, at least in part, to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of the unlawful activity described in the Indictment. That is, the interstate act's relationship to the unlawful activity must be more than incidental. For example, travel by customers or patrons would not be sufficient to find the defendant guilty of a Travel Act violation.

Second Element – Distribute the Proceeds of,
and Promote and Facilitate the Promotion, of Any Unlawful Activity

The second element that the Government must prove is that defendant Paul Bergin traveled, caused the travel, in interstate commerce, or used, or caused the use of a facility in interstate commerce with the specific intent to promote, or facilitate the promotion, of an unlawful activity. The phrase to "promote, or facilitate the promotion, of any unlawful activity" means to do any act that would cause in any way the "unlawful activity" described in Racketeering Act 5(a) and Count 15 to be accomplished or to assist the "unlawful activity" – namely, conspiracy to promote prostitution in violation of New Jersey law. And you must all unanimously agree on the unlawful activity involved.

Third Element – "Prostitution" Under New York Law

The third element that the Government must prove for Racketeering Act 5(a) and Count 15 is that the unlawful activity described therein was promoting prostitution in

violation of the laws of the State of New York, aiding and abetting the promotion of prostitution, or conspiring to promote prostitution.

Under New York law, a person is guilty of promoting prostitution in when that person knowingly advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.

Some of the terms used in this definition have their own special meaning in New York law. I will now give you the meaning of the following terms: "prostitution," "advances prostitution," "profits from prostitution," and "knowingly."

"Prostitution" means the act or practice of engaging, or agreeing or offering to engage in sexual conduct with another person in return for a fee.

A person "advances prostitution" when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

A person "profits from prostitution" when, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or

receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

A person "knowingly" advances or profits from prostitution when that person is aware that he is advancing or profiting from prostitution.

In order for you to find defendant Paul Bergrin guilty of this crime, the Government is required to prove, from all of the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about December 10, 2004, in the counties of Essex, Hudson, and Mercer, in the District of New Jersey, and elsewhere, the defendant Paul Bergrin advanced or profited from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; and

2. That the defendant did so knowingly.

Therefore, if you find that the Government has proven beyond a reasonable doubt both of those elements, you may find the defendant guilty of the crime of promoting prostitution.

On the other hand, if you find that the Government has not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of promoting prostitution, and must find that he did not commit Racketeering Act 5(a), using interstate travel to promote prostitution on December 10, 2004.

Like federal law, New York law recognizes that two or more individuals can act jointly to commit a crime, and that in certain circumstances, each can be held criminally liable for the acts of the other. In that situation, those persons can be said to be "acting in concert" with each other.

New York law defines the circumstances under which one person may be criminally liable for the conduct of another. That definition is as follows:

When one person engages in conduct which constitutes an offense, another is criminally liable for such conduct when, acting with the state of mind required for the commission of that offense, he or she solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

Like federal law governing accomplice liability, under that definition, mere presence at the scene of a crime, even with knowledge that the crime is taking place, (or mere association with a perpetrator of a crime,) does not by itself make a defendant criminally liable for that crime.

In order for the defendant to be held criminally liable for the conduct of others which constitutes an offense, you must find beyond a reasonable doubt:

1. That he solicited, requested, commanded, importuned, or intentionally aided persons to engage in that conduct, and

2. That he did so with the state of mind required for the commission of the offense.

If it is proven beyond a reasonable doubt that the defendant is criminally liable for the conduct of another, the extent or degree of the defendant's participation in the crime does not matter. A defendant proven beyond a reasonable doubt to be criminally liable for the conduct of another in the commission of a crime is as guilty of the crime as if the defendant, personally, had committed every act constituting the crime.

The Government has the burden of proving beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the crime, and either personally, or by acting in concert with another person, committed each of the remaining elements of the crime concert with another person, committed each of the remaining elements of the crime.

Finally, like federal law, under New York law, a person is guilty of conspiracy when, with intent that conduct constituting a felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct.

The term "intent" used in this definition has its own special meaning in New York law. I will now give you the meaning of that term.

"Intent" means conscious objective or purpose. Thus, a person acts with the intent that conduct constituting a felony be performed when his or her conscious objective or purpose is that such conduct be performed.

I have already explained to you the elements of the object of the alleged conspiracy, promoting prostitution in the third degree.

Fourth Element - Overt Act

The fourth element of the Travel Act offense alleged in Racketeering Act 5(a) and Count 15 requires the Government to prove that defendant Paul Bergrin knowingly and deliberately performed an act, or attempted to perform an act, to promote, manage, establish, carry on, or facilitate the unlawful activity, after traveling or causing the travel interstate, or using, or causing the use of, a facility in interstate commerce. The act need not be illegal, in and of itself. The act simply must be some conduct done in furtherance of the unlawful activity after the interstate travel or the facility in interstate commerce had been used.

INSTRUCTION NO. 38

RICO – RACKETEERING ACT SIX

The sixth act of racketeering activity alleged in Count 1, which relates to the interstate travel and transportation in aid of bribery of a witness, alleges that Paul Bergrin committed three separate offenses, any one of which is sufficient to prove Racketeering Act Six. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following three offenses.

INSTRUCTION NO. 38A

RACKETEERING ACT 6(a)
(Aiding a Witness to Accept a Bribe in a Criminal Case, in violation of New Jersey law)

Racketeering Act 6(a) charges that from on or about June 8, 2007 through in or about August 2007, in the county of Essex, in the District of New Jersey and elsewhere, believing that an official proceeding and investigation was pending and about to be instituted against Client Criminal Abdul Williams, and with the purpose of promoting and facilitating the commission of the offense, defendant Paul Bergrin and others, aided, agreed to aid, and attempted to aid another, namely, Jamal Muhammad, to accept and agree to accept any benefit in consideration of Muhammad testifying and informing falsely, in violation of sections 2C:2-6 and 2C:28-5(c) of New Jersey's statutes.

Section 2C:28-5(c) of New Jersey's statutes reads in pertinent part as follows:

A person commits a crime of the third degree witness tampering, if he solicits, accepts or agrees to accept any benefit in consideration of his doing any of the following:

(1) Testify or inform falsely;

(2) Withhold any testimony, information, document or thing;

(3) Elude legal process summoning him to testify or supply evidence;

(4) Absent himself from any proceeding or investigation to which he has been legally summoned; or

(5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.

I have already defined the concept of accomplice liability under New Jersey law in connection with Racketeering Act 4(d). You should refer back to those instructions. But I want to reiterate that in order to find defendant Paul Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt each of the following elements:

(1) That Jamal Muhammad committed the crime of witness tampering by accepting a bribe, which elements I will explain to you shortly;

(2) That defendant Paul Bergrin solicited Muhammad to commit that crime and/or did aid or agree or attempt to aid Muhammad in planning or committing that crime;

(3) That defendant Paul Bergrin's purpose was to promote or facilitate the commission of the offense; and

(4) That defendant Paul Bergrin possessed the criminal state of mind that is required to be proved against the person who actually committed the act, that is, he acted purposely.

Under New Jersey law, a person commits a crime of witness tampering if he solicits, accepts or agrees to accept any benefit in consideration of his agreeing to testify or inform falsely.

The first element that the Government must prove beyond a reasonable doubt is that Jamal Muhammad solicited, accepted, or agreed to accept a benefit.

The term "benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including a pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested. "Benefit as consideration" means any benefit not authorized by law."

"Pecuniary benefit" is benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain.

The second element that the Government must prove beyond a reasonable doubt is that Jamal Muhammad did so as consideration for testifying falsely.

"Consideration" means some right, interest or profit accruing to one party.

The third element that the Government must prove beyond a reasonable doubt is that Jamal Muhammad acted purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. "Purpose," "with purpose," and similar words have the same meaning. In other words, in order for you to find that Muhammad acted "purposely," the Government must show that it was Muhammad's conscious object at the time he committed an unlawful act. His state of mind may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

The Government also must show that, in return for agreeing to accept a benefit, Jamal Muhammad agreed or promised to make an assertion, under oath, of a material

false statement, or the swearing or affirming under oath as to the truth of a previously made statement in an official proceeding, when the person making the statement does not believe that the statement is true and the statement is material, which is a crime under New Jersey law. The Government does not have to show that Muhammad actually committed perjury, only that he agreed or promised to do so. Some of these terms require definition.

The term official proceeding is defined as "a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence, under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding. The term "official proceeding" is intended to include any type of proceeding where the taking of testimony under oath is authorized "

A statement is defined as "any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation." The Government must prove beyond a reasonable doubt that the statement made by Jamal Muhammad was false, and that he did not believe it to be true.

Under this section, however, there is no criminal liability for misstatements that are inadvertent in the sense that the declarant misunderstood the question put to him or unconsciously made a slip of the tongue in responding.

The Government also alleges that the defendant made a statement that he did not believe to be true. The defendant's belief that the statement was not true may be established by proof of actual knowledge on the part of the defendant that the statement was untrue; or from proof of such facts from which it might reasonably be inferred that the defendant believed the statement was untrue.

Additionally, under the law of the State of New Jersey, a defendant cannot be found guilty of perjury solely on the testimony of one witness. New Jersey has adopted the test that the oath of a single witness must be supported by proof of corroborating testimony or circumstances of such character as to clearly overcome the oath of the defendant and legal presumption of his innocence.

To corroborate means to strengthen, to confirm by additional security, to add strength. Corroborating circumstances when used in reference to testimony given, are such as serve to strengthen the testimony, to render it more probable; such, in short as may serve to impress a jury with a belief of its truth.

Evidence is not corroborative unless it tends to prove the fact alleged to have been falsely stated. It must relate to the substance of the evidence on which perjury is assigned; that is, it must be inconsistent with the truth of the defendant's testimony before the official proceeding.

Falsification is "material" in the official proceeding if it could have affected the course or outcome of that proceeding or the disposition of the matter. It is irrelevant if the declarant mistakenly believed that the falsification was not material.

If you find that the Government has proved each of these elements beyond a reasonable doubt, that is, Jamal Muhammad solicited, accepted, or agreed to accept a bribe in return for agreeing to testify falsely, that is, by providing a false statement under oath at an official proceeding, you must then decide whether defendant Paul Bergrin knowingly and purposefully aided and abetted Muhammad in the commission of that offense. If the Government has failed to prove any of these elements beyond a reasonable doubt, you must find that Jamal Muhammad did not commit the crime of witness tampering by soliciting, accepting, or agreeing to accept a bribe as consideration for testifying falsely, and you must find defendant Paul Bergrin not guilty of aiding and abetting Muhammad.

I have already defined the concept of accomplice liability under New Jersey law in connection with Racketeering Act 4(d). You should refer back to those instructions. But I want to reiterate that to find that defendant Paul Bergrin aided and abetted Jamal Muhammad, the Government must prove beyond a reasonable doubt each of the following elements:

(1) That Jamal Muhammad committed the crime of witness tampering by purposely soliciting, accepting or agreeing to accept a benefit in exchange for agreeing to testify falsely at an official proceeding;

(2) That defendant Paul Bergrin solicited Muhammad to commit that crime and/or did aid or agree or attempt to aid Muhammad in planning or committing that crime;

(3) That defendant Paul Bergrin's purpose was to promote or facilitate the commission of the offense; and

(4) That defendant Paul Bergrin possessed the criminal state of mind that is required to be proved against the person who actually committed the act, that is, he acted purposely.

INSTRUCTION NO. 38B

RACKETEERING ACT 6(b)
Interstate travel in aid of bribery and drug trafficking business
(June 21, 2007 telephone call),
(as also charged in Count 18)

Both Racketeering Act 6(b) and Count 18 charge that, on or about June 21, 2007, in the count of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, (a) bribery, contrary to sections 2C:28-5 and 2C:2-6 of New Jersey's statutes, and (b) the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and Section 2.

This is another Travel Act offense, and I have already defined for you the elements of that offense. I have also previously defined for you the unlawful activity charged in this Travel Act offense, bribery of a witness under New Jersey law, and conspiring to distribute a controlled substance under federal law. You do not need to find that the

Travel Act offense involved both types of unlawful activity, so long as you unanimously agree that it involved at least one such unlawful activity and you unanimously agree as to which one it is.

INSTRUCTION NO. 38C

RACKETEERING ACT 6(c)
Interstate travel in aid of bribery and drug trafficking business
(July 1, 2007 telephone call),
(as also charged in Count 19)

Both Racketeering Act 6(c) and Count 19 charge that, on or about July 1, 2007, in the county of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, (a) bribery, contrary to N.J.S.A. Sections 2C:28-5 and 2C:2-6, and (b) the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and Section 2.

This is yet another Travel Act offense, and I have already defined for you the elements of this offense. I have also previously defined for you the unlawful activity charged in this Travel Act offense, bribery of a witness under New Jersey law and conspiring to distribute a controlled substance under federal law. Again, you do not need

to find that the Travel Act offense involved both types of unlawful activity, so long as you unanimously agree that it involved at least one such unlawful activity and you unanimously agree as to which one it is.

INSTRUCTION NO. 39

RICO – RACKETEERING ACT SEVEN

The seventh act of racketeering activity alleged in Count 1, which relates to the plot to murder witnesses in a criminal case against client criminal Vicente Esteves, alleges that Paul Bergrin committed six separate offenses, any one of which is sufficient to prove Racketeering Act Seven. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following six offenses, and you must unanimously agree as to which one it is.

INSTRUCTION NO. 39A

RACKETEERING ACT 7(a)
(Conspiracy to murder witnesses against client criminal Vicente Esteves in violation of New Jersey law)

Racketeering Act 7(a) charges that, from in or about June 2008 through in or about April 2009, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly and intentionally conspire and agree with others to cause the death and serious bodily injury resulting in death of another person, namely, Danilo Chen-Pui and Carlos Noyola, in violation of sections 2C:5-2 and 2C:11-3 of New Jersey's statutes.

To prove defendant Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt the following elements:

(1) That the defendant agreed with another person or persons that they or one or more of them would engage in conduct which constitutes a crime or an attempt or solicitation to commit such crime;

(2) That the defendant's purpose was to promote or facilitate the commission of the crime of murder.

I previously defined for you the elements of conspiracy to commit murder under New Jersey law in connection with Racketeering Act 4(c). Please refer back to those instructions.

INSTRUCTION NO. 39B

RACKETEERING ACT 7(b)
Interstate Travel in Aid of Drug Trafficking Business
(July 7, 2008 travel from Illinois to New Jersey)
(as also charged in Count 21)

Both Racketeering Act 7(b) and Count 21 charge that, on or about July 7, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is another Travel Act offense, but because it charges a different subsection of the statute, I will define it for you. Title 18, United States Code, Section 1952(a)(2) provides that

> Whoever travels in interstate or foreign commerce or uses . . . any facility in interstate or foreign commerce, with intent to . . . (2) commit any crime of violence to further any unlawful activity, and thereafter performs or attempts to perform . . . an act described in paragraph (2) [commits a crime against the United States].

To prove defendant Paul Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt four elements:

First: That defendant Paul Bergrin traveled or caused the travel from one state to another, or used or caused the use of a facility in interstate commerce;

Second: That defendant Paul Bergrin did so with the intention to commit any crime of violence to further an unlawful activity;

Third: That the unlawful activity in question was a conspiracy to distribute a controlled substance, in violation of federal law, as charged in Racketeering Act 7(b) and Count 21 of the Indictment; and

Fourth: After the interstate travel or use of a facility in interstate commerce, defendant Paul Bergrin knowingly and deliberately did an act, or attempted to do an act, in order to distribute the proceeds of the unlawful activity or to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of the unlawful activity described in the Indictment.

I previously gave you detailed instructions on the first and fourth elements of the Travel Act offense in connection with Racketeering Act 5(a). I refer you back to those instructions. However, because the second and third elements are different, I want to define those elements for you now.

The second element requires the Government to prove that the interstate travel in question was undertaken with the intent to commit a crime of violence. For purposes of Racketeering Act Seven and Counts 21 to 25, the crime of violence charged in the Indictment is conspiracy to commit murder under New Jersey law. I gave you detailed

instructions on that offense with respect to Racketeering Act 4(c). You should apply those same instructions here to determine whether the Government has proven beyond a reasonable doubt that the interstate travel was undertaken with the intention to commit a crime of violence.

The unlawful activity alleged in Racketeering Act Seven, and in Counts 20 through 25, is conspiracy to distribute a controlled substance. I gave you detailed instructions on the elements of that offense in connection with Racketeering Act 1(a). You should apply those same instructions here. However, you should keep in mind that the drug trafficking conspiracy alleged in Racketeering Act Seven is a different conspiracy from the conspiracy charged in Racketeering Act 1(a) and in Count 5. So you must determine whether there was a drug trafficking conspiracy as alleged in Racketeering Act Seven and in Counts 20 through 25 using the instructions I previously gave you.

Thus, to summarize, with respect to the second element, the Government must prove beyond a reasonable doubt that defendant Paul Bergrin traveled or used facilities in interstate commerce with the specific intent to commit a crime of violence, that is, the crime of conspiracy to commit murder, and that he did so to further an unlawful activity, that is, to distribute and conspire to distribute a controlled substance, that is cocaine, as alleged in Racketeering Act Seven and in Counts 20 through 25.

INSTRUCTION NO. 39C

RACKETEERING ACT 7(c)
Interstate Travel in Aid of Drug Trafficking Business
(August 5, 2008 travel from New Jersey to Illinois)
(as also charged in Count 22)

Both Racketeering Act 7(c) and Count 22 charge that, on or about August 5, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is another Section 1952(a)(2) Travel Act offense and it requires the Government to prove the same elements I described with respect to Racketeering Act 7(b). Please refer to those definitions.

INSTRUCTION NO. 39D

RACKETEERING ACT 7(d)
Interstate Travel in Aid of Drug Trafficking Business
(August 21, 2008 telephone call),
as also charged in Count 23

Both Racketeering Act 7(d) and Count 23 charge that, on or about August 21, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is another Section 1952(a)(2) Travel Act offense and it requires the Government to prove the same elements I described with respect to Racketeering Act 7(b). Please refer to those definitions.

INSTRUCTION NO. 39E

RACKETEERING ACT 7(e)
Interstate Travel in Aid of Drug Trafficking Business
(September 5, 2008 Telephone Call),
as also charged in Count 24

Both Racketeering Act 7(e) and Count 24 charge that, on or about September 5, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is another Section 1952(a)(2) Travel Act offense and it requires the Government to prove the same elements I described with respect to Racketeering Act 7(b). Please refer to those definitions.

INSTRUCTION NO. 39F

RACKETEERING ACT 7(f)
Interstate Travel in Aid of Drug Trafficking Business
(The December 8, 2008 Travel From Illinois to New Jersey),
as also charged in Count 25

Both Racketeering Act 7(f) and Count 25 charge that, on or about December 8, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is another Section 1952(a)(2) Travel Act offense and it requires the Government to prove the same elements I described with respect to Racketeering Act 7(b). Please refer to those definitions.

INSTRUCTION NO. 41

RICO – SUMMARY

To summarize, in order for you to find the defendant guilty of the Racketeering Influenced and Corrupt Organizations Act offense charged in Count 1, the Government must prove all of the following five elements beyond a reasonable doubt:

1. The existence of an association-in-fact enterprise;

2. That the enterprise was engaged in or its activities affected interstate or foreign commerce;

3. That Paul Bergrin was employed by or associated with that enterprise;

4. That Paul Bergrin knowingly conducted that enterprise's affairs or that he knowingly participated, directly or indirectly, in the conduct of that enterprise's affairs; and

5. That Paul Bergrin knowingly conducted or participated, directly or indirectly, in the conduct of that enterprise's affairs through a pattern of racketeering activity, as alleged in the Indictment.

If you find that the Government has proven each one of the elements beyond a reasonable doubt, you must find the defendant guilty of this Racketeering Influenced and Corrupt Organizations Act offense. However, if you find that the Government has not proven all of these elements beyond a reasonable doubt, you must find the defendant Paul Bergrin not guilty.

INSTRUCTION NO. 42

COUNT TWO – RICO CONSPIRACY

Count 2 of the indictment charges that defendant Paul Bergrin agreed or conspired with one or more other persons to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, as I have explained to you.

It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective.

In order for you to find defendant Paul Bergrin guilty of conspiracy to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, you must find that the Government proved beyond a reasonable doubt each of the following three (3) elements:

First: That two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity;

Second: That defendant Paul Bergrin was a party to or member of that agreement; and

Third: That Mr. Bergrin joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that Mr. Bergrin and at least one other alleged conspirator shared a unity of purpose and the intent to achieve the objective of conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity.

The meanings of the elements "enterprise," "employed by or associated with," "conduct or participate, directly or indirectly, in the conduct of that enterprise's affairs," and "through a pattern of racketeering activity" are the same as I have just explained to you with respect to the RICO offense charged in Count 1. However, the RICO conspiracy charged in Count 2 is a distinct offense from the RICO offense charged in Count 1. There are several important differences between these offenses.

One important difference is that, unlike the requirements to find defendant Paul Bergrin guilty of the RICO offense charged in Count 1, in order to find Mr. Bergrin guilty of the RICO conspiracy charged in Count 2, the Government is not required to prove that the alleged enterprise actually existed, or that the enterprise actually engaged in or its activities actually affected interstate or foreign commerce. Rather, because an agreement to commit a RICO offense is the essence of a RICO conspiracy, the Government need only prove that Mr. Bergrin joined the conspiracy and that if the object of the conspiracy was achieved, the enterprise would be established and the enterprise would be engaged in or its activities would affect interstate or foreign commerce.

Similarly, unlike what is required to find defendant Bergrin guilty of the RICO offense, in order to find him guilty of the RICO conspiracy charged in Count 2, the Government is not required to prove that Mr. Bergrin was actually employed by or associated with the enterprise, or that he agreed to be employed by or to be associated with the enterprise. Nor does the RICO conspiracy charge require the Government to prove that Mr. Bergrin personally participated in the operation or management of the

enterprise, or agreed to personally participate in the operation or management of the enterprise. Rather, you may find Mr. Bergrin guilty of the RICO conspiracy offense if the evidence establishes that he knowingly agreed to facilitate or further a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who would be employed by or associated with the enterprise and who would participate in the operation or management of the enterprise.

Finally, in order to find defendant Bergrin guilty of the RICO conspiracy charged in Count 2, the Government is not required to prove that Mr. Bergrin personally committed or agreed to personally commit any act of racketeering activity. Indeed, it is not necessary for you to find that the objective or purpose of the conspiracy were achieved at all. However, the evidence must establish that Mr. Bergrin knowingly agreed to facilitate or further a scheme which, if completed, would include a pattern of racketeering activity committed by at least one other conspirator.

In short, to find Mr. Bergrin guilty of the RICO conspiracy charged in Count 2 of the indictment, you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin joined in an agreement or conspiracy with another person or persons, knowing that the objective or purpose was to conduct or to participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity, and intending to join with the other person or persons to achieve that objective.

The Indictment need not specify the predicate racketeering acts that Mr. Bergrin agreed would be committed by some member of the conspiracy in the conduct of the affairs of the enterprise. The indictment alleges that Mr. Bergrin agreed that multiple racketeering acts would be committed. You are not limited to considering only the specific racketeering acts alleged in Count 1 of the indictment (the RICO substantive count). Rather, you may also consider the evidence presented of other racketeering acts committed or agreed to be committed by any co-conspirator in furtherance of the enterprise's affairs, including racketeering acts for which Mr. Bergrin is not charged in Count 1 (the RICO substantive count), to determine whether Mr. Bergrin agreed that at least one member of the conspiracy would commit two or more racketeering acts.

Moreover, in order to convict Mr. Bergrin of the RICO conspiracy offense, your verdict must be unanimous as to which type or types of racketeering activity he agreed would be committed; for example, murder, conspiracy to commit murder, witness bribery, or any combination thereof.

Conspiracy – Single or Multiple Conspiracies

The Indictment charges that Paul Bergrin and the other alleged co-conspirators were all members of one single conspiracy to commit several federal crimes. Whether a single conspiracy or multiple conspiracies exist is a question of fact that you must decide.

In order to find Mr. Bergrin guilty of the conspiracy charged in the Indictment, you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin was a

member of that conspiracy. If the Government failed to prove that Mr. Bergrin was a member of the conspiracy charged in the Indictment, then you must find Mr. Bergrin not guilty of conspiracy, even if you find that there were multiple conspiracies and that Mr. Bergrin was a member of a separate conspiracy other than the one charged. However, proof that Mr. Bergrin was a member of some other conspiracy would not prevent you from also finding him guilty of the conspiracy charged in the Indictment, if you find that the Government proved beyond a reasonable doubt that Mr. Bergrin was a member of the conspiracy charged.

In deciding whether there was one single conspiracy or more than one conspiracy, you should concentrate on the nature of the agreement proved by the evidence. To prove a single conspiracy, the Government must prove beyond a reasonable doubt that each of the alleged members or conspirators agreed to participate in what he knew or should have known was a single group activity directed toward common objectives. The Government must prove that there was a single agreement on overall objectives.

Multiple conspiracies are separate agreements operating independently of each other. However, a finding of a master conspiracy that includes other, sub-schemes does not constitute a finding of multiple, unrelated conspiracies. A single conspiracy may exist when there is a continuing core agreement that attracts different members at different times and which involves different sub-groups committing acts in furtherance of an overall objective.

In determining whether a series of events constitutes a single conspiracy or separate and unrelated conspiracies, you should consider whether there was a common goal among the alleged conspirators; whether there existed common or similar methods; whether and to what extent alleged participants overlapped in their various dealings; whether and to what extent the activities of the alleged conspirators were related and interdependent; how helpful each alleged coconspirator's contributions were to the goals of the others; and whether the scheme contemplated a continuing objective that would not be achieved without the ongoing cooperation of the conspirators.

A single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members would play. A single conspiracy may exist even if different members joined at different times, or the membership of the conspiracy changed over time. Similarly, there may be a single conspiracy even though there were different sub-groups operating in different places, or many acts or transactions committed over a long period of time. You may consider these things in deciding whether there was one single conspiracy or more than one conspiracy, but they are not necessarily controlling. What is controlling is whether the Government has proved beyond a reasonable doubt that there was one overall agreement on common objectives

INSTRUCTION NO. 43

COUNTS THREE AND FOUR – VIOLENT CRIMES IN AID OF RACKETEERING

Counts 3 and 4 of the Indictment charges defendant Paul Bergrin with committing a crime of violence in aid of a racketeering enterprise in violation of Section 1959 of Title 18 of the United States Code, also known as "VICAR." Count 3 arises from the alleged conspiracy to murder Kemo McCray, and Count 4 arises from the alleged conspiracy to murder witnesses against Vicente Esteves. Because the elements for these offenses are largely the same, I am going to instruct you as to both offenses at the same time.

Section 1959(a) of Title 18 of the United States Code provides that

> Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished . . . .

To convict a defendant of a VICAR offense, the Government must prove beyond a reasonable doubt each of the following elements:

1. That on or about the date charged in Counts Three and Four of the Indictment, an "enterprise" existed;

2. That the charged enterprise engaged in, or affected, interstate or foreign commerce;

3. That the enterprise engaged in racketeering activity;

4. That, for the purposes of Count 3, defendant Bergrin conspired to murder, or aided and abetted in the murder, of Kemo McCray. For purposes of Count 4, defendant Bergrin conspired to commit murder.

5. That the defendant's purpose in conspiring to commit the crime of violence was either to gain entrance to, or to maintain, or to increase his position in the enterprise or as consideration for the receipt of, or consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity.

I already instructed you with respect to the terms "enterprise," "racketeering activity," and "interstate commerce" in Count 1. I also provided you with detailed instructions regarding the New Jersey law governing murder, aiding and abetting a murder, and conspiracy to commit murder, when I instructed you on Racketeering Acts 4(c), 4(d), and 7(a) of Count 1. You should use those instructions with respect to Counts Three and Four. I will now instruct you on the fifth element of the VICAR offense.

With respect to both Count 3 and 4, the Government must prove beyond a reasonable doubt that the underlying crime of violence was committed for the purposes of *either* maintaining or increasing position in, or receiving anything of pecuniary value from, the charged enterprise.

The Government need only prove that the crime of violence was committed by the defendant for one of these purposes. You need not, however, find that these purposes were the defendant's sole or even principal motive. For example, it does not matter if the defendant had additional purposes for committing the crime of violence, such as personal reasons, as long as you find that among of the purposes for which the defendant

committed the crime of violence was one of the two alternative purposes that I just discussed.

The Government may prove the fifth element of the VICAR offenses by proving beyond a reasonable doubt that at least one of defendant Bergrin's purposes in committing the alleged crime of violence was to "maintain" or "increase" his position in the enterprise or that he committed the alleged crime of violence as consideration for the receipt of, or consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity. In determining whether one of his purposes was to "maintain" or "increase" his position in the enterprise, you should give those words their ordinary meaning. You should consider all of the facts and circumstances in making that determination. For example, you may consider what, if any, position defendant Bergrin held in the enterprise, and the extent, if at all, commission of the alleged crimes served to maintain, uphold or enhance his position within the enterprise. It is sufficient if the crime of violence was committed "as an integral aspect of membership" in the enterprise.

You need not, however, find that maintaining, or increasing position in the enterprise was defendant Bergrin's only purpose. It is sufficient if you find that defendant Bergrin conspired to commit a crime of violence as consideration for the receipt of, or consideration for a promise or agreement to pay, anything of pecuniary value from the enterprise engaged in racketeering activity and because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in

furtherance of that membership. In deciding what the defendant's "purpose" was in committing a particular act, you must determine what he had in mind. Since one cannot look into a person's mind, you have to determine his purpose by considering all of the facts and circumstances in evidence.

INSTRUCTION NO. 44

COUNT FIVE – CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE

(as also alleged in Racketeering Act 1(a))

Count 5 of the Indictment alleges that from at least in or about January 2003 through on or about May 21, 2009, Paul Bergrin conspired with others to distribute, and to possess and distribute, five or more kilograms of a controlled substance, in violation of sections 841 and 846 of Title 21 of the United States Code. This is the same offense that is alleged in Racketeering Act 1(a) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

INSTRUCTION NO. 45

COUNT EIGHT – MAINTAINING DRUG-INVOLVED PREMISES
(as also charged in Racketeering Act 1(b))

Count 8 alleges that from at least as early as in or about January 2003 through on or about May 21, 2009, in the county of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin, as an owner and occupant, managed or controlled a building located at 710 Summer Avenue, Newark, New Jersey, which he knowingly and intentionally rented, profited from, or made available for the purpose of unlawfully storing and distributing a controlled substance, that is, cocaine, in violation of Title 21, United States Code, Section 856(a)(2), and Title 18, United States Code, Section 2.

This is the same offense that is alleged in Racketeering Act 1(b) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

INSTRUCTION NO. 46

COUNT NINE – MAINTAINING DRUG-INVOLVED PREMISES
(as also charged in Racketeering Act 1(c))

Count 9 alleges that from at least as early as in or about September 2004 through in or about October 2005, in the county of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin, as an owner and occupant, managed or controlled a building located at 572 Market Street, Newark, New Jersey for the purpose of distributing a controlled substance, that is, cocaine, in violation of Title 21, United States Code, Section 856(a)(1), and Title 18, United States Code, Section 2.

This is the same offense that is alleged in Racketeering Act 1(c) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

INSTRUCTION NO. 47

COUNT TEN – MAINTAINING DRUG-INVOLVED PREMISES
(as also charged in Racketeering Act 1(d))

Count Ten alleges that from at least as early as in or about 2008 through on or about May 20, 2009, in the county of Essex, in the District of New Jersey, defendant Paul Bergrin, as an owner and occupant, managed or controlled a building located 50 Park Place, Newark, New Jersey for the purpose of distributing a controlled substance, that is, cocaine, in violation of Title 21, United States Code, Section 856(a)(1), and Title 18, United States Code, Section 2.

This is the same offense that is alleged in Racketeering Act 1(d) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

INSTRUCTION NO. 48

COUNT TWELVE – CONSPIRACY TO MURDER A FEDERAL WITNESS
(as also charged in Racketeering Act 4(a))

Count Twelve alleges that, from on or about November 25, 2003 through on or about March 2, 2004, in the counties of Essex and Hudson, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly and intentionally conspire to murder a witness, namely, Kemo McCray, with malice aforethought and intent to prevent his attendance and testimony at an official proceeding, in violation of Title 18, United States Code, Section 1512(k).

This is the same offense that is alleged in Racketeering Act 4(a) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

INSTRUCTION NO. 49

COUNT THIRTEEN – AIDING AND ABETTING THE MURDER OF A FEDERAL WITNESS

(as also charged in Racketeering Act 4(b))

Count Thirteen alleges that from on or about November 25, 2003 through on or about March 2, 2004, in the counties of Essex and Hudson, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly and intentionally aid, abet, counsel, and induce others to murder a witness, namely, Kemo McCray, with malice aforethought and intent to prevent his attendance and testimony at an official proceeding, in violation of Title 18, United States Code, Section 1512(a)(1)(A), 1512(a)(3)(A) and Title 18, United States Code, Section 2.

This is the same offense that is alleged in Racketeering Act 4(b) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

INSTRUCTION NO. 50

COUNT FOURTEEN – CONSPIRACY TO TRAVEL IN AID OF PROSTITUTION BUSINESS

Count Fourteen charges that from on or about July 24, 2004 through on or about March 2, 2005, in the counties of Essex, Hudson and Mercer, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly and intentionally conspire with others to commit an offense against the United States, that is, to travel in and use the mail and facilities in interstate commerce, and to cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, prostitution offenses, contrary to New York law, and to thereafter perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, contrary to Title 18, United States Code, Section 1952(a)(3), and that, to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act, as I will describe to you, all in violation of Title 18, United States Code, Section 371.

As I have previously instructed you, the crime of conspiracy is separate from the underlying substantive offense. To prove the conspiracy charged in Count Fourteen, the Government must prove beyond a reasonable doubt four elements:

First: That two or more persons agreed to commit an offense against the United States, that is, to violate the Travel Act, as charged in the Indictment. I have explained the elements of the Travel Act offense already when I instructed you on Racketeering Act 5(a) of Count 1. You should refer to those instructions here.

Second: That Mr. Bergrin was a party to or member of that agreement;

Third: That Mr. Bergrin joined the agreement or conspiracy knowing of its objective to commit an offense against the United States, that is, to violate the Travel Act, and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that defendant Bergrin and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit an offense against the United States, that is, to violate the Travel Act; and

Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objective of the agreement.

I previously defined for you the first three elements of the conspiracy offense when I instructed you on Racketeering Act 1(a), so please refer to those instructions here. However, this particular conspiracy offense contains an additional element—the "overt act" requirement—that I will define for you now.

With regard to the fourth element of conspiracy – overt acts – the Government must prove beyond a reasonable doubt that during the existence of the conspiracy at least one member of the conspiracy performed at least one of the overt acts described in the indictment, for the purpose of furthering or helping to achieve the objective of the conspiracy.

INSTRUCTION NO. 52

COUNT SIXTEEN – TRAVEL IN AID OF PROSTITUTION BUSINESS
(as also charged in Racketeering Act 5(b))

Count Sixteen alleges that on January 12, 2005, in the counties of Hudson and Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and use of the mail and facilities in interstate commerce, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, prostitution, contrary to New York Law, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and Section 2.

This is the same offense that is alleged in Racketeering Act 5(b) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 53

COUNT SEVENTEEN – CONSPIRACY TO TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS AND BRIBERY

Count Seventeen charges that from on or about June 8, 2007 through on or about August 2007, defendant Paul Bergrin did knowingly and intentionally conspire and agree with others to commit an offense against the United States, that is, to travel in or use the facilities in interstate commerce and to cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, (a) bribery, contrary to N.J.S.A. Sections 2C:28-5 and 2C:2-6, and (b) the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and to thereafter perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

The conspiracy charged in Count Seventeen requires the Government to prove beyond a reasonable doubt the same four elements I described in Count Fourteen, and you should use those instructions here, except that with respect to the fourth element, you should consider the overt acts alleged in Count Seventeen of the Indictment. Also, I gave you detailed instructions with respect to the unlawful activity underlying the Travel Act

offense when I instructed you on Racketeering Acts 1(a) and 6(a). Please refer back to those instructions. Also, please remember that while you do not need to find that the unlawful activity involved both bribery and drug trafficking, you must unanimously agree on which one.

INSTRUCTION NO. 54

COUNT EIGHTEEN – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS AND BRIBERY
(as also charged in Racketeering Act 6(b))

Count Eighteen charges that, on or about June 21, 2007, in the county of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, (a) bribery, contrary to N.J.S.A. Sections 2C:28-5 and 2C:2-6, and (b) the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and Section 2.

This is the same offense that is charged in Racketeering Act 6(b) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 55

COUNT NINETEEN – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS AND BRIBERY

(as also charged in Racketeering Act 6(c))

Count Nineteen charges that, on or about July 1, 2007, in the county of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, (a) bribery, contrary to N.J.S.A. Sections 2C:28-5 and 2C:2-6, and (b) the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and Section 2.

This is the same offense that is charged in Racketeering Act 6(c) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 56

COUNT TWENTY – CONSPIRACY TO TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS

Count Twenty charges that, from in or about June 2008 through in or about April 2009, in the counties of Essex and Monmouth, in the District of New Jersey, defendant Paul Bergrin did knowingly and intentionally conspire with others to commit an offense against the United States, that is, to travel or use the facilities in interstate commerce, and to cause the travel in and the use of the mail and facilities in interstate commerce with the intent: (a) to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and to thereafter perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3); and (b) to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and to thereafter perform an act to commit a crime of violence to further such unlawful activity, contrary to Title 18, United States Code, 1952(a)(2), in violation of Section 371, Title 18 of the United States code.

The conspiracy charged in Count Twenty requires the Government to prove beyond a reasonable doubt the same four elements I described in Count Fourteen, and you

should use those instructions here, except that with respect to the fourth element, you should consider the overt acts alleged in Count Twenty of the Indictment. Also, I gave you detailed instructions with respect to the unlawful activity underlying the Travel Act offense when I instructed you on Racketeering Act 7(b). Please refer back to those instructions. Also, please remember that while you do not need to find that the unlawful activity involved both drug trafficking and a crime of violence in furtherance of drug trafficking, you must unanimously agree on at least one to find the defendant guilty.

INSTRUCTION NO. 57

COUNT TWENTY-ONE – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS
(as also alleged in Racketeering Act 7(b))

Count Twenty-One alleges that, on or about July 7, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is the same offense that is alleged in Racketeering Act 7(b) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 58

COUNT TWENTY-TWO – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS
(as also alleged in Racketeering Act 7(c))

Count Twenty-two alleges that, on or about August 5, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is the same offense that is alleged in Racketeering Act 7(c) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 59

COUNT TWENTY-THREE – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS (as also alleged in Racketeering Act 7(d))

Count Twenty-Three alleges that, on or about August 21, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is the same offense that is alleged in Racketeering Act 7(d) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 60

COUNT TWENTY-FOUR – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS
(as also alleged in Racketeering Act 7(e))

Count Twenty-Four alleges that, on or about September 5, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is the same offense that is alleged in Racketeering Act 7(e) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 61

COUNT TWENTY-FIVE – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS

(as also alleged in Racketeering Act 7(f))

Count Twenty-Five alleges that, on or about December 8, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, United States Code, Sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(2) and Section 2.

This is the same offense that is alleged in Racketeering Act 7(f) of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 62

COUNT TWENTY-SIX – FAILURE TO FILE AN IRS FORM 8300
(as also alleged in Racketeering Act 8)

Count Twenty-Six alleges on or about September 4, 2008, in the county of Essex, in the District of New Jersey and elsewhere, defendant Paul Bergrin did knowingly and for the purposes of evading the reporting requirements of Title 31, United States Code, Section 5331, and the regulations issued thereunder, cause a nonfinancial trade and business, namely Law Office of Paul Bergrin, to fail to file a report required under Title 31, United States Code, Section 5331, in connection with the receipt by Law Office of Paul Bergrin of United States currency in amounts over $10,000, in violation of Title 31, United States Code, Section 5324(b), and Title 18, United States Code, Section 2.

This is the same offense that is alleged in Racketeering Act 8 of Count 1. Since I already gave you detailed instructions regarding this offense, refer to those instructions here.

INSTRUCTION NO. 63

THE SIXTH AMENDMENT

During trial, you heard both parties refer to the text of the Sixth Amendment of the United States Constitution. I instruct you that the Sixth Amendment provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INSTRUCTION NO. 64

KNOWINGLY, INTENTIONALLY, WILLFULLY

In defining the elements of the offenses charged in the Indictment, I have used the terms "knowingly," "intentionally," and "willfully." Please use these definitions when considering those terms.

Knowingly

Many of the offenses require that the Government prove that defendant Paul Bergrin acted "knowingly" with respect to certain elements of the offenses. This means that the Government must prove beyond a reasonable doubt that defendant Paul Bergrin was conscious and aware of the nature of his actions and of the surrounding facts and circumstances, as specified in the definition of the offenses charged.

In deciding whether Mr. Bergrin acted "knowingly," you may consider evidence about what defendant said, did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in the defendant's mind at that time. The Government is not required to prove that the defendant knew his acts were against the law.

Intentionally

Some of the offenses charged in the Indictment require that the Government prove that Mr. Bergrin acted "intentionally" with respect to certain elements of the offenses. This means that the Government must prove beyond a reasonable doubt either that: (1) it

was the defendant's conscious desire or purpose to act in a certain way or to cause a certain result; or (2) the defendant knew that he was acting in that way or would be practically certain to cause that result. In deciding whether the defendant acted "intentionally," you may consider evidence about what defendant said, what he did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in the defendant's mind at that time.

Willfully

Some of the offenses charged in the Indictment requires the Government to prove that Mr. Bergrin acted "willfully" with respect to certain elements of the offenses. This means the Government must prove beyond a reasonable doubt that the defendant knew his conduct was unlawful and intended to do something that the law forbids. That is, to find that the defendant acted "willfully," you must find that the evidence proved beyond a reasonable doubt that defendant acted with a purpose to disobey or disregard the law.

"Willfully" does not, however, require proof that the defendant had any evil motive or bad purpose other than the purpose to disobey or disregard the law. "Willfully" does not require proof that the defendant knew of the existence and meaning of the statute making his conduct criminal.

INSTRUCTION NO. 65

INTENT AND KNOWLEDGE INFERRED

Often the state of mind with which a person acts at any given time -- intentionally, knowingly and willfully -- cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, defendant Paul Bergrin's state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine what the defendant intended or knew at a particular time, you may consider evidence about what the defendant said, what he did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in defendant's mind at that time. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about Mr. Bergrin's state of mind.

You may also consider the natural and probable results or consequences of any acts the defendant knowingly did, and whether it is reasonable to conclude that the defendant intended those results or consequences. You may find, but you are not required to find, that the defendant knew and intended the natural and probable consequences or results of acts he knowingly did. This means that if you find that an ordinary person in defendant's situation would have naturally realized that certain consequences would result from his actions, then you may find, but you are not required to find, that the defendant did know and did intend that those consequences would result from his actions. This is entirely up to you to decide as the finders of the facts in this case.

INSTRUCTION NO. 66

MOTIVE EXPLAINED

Motive is not an element of the offenses with which defendant Paul Bergrin is charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that the defendant is guilty and proof of good motive alone does not establish that the defendant is not guilty. Evidence of the defendant's motive may, however, help you find the defendant's intent.

Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular act is done. Personal advancement and financial gain, for example, are motives for much of human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable while prompting another person to intentionally do an act that is a crime.

INSTRUCTION NO. 67

DEFENDANT'S PRIOR BAD ACTS OR CRIMES

During the trial, you heard testimony by Richard Pozo about events that occurred in 2004. It is your decision whether to credit that evidence according to the instructions I gave you earlier. If you do decide to credit that evidence, you may consider it with respect to the racketeering charges alleged in Counts 1 through 4 of the Indictment, and with respect to the offenses charged in Count 5. You may also consider that evidence for a limited purpose when considering Counts 12 and 13, which relate to the murder of Kemo McCray, and when considering Counts 20 through 26, which relate to travel in aid of a drug trafficking business. Specifically, you may consider the testimony of Pozo in determining whether defendant Paul Bergrin acted with the specific intent to tamper with or kill a federal witness, or to travel in aid of a drug trafficking business. You may not consider Pozo's testimony for the purpose of inferring that Mr. Bergrin has the character trait or propensity for wrongdoing.

You also heard testimony from Oscar Cordova, Vicente Esteves, and Thomas Moran about events that occurred in 2008. It is your decision whether to credit that evidence according to the instructions I gave you earlier. If you do decide to credit that evidence, you may consider it with respect to the racketeering charges alleged in Counts 1 through 4 of the Indictment, and with respect to the offenses charged in Count 5 and Counts 20 through 26. You may also consider that evidence for a limited purpose when

considering Counts 12 and 13. Specifically, you may consider the testimony of Cordova, Esteves, and Moran as to those events in determining whether defendant Paul Bergrin acted with the specific intent to tamper with or kill a federal witness. You may not consider their testimony for the purpose of inferring that Mr. Bergrin has the character trait or propensity for wrongdoing.

Other than the specific counts I have identified in this instruction—that is Counts 1 through 4, Count 5, Counts 12 and 13, and Counts 20 through 26—you may not consider the testimony of Richard Pozo, Oscar Cordova, Vicente Esteves and Thomas Moran as to those events with respect to any of the other counts in the Indictment. Do not use it for any other purpose.

Also, you heard evidence that defendant Bergrin entered guilty pleas to offenses in New York State Court in 2009. I instruct you that you are to consider those guilty pleas only in determining whether the Government has proven beyond a reasonable doubt the crimes charged in Counts 1 through 4 and Counts 14 through 16. You are not to consider those guilty pleas with respect to any other counts. You may not use the evidence of those guilty pleas, or any of the evidence I mentioned a short time ago, as a substitute for proof that the defendant committed the crimes charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other acts, he must also have committed the acts charged in the Indictment.

Remember that the defendant is on trial here only for the offenses charged in the Indictment, not for these other acts. Do not return a guilty verdict unless the Government proves each element of each offense charged in the Indictment beyond a reasonable doubt.

INSTRUCTION NO. 68

ELECTION OF FOREPERSON; UNANIMOUS VERDICT; DO NOT CONSIDER PUNISHMENT; DUTY TO DELIBERATE; COMMUNICATION WITH COURT

That concludes my instructions explaining the law regarding the testimony and other evidence and the offenses charged. Now let me explain some things about your deliberations in the jury room, and your possible verdicts.

First, the first thing that you should do in the jury room is choose someone to be your foreperson. This person will speak for the jury here in court. He or she will also preside over your discussions. However, the views and vote of the foreperson are entitled to no greater weight than those of any other juror.

Second, I want to remind you that your verdict, whether it is guilty or not guilty, must be unanimous. To find defendant Paul Bergrin guilty of an offense, every one of you must agree that the Government has overcome the presumption of innocence with evidence that proves each element of that offense beyond a reasonable doubt. To find Mr. Bergrin not guilty, every one of you must agree that the Government has failed to convince you beyond a reasonable doubt.

Third, if you decide that the Government has proved Mr. Bergrin guilty, then it will be my responsibility to decide what the appropriate punishment should be. You should never consider the possible punishment in reaching your verdict.

Fourth, as I have said before, your verdict must be based only on the evidence received in this case and the law I have given to you. You should not take anything I may have said or done during trial as indicating what I think of the evidence or what I think your verdict should be. What the verdict should be is the exclusive responsibility of the jury.

Fifth, now that all the evidence is in, the arguments are completed, and once I have finished these instructions, 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. Do not hesitate to change your mind if you are convinced that other jurors are right and that 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. Listen carefully to what the other jurors have to say, and then decide for yourself if the Government has proved the defendant guilty beyond a reasonable doubt. No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. You should all feel free to speak your minds.

Sixth, once you start deliberating, do not talk about the case to the court officials, or to me, or to anyone else except each other. If you have any questions or messages,

your foreperson should write them down on a piece of paper, sign them, and then give them to the court official who will give them to me. I will first talk to the lawyers about what you have asked, and I will respond as soon as I can. In the meantime, if possible, continue with your deliberations on some other subject.

One more thing about messages. Do not ever write down or tell anyone how you or any one else voted. That should stay secret until you have finished your deliberations. If you have occasion to communicate with the court while you are deliberating, do not disclose the number of jurors who have voted to acquit or convict on the offenses charged in the indictment.

INTERNET USE DURING DELIBERATIONS

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

INSTRUCTION NO. 70

VERDICT FORM

A verdict form has been prepared that you should use to record your verdicts.

Take this form with you to the jury room. When you have reached your unanimous verdicts, the foreperson should write the verdicts on the form, date and sign it, return it to the courtroom and give the form to my courtroom deputy to give to me. If you decide that the Government has proved Paul Bergrin guilty of any or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate places on the form. If you decide that the Government has not proved Paul Bergrin guilty of some or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate places on the form.

With respect to Count 1, the substantive RICO count, if you find the defendant guilty, then you must indicate which of the predicate acts listed there you unanimously found proved beyond a reasonable doubt. With respect to Racketeering Act 1(a) of Count 1, as I already indicated, there are questions about the quantity of cocaine involved in the conspiracy, which you must answer only if you find that the Government has proven that racketeering act.

Revised 5/22/95

LIABILITY FOR ANOTHER'S CONDUCT
(N.J.S.A. 2C:2-6)

ACCOMPLICE

CHARGE # ONE - Where defendant is charged as accomplice and jury does not receive instruction on lesser included charges.

The indictment charges/or the State alleges[1] that the defendant is legally responsible for the criminal conduct of X[2], in violation of a law which reads in pertinent part as follows:

> A person is guilty of an offense if it is committed by his own conduct or the conduct of another person for which he is legally accountable, or both.

A person is legally accountable for the conduct of another person when he/she is an accomplice of such other person in the commission of an offense.

A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, he/she (a) solicits such other person to commit it and/or (b) aids or agrees or attempts to aid such other person in planning or committing it.

This provision of the law means that not only is the person who actually commits the criminal act responsible for it but one who is legally accountable as an accomplice is also responsible as if he/she committed the crime(s) himself/herself.

In this case, the State alleges that the defendant is guilty of the crime(s) committed by X because he/she acted as his/her accomplice. In order to find the defendant guilty, the State must prove beyond a reasonable doubt each of the following elements:

1. That X committed the crime(s) of _____. I will now explain the elements of this/these offense(s).

2. That this defendant solicited him/her to commit it/them and/or did aid or agree or attempt to aid him/her in planning or committing it/them.

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[1] Where the evidence indicates a rational basis for accomplice liability, the judge can charge the jury on that basis even though the indictment does not expressly allege a violation of N.J.S.A. 2C:2-6. The court should indicate its intention to so charge, with or without request, before summations so that counsel can prepare to comment on the issue of accomplice liability during summations. See State v. Hakim, 205 N.J. Super. 385, 388 (App. Div. 1985).

[2] X can be a named person or an unknown person.

LIABILITY FOR ANOTHER'S CONDUCT
(N.J.S.A. 2C:2-6) ACCOMPLICE

3. That this defendant's purpose was to promote or facilitate the commission of the offense(s).

4. That this defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the act.

Remember that one acts purposely with respect to his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result.

"Solicit" means to strongly urge, suggest, lure or proposition. "Aid" means to assist, support or supplement the efforts of another. "Agrees to aid" means to encourage by promise of assistance or support. "Attempt to aid" means that a person takes substantial steps in a course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of a substantive offense.

If you find that the defendant, with the purpose of promoting or facilitating the commission of the offense(s), solicited X to commit it/them and/or aided or agreed or attempted to aid him/her in planning or committing it/them, then you should consider him/her as if he/she committed the crime(s) himself/herself. (If more than one offense is charged, instruct jury that accomplice status should be considered separately as to each charge).

To prove the defendant's criminal liability, the State does not have to prove his/her accomplice status by direct evidence of a formal plan to commit a crime. There does not have to be verbal agreement by all who are charged. The proof may be circumstantial. Participation and agreement can be established from conduct as well as the spoken words.

(READ IF APPROPRIATE)

Mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him/her a participant in the crime. It is, however, a circumstance to be considered with the other evidence in determining whether he/she was present as an accomplice. Presence is not in itself conclusive evidence of that fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt there must exist a community of purpose and actual participation in the crime committed.

While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime, without

disapproving or opposing it, is evidence from which, in connection with other circumstances, it is possible for the jury to infer that he/she assented thereto, lent to it his/her countenance and approval and was thereby aiding the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.

(RESUME ACCOMPLICE CHARGE)

An accomplice may be convicted on proof of the commission of a crime or of his/her complicity therein even though the person who it is claimed committed the crime(s) has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity from prosecution or conviction of has been acquitted.

In order to convict the defendant as an accomplice to the crime(s) charged, you must find that the defendant had the purpose to participate in that particular crime(s). He/She must act with the purpose of promoting or facilitating the commission of the substantive crime(s) with which he/she is charged.

It is not sufficient to prove only that the defendant had knowledge that another person was going to commit the crime(s) charged. The State must prove that it was defendant's conscious object that the specific conduct charged be committed.

In sum, in order to find the defendant guilty of committing the crime(s) of _____, the State must prove each of the following elements beyond a reasonable doubt:

1. That X committed the crime(s) of _____.

2. That this defendant's purpose was to promote or facilitate the commission of the offense(s).

3. That this defendant solicited him/her to commit it/them and/or did aid or agree or attempt to aid him/her in planning or committing it/them.

4. That this defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act.

(Again, remind the jury to consider the accomplice status separately as to each charge).

If you find that the State has proven each and every one of the elements that I have explained to you beyond a reasonable doubt, then you must find the defendant guilty. If on the

LIABILITY FOR ANOTHER'S CONDUCT
(N.J.S.A. 2C:2-6) ACCOMPLICE

other hand you find that the State has failed to prove one or more of these elements beyond a reasonable doubt, then you must find the defendant not guilty. As I have previously instructed, your verdict(s) must be unanimous. All twelve jurors must agree as to guilty or not guilty.

Revised 5/22/95

LIABILITY FOR ANOTHER'S CONDUCT
(N.J.S.A. 2C:2-6)

ACCOMPLICE

CHARGE # TWO - Where defendant is charged as accomplice and jury is instructed as to lesser included charges. [1]

The indictment charges/or the State alleges [2] that the defendant is legally responsible for the criminal conduct of X, [3] in violation of a law which reads in pertinent part as follows:

> A person is guilty of an offense if it is committed by his own conduct or the conduct of another person for which he is legally accountable or both.

A person is legally accountable for the conduct of another person when he/she is an accomplice of such other person in the commission of an offense.

A person is an accomplice of another person in the commission of an offense, if, with the purpose of promoting or facilitating the commission of the offense, he/she (a) solicits such other person to commit it and/or (b) aids or agrees or attempts to aid such other person in planning or committing it.

This provision of the law means that not only is the person who actually commits the criminal act responsible for it but one who is legally accountable as an accomplice is also responsible. Now this responsibility as an accomplice may be equal and the same as he/she who actually committed the crime(s) or there may be responsibility in a different degree depending on the circumstances as you may find them to be. The Court will further explain this distinction in a moment.

In this case, the State alleges that the defendant is equally guilty of the crime(s) committed by X because he/she acted as his/her accomplice with the purpose that the specific

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[1] This charge is intended to address circumstances similar to those in State v. Bielkiewicz, 267 N.J.Super. 520, 533 (App. Div. 1993).

[2] Where the evidence indicates a rational basis for accomplice liability, the judge can charge the jury on that basis even though the indictment does not expressly allege a violation of N.J.S.A. 2C:2-6. The court should indicate its intention to so charge, with or without request, before summations so that counsel can prepare to comment on the issue of accomplice liability during summations. See State v. Hakim, 205 N.J. Super. 385, 388 (App. Div. 1985).

[3] X can be a named person or an unknown person.

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crime(s) charged be committed. In order to find the defendant guilty of the specific crime(s) charged, the State must prove beyond a reasonable doubt each of the following elements:

1. That X committed the crime(s) of _____. I will shortly explain (or have already explained) the elements of this/these offense(s).

2. That this defendant solicited him/her to commit it/them and/or did aid or agree or attempt to aid him/her in planning or committing it/them.

3. That this defendant's purpose was to promote or facilitate the commission of the offense(s).

4. That this defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act.

Remember that one acts purposely with respect to his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result.

"Solicit" means to strongly urge, suggest, lure or proposition. "Aid" means to assist, support, or supplement the efforts of another. "Agree to aid" means to encourage by promise of assistance or support. "Attempt to aid" means that a person takes substantial steps in a course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of a substantive offense.

If you find that the defendant, with the purpose of promoting or facilitating the commission of the offense(s), solicited X to commit it/them and/or aided or agreed or attempted to aid him/her in planning or committing it/them, then you should consider him/her as if he/she committed the crime(s) himself/herself. (If more than one offense is charged, instruct jury that accomplice status should be considered separately as to each charge).

To prove the defendant's criminal liability, the State does not have to prove his/her accomplice status by direct evidence of a formal plan to commit a crime. There does not have to be verbal agreement by all who are charged. The proof may be circumstantial. Participation and agreement can be established from conduct as well as the spoken words.

(READ IF APPROPRIATE)

Mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him/her a participant in the crime. It is, however, a

circumstance to be considered with the other evidence in determining whether he/she was present as an accomplice. Presence is not in itself conclusive evidence of that fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt, there must exist a community of purpose and actual participation in the crime committed.

While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime(s), without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is possible for the jury to infer that he/she assented thereto, lent to it his/her countenance and approval and was thereby aiding the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.

(RESUME ACCOMPLICE CHARGE)

An accomplice may be convicted on proof of the commission of a crime or of his/her complicity therein even though the person who it is claimed committed the crime has not been prosecuted or has been convicted of a different offense or degree of offense or has an immunity from prosecution or conviction or has been acquitted.

Remember that this defendant can be held to be an accomplice with equal responsibility only if you find as a fact that he/she possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act(s).

In order to convict the defendant as an accomplice to the specific crime(s) charged, you must find that the defendant had the purpose to participate in that particular crime. He/She must act with the purpose of promoting or facilitating the commission of the substantive crime(s) with which he/she is charged.

It is not sufficient to prove only that the defendant had knowledge that another person was going to commit the crime(s) charged. The State must prove that it was defendant's conscious object that the specific conduct charged be committed.

In sum, in order to find the defendant guilty of committing the crime(s) of _____, the State must prove each of the following elements beyond a reasonable doubt:

1. That X committed the crime(s) of_____.

LIABILITY FOR ANOTHER'S CONDUCT
(N.J.S.A. 2C:2-6) ACCOMPLICE

2. That this defendant solicited him/her to commit it/them and/or did aid or agree or attempt to aid him/her in planning or committing it/them.

3. That this defendant's purpose was to promote or facilitate the commission of the offenses.

4. That this defendant possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act.

(Again, remind the jury to consider the accomplice charge separately as to each charge).

If you find that the State has proven each one of the elements as described above beyond a reasonable doubt, then you must find the defendant guilty of [crime charged]. If, on the other hand, you find that the State has failed to prove one or more of these elements beyond a reasonable doubt, then you must find the defendant not guilty of [crime charged]. As I have previously instructed, any verdict(s) rendered must be unanimous. All twelve jurors must agree as to guilty or not guilty.

Now, as I have previously indicated, you will initially consider whether the defendant should be found not guilty or guilty of acting as an accomplice of X with full and equal responsibility for the specific crime(s) charged. If you find the defendant guilty of the specific charge(s), then you need not consider any lesser charge(s).

If, however, you find the defendant not guilty of acting as an accomplice of X on the specific crime(s) charged, then you should consider whether the defendant did act as an accomplice of X but with the purpose of promoting or facilitating the commission of some lesser offense(s) than the actual crime(s) charged in the indictment.

Our law recognizes that two or more persons may participate in the commission of an offense but each may participate therein with a different state of mind. The liability or responsibility of each participant for any ensuing offense is dependent on his/her own state of mind and not on anyone else's.

Guided by these legal principles, and if you have found the defendant not guilty of the specific crime(s) charged, you should then consider whether the defendant is guilty or not guilty as an accomplice on the lesser charge of _____. I will now explain the elements of that offense to you. (Here the court may tell the jury what view of the facts could

lead to this conclusion).[4]

In considering whether the defendant is guilty or not guilty as an accomplice on this lesser charge, remember that each person who participates in the commission of an offense may do so with a different state of mind and the liability or responsibility of each person is dependent on his/her own state of mind and no one else's.

Therefore, in order to find the defendant guilty of the lesser included offense(s) of _____, the State must prove beyond a reasonable doubt:

1. That X committed the crime(s) of _____, as alleged in the indictment, or the lesser included offense of _____.

2. That this defendant solicited X to commit [lesser included offense] and/or did aid or agree or attempt to aid him/her in planning to commit [lesser included offense].

3. That this defendant's purpose was to promote or facilitate the commission of [lesser included offense].

4. That this defendant possessed the criminal state of mind that is required for the commission of [lesser included offense].

If you find that the State has proven each one of these elements beyond a reasonable doubt, then you must find the defendant guilty. If on the other hand you find that the State has failed to prove one or more of these elements beyond a reasonable doubt, then you must find the defendant not guilty. As I have previously indicated, your verdict(s) must be unanimous. All twelve jurors must agree as to guilty or not guilty.

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[4] In instructing jury as to lesser included offense(s), court should tell jury what view of the facts could lead to this conclusion. See State v. Bielkiewicz, 267 N.J. Super. 520, 533 (App. Div. 1993).

Approved 10/17/88

CONSPIRACY - VICARIOUS LIABILITY
(N.J.S.A. 2C:2-6b(4))

Count ____ of the indictment charges the defendant with the crime of _____. The State does not allege that the defendant committed the crime of _____ personally, but rather that he/she is legally accountable for that crime even though it was committed by another. More specifically, the State alleges that the crime of _____ was committed by _____, and that the defendant is legally accountable for the crime of _____ committed by _____ because the defendant and _____ allegedly conspired together to commit that crime. It is therefore necessary that I instruct you as to both the crime of _____ _____ and the law of conspiracy.

(HERE REFER TO THE MODEL CHARGE FOR THE PARTICULAR CRIME)

If you are satisfied beyond a reasonable doubt that the State has proven all of these essential elements and that _____ committed the crime of _____, then you must go on to determine the guilt or innocence of the defendant for that same crime. However, if you are not satisfied beyond a reasonable doubt that _____ committed the crime of _____, then your inquiry ends here and you must return a verdict of Not Guilty as to the defendant. Therefore, the following instructions on conspiracy are only for your use if you find beyond a reasonable doubt that _____ committed the crime of _____.

Our law provides that a person is guilty of an offense if it is committed by his/her own conduct or by the conduct of another person for which he/she) is legally accountable, or both.[1] A person is legally accountable for the conduct of another person when he/she is engaged in a conspiracy with such other person[2] and the conduct is within the scope of the conspiracy.[3] Thus, you must decide whether the defendant engaged in a conspiracy with _____ to commit the crime of _____.

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1 N.J.S.A. 2C:2-6a.

2 N.J.S.A. 2C:2-6b (4).

3 In an appropriate case it may be necessary to charge that a defendant is not legally accountable for conduct of other persons after the defendant has explicitly abandoned the conspiracy. See N.J.S.A. 2C:5-2f (3).

CONSPIRACY - VICARIOUS LIABILITY
(N.J.S.A. 2C:2-6b (4))

A person is guilty of conspiracy with another person (or persons)[4] if with the purpose of promoting or facilitating the commission of a crime he/she:

(1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Thus, for the purposes of this case, to find that the defendant engaged in a conspiracy with _____ _____ you must be satisfied beyond a reasonable doubt of the following elements:

(1) That defendant agreed with _____ (select appropriate language); and

(2) That when the defendant so agreed with _____ the defendant's purpose, i.e., his/her conscious object, was to promote or to make it easier for _____ to commit the crime of _____.

In this case, after consideration of all of the evidence, if you find beyond a reasonable doubt that _____ committed the crime of _____ and also that the defendant conspired with _____ to commit that crime, then you must find the defendant guilty of the crime of _____. On the other hand, if you have a reasonable doubt that _____ committed the crime of _____, that the defendant conspired with _____ to commit that crime, or both, then you must find the defendant not guilty.

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[4] In an appropriate case it may be necessary to charge as to the scope of a conspiracy involving additional persons. See N.J.S.A. 2C:5-2b.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 09-cr-369-DMC
v.	:	
PAUL W. BERGRIN,	:	TRANSCRIPT OF TRIAL PROCEEDINGS
Defendant.	:	VOLUME 35

Newark, New Jersey
March 14, 2013

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.,
AND A JURY

Reported by:
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

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(Laughter)

THE COURT: Maybe this will help, hopefully.

All right. If anybody can't hear, please just raise your hands.

All right. Members of the jury, you have seen and heard all of the evidence and the arguments of the lawyers. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence that you have heard and seen in court during this trial. That is your job and yours alone. I play no part in the finding of facts. You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think about what your verdict should be.

Your second duty is to apply the law as I give it to you to the facts. My role now is to explain to you the legal principles that must guide you in your decisions. You must apply my instructions carefully. Each of the instructions is important, and you must apply all of them. You must not substitute or follow your own notion or opinion about what the law is or ought to be. You must apply the law as I give it to you, whether you agree with it or not.

Whatever your verdict, it will have to be unanimous. All of you will have to agree or there will be no verdict. In the jury room, you will discuss the case

among yourselves, but ultimately each of you will have to make up his or her own mind. This is a responsibility that each of you has and you cannot avoid.

During your deliberations, you must not communicate with anyone or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or web site such as Facebook, MySpace, LinkedIn, YouTube or Twitter to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about the case. You can only discuss the case in the jury room with your fellow jurors during your deliberations.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented here in the courtroom. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence that you have. In our judicial system, it is

important that you are not influenced by anything or anyone outside of this courtroom.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, gender, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community.

Just briefly regarding your notes.

Do not use your notes or any other jurors' notes as authority to persuade fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not evidence, and they are by no means a complete outline of the proceedings or a list of the highlights in the trial. They are valuable, if at all, only as a way to refresh your memory. Your memory is what you should be relying on when it comes time to deliberate and render your verdict in this case. You therefore are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial. Notes are not to be used in place of the evidence. They are not to be given precedence over your independent recollection of the facts.

Now, Mr. Bergrin has decided to represent himself

in this trial and not to use the services of a lawyer for the conducting of the trial itself. He has a constitutional right to do that. His decision has no bearing on whether he is guilty or not guilty, and it must not affect your consideration of the case.

Because Mr. Bergrin decided to act as his own lawyer, you heard him speak at various times during the trial. He made an opening statement and a closing argument. He asked questions of witnesses, made objections, and argued to the Court. I want to remind you that when Mr. Bergrin spoke in these parts of the trial, he was acting as a lawyer in the case, and his words are not evidence. The only evidence in the case comes from the witnesses who testify under oath on the witness stand and from the exhibits that are admitted in evidence.

During the trial, you've heard testimony that the attorneys, including Mr. Bergrin, or their agents or investigators have interviewed or attempted to interview some of the witnesses who testified at trial. No adverse inference should be drawn from that conduct. Indeed, the attorneys had a right, a duty, and an obligation to conduct and attempt to conduct those interviews, and prepare this case as thoroughly as possible, and they might have been derelict in the performance of their duties if they had not questioned the witnesses as the investigation progressed and

during their preparation of the trial. Indeed, it would be negligent on the part of any lawyer not to interview or attempt to interview a witness whom he planned to call to testify.

During the trial, you heard testimony of witnesses and argument by counsel that the Government did not use specific investigative techniques. You may consider these facts in deciding whether the Government has met its burden of proof, because as I told you, you should look to all the evidence or lack of evidence in deciding whether the Defendant is guilty. However, there is no legal requirement that the Government use any specific investigative techniques or all possible techniques to prove its case.

Your concern, as I have said, is to determine whether or not the evidence admitted in this trial proves the Defendant's guilt beyond a reasonable doubt.

Although the Government is required to prove the Defendant's guilt beyond a reasonable doubt, the Government is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case. In addition, as I have explained, the Defendant is not required to present any evidence or produce any witnesses.

In this case, Mr. Bergrin presented evidence and produced witnesses. Mr. Bergrin is not required to present

all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case.

The Evidence.

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

The evidence from which you are to find the facts consists of the following: One, the testimony of the witnesses; two, documents and other things received as exhibits; three, any fact or testimony that was stipulated - that is, formally agreed to by the parties; and, four, any facts that have been judicially noticed - that is, facts which I say you may accept as true even without other evidence.

The following are not evidence: The Indictment; statements and arguments of the lawyers for the parties in the case; questions by the lawyers and questions I might have asked; objections by the lawyers, including objections in which the lawyers stated facts; any testimony I struck or told you to disregard; and anything you may have seen or heard about this case outside the courtroom.

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 and common sense tells you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.

As I told you in my preliminary instructions, the Rules of Evidence control what can be received into evidence. During the trial, the lawyers objected when they thought that evidence was offered that was not permitted by the Rules of Evidence. These objections simply meant that the lawyers were asking me to decide whether the evidence should be allowed under the rules.

You should not be influenced by the fact that an objection was made. You should also not be influenced by my rulings on objections or any sidebar conferences you may have overheard. When I overruled an objection, the question was answered or the exhibit was received as evidence, and you should treat that testimony or exhibit like any other. When I allowed the evidence, testimony or exhibits, for a limited purpose only, I instructed you to consider that evidence only for that limited purpose, and you must do that.

When I sustained an objection, the question was not answered or the exhibit was not received as evidence. You must disregard the question or the exhibit entirely.

Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown. Sometimes a witness may have already answered before a lawyer objected or before I ruled on the objection. If that happened, and if I sustained the objection, you must disregard the answer that was given.

Also, if I ordered that some testimony or other evidence be stricken or removed from the record, you must disregard that evidence. When you are deciding this case, you must not consider or be influenced by any of the testimony or other evidence that I told you to disregard.

Although the lawyers may have called your attention to certain facts or factual conclusions that they thought were important, what the lawyers said is not evidence and is not binding upon you. It is your own recollection and interpretation of the evidence that controls your decision in this case. Also, do not assume from anything I may have done or said during the trial that I have an opinion about any of the issues in this case or about what the verdict should be.

Now, you heard recordings that were received in evidence, and you were given written transcripts of those recordings.

Keep in mind that, except for transcripts containing English translations of conversations that may

have occurred in Spanish, the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read.

And if you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

With respect to stipulations, a stipulation of fact is an agreement between the parties that a certain fact is true. Whenever the Government and a defendant have reached a stipulation of fact, you may treat that fact as having been proven. You are not required to do so, however, since you are the sole judges of the facts.

With respect to experts.

The Rules of Evidence ordinarily do not permit witnesses to state their own opinions about important questions at trial, but there are exceptions to these rules.

In this case, you heard testimony from Dr. Patrick Hinfey, Detective Louis Alarcon, Dr. Junaid Shaikh, Attila Mathe, and James Reames. Because of their knowledge, skill, experience, training, and education in the fields of firearms identification, forensic pathology, or audio

recording technology, they were permitted to offer opinions in those fields and the reasons for those opinions.

The opinions these witnesses stated should receive whatever weight you think appropriate, given all the evidence in the case. In weighing this opinion testimony, you may consider the witnesses' qualifications, the reasons for the witnesses' opinions, as well as other factors discussed in these instructions for weighing the testimony of witnesses. You may disregard the opinions entirely if you decide that the witnesses' opinions are not based on sufficient knowledge, skill, experience, training, or education. You may also disregard the opinions if you conclude that the reasons given in support of the opinions are not sound, or if you conclude that the opinions are not supported by the facts shown by the evidence, or if you think that the opinions are outweighed by other evidence.

Certain charts or summaries were admitted into evidence. You may consider the charts and summaries as you would any other evidence admitted during the trial and give them such weight or importance, if any, as you believe they deserve.

Both sides presented certain charts or summaries during the course of their summations in order to help explain the facts which they contend are established by the evidence in this case. These charts or summaries are not

themselves evidence or proof of any facts. Rather, they were presented to you solely in order to assist the parties in presenting their closing arguments. To the extent that the charts or summaries do not reflect the evidence in the case, you should disregard them and determine the facts from the underlying evidence.

Direct and Circumstantial Evidence.

Two types of evidence may have been used here in the trial, "direct evidence" and "circumstantial or indirect evidence." You may use both types of evidence in reaching your verdict.

"Direct evidence" is simply evidence which, if believed, directly proves a fact. An example of direct evidence occurs when a witness testifies about something the witness knows from his or her own senses - something the witness has seen, touched, heard, or smelled.

"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts. A reasonable inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. A reasonable inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another

fact.

For example, if someone were to walk into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could reasonably find or conclude that it was raining outside. You would not have to find that it was raining, but you could.

Sometimes different inferences may be drawn from the same set of facts. The Government may ask you to draw one inference, and the Defense may ask you to draw another. You, and you alone, must decide what reasonable inferences you will draw based on all of the evidence and your reason, experience, and common sense.

You should consider all the evidence that is presented in the trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

Credibility of Witnesses.

As I stated in my preliminary instructions at the beginning of the trial, in deciding what the facts are, you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Was the witness truthful?

Was the witness' testimony accurate? You may believe everything a witness says, or only part of it, or none of it.

You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.

In deciding what to believe, you may consider a number of factors:

One, the opportunity and ability of the witness to see or hear or know the things about which the witness testified;

Two, the quality of the witness' knowledge, understanding, and memory;

Three, the witness' appearance, behavior, and manner while testifying;

Four, whether the witness has an interest in the outcome of the case, or any motive, bias, or prejudice;

Five, any relation the witness may have with a party in the case and any effect the verdict may have on the witness;

Six, whether the witness said or wrote anything before trial that was different from what the witness said in court;

Seven, whether the witness' testimony was consistent or inconsistent with other evidence that you believe; and

Eight, any other factors that bear on whether the witness should be believed.

Inconsistencies or discrepancies in a witness' testimony or between the testimony of different witnesses may or may not cause you to disbelieve a witness' testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should also consider whether it was about a matter of importance or an insignificant detail. You should also consider whether the inconsistency was innocent or intentional.

You are not required to accept testimony even if the testimony was not contradicted and the witness was not impeached. You may decide that the witness is not worthy of belief because of the witness' bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.

After you make your own judgment about the

believability of a witness, you can then attach to that witness' testimony the importance or weight that you think it deserves.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testified or the quantity of the evidence that was presented. What is more important than numbers or quantity is how believable the witnesses were, and how much weight you think their testimony deserves.

Now, you heard testimony of law enforcement officers. The fact that a witness is employed as a law enforcement officer does not mean that his or her testimony necessarily deserves more or less consideration or greater or lesser weight than any other witness.

At the same time, it is quite legitimate for the Defense to try to attack the believability of a law enforcement witness on the ground that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

You must decide, after reviewing all the evidence, whether you believe the testimony of the law enforcement witnesses who were called and how much weight, if any, it deserves.

Now, the credibility of witnesses when we're dealing with cooperating witnesses.

You have heard evidence that certain witnesses entered into plea agreements with the Government. This testimony was received in evidence and may be considered by you. The Government is permitted to present the testimony of someone who has reached a plea agreement with the Government in exchange for his or her testimony, but you should consider his or her testimony with great care and caution. In evaluating such a witness' testimony, you should consider this factor along with the others I have called to your attention. Whether or not his or her testimony may have been influenced by the plea agreement is for you to determine. You may give his or her testimony such weight as you think it deserves.

You must not consider a witness' guilty plea as evidence of the guilt of the Defendant charged in the Indictment. A witness' decision to plead guilty was a personal decision about his or her own guilt. Such evidence is offered only to allow you to assess the credibility of the witness, to eliminate any concern that the Defendant has been singled out for prosecution, and to explain how the witness came to possess detailed first-hand knowledge of the events about which he testified. You may consider the witness' guilty plea only for these purposes.

Impeachment of Witnesses - Prior Inconsistent Statements.

You have heard the testimony of certain witnesses. You have also heard that before this trial they made statements that may be different from their testimony in this trial. It is up to you to determine whether these statements were made and whether they were different from the witnesses' testimony in this trial. These earlier statements were brought to your attention only to help you decide whether to believe the witnesses' testimony here at trial. You cannot use it as proof of the truth of what the witnesses said in the earlier statements. You can only use it as one way of evaluating the witnesses' testimony in this trial.

You also heard evidence that certain witnesses made statements before this trial that were made under oath at a prior proceeding and that may be different from their testimony here. When a statement was made under oath, you may not only use it to help you decide whether you believe the witness' testimony in this trial, but you may also use it as evidence of the truth of what the witness said in the earlier statements. But when a statement is not made under oath, you may use it only to help you decide whether you believe the witness' testimony in this trial and not as proof of the truth of what the witness said in the earlier statements.

There's legal axiom, false in one, false in all.

If you believe that a witness knowingly testified falsely concerning any important matter, you may distrust the witness' testimony concerning other matters. You may reject all of the testimony, or you may accept such parts of the testimony that you believe are true and give it such weight as you think it deserves.

You also heard evidence that a number of witnesses committed certain offenses or other bad acts probative of their character for truthfulness. You may consider this evidence, along with other pertinent evidence, only in deciding whether to believe these witnesses and how much weight to give their testimony.

Regarding prior convictions.

You have heard evidence that a number of witnesses were previously convicted of crimes punishable by more than one year in jail and/or involving dishonesty or false statements. You may consider this evidence, along with the other pertinent evidence, in deciding whether or not to believe these witnesses and how much weight to give to their testimony.

Now, in this case, Mr. Bergrin decided not to testify. A defendant has an absolute constitutional right not to testify. The burden of proof remains with the prosecution throughout the entire trial and never shifts to the Defendant. A defendant is never required to prove that

he is innocent. You must not attach any significance to the fact that Mr. Bergrin did not testify. You must not draw any adverse inference against him because he did not take the witness stand. Do not consider, for any reason at all, the fact that Mr. Bergrin did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

Burden of Proof and the Presumption of Innocence.

The Defendant Paul Bergrin pleaded not guilty to the offense charged. He is presumed to be innocent. He started the trial with a clean slate, with no evidence against him. The presumption of innocence stays with Mr. Bergrin unless and until the Government has presented evidence that overcomes that presumption by convincing you that he is guilty of the offense charged beyond a reasonable doubt. The presumption of innocence requires that you find Mr. Bergrin not guilty, unless you are satisfied that the Government has proved his guilt beyond a reasonable doubt.

The presumption of innocence means that Mr. Bergrin has no burden or obligation to present any evidence at all or to prove that he is not guilty. The burden or obligation of proof is on the Government to prove that Mr. Bergrin is guilty, and this burden stays with the Government throughout the trial.

In order for you to find Mr. Bergrin guilty of the

offense charged, the Government must convince you that he is guilty beyond a reasonable doubt. That means that the Government must prove each and every element of the offense charged beyond a reasonable doubt. The Defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts.
a reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

If, having now heard all the evidence, you are convinced that the Government proved each and every element of the offense charged beyond a reasonable doubt, you should return a verdict of guilty for that offense. However, if you have a reasonable doubt about one or more of the elements of the offense charged, then you must return a verdict of not guilty to that offense.

Now, as you know, Mr. Bergrin is charged in the

Indictment with violating Federal law, specifically in Count 1 with racketeering, in Count 2 with conspiring to commit racketeering, and in Counts 3 and 4 with violent crimes in aid of racketeering. Counts 5, 8 through 10, and 12 through 26 charge substantive offenses, many of which duplicate the racketeering acts alleged in Count 1. As I explained at the beginning of the trial, an Indictment is just the formal way of specifying the exact crimes the Defendant is accused of committing. An Indictment is simply a description of the charges against a defendant. It an accusation only. An Indictment is not evidence of anything, and you should not give any weight to the fact that Mr. Bergrin has been indicted in making your decision in this case.

Persons Not on Trial.

You're here to decide whether the Government has proved beyond a reasonable doubt that the Defendant is guilty of the crimes charged. Paul Bergrin is not on trial for any act, conduct, or offense not alleged in the Indictment. Neither are you concerned with the guilt of any other person or persons not on trial. You may not draw any inference, favorable or unfavorable, towards the Government or the Defendant, from the fact that certain persons were not named as Defendants in the Indictment. Why certain persons were not indicted or are not on trial here must play no part in your deliberations. It should be of no concern

to you, and you should not speculate as to the reason for their absence.

Whether a person should be named as a defendant is a matter within the sole discretion of the United States Attorney and the grand jury. Therefore, you may not consider it in any way in reaching your verdict as to Defendant Paul Bergrin.

You'll note that the Indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, here, Mr. Bergrin is charged with 23 offenses. Each offense is charged in a separate count of the Indictment.

The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the Government has proved beyond a reasonable doubt that the Defendant is guilty of that particular offense.

With the exception of those racketeering acts that duplicate other crimes charged in the Indictment, your

decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.

Now we'll get into the substantive law on the offenses.

Count 1 - Racketeer Influenced and Corrupt Organizations.

Count 1 of the Indictment charges Paul Bergrin with violating the Racketeer Influenced and Corrupt Organizations Act, also known as RICO. Under this statute, it is a Federal crime for any person who is employed by or associated with an enterprise that is engaged in or affects interstate or foreign commerce, to conduct or to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

In order to find Paul Bergrin guilty of this offense, you must find that the Government proved each of the following five elements beyond a reasonable doubt:

First, the existence of an enterprise;

Second, that the enterprise was engaged in or its activities affected interstate or foreign commerce;

Third, that Paul Bergrin was employed by or associated with the enterprise;

Fourth, that Paul Bergrin knowingly conducted that

enterprise's affairs or knowingly participated, directly or indirectly, in the conduct of that enterprise's affairs; and

Fifth, that Paul Bergrin knowingly conducted or participated, directly or indirectly, in the conduct of that enterprise's affairs through a pattern of racketeering activity, as alleged in the Indictment.

I will now explain the law that applies to these elements.

The first element that the Government must prove beyond a reasonable doubt for the offense charged in Count 1 is the existence of an "enterprise," as alleged in the Indictment. An enterprise may be: One, a legal entity, such as a corporation or a partnership; or, two, a group of individuals associated in fact although not a legal entity. In this case, the enterprise alleged in the Indictment is a group of individuals and corporations associated in fact although not a legal entity.

The term enterprise includes both legitimate enterprises and also illegitimate or completely illegal enterprises. Thus, the enterprise need not have a purpose other than the commission of or facilitating the commission of the racketeering activity alleged in this Indictment.

Although the Government must prove that Paul Bergrin was employed by or associated with the enterprise, the enterprise must itself be an entity separate and

distinct from the Defendant.

RICO - "Enterprise"; Association in Fact Defined.

The Indictment alleges that the enterprise in this case was a group of individuals and legal entities associated together in fact. As I already told you, an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals and legal entities. A group or association of individuals and legal entities can be an enterprise if they have associated together for a common purpose of engaging in a course of conduct. This is referred to as an "association in fact enterprise."

In order to find the existence of an "association in fact enterprise," you must find that the Government proved beyond a reasonable doubt each of the following:

First, that the group had purposes and longevity sufficient for the members of the group to pursue its purposes;

Second, that the group had an ongoing organization, formal or informal, with some sort of framework for carrying out its objectives;

Third, that there was a relationship among the members of the group and that the members of the group functioned as a continuing unit to achieve common purposes; and

Fourth, that the enterprise existed separate and apart from the alleged pattern of racketeering activity.

To find that the enterprise was an entity separate and apart from the alleged pattern of racketeering activity, you must find that the Government proved that the enterprise had an existence beyond what was necessary merely to commit the charged racketeering activity. However, the Government does not have to prove that the enterprise had some function wholly unrelated to the racketeering activity; the enterprise may be formed solely for the purpose of carrying out a pattern of racketeering activity. The existence of an association-in-fact enterprise is often proved by what it does, rather than by abstract analysis of its structures. Evidence that shows a pattern of racketeering activity may be considered in determining whether the Government has proved the existence of an enterprise beyond a reasonable doubt, and proof of a pattern of racketeering activity may be sufficient for you to infer the existence of an association-in-fact enterprise. Also, evidence showing the oversight or coordination of the commission of several different racketeering acts and other activities on an ongoing basis may be considered in determining whether the enterprise had a separate existence.

To prove an association-in-fact enterprise, the Government need not prove that the group had a hierarchical

structure or a chain of command; decisions may be made on an ad hoc basis and by any number of methods. The Government also need not prove that the members of the group had fixed roles; different members may perform different roles at different times. The Government need not prove that the group was a business-like entity, or that it had a name, or regular meetings, or established rules and regulations, or the like. An enterprise is also not limited to groups whose crimes are sophisticated, diverse, complex, or unique.

"RICO - 'Engaged in, Or the Activities of Which Affect, Interstate Or Foreign Commerce' Defined."

The second element that the Government has to prove beyond a reasonable doubt for the offense charged in Count 1 is that the enterprise was engaged in interstate or foreign commerce, or that the enterprise's activities affected interstate or foreign commerce. This means the Government must prove that the enterprise was involved in or affected in some way trade, or business, or travel between two or more states or between a state and a foreign country.

An enterprise is engaged in interstate or foreign commerce when it is itself directly engaged in the production, distribution, or acquisition of services, money, goods, or other property in interstate or foreign commerce.

Alternatively, an enterprise's activities affected interstate or foreign commerce if its activities in any way

interfered with, changed, or altered the movement or transportation or flow of goods, merchandise, money, or other property between or among two or more states or between a state and a foreign country. The Government must prove that the enterprise's activities had some effect on commerce, no matter how minimal or slight. The Government need not prove that Paul Bergrin knew that the enterprise would engage in, or that the enterprise's activities would affect, interstate or foreign commerce. The Government also need not prove that Paul Bergrin intended to obstruct, delay or interfere with foreign commerce, or that the purpose of the alleged crime generally was to affect interstate or foreign commerce. Moreover, you do not have to decide whether the effect on commerce was harmful or beneficial.

In addition, the Government does not have to prove that the pattern of the individual acts of racketeering activity themselves affected interstate or foreign commerce. Rather, it is the enterprise and its activities considered as a whole that must be shown to have that effect. On the other hand, this effect on interstate or foreign commerce may be established through the effect caused by the pattern of the individual acts of racketeering activity.

Next, RICO - "Employed By Or Associated With Any Enterprise" Defined.

The third element that the Government must prove

beyond a reasonable doubt for the offense charged in Count 1 is that Mr. Bergrin was either "employed by" or "associated with" the enterprise. The Government need not prove both.

If you find that Paul Bergrin was employed by the enterprise, that is enough to satisfy this element. You should give the phrase "employed by" its common, ordinary meaning. For example, a person is employed by an enterprise when he or she is on the payroll of the enterprise, or performs services for the enterprise, or holds a position in the enterprise.

Alternatively, you may find that Paul Bergrin was "associated with" the enterprise if you find that the Government proved that he was aware of the general existence and nature of the enterprise, that it extended beyond his individual role, and with that awareness participated in, aided, or furthered the enterprise's activities or had an ownership interest in the enterprise.

It is not required that Paul Bergrin be employed by or associated with the enterprise for the entire time the enterprise existed. The Government also is not required to prove that Paul Bergrin had a formal or managerial position in the enterprise, or participated in all the activities of the enterprise, or had full knowledge of all the activities of the enterprise, or knew about the participation of all the other members of the enterprise. What the Government

must prove beyond a reasonable doubt is that at some time during the existence of the enterprise as alleged in the Indictment, Paul Bergrin was employed by or associated with the enterprise within the meaning of those terms as I have just explained.

To prove that Paul Bergrin was either employed by or associated with an enterprise, the Government must prove beyond a reasonable doubt that he was connected to the enterprise in some meaningful way, and that he knew of the existence of the enterprise and of the general nature of its activities.

The fourth element that the Government must prove beyond a reasonable doubt for the offense charged in Count 1 is that Paul Bergrin knowingly conducted the affairs of the enterprise or that he knowingly participated, directly or indirectly, in the conduct of the affairs of the enterprise. In order to prove this element, the Government must prove a connection between Paul Bergrin and the conduct of the affairs of the enterprise. The Government must prove that Paul Bergrin took some part in the operation or management of the enterprise or that he had some role in directing the enterprise's affairs .

Evidence that Paul Bergrin held a managerial position within the enterprise or exerted control over the enterprise's operations is enough to prove this element.

The fifth element that the Government must prove beyond a reasonable doubt for the offense charged in Count 1 is that Mr. Bergrin knowingly conducted the enterprise's affairs or knowingly participated, directly or indirectly, in the conduct of the enterprise's affairs "through a pattern of racketeering activity."

To establish this element, the Government must prove each of the following beyond a reasonable doubt:

First, that Mr. Bergrin committed at least two of the acts of racketeering activity alleged in the Indictment and that the last act of racketeering activity occurred within 10 years after the commission of a previous act of racketeering activity; second, that the acts of racketeering activity were related to each other, meaning that there was a relationship between or among the acts of racketeering activity (referred to as the "relatedness" requirement);

Third, that the acts of racketeering activity amounted to or posed a threat of continued criminal activity (referred to as the "continuity" requirement); and

Fourth, that Paul Bergrin conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs "through" the pattern of racketeering activity.

With respect to the second requirement, acts of racketeering activity are "related" if the acts had the same

or similar purposes, results, participants, victims or methods of commission, or were otherwise interrelated by distinguishing characteristics. Acts of racketeering activity are not related if they are disconnected, sporadic, or widely separated and isolated acts.

As to the third requirement, the Government must prove that the racketeering acts themselves amounted to continuing racketeering activity or that the acts otherwise posed a threat of continuing racketeering activity. Continuing racketeering activity may be proved by evidence showing a closed period of repeated racketeering activity; that is, by evidence of a series of related racketeering acts committed over a substantial period of time. Acts of racketeering activity committed over only a few weeks or months and which do not threaten future criminal conduct do not satisfy this requirement. Continuing racketeering activity or a threat of continuing racketeering activity may also be proved by evidence showing past racketeering activity that by its nature projects into the future with a threat of repetition; for example, when the acts of racketeering activity are part of a long -term association that exists for criminal purposes or when the acts of racketeering activity are shown to be the regular way of conducting the affairs of the enterprise.

In deciding whether the Government proved a

pattern of racketeering activity, you may consider evidence regarding the number of acts of racketeering activity, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.

You may find that separately performed, functionally different, or directly unrelated acts of racketeering activity form a pattern of racketeering activity if you find that the Government proved beyond a reasonable doubt that they were all undertaken in furtherance of one or more of the purposes of the enterprise.

To prove the fourth requirement, that Paul Bergrin conducted or participated in the conduct of the enterprise's affairs "through" a pattern of racketeering activity, the Government must prove that the acts of racketeering activity had a relationship or a meaningful connection to the enterprise. The relationship or connection may be established by evidence that Mr. Bergrin was enabled to commit the racketeering activity by virtue of his position with or involvement in the affairs of the enterprise, or by evidence that Paul Bergrin's position with or involvement in the enterprise facilitated his commission of the racketeering activity, or by evidence that the racketeering activity benefited the enterprise, was authorized by the

enterprise, promoted or furthered the purposes of the enterprise, or was in some way other way related to the affairs of the enterprise.

"Racketeering activity," as defined by the RICO statute, includes any acts that involve or that may be charged as any of a wide range of crimes under state or Federal law. Count 1 of the Indictment alleges that Paul Bergrin committed six acts of racketeering activity. Five of those six acts allege more than one crime. I instruct you that you may find a racketeering act proved so long as you agree that the Government has proved at least one of the crimes alleged beyond a reasonable doubt; but you unanimously agree on the same particular crime.

I will now define the elements of those crimes for you. Please be aware that many, but not all, of the offenses I will define for you now are also charged as substantive offenses in Counts 5 through 26. When a racketeering act overlaps with a substantive offense, I will point that out so that I do not have to repeat all of these instructions later. So please pay careful attention to the following instructions.

Also, you will see that some of the racketeering acts and some substantive counts have been omitted from the Indictment. There will be no instructions regarding those acts or counts, and they will not be listed on the verdict

form. Those acts and counts have been omitted by the agreement of the parties and the Court and are irrelevant to the acts and counts that are charged in the Indictment.

The Indictment alleges that Paul Bergrin committed six acts of racketeering activity. As I have instructed, you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin committed at least two of the alleged acts of racketeering activity within the prescribed time period.

You must unanimously find that the Government proved beyond a reasonable doubt that Mr. Bergrin committed each of at least two of the same particular acts of racketeering activity alleged. It is not enough that some members of the jury find that Mr. Bergrin committed two of the particular racketeering acts alleged while other members of the jury find that Mr. Bergrin committed two different racketeering acts. In order for you to find Paul Bergrin guilty, there must be at least two specific racketeering acts that all of you find were committed by Paul Bergrin.

The first act of racketeering alleged in Count 1, which relates to the trafficking and storage of cocaine, alleges that Paul Bergrin committed four separate offenses, any one of which is sufficient to prove Racketeering Act 1. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the

Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following four offenses.

Racketeering Act 1(a) and Count 5 allege that from at least in or about January 2003 through on or about May 21, 2009, Paul Bergrin conspired with others to distribute, and to possess and distribute, five or more kilograms of a controlled substance.

It is a Federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.

In order for you to find Paul Bergrin guilty of conspiracy to distribute, or to possess with the intent to distribute, a controlled substance, you must find that the Government proved beyond a reasonable doubt each of the following three elements:

First, that two or more persons agreed to distribute or possess with the intent to distribute a controlled substance;

Second, that Paul Bergrin was a party to or member of that agreement; and

Third, that Paul Bergrin joined the agreement or conspiracy knowing of its objectives to distribute or possess with the intent to distribute a controlled substance

and intending to join together with at least one other alleged conspirator to achieve those objectives; that is, that Paul Bergrin and at least one other alleged conspirator shared a unity of purpose and the intent to achieve those objectives.

I will now explain these elements in more detail. Please note that several other racketeering acts and substantive offenses charge conspiracy offenses as well. As a result, I am going to define conspiracy law in full now, and will refer back to these instructions later so that I do not have to repeat these instructions again and again. So, again, please pay close attention. Also, many of the instructions I will give you use the terms "knowingly," "intentionally", or "willfully." I will define those terms later.

Conspiracy - Existence of an Agreement.

The first element of the crime of conspiracy is the existence of an agreement. The Government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy.

The Government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the

understanding. The Government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objectives, or agreed to all the details, or agreed to what the means were by which the objectives would be accomplished. The Government is not even required to prove that all the people named in the Indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the Government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.

You may consider both direct and circumstantial evidence in deciding whether the Government has proved beyond a reasonable doubt that an agreement or mutual understanding existed. You may find the existence of a conspiracy based on reasonable inferences drawn from the actions and statements of the alleged members of the conspiracy, from the circumstances surrounding the scheme, and from evidence of related facts and circumstances which prove that the activities of the participants in a criminal venture could not have been carried out except as the result of a preconceived agreement, scheme, or understanding.

The Indictment charges various conspiracies to commit several Federal crimes. The Government does not have to prove that the alleged conspirators agreed to commit all of these crimes. The Government, however, must prove that they agreed to commit at least one of the object crimes, and you must unanimously agree on which crime. You cannot find Paul Bergrin guilty of conspiracy unless you unanimously agree that the same Federal crime was the objective of the conspiracy. It is not enough if some of you agree that one of the charged crimes was the objective of the conspiracy and others agree that a different crime was the objective of the conspiracy.

If you find that a criminal agreement or conspiracy existed, then in order to find Paul Bergrin guilty of conspiracy, you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin knowingly and intentionally joined that agreement or conspiracy during its existence. The Government must prove that Mr. Bergrin knew the goal or objectives of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve the common goals or objectives and to work together with the other alleged conspirators toward those goals or objectives.

The Government need not prove that Mr. Bergrin knew everything about the conspiracy or that he knew

everyone involved in it, or that he was a member from the beginning. The Government also does not have to prove that a defendant played a major or substantial role in the conspiracy.

You may consider both direct and indirect evidence -- and circumstantial evidence in deciding whether Mr. Bergrin joined the conspiracy, knew of its criminal objectives, and intended to further the objectives. Evidence which shows that a defendant only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that the Defendant was a member of the conspiracy even if he approved of what was happening or did not object to it. Likewise, evidence showing that a defendant may have done something that happened to help a conspiracy does not necessarily prove that he joined the conspiracy. You may, however, consider this evidence, with all the other evidence, in deciding whether the Government proved beyond a reasonable doubt that Paul Bergrin joined the conspiracy.

In order to find a defendant guilty of conspiracy, you must find that the Government proved beyond a reasonable doubt that the Defendant Paul Bergrin joined the conspiracy knowing of its objectives and intending to further or achieve that objective. That is, the Government must prove

that Mr. Bergrin, one, knew of the objective or goal of the conspiracy; two, joined the conspiracy intending to help further or achieve that goal or objective; and, three, shared with at least one other alleged conspirator a unity of purpose toward that objective or goal.

You may consider both direct and circumstantial evidence, including the Defendant's words or conduct and other facts and circumstances in deciding whether each defendant had the required knowledge and intent. For example, evidence that a defendant derived some benefit from the conspiracy or had some stake in the achievement of the conspiracy's objective might tend to show that the Defendant had the required intent or purpose that the conspiracy's objectives be achieved.

Evidence has been admitted in this case that certain persons, who are alleged to be co-conspirators of Defendant Paul Bergrin, did or said certain things. The acts or statements of any member of a conspiracy are treated as the acts or statements of all the members of the conspiracy, if these acts or statements were performed or spoken during the existence of the conspiracy and to further the objectives of the conspiracy.

Therefore, you may consider as evidence against Defendant Paul Bergrin any acts done or statements made by any members of the conspiracy, during the existence of and

to further the objectives of that conspiracy. You may consider these acts and statements even if they were done and made in the absence and without his knowledge -- in his absence and without his knowledge. As with all the evidence in this case, it is for you to decide whether you believe this evidence and how much weight to give it.

Acts done or statements made by an alleged co-conspirator before Mr. Bergrin joined the alleged conspiracy may also be considered by you as evidence against Mr. Bergrin. However, acts done or statements made before the alleged conspiracy began or after it ended may only be considered by you as evidence against the person who performed the act or made the statement.

The Government is not required to prove that any of the members of the conspiracy were successful in achieving any or all of the objectives of the conspiracy. You may find Paul Bergrin guilty of conspiracy if you find that the Government proved beyond a reasonable doubt the elements that I have explained, even if you find that the Government did not prove that any of the co-conspirators actually committed any other offense against the United States. Conspiracy is a criminal offense separate from the offenses that were the objectives of the conspiracy; conspiracy is complete without the commission of those offenses.

Now let me discuss the object of the conspiracy that is alleged in both Racketeering Act 1(a) of Count 1 and in Count 5 of the Indictment. The Government must prove beyond a reasonable doubt that the object of the conspiracy was to distribute or possess with intent to distribute a controlled substance. Some of these terms require definition.

To "possess" a controlled substance means to have it within a person's control. The Government does not have to prove that Defendant Paul Bergrin physically held the controlled substance, that is, had actual possession of it as long as object of the conspiracy was to bring the controlled substance within Mr. Bergrin's control. Proof of ownership of the controlled substance is not required.

The law also recognizes that possession may be sole or joint. If one person alone possesses a controlled substance, that's sole possession. However, more than one person may have the power and intention to exercise control over a controlled substance. This is called joint possession. If you find that Mr. Bergrin had such power and intention, then he possessed the controlled substance even if he possessed it jointly with another.

Mere proximity to the controlled substance, or mere presence on the property where it is located, or mere association with the person who does control the controlled

to distribute a controlled substance. The United States does not have to prove that the Defendant knew the type of the drugs that he conspired about or the exact quantity of drugs involved. It is enough that the United States prove that the Defendant knew that the conspiracy involved some type and some amount of a controlled substance and that the conspiracy involved the type and amount of drugs alleged in the Indictment.

You will see from the verdict form, which we'll get to later, that if you find that the Government has proven Racketeering Act 1(a) beyond a reasonable doubt, you will be asked to answer several additional questions regarding the type and quantity of the controlled substance involved in the conspiracy. Your answers to these questions must be unanimous, and in order to find that the offense involved a certain weight or quantity of controlled substance, you must all be satisfied that the Government proved the weight or quantity beyond a reasonable doubt. Weight or quantity means the total weight of any mixture or substance which contains a detectable amount of the controlled substance charged.

The first question asks whether you unanimously find beyond a reasonable doubt that the weight or quantity of cocaine which was involved in the conspiracy was five kilograms or more. In determining the type and amounts of

controlled substances involved in the conspiracy, you may consider all the evidence in the case that may help you make that determination, including the physical and documentary evidence, the testimony of any witnesses, or the contents of any audio or video recording.

If your answer to the question is "yes," you should proceed to Racketeering Act 1(b). If your answer is "no," you must then answer the second question, whether you unanimously find beyond a reasonable doubt that the quantity of cocaine which was involved in the conspiracy was 500 grams or more.

As long as you find that the Government proved beyond a reasonable doubt that the conspiracy involved five kilograms or more of cocaine, specifically, and that Mr. Bergrin knew that what he conspired to distribute and possess was a controlled substance, you need not find that Mr. Bergrin knew that the controlled substance was cocaine or that Mr. Bergrin knew that the weight of the controlled substance was five kilograms or more.

With respect to Racketeering Act 1(b), maintaining the drug premises. This is also charged in Count 8.

Both Racketeering Act 1(b) of Count 1 and Count 8 allege that from at least as early as in or about October 2004 through on or about May 21, 2009, Defendant Paul Bergrin and others, as an owner and occupant, managed or

controlled a building located at 710 Summer Avenue, Newark, New Jersey, and he knowingly opened, leased, rented, used, profited from, made available for use such place for the purpose of unlawfully storing and distributing a controlled substance, i.e., cocaine, in violation of Title 21, U. S. Code, section 856(a)(2), and Title 18, U. S. Code, section 2.

In order for you to find the Defendant guilty of this charge, the Government must prove the following elements beyond a reasonable doubt:

First, that the Defendant managed or controlled a place;

Second, that the Defendant was an owner; lessee; agent; employee; occupant; or mortgagee of that place; and

Third, the Defendant knowingly rented; leased the place; profited from the place; made the place available for use, with or without compensation; and

Fourth, the Defendant did so for the purpose of unlawfully storing or distributing a controlled substance. The Government is not required to prove that that was the Defendant's sole purpose.

Both Racketeering Act 1(c) of Count 1 and Count 9 allege that from at least as early as in or about September 2004 through October 2005, Paul Bergrin and others knowingly opened, leased, rented, used, and maintained a building

located at 572 Market Street, Newark, New Jersey for the purpose of distributing a controlled substance, that is, cocaine.

In order for you to find the Defendant guilty of this charge, the Government must prove beyond a reasonable doubt the same four elements I just described to you.

Both Racketeering Act 1(d) of Count 1 and Count Ten allege that from at least as early as in or about 2008 through on or about May 20, 2009, Paul Bergrin and others opened, leased, rented, used and maintained a building located at 50 Park Place, Newark, New Jersey for the purpose of distributing a controlled substance, that is, cocaine, in violation of Title 21, U. S. Code, section 856 (a)(1), and Title 18, U. S. Code, section 2.

In order for you to find the Defendant guilty of this charge, the Government must prove beyond a reasonable doubt two elements:

First, that the Defendant knowingly opened, leased, rented, used or maintained a place, whether permanently or temporarily; and

Second, that he did so for the purpose of manufacturing, distributing, or using any controlled substance.

The Government must prove that manufacturing, distributing, or using any controlled substance was a

significant purpose for leasing, renting, using or maintaining the place.

The fourth act of racketeering activity alleged in Count 1, which relates to the murder of Kemo McCray, alleges that Paul Bergrin committed four separate offenses, any one of which constitutes the commission of Racketeering Act 4. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following four offenses.

Both Racketeering Act 4(a) of Count 1 and Count 12 alleged that from on or about November 25, 2003 through on or about March 2, 2004, Paul Bergrin knowingly and intentionally conspired and agreed with others to murder a witness to prevent his testimony at an official proceeding.

Title 18, U. S. Code, section 1512(k), provides that: "Whoever conspires to commit any offense under...[section 1512]...is guilty of a crime against the United States." One of the offenses listed, in section 1512(a), provides that: "Whoever kills...another person, with intent to prevent the attendance or testimony of any person in an official proceeding" is guilty of a crime against the United States.

In order to prove the existence of the conspiracy

charged in Racketeering Act 4(a) and in Count 12, the Government must establish two elements beyond a reasonable doubt: First, that two or more persons formed, reached, or entered into an unlawful agreement to murder Kemo McCray with the intent to prevent Mr. McCray's attendance or testimony at an official proceeding, and, second, that at some time during the existence or life of that unlawful agreement, Defendant Bergrin knew the purpose of that agreement and intentionally joined in it.

I have already given you detailed instructions about what the Government must prove to show a conspiracy and the Defendant's membership in the conspiracy. I'll now give you instructions about the object of the particular conspiracy charged in Racketeering Act 4(a) and in Count 12.

The Government must prove beyond a reasonable doubt that the object of the illegal agreement charged in Racketeering Act 4(a) and in Count 12 was to murder Kemo McCray, with the specific intent of preventing his testimony at an official proceeding. Murder is defined in Title 18, section 1111(a), and requires the Government to prove that the murder was both premeditated and committed with malice aforethought.

Let me define some of these terms.

An act is done with premeditation if it is done upon planning or deliberation. In order to satisfy this

element, the Government must prove that the Defendant killed the victim 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. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the Defendant, after forming the intent to kill, to be fully conscious of his intent, and to have thought about the killing.

"Malice aforethought" means an intent, at the time of the killing, willfully to take the life of a human being, or an intent to act in callous and wanton disregard of the consequences to human life; but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.

In determining whether the object of the unlawful agreement charged in Racketeering Act 4(a) and in Count 12 was to murder Kemo McCray with malice aforethought, you should consider all the evidence concerning the facts and circumstances preceding, surrounding and following the murder which tend to shed light upon the question of intent.

"Official proceeding" means a proceeding before a judge or a court of the United States. I instruct you that a Federal criminal trial is an "official proceeding" within

the meaning of section 1512.

It is not necessary that the victim be under subpoena or scheduled to be a witness in a case. The statute purposely uses the term "person" instead of "witness."

Aiding and Abetting the Murder of a Witness.

Both Racketeering Act 4(b) of Count 1 and Count 13 charge Defendant Bergrin with aiding and abetting the murder of a witness to prevent his testimony at an official proceeding, in violation of Title 18, U. S. Code, section 1512(a)(1)(A), 1512(a)(3)(A) and section 2.

As I just explained, section 1512(a) provides that: "Whoever kills...another person, with intent to...prevent the attendance or testimony of any person in an official proceeding" is guilty of a crime against the United States.

The aiding and abetting statute, Title 18, U. S. Code, section 2, provides that:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

A person may be guilty of an offense because he personally committed the offense himself or because he aided and abetted another person in committing the offense.

A person who has aided and abetted another person in committing an offense is often called an accomplice. The person whom the accomplice aids and abets is known as the principal.

In this case, the Government alleges that Defendant Paul Bergrin aided and abetted others in murdering a witness with the intent to prevent his testimony, as charged in Racketeering Act 4(b) and in Count 13 of the Indictment. In order to find Defendant guilty as an aider and abetter of this offense, you must find that the Government proved beyond a reasonable doubt each of the following four requirements:

First, that someone committed each of the elements of the murder offense, as I have explained those elements to you earlier in these instructions. That person need not have been charged with or found guilty of the offense, however, as long as you find that the Government proved beyond a reasonable doubt that someone committed the offense;

Second, that Mr. Bergrin knew that someone was committing or was going to commit murder of Kemo McCray to prevent him from testifying at an official proceeding;

Third, that Mr. Bergrin knowingly did some act for the purpose of aiding, assisting, soliciting, facilitating, or encouraging another in committing that murder and with the intent that the murder be carried out;

And, fourth, that Mr. Bergrin's acts did, in some way, aid, assist, facilitate, encourage, someone in murdering Kemo McCray.

Paul Bergrin's acts need not themselves be against the law. In deciding whether Mr. Bergrin had the required knowledge and intent, you may consider both direct and circumstantial evidence, including Defendant's words and actions and the other facts and circumstances. However, evidence that Mr. Bergrin merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense is not enough for you to find him guilty as an aider and abetter. If the evidence shows that the Defendant knew that the offense was being committed or was about to be committed, but does not also prove beyond a reasonable doubt that it was his intent and purpose to aid, assist, encourage, facilitate, or otherwise associate himself with the offense, you may not find Mr. Bergrin guilty of the offense as an aider and abetter. The Government must prove beyond a reasonable doubt that the Defendant in some way participated in the murder of Kemo McCray as something

Defendant wished to bring about and to make succeed. The Government needs to show some affirmative participation by Mr. Bergrin which at least encouraged another to murder Mr. McCray.

Now, as you know, Mr. Bergrin was a licensed practicing attorney at the time of the conduct alleged in Racketeering Acts 4(a) and 4(b) and in Counts 12 and 13. Mr. Bergrin contends that certain aspects of his alleged conduct constituted lawful and legitimate legal representation of a client in connection with or in anticipation of an official proceeding.

I instruct you that it is a defense to the charges in the Indictment that the Defendant's acts constituted lawful and legitimate legal representation of a client. The burden of proof is on the Government to prove beyond a reasonable doubt that the Defendant was not engaged in lawful and legitimate legal representation of a client in connection with or in anticipation of an official proceeding. If the Government proves beyond a reasonable doubt that Mr. Bergrin acted with the specific intent of preventing Mr. McCray from testifying at an official proceeding, then this defense is not available to Mr. Bergrin .

Racketeering Act 4(c). This is conspiracy to commit murder under New Jersey law.

Racketeering Act 4(c) of Count 1 charges that Defendant Paul Bergrin did knowingly and intentionally conspire and agree with others to cause the death and serious bodily injury resulting in death of another person, namely, Kemo McCray, in violation of sections 2C:5-2 and 2C:11-3(1)&(2) of New Jersey statutes.

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

One, agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

Two, agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

In order for you to find Defendant guilty of the crime of conspiracy, the Government must prove beyond a reasonable doubt the following elements:

One, that the Defendant agreed with another person or persons that they or one or more of them would engage in conduct which constitutes a crime or an attempt or solicitation to commit such crime;

Two, that the Defendant's purpose was to promote or facilitate the commission of the crime of murder.

A person acts purposely with respect to the nature of his conduct or a result thereof, if it is his conscious object to engage in conduct of that nature or cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist.

In order to find the Defendant guilty of the crime of conspiracy, the Government does not have to prove that he actually committed the crime of murder. However, to decide whether the Government has proven the crime of conspiracy, you must understand what constitutes the crime of murder.

A person is guilty of murder if he:

One, caused the victim's death or serious bodily injury that then resulted in the victim's death; and

Two, the Defendant did so purposely or knowingly.

In order to find the Defendant guilty of murder, the Government is required to prove each of the following elements beyond a reasonable doubt:

One, that the Defendant caused Kemo McCray's death or serious bodily injury that then resulted in Kemo McCray's death, and

Two, that the Defendant did so purposely or knowingly.

One element that the Government must prove beyond a reasonable doubt is that the Defendant acted purposely or

knowingly.

A person acts purposely when it is the person's conscious object to cause death or serious bodily injury resulting in death.

A person acts knowingly when the person is aware that it is practically certain that his conduct will cause death or serious bodily injury resulting in death.

The nature of the purpose of knowledge with which the Defendant acted toward Kemo McCray is a question of fact for you the jury to decide. Purpose and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. It is not necessary for the Government to produce a witness or witnesses who could testify that the Defendant stated, for example, that his purpose was to cause death or serious bodily injury resulting in death; or that he knew that his conduct would cause death or serious bodily injury resulting in death. It is within your power to find that proof of purpose or knowledge has been furnished beyond a reasonable doubt by inferences which may arise from the nature of the acts and the surrounding circumstances. Such things as the place where the acts occurred, the weapon used, the location, number and nature of wounds inflicted, and all that was done or said by the Defendant preceding, connected with, and immediately succeeding the events leading to the

death of Kemo McCray are among the circumstances to be considered.

Although the Government must prove that the Defendant acted either purposely or knowingly, the Government is not required to prove a motive. If the Government has proved the essential elements of the offense beyond a reasonable doubt, the Defendant must be found guilty of that offense regardless of the Defendant's motive or lack of motive. If the Government, however, has proved a motive, you may consider that insofar as it gives meaning to other circumstances. On the other hand, you may consider the absence of motive in weighing whether or not the Defendant is guilty of the crime charged.

The other element that the Government must prove beyond a reasonable doubt is that the Defendant caused Kemo McCray's death or serious bodily injury resulting in death.

As I previously advised you, in order to convict the Defendant of murder, the Government must prove beyond a reasonable doubt that the Defendant either purposely or knowingly caused the victim's death or serious bodily injury resulting in death. In that regard, "serious bodily injury" means bodily injury that creates a substantial risk of death. A substantial risk of death exists where it is highly probable that the injury will result in death.

In order for you to find the Defendant guilty of

purposeful serious bodily injury murder, the Government must prove beyond a reasonable doubt that it was the Defendant's conscious object to cause serious bodily injury that then resulted in the victim's death; that the Defendant knew that the injury created a substantial risk of death; and that it was highly probable that death would result. In order for you to find the Defendant guilty of knowing serious bodily injury murder, the Government must prove beyond a reasonable doubt that the Defendant was aware that it was practically certain his conduct would cause serious bodily injury that then resulted in the victim's death; that the Defendant knew that the injury created a substantial risk of death, and that it was highly probable that death would occur.

Whether the killing is committed purposely or knowingly, causing death or serious bodily injury resulting in death must be within the design or contemplation of the Defendant.

You have to decide whether the Defendant's purpose was that he or a person with whom he was conspiring would commit the crime of murder. For Mr. Bergrin to be found guilty of conspiracy, the Government has to prove beyond a reasonable doubt that when he agreed it was his conscious object or purpose to promote or make it easier to commit murder.

Racketeering Act 4(d) of Count 1 charges that

Paul Bergrin is legally responsible for the criminal conduct of Anthony Young, in violation of Section 2 C:2-6 of New Jersey's statutes, which reads in pertinent part as follows:

"A person is guilty of an offense if it is committed by his own conduct or the conduct of another person for which he is legally accountable, or both."

A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of an offense.

A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of the offense, he solicits such other person to commit it and/or aids or agrees or attempts to aid such other person in planning or committing it.

This provision of the law means that not only is the person who actually commits the criminal act responsible for it but one who is legally accountable as an accomplice is also responsible as if he committed the crime himself.

In this case, the Government alleges that the Defendant is guilty of the crime committed by Anthony Young because he acted as his accomplice.

In order to find the Defendant guilty, the Government must prove beyond a reasonable doubt each of the

following elements:

One, that Anthony Young committed the crime of murder, as I previously explained to you.

Two, that the Defendant Mr. Bergrin solicited him to commit it and did aid or agree or attempt to aid him in planning or committing it.

Three, that the Defendant Mr. Bergrin's purpose was to promote or facilitate the commission of the offense.

And, four, that Mr. Bergrin possessed the criminal state of mind that is required to be proved against the person who actually committed the act, that is, knowingly and purposely.

Remember that one acts purposely with respect to his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result.

"Solicit" means to strongly urge, suggest, lure, or proposition. "Aid" means to assist, support or supplement the efforts of another. "Agrees to aid" means to encourage by promise of assistance or support. "Attempt to aid" means that a person takes substantial steps in a course of conduct designed to or planned to lend support or assistance in the efforts of another to cause the commission of a substantive offense.

If you find that the Defendant, with the purpose

of promoting or facilitating the commission of the murder of Kemo McCray, solicited Anthony Young to commit it or aided or agreed or attempted to aid him in planning or committing it, then you should consider him as if he committed the crime himself.

Mere presence at or near the scene does not make one a participant in the crime, nor does the failure of a spectator to interfere make him a participant in the crime. It is, however, a circumstance to be considered with the other evidence in determining whether he was present as an accomplice. Presence is not in and of itself conclusive evidence of that fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt, there must exist a community of purpose and actual participation in the crime committed.

While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is possible for the jury to infer that he assented thereto, lent to it his countenance and approval and was thereby aiding the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.

An accomplice may be convicted on proof of the commission of a crime or of his complicity therein even though the person who it is claimed committed the crime has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity from prosecution or conviction or has been acquitted.

In order to convict the Defendant as an accomplice to the crime charged, you must find that the Defendant had the purpose to participate in that particular crime. He must act with the purpose of promoting or facilitating the commission of the substantive crime with which he is charged.

It is not sufficient to prove only that the Defendant had knowledge that another person was going to commit the crime charged. The Government must prove that it was Defendant's conscious object that the specific conduct charged be committed. In sum, in order to find the Defendant guilty of committing the crime of murder, the Government must prove each of the elements beyond a reasonable doubt.

If you find that the Government has proven each and every one of the elements that I have explained to you beyond a reasonable doubt, then you must find the Defendant guilty. If on the other hand you find that the Government has failed to prove one or more of these elements beyond a

reasonable doubt, then you must find the Defendant not guilty. As I have previously instructed, your verdict must be unanimous. All 12 jurors must agree.

We're going to have to take a short break, not long, but I've got a lot more to go, and I want to get this done before you go to lunch. But I need a few minutes. Okay?

So why don't we just take 10 minutes?

THE COURT CLERK: All rise.

(The jury exits)

(Defendant present)

(Jury out)

THE COURT: Unbeknownst to me, the jury's food was delivered, so when they got upstairs, all their food was there. So I let them have a 15-minute lunch. That's what took so long.

So let's hopefully get through this.

THE COURT CLERK: All rise.

(The jury enters)

THE COURT: Be seated.

It's my understanding we had a surprise food arrival that I didn't know about, so I couldn't tempt you to let it sit up there. So I hope you enjoyed your quick lunch, and we'll try to get through this as reasonably as I can.

With respect to RICO, Racketeering Act 5.

The fifth act of racketeering activity alleged in Count 1, which relates to the interstate travel and transportation in aid of a prostitution business, alleges that Mr. Bergrin committed two separate offenses, either of which is sufficient to prove Racketeering Act 5. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following two offenses.

Both Racketeering Act 5(a) of Count 1 and Count 15 charge that on December 10, 2004, in the counties of Essex, Hudson and Mercer, in the District of New Jersey, and elsewhere, Paul Bergrin and others knowingly did travel in and use the mail and facilities in interstate commerce, and cause the travel in and use of the mail and facilities in interstate commerce, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, prostitution, contrary to New York Law, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, U. S. Code, section 1952(a)(3) and section 2, which is the aiding

and abetting statute I described previously.

Now, a number of the remaining racketeering acts allege the violation of Title 18, section 1952, which I will refer to as the Travel Act for convenience. So please pay attention to these instructions as I will repeat for additional Travel Act offenses only as necessary.

Title 18, U. S. Code, section 1952(a)(3) provides

"Whoever travels in interstate or foreign commerce or uses...any facility in interstate or foreign commerce, with intent to...(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity, and thereafter performs or attempts to perform...an act described in paragraph...(3)

commits a crime against the United States.

As used in section 1952(a)(3), the term "unlawful activity" includes "prostitution...in violation of the laws of the State in which committed."

In order to prove the crime of traveling in interstate commerce or using a facility in interstate commerce to distribute the proceeds of an unlawful activity or to promote an unlawful activity, the Government must prove the following elements beyond a reasonable doubt:

First, that on or about the dates and between the places alleged in the Indictment, the Defendant Paul Bergrin

traveled or caused the travel from one state to another, or used or caused the use of a facility in interstate commerce;

Second, that Defendant Paul Bergrin did so with the specific intent to promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of the unlawful activity alleged in the Indictment;

Third, the unlawful activity alleged in Racketeering Act 5(a) of Count 1 and Count 15 was prostitution, contrary to the laws of the State of New York; and

Fourth, either while traveling or after the interstate travel or use of a facility in interstate commerce, Defendant Bergrin knowingly and deliberately performed an act, or attempted to perform an act, in furtherance of promoting, managing, establishing, carrying on or facilitating the promotion, management, establishment or carrying on of the unlawful activity.

The first element is that Paul Bergrin traveled or caused the travel, in interstate commerce, or used, or caused the use of, a facility in interstate commerce. The term "travels in interstate commerce" means simply travel or transportation from one state to another. The term "uses any facility in interstate commerce" means employing or utilizing any method of communication or transportation

between one state and another. The term "uses any facility in interstate commerce" for example includes the use of the telephone or a fax machine. The Government does not have to prove that a telephone call or fax actually crossed state lines.

It is not necessary for the Government to prove that any travel from one state to another or any use of a facility in interstate commerce was contemplated or planned at the time that the course of activity began or that the Defendant knew that he was actually traveling in interstate commerce, or using a facility in interstate commerce. It is not necessary for the Government to prove that the promotion or facilitation of the activity alleged to be unlawful was the only reason for the interstate travel or use of an interstate facility, or that the travel, the use of an interstate facility was essential to that activity.

The Government must prove beyond a reasonable doubt, however, that the Defendant traveled in interstate commerce or used a facility in interstate commerce with the specific intent, at least in part, to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of the unlawful activity described in the Indictment. That is, the interstate act's relationship to the unlawful activity must be more than incidental. For example, travel by customers or patrons

would not be sufficient to find the Defendant guilty of a Travel Act violation.

The second element that the Government must prove is that Paul Bergrin traveled, caused the travel, in interstate commerce, or used, or caused the use of a facility in interstate commerce with the specific intent to promote, or facilitate the promotion, of an unlawful activity. The phrase to "promote, or facilitate the promotion, of any unlawful activity" means to do any act that would cause in any way the "unlawful activity" described in Racketeering Act 5A and Count 15 to be accomplished or to assist the "unlawful activity" - namely, conspiracy to promote prostitution in violation of New Jersey law. And you must all unanimously agree on the unlawful activity involved.

The third element that the Government must prove for Racketeering Act 5(a) and Count 15 is that the unlawful activity described therein was promoting prostitution in violation of the laws of the State of New York, aiding and abetting the promotion of prostitution, or conspiring to promote prostitution.

In the last paragraph, should that have been New York rather than New Jersey?

MR. SANDERS: Yes.

THE COURT: That's what I thought.

Under New York law, a person is guilty of promoting prostitution when that person knowingly advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.

Some of the terms used in this definition have their own special meaning in New York law. I will now give you the meaning of the following terms: "Prostitution," "advances prostitution," "profits from prostitution," and "knowingly."

"Prostitution" means the act or practice of engaging, or agreeing or offering to engage in sexual conduct with another person in return for a fee.

A person "advances prostitution" when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

A person "profits from prostitution" when, acting

other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

A person "knowingly" advances or profits from prostitution when that person is aware that he is advancing or profiting from prostitution.

In order for you to find Defendant Paul Bergrin guilty of this crime, the Government is required to prove, from all of the evidence in the case, beyond a reasonable doubt, both of the following two elements:

One, that on or about December 10, 2004, in the counties of Essex, Hudson, and Mercer, in the District of New Jersey, and elsewhere, Paul Bergrin advanced or profited from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; and

That the Defendant did so knowingly.

Therefore, if you find that the Defendant has proven beyond a reasonable doubt both of those elements, you may find the Defendant guilty of the crime of promoting prostitution.

On the other hand, if you find that the Government has not proven beyond a reasonable doubt either one or both of those elements, you must find the Defendant not guilty of the crime of promoting prostitution, and must find that he did not commit Racketeering Act 5(a), using interstate travel to promote prostitution on December 10, 2004.

Like Federal law, New York law recognizes that two or more individuals can act jointly to commit a crime, and that in certain circumstances, each can be held criminally liable for the acts of the other. In that situation, those persons can be said to be "acting in concert" with each other.

New York law defines the circumstances under which one person may be criminally liable for the conduct of another. That definition is as follows:

When one person engages in conduct which constitutes an offense, another is criminally liable for such conduct when, acting with the state of mind required for the commission of that offense, he or she solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

Like Federal law governing accomplice liability, under that definition, mere presence at the scene of a crime, even with knowledge that the crime is taking place, or mere association with a perpetrator of a crime, does not

by itself make a defendant criminally liable for that crime.

In order for the Defendant to be held criminally liable for the conduct of others which constitutes an offense, you must find beyond a reasonable doubt

One, that he solicited, requested, commanded, importuned, or intentionally aided persons to engage in that conduct; and

Two, that he did so with the state of mind required for the commission of the offense.

If it is proven beyond a reasonable doubt that the Defendant is criminally liable for the conduct of another, the extent or degree of the Defendant's participation in the crime does not matter. A defendant proven beyond a reasonable doubt to be criminally liable for the conduct of another in the commission of a crime is as guilty of the crime as if the Defendant, personally, had committed every act constituting the crime.

The Government has the burden of proving beyond a reasonable doubt that the Defendant acted with the state of mind required for the commission of the crime, and either personally, or by acting in concert with another person, committed each of the remaining elements of the crime in concert with another person, committed each of the remaining elements of the crime.

Finally, like Federal law, under New York law, a

person is guilty of conspiracy when, with intent that conduct constituting a felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct.

The term "intent" used in this definition has its own special meaning in New York law. I will give that to you now.

"Intent" means conscious objective or purpose. Thus, a person acts with the intent that conduct constituting a felony be performed when his or her conscious objective or purpose is that such conduct be performed.

I have already explained to you the elements of the object of the alleged conspiracy, promoting prostitution in the third degree.

The fourth element of the Travel Act offense alleged in Racketeering Act 5(a) and Count 15 requires the Government to prove that Paul Bergrin knowingly and deliberately performed an act, or attempted to perform an act, to promote, manage, establish, carry on or facilitate the unlawful activity, after traveling or causing the travel interstate, or using, or causing the use of, a facility in interstate commerce. The act need not be illegal, in and of itself. The act simply must be some conduct done in furtherance of the unlawful activity after the interstate travel or the facility in interstate commerce had been used.

Both Racketeering Act 5(b) of Count 1 and Count 16 charge that on January 12, 2005, Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and use of the mail and facilities in interstate commerce, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, prostitution, contrary to New York law, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of Title 18, U. S. Code, section 1952(a)(3) and section 2.

I have just defined all of the elements of this offense to you. Please refer to those instructions, with the following differences: In order for you to find Mr. Bergrin guilty of this crime, the Government is required to prove, from all of the evidence, beyond a reasonable doubt, both of the following:

One, that on or about January 12, 2005, in the District of New Jersey --

That should be New Jersey there.

MR. GAY: Yes.

MR. SANDERS: Yes.

MR. GAY: Yes.

THE COURT: -- in the District of New Jersey, and elsewhere, Paul Bergrin advanced or profited from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; and

That the Defendant did so knowingly.

Therefore, if you find that the Government has not proven beyond a reasonable doubt either one or both of those elements, you must find the Defendant not guilty of the crime of promoting prostitution, and must find that he did not commit Racketeering Act 5(b) using interstate travel to promote prostitution on January 12, 2005.

The sixth act of racketeering activity alleged in Count 1, which relates to the interstate travel and transportation in aid of bribery of a witness, alleges that Paul Bergrin committed three separate offenses, any one of which is sufficient to prove Racketeering Act 6. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following three offenses.

Racketeering Act 6(a) charges that from on or about June 8, 2007 through in or about August 2007, in the

County of Essex, in the District of New Jersey and elsewhere, believing that an official proceeding and investigation was pending and about to be instituted against Client Criminal Abdul Williams, and with the purpose of promoting and facilitating the commission of the offense, Defendant Paul Bergrin and others, aided, agreed to aid, and attempted to aid another, namely, Jamal Muhammad, to accept and agree to accept any benefit in consideration of Muhammad testifying and informing falsely, in violation of sections 2C:2-6 and 2 C:28-5(c) of New Jersey's statutes.

Section 2C:28-5(c) of New Jersey's statutes reads, in pertinent part:

A person commits a crime of the third degree witness tampering, if he solicits, accepts or agrees to accept any benefit in consideration of his doing any of the following:

One, testify or inform falsely;

Two, withhold any testimony, information, document or thing;

Three, elude legal process summoning him to testify or supply evidence;

Four, absent himself from any proceeding or investigation to which he has been legally summoned; or

Five, otherwise obstruct, delay, prevent or impede an official proceeding or investigation.

I have already defined the concept of accomplice liability under New Jersey law in connection with Racketeering Act 4(d). You should refer back to those instructions. But I want to reiterate that in order to find Defendant Paul Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt each of the following elements:

One, that Jamal Muhammad committed the crime of witness tampering by accepting a bribe, which elements I will explain to you shortly;

Two, that Defendant Paul Bergrin solicited Muhammad to commit that crime and/or did aid or agree or attempt to aid Muhammad in planning or committing that crime;

Three, that Paul Bergrin's purpose was to promote or facilitate the commission of the offense; and

Four, that Paul Bergrin possessed the criminal state of mind that is required to be proved against the person who actually committed the act, that is, he acted purposely.

Under New Jersey law, a person commits a crime of witness tampering if he solicits, accepts or agrees to accept any benefit in consideration of his agreeing to testify or inform falsely.

The first element that the Government must prove

includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation." The Government must prove beyond a reasonable doubt that the statement made by Jamal Muhammad was false, and that he did not believe it to be true.

Under this section, however, there is no criminal liability for misstatements that are inadvertent in the sense that the declarant misunderstood the question put to him or unconsciously made a slip of the tongue in responding.

The Government also alleges that the Defendant made a statement that he did not believe to be true. The Defendant's belief that the statement was not true may be established by proof of actual knowledge on the part of the Defendant that the statement was untrue; or from proof of such facts from which it might reasonably be inferred that the Defendant believed the statement was untrue.

Additionally, under the law of New Jersey, a defendant cannot be found guilty of perjury solely on the testimony of one witness. New Jersey has adopted the test that the oath of a single witness must be supported by proof of corresponding testimony or for circumstances of such character as to clearly overcome the oath of the Defendant

and legal presumption of his innocence.

To corroborate means to strengthen, to confirm by additional security, to add strength. Corroborating circumstances when used in reference to testimony given are such as serve to strengthen the testimony, to render it more probable; such, in short, as may serve to impress a jury with a belief of its truth.

Evidence is not corroborative unless it tends to prove the fact alleged to have been falsely stated. It must relate to the substance of the evidence on which perjury is assigned; that is, it must be inconsistent with the truth of the Defendant's testimony before the official proceeding.

Falsification is "material" in the official proceeding if it could have affected course or outcome of that proceeding or the disposition of the matter. It is irrelevant if the declarant mistakenly believed that the falsification was not material.

If you find that the Government has proved each of these elements beyond a reasonable doubt, that is, Jamal Muhammad solicited, accepted, or agreed to accept a bribe in return for agreeing to testify falsely, that is, by providing a false statement under oath at an official proceeding, you must then decide whether Defendant Paul Bergrin knowingly and purposefully aided and abetted Muhammad in the commission of that offense. If the

Government has failed to prove any of these elements beyond a reasonable doubt, you must find that Jamal Muhammad did not commit the crime of witness tampering by soliciting, accepting, or agreeing to accept a bribe as consideration for testifying falsely, and you must find Defendant Paul Bergrin not guilty of aiding and abetting Muhammad.

I have already defined the concept of accomplice liability under New Jersey law in connection with Racketeering Act 4(d). You should refer back to those instructions. But I want to reiterate that to find the Defendant Paul Bergrin aided and abetted Jamal Muhammad, the Government must prove beyond a reasonable doubt each of the following:

One, that Jamal Muhammad committed the crime of witness tampering by purposely soliciting, accepting or agreeing to accept a benefit in exchange for agreeing to testify falsely at an official proceeding;

Two, that Defendant Paul Bergrin solicited Muhammad to commit that crime and/or did aid or agree or attempt to aid Muhammad in planning or committing that crime;

Three, that Defendant Paul Bergrin's purpose was to promote or facilitate the commission of the offense; and

Four, that Defendant Paul Bergrin possessed the criminal state of mind that is required to be proved against

the person who actually committed the act, that is, he acted purposely.

Both Racketeering Act 6(b) and Count 18 charge that, on or about June 21, 2007, in the County of Essex, in New Jersey and elsewhere, Defendant Paul Bergrin and others knowingly did travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, (a) bribery, contrary to section 2C:28-5 and 2C:26-6 of New Jersey's statutes, and, (b), the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, U. S. Code, sections 841 and 846, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of such unlawful activity, in violation of Title 18, U. S. Code, section 1952(a)(3) and section 2.

This is another Travel Act offense, and I have already defined for you the elements of that offense. I have also previously defined for you the unlawful activity charged in the Travel Act offense, bribery of a witness under New Jersey law, and conspiring to distribute a

controlled substance under Federal law. You do not need to find that the Travel Act offense involved both types of unlawful activity, so long as you unanimously agree that it involved at least one such unlawful activity and you unanimously agree as to which one it is.

Both Racketeering Act 6(c) and Count 19 charge that, on or about July 1, 2007, in the County of Essex, in the District of New Jersey and elsewhere, that Defendant Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, (a), bribery, contrary to New Jersey statute sections 2C:28-5 and 2C:2-6, and (b) the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, U. S. Code, sections 841 and 846, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of such unlawful activity, in violation of Title 18, U. S. Code, section 1952(a)(3) and section 2.

This is another Travel Act offense that I have already defined the elements of. I have also previously

defined for you the unlawful activity charged in this Travel Act offense, bribery of a witness under New Jersey law, and conspiring to distribute a controlled substance under Federal law. Again, you do not need to find that the Travel Act offense involved both types of unlawful activity, so long as you unanimously agree that it involved at least one such unlawful activity and you unanimously agree as to which one it is.

The seventh act of racketeering activity alleged in Count 1, which relates to the plot to murder witnesses in a criminal case against client criminal Vicente Esteves, alleges that Paul Bergrin committed six separate offenses, any one of which is sufficient to prove Racketeering Act 7. In order to find that Paul Bergrin committed this act of racketeering activity, you must unanimously find that the Government proved beyond a reasonable doubt that Paul Bergrin committed at least one of the following six offenses, and you must unanimous agree as to which one it is.

Racketeering Act 7(a) charges that, from in or about June 2008 through in or about April 2009, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, Paul Bergrin did knowingly and intentionally conspire and agree with others to cause the death and serious bodily injury resulting in death of

another person, namely, Danilo Chen-Pui and Carlos Noyola, in violation of sections 2C:5-2 and 2C:11-3 of New Jersey's statutes.

To prove Defendant Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt:

One, that the Defendant agreed with another person or persons that they or one or more of them would engage in conduct which constitutes a crime or an attempt or solicitation to commit such crime; and

Two, that the Defendant's purpose was to promote or facilitate the commission of the crime of murder.

I previously defined for you the elements of conspiracy to commit murder under New Jersey law in connection with Racketeering Act 4(c). Please refer back to those instructions.

Both Racketeering Act 7(b) and Count 21 charge that, on or about July 7, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21,

U. S. Code, sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, U. S. Code, section 1952(a)(2) and section 2.

This is another Travel Act offense, but because it charges a different subsection of the statute, I will define it for you.

Title 18, U. S. Code, section 1952(a)(2) provides that

Whoever travels in interstate or foreign commerce or uses...any facility in interstate or foreign commerce, with intent to...(2) commit any crime of violence to further any unlawful activity, and thereafter performs or attempts to perform...an act described in paragraph (2) [commits a crime against the United States].

To prove Defendant Paul Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt four elements:

First, that Defendant Paul Bergrin traveled or caused the travel from one state to another, or used or caused the use of a facility in interstate commerce.

Second, that Defendant Paul Bergrin did so with the intention to commit any crime of violence to further an unlawful activity;

Third, that the unlawful activity in question was

a conspiracy to distribute a controlled substance, in violation of Federal law, as charged in Racketeering Act 7(b) and Count 21 of the Indictment; and

Fourth, after the interstate travel or use of a facility in interstate commerce, Defendant Paul Bergrin knowingly and deliberately did an act, or attempted to do an act, in order to distribute the proceeds of the unlawful activity or to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of the unlawful activity described in the Indictment.

I previously gave you detailed instructions on the first and fourth elements of the Travel Act offense in connection with Racketeering Act 5(a). I refer you back to those instructions. However, because the second and third elements are different, I want to define them now.

The second element requires the Government to prove that the interstate travel in question was undertaken with the intent to commit a crime of violence. For purposes of Racketeering Act 7 and Counts 21 to 25, the crime of violence charged in the Indictment is conspiracy to commit murder under New Jersey law. I gave you detailed instructions on that offense with respect to Racketeering Act 4(c). You should apply those same instructions here to determine whether the Government has proven beyond a

reasonable doubt that the interstate travel was undertaken with the intention to commit a crime of violence.

The unlawful activity alleged in Racketeering Act 7, and in Counts 20 through 25, is conspiracy to distribute a controlled substance. I gave you detailed instructions on the elements of that offense in connection with Racketeering Act 1(a). You should apply those instructions here. However, you should keep in mind that the drug trafficking conspiracy alleged in Racketeering Act 7 is a different conspiracy from the conspiracy charged in Racketeering Act 1(a) and in Count 5. So you must determine whether there was a drug trafficking conspiracy as alleged in Racketeering Act 7 and in Counts 20 through 25 using the instructions I previously gave you.

Thus, to summarize, with respect to the second element, the Government must prove beyond a reasonable doubt that Defendant --

Every time I say the Government must prove something, it's beyond a reasonable doubt. So I may not continue to keep saying that here.

-- must prove that Paul Bergrin traveled or used facilities in interstate commerce with the specific intent to commit a crime of violence, that is, the crime of conspiracy to commit murder, and that he did so to further an unlawful activity, that is, to distribute and conspire to

distribute a controlled substance, that is, cocaine, as alleged in Racketeering Act 7 and in Counts 20 through 25.

Both Racketeering Act 7(c) and Count 22 charge that, on or about August 5, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, U. S. Code, sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, U. S. Code, section 1952(a)(2) and section 2.

This is another section 1952(a)(2) Travel Act offense, and it requires the Government to prove the same elements I described with respect to Racketeering Act 7(b). You must refer to those definitions.

Both Racketeering Act 7(d) and Count 23 charge that, on or about August 21, 2008, in the counties of Essex and Monmouth, in the District of New Jersey, that Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel

in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to Title 21, U. S. Code, sections 841 and 846, and thereafter, did perform and attempt to perform an act to commit a crime of violence to further such unlawful activity, in violation of Title 18, U. S. Code, section 1952(a)(2) and section 2.

Again, a Travel Act offense, and it requires the Government to prove the same elements I described previously. Please refer to those definitions in Racketeering Act 7(b).

Both Racketeering Act 7(e) and Count 24 charge that, on or about September 5, 2008, in the counties of Essex and Monmouth in the District of New Jersey and elsewhere, that Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and a conspiracy to distribute a controlled substance, contrary to the statutes. I'm not reading them again.

This is another section 1952(a)(2) Travel Act

offense and requires the Government to prove the same elements I described previously in Racketeering Act 7(b). Refer to those definitions.

Both Racketeering Act 7(f) and Count 25 charge that, on or about December 8, 2008, in Essex and Monmouth Counties, in the District of New Jersey and elsewhere, Paul Bergrin and others did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to the statutes.

This is another section 1952(a)(2) Travel Act offense, and it requires the Government to prove the same elements I described with respect to Racketeering Act 7(b). Refer to those definitions.

Both Racketeering Act 8 and Count 26 charge that, on or about September 4, 2008, in the County of Essex, in the District of New Jersey and elsewhere, Paul Bergrin did knowingly and for the purposes of evading the reporting requirements of Title 31, U. S. Code, section 5331, and the regulations issued thereunder, cause a nonfinancial trade and business, namely Law Office of Paul Bergrin, to fail to file a report required under Title 31, U.S. Code, section

5331, in connection with the receipt by Law Office of Paul Bergrin of United States currency in amounts over $10,000, in violation of Title 31, U.S. Code, section 5324(b), and Title 18, U.S. Code, Section 2.

Section 5324(b)(1) of Title 31 of the U.S. Code provides that

"No person shall, for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section...cause or attempt to cause a nonfinancial trade or business to fail to file a report required under section 5331 or any regulation prescribed under such section."

Section 5331 of Title 31 provides that any person who is engaged in a trade or business, and who, in the course of such trade or business, receives more than $10,000 in coins or currency in 1 transaction (or 2 or more related transactions)...shall file a report described in subsection (b) with respect to such transaction (or related transactions) with the Financial Crimes Enforcement Network at such time and in such manner as the Secretary may, by regulation, prescribe."

Pursuant to section 5331(b), the Secretary of the Treasury has promulgated a regulation requiring a trade or business that receives more than $10,000 in currency in one transaction to file, within 15 days of the transaction, an

I.R.S. Form 8300 with the Financial Crimes Enforcement Network.

To find Defendant Paul Bergrin guilty of this offense, the Government must prove the following four elements:

One, that on or about September 4, 2008, in the County of Essex, in the District of New Jersey and elsewhere, Defendant Paul Bergrin was engaged in a trade or business, that is, the Law Office of Paul Bergrin.

Two, that Defendant Bergrin had knowledge of the currency transaction reporting requirements.

Three, that in the course of that trade or business, and with such knowledge, Defendant Bergrin knowingly caused or attempted to cause the trade or business to fail to file a Form 8300 with the Government within 15 days of a currency transaction wherein he received more than $10,000 in cash; and

Four, that the purpose of the transaction was to evade the transaction reporting requirements in section 5331 of Title 31.

The term "purpose" is the same as "intent." As I said earlier, I will define the terms like "knowingly" and "intentionally" later on.

To summarize, in order for you to find the Defendant guilty of the Racketeering Influenced and Corrupt

Organizations Act offense charged in Count 1, the Government must prove all of the following five elements beyond a reasonable doubt:

One, the existence of an association-in-fact enterprise;

Two, that the enterprise was engaged in or its activities affected interstate or foreign commerce;

Three, that Paul Bergrin was employed by or associated with that enterprise;

Four, that Paul Bergrin knowingly conducted that enterprise's affairs or that he knowingly participated, directly or indirectly, in the conduct of that enterprise's affairs; and

Five, that Paul Bergrin knowingly conducted or participated, directly or indirectly, in the conduct of that enterprise's affairs through a pattern of racketeering activity, as alleged in the Indictment.

If you find that the Government has proven each one of the elements beyond a reasonable doubt, you must find the Defendant guilty of the Racketeering Influenced and Corrupt Organizations Act. However, if you find that the Government has not proven all of these elements beyond a reasonable doubt, you must find him not guilty.

Count 2-RICO conspiracy.

I'm sorry that we thought these would be over by

lunchtime.

Count 2 of the Indictment charges that Paul Bergrin agreed or conspired with on or more other persons to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, as I have already explained.

It is a Federal crime for two or more persons to agree to conspire to commit any offense against the United States, even if they never actually achieve their objective.

In order for you to find Paul Bergrin guilty of conspiracy to conduct or to participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, you must find that the Government proved beyond a reasonable doubt each of the following three elements:

One, that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity;

Second, that Paul Bergrin was a party to or member of that agreement; and

Three, that Mr. Bergrin joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering

activity and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that Mr. Bergrin and at least one other alleged conspirator shared a unity of purpose and the intent to achieve the objective of conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity.

The meanings of the elements "enterprise," "employed by or associated with, "conduct or participate, directly or indirectly, in the conduct of that enterprise's affairs," and "through a pattern of racketeering activity" are the same as I have just explained to you with respect to the RICO offense charged in Count 1. However, the RICO conspiracy charged in Count 2 is a distinct offense from the RICO offense charged in Count 1. And there are several important differences between these two, RICO and RICO conspiracy."

One important difference is that, unlike the requirements to find Defendant Bergrin guilty of the RICO offense in Count 1, in order to find Mr. Bergrin guilty of the RICO conspiracy charged in Count 2, the Government is not required to prove that the alleged enterprise actually existed, or that the enterprise actually engaged in or its activities actually affected interstate or foreign commerce. Rather, because an agreement to commit a RICO offense is the

essence of a RICO conspiracy, the Government need only prove that Mr. Bergrin joined the conspiracy and that if the object of the conspiracy was achieved, the enterprise would be established and the enterprise would be engaged in or its activity would affect interstate or foreign commerce.

Similarly, unlike what is required to find Defendant Bergrin guilty of the RICO offense, in order to find him guilty of the RICO conspiracy charged in Count 2, the Government is not required to prove that Mr. Bergrin was actually employed by or associated with the enterprise, or that he agreed to be employed by or to be associated with the enterprise. Nor does the RICO conspiracy charge require the Government to prove that Mr. Bergrin personally participated in the operation or management of the enterprise or agreed to personally participate in the operation or management of the enterprise. Rather, you may find Mr. Bergrin guilty of the RICO conspiracy offense if the evidence establishes that he knowingly agreed to facilitate or further a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who would be employed by or associated with the enterprise and who would participate in the operation or management of the enterprise.

Finally, in order to find Defendant Bergrin guilty of the RICO conspiracy charged in Count 2, the Government is

not required to prove that Mr. Bergrin personally committed or agreed to personally commit any act of racketeering activity. Indeed, it is not necessary for you to find that the objective or purpose of the conspiracy were achieved at all. However, the evidence must establish that Mr. Bergrin knowingly agreed to facilitate or further a scheme which, if completed, would include a pattern of racketeering activity committed by at least one other conspirator.

In short, to find Mr. Bergrin guilty of the RICO conspiracy charged in Count 2, you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin joined in an agreement or conspiracy with another person or persons, knowing that the objective or purpose was to conduct or to participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity, and intending to join with the other person or persons to achieve that objective.

The Indictment need not specify the predicate racketeering acts that Mr. Bergrin agreed would be committed by some member of the conspiracy in the conduct of the affairs of the enterprise. The Indictment alleges that Mr. Bergrin agreed that multiple racketeering acts would be committed. You are not limited to considering only the specific racketeering acts alleged in Count 1 of the Indictment. That's the RICO substantive count. Rather, you

may also consider the evidence presented of other racketeering acts committed or agreed to be committed by any co-conspirator in furtherance of the enterprise's affairs, including racketeering acts for which Mr. Bergrin is not charged in Count 1, to determine whether Mr. Bergrin agreed that at least one member of the conspiracy would commit two or more racketeering acts.

Moreover, in order to convict Mr. Bergrin of the RICO conspiracy offense, your verdict must be unanimous as to which type or types of racketeering activity he agreed would be committed; for example, murder, conspiracy to commit murder, witness bribery, or any combination thereof.

The Indictment charges that Paul Bergrin and the other alleged co-conspirators were all members of one single conspiracy to commit several Federal crimes. Whether a single conspiracy or multiple conspiracies exist is a question of fact for you.

In order to find Mr. Bergrin guilty of the conspiracy charged in the Indictment, you must find that the Government proved beyond a reasonable doubt that Mr. Bergrin was a member of that conspiracy. If the Government fails to prove that Mr. Bergrin was a member of the conspiracy charged in the Indictment, then you must find Mr. Bergrin not guilty of the offense, even if you find that there were multiple conspiracies and that Mr. Bergrin was a member of a

separate conspiracy other than the one charged. However, proof that Mr. Bergrin was a member of some other conspiracy would not prevent you from also finding him guilty of the conspiracy charged in the Indictment, if you find that the Government proved beyond a reasonable doubt that Mr. Bergrin was a member of the conspiracy charged.

In deciding whether there was one single conspiracy or more than one, you should concentrate on the nature of the agreement proved by the evidence. To prove a single conspiracy, the Government must prove that each of the alleged members or conspirators agreed to participate in what he knew or should have known was a single group activity directed toward common objectives. The Government must prove that there was a single agreement on overall objectives.

Multiple conspiracies are separate agreements operating independently of each other. However, a finding of a master conspiracy that includes other sub-schemes does not constitute a finding of multiple, unrelated conspiracies. A single conspiracy may exist when there is a continuing core agreement that attracts different members at different times and which involves different sub-groups committing acts in furtherance of an overall objective.

In determining whether a series of events constitutes a single conspiracy or separate and unrelated

conspiracies, you should consider whether there was a common goal among the alleged conspirators; whether there existed common or similar methods; whether and to what extent alleged participants overlapped in their various dealings; whether and to what extent the activities of the alleged conspirators were related and interdependent; how helpful each alleged co-conspirator's contributions were to the goals of the others; and whether the scheme contemplated a continuing objective that would not be achieved without the ongoing cooperation of the conspirators.

A single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members would play. A single conspiracy may exist even if different members joined at different times, or the membership of the conspiracy changed over time. Similarly, there be a single conspiracy even though there were different sub-groups operating in different places or many acts or transactions committed over a long period of time. You may consider these things in deciding whether there was one single conspiracy or more than one conspiracy, but they are not necessarily controlling. What is controlling is whether the Government has proved beyond a reasonable doubt that there was one overall agreement on common objectives.

Counts 3 and 4 of the Indictment charge

Mr. Bergrin with committing a crime of violence in aid of a racketeering enterprise in violation of section 1959 of Title 18 of the U. S. Code, also known as VICAR, V-I-C-A-R. Count 3 arises from the alleged conspiracy to murder Kemo McCray, and Count 4 arises from the alleged conspiracy to murder witnesses against Vicente Esteves. Because the elements for these offenses are largely the same, I am going to instruct you as to both offenses at the same time.

Section 1959(a) of Title 18 of the U. S. Code provides that

"Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value in an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders...any individual in violation of the laws of any State or the United States, or attempts or conspires to do so, shall be punished..."

To convict a defendant of a VICAR offense, the Government must prove each of the following elements:

One, that on or about the date charged in Counts 3 and 4 of the Indictment, an "enterprise" existed;

Two, that the charged enterprise engaged in, or affected, interstate or foreign commerce;

Three, that the enterprise engaged in racketeering

activity;

Four, that for the purposes of Count 3, Defendant Bergrin conspired to murder, or aided and abetted in the murder, of Kemo McCray. For purposes of Count 4, Defendant Bergrin conspired to commit murder.

Five, that the Defendant's purpose in conspiring to commit the crime of violence was either to gain entrance to, or to maintain, or to increase his position in the enterprise or as consideration for the receipt of, or consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity.

I already instructed you with respect to the terms "enterprise," "racketeering activity," and "interstate commerce" in Count 1. I also provided you with detailed instructions regarding the New Jersey law governing murder, aiding and abetting a murder, and conspiracy to commit murder when I instructed you on Racketeering Acts 4(c), 4(d), and 7(a) of Count 1. You should use those instructions with respect to Counts 3 and 4.

I will now instruct you on the fifth element of the VICAR offense.

With respect to both Counts 3 and 4, the Government must prove beyond a reasonable doubt that the underlying crime of violence was committed for the purposes

of either maintaining or increasing position in, or receiving anything of pecuniary value from, the charged enterprise.

The Government need only prove that the crime of violence was committed by the Defendant for one of these purposes. You need not, however, find that these purposes were the Defendant's sole or even principal motive. For example, it does not matter if the Defendant had additional purposes for committing the crime of violence, such as personal reasons, as long as you find that among of the purposes for which the Defendant committed the crime of violence was one of the two alternative purposes that I just discussed.

The Government may prove the fifth element of the VICAR offenses by proving beyond a reasonable doubt that at least one of Defendant Bergrin's purposes in committing the alleged crime of violence was to "maintain" or "increase" his position in the enterprise or that he committed the alleged crime of violence as consideration for the receipt of, or consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity. In determining whether one of his purposes was to "maintain" or "increase" his position in the enterprise, you should give those words their ordinary meaning. You should consider all of the facts and

circumstances in making that determination. For example, you may consider what, if any, position Bergrin held in the enterprise, and the extent, if at all, commission of the alleged crimes served to maintain, uphold or enhance his position within the enterprise. It is sufficient if the crime of violence was committed "as an integral aspect of membership" in the enterprise.

You need not, however, find that maintaining, or increasing position in the enterprise was Defendant Bergrin's only purpose. It is sufficient if you find that Defendant Bergrin conspired to commit a crime of violence as consideration for the receipt of, or consideration for a promise or agreement to pay, anything of pecuniary value from the enterprise engaged in racketeering activity and because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership. In deciding what the Defendant's "purpose" was in committing a particular act, you must determine what he had in mind. Since one cannot look into a person's mind, you have to determine his purpose by considering all of the facts and circumstances in evidence.

Why don't we stand up for a moment?

And you thought going through jury selection was no fun.

(Laughter)

THE COURT: Okay. We're getting there.

I hope you understand, ladies and gentlemen -- I know this is tedious, but to be fair here, the Government has obligations that they have to prove, they have to be understood. The Defendant has his rights under our Constitution, and it has to be understood that all of these things have to be proven. This is very serious stuff, so we have to go through this. We just have to.

I appreciate your patience and your attention.

All right. We are really, getting there.

Okay.

Count 5 of the Indictment alleges that from at least in or about January 2003 through on or about May 21, 2009, Paul Bergrin conspired with others to distribute, and to possess and distribute, five or more kilograms of a controlled substance, in violation of section 841 and 846 of Title 21 of the U.S. Code. This is the same offense that is alleged in Racketeering Act 1(a) of Count One.

Since I already gave you detailed instructions regarding that offense, I will not repeat them here.

Count 8 alleges that from at least as early as in or about January 2003 through on or about May 21, 2009, in the County of Essex, in the District of New Jersey and elsewhere, Paul Bergrin, as an owner and occupant, managed

or controlled a building located at 710 Summer Avenue, Newark, New Jersey, which he knowingly and intentionally rented, profited from, or made available for the purpose of unlawfully storing and distributing a controlled substance, that is, cocaine, in violation of Title 21, U. S. Code, section 856(a)(2), and Title 18, U.S. Code, section 2.

This is the same offense that is alleged in Racketeering Act 1(b) of Count 1, and since I've already given you those instructions, I won't repeat them here.

Count 9 alleges that from September 2004 through on or about October 2005, in Essex County, in the District of New Jersey and elsewhere, Paul Bergrin, as an owner and occupant, managed or controlled a building located at 572 Market Street, again, for the purposes of distributing a controlled substance, in violation of the statute.

Again, this is the same offense that is alleged in Racketeering Act 1(c) of Count 1. I've already given you those instructions. I won't do it again now.

Count Ten alleges that from 2008 through on or about May 20, 2009, in Essex County, District of New Jersey, Mr. Bergrin as an owner and occupant, managed or controlled a building located at 50 Park Place, Newark, again for the purpose of distributing a controlled substance, in violation of the statues previously mentioned.

You've been given those instructions. I'm not

doing it again now.

Count 12 alleges that from on or about November 25, 2003 through March 2, 2004, in Essex and Hudson Counties in the District of New Jersey and elsewhere, Defendant Paul Bergrin knowingly and intentionally conspired to murder a witness, namely, Kemo McCray, with malice aforethought and intent to prevent his attendance and testimony at an official proceeding, in violation of Title 18, U. S. Code, section 1512(k).

This is the same offense that is alleged in Racketeering Act 4(a) of Count 1. I've already given you detailed instructions. I will not repeat them now.

Count 13 alleges that from on or about November 25, 2003 through on or about March 2, 2004, in the counties of Essex and Hudson, in the District of New Jersey and elsewhere, Defendant Paul Bergrin did knowingly and intentionally aid, abet, counseled and induced others to murder a witness, namely, Kemo McCray, with malice aforethought and intent to prevent his attendance and testimony at an official proceeding, in violation of Title 18, U.S. Code, section 1512(a)1(A), 1512(a)(3)(A) and Title 18, U. S. Code, section 2.

This is the same offense that is alleged in Racketeering Act 4(b) of Count 1. I've already given you detailed instructions on that offense.

Count Fourteen charges that from on or about July 24, 2004 through on or about March 2, 2005, in the counties of Essex, Hudson and Mercer, in the District of New Jersey and elsewhere, Paul Bergrin did knowingly and intentionally conspire with others to commit an offense against the U.S., that is, to travel in and use the mail and facilities in interstate commerce, and to cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, prostitution offenses, contrary to New York law, and to thereafter perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of the statutes, and to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act, as I will describe to you, all in violation of Title 18, U.S. Code, section 371.

As I have previously instructed you, the crime of conspiracy is a separate crime from the underlying substantive offense. To prove the conspiracy charged in Count Fourteen, the Government must prove four elements beyond a reasonable doubt:

First, that two or more persons agreed to commit

an offense against the United States, that is, to violate the Travel Act, as charged in the Indictment. I have explained the Travel Act to you pursuant to Racketeering Act 5(a) of Count One.

Second, that Mr. Bergrin was a party to or member of that agreement;

Third, that Mr. Bergrin joined the agreement or conspiracy knowing of its objective to commit an offense against the United States, that is, to violate the Travel Act, and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that Defendant Bergrin and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit an offense against the United States, that is, to violate the Travel Act; and --

Fourth, that at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objective of the agreement.

I previously defined for you the first three elements of the conspiracy offense in Racketeering Act 1(a), so you have to refer to those. However, this particular conspiracy offense contains an additional element, that is, the "overt act" requirement, and I'll define that now.

With regard to the fourth element of conspiracy -

overt acts - the Government must prove beyond a reasonable doubt that during the existence of the conspiracy, at least one member of the conspiracy performed at least one of the overt acts described in the Indictment, for the purpose of furthering or helping to achieve the objective of the conspiracy.

Count 14 alleges certain overt acts. The Government does not have to prove that all of these acts were committed or that any of these acts were themselves illegal. Also, the Government does not have to prove that ddMr. Bergrin personally committed any of the overt acts. The Government must prove that at least one member of the conspiracy committed at least one of the overt acts alleged in Count 14 and committed it during the time that the conspiracy existed, for the purpose of furthering or helping to achieve the objective of the conspiracy. You must unanimously agree on the overt act that was committed.

Count 15 charges that on December 10, 2004, in Hudson and Essex Counties, in the District of New Jersey and elsewhere, Paul Bergrin did knowingly travel in and use the mail and facilities in interstate commerce, and cause the travel in and use of the mails in interstate commerce, with the intent to promote, manage, establish, carrying on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, prostitution,

contrary to New York law, and thereafter, did perform and attempt to perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of the statutes.

This is the same offense that is alleged in Racketeering Act 5(a) of Count 1. Since I already gave you those instructions, I will not repeat them here.

Count Sixteen alleges that on January 12th, 2005, in Hudson and Essex in the District of New Jersey and elsewhere, Paul Bergrin did knowingly travel in and use the mails and facilities in interstate commerce, and cause the travel in and use of the mail and facilities in interstate commerce, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, prostitution, contrary to New York law, and thereafter...in violation of the statutes.

This is the same offense that is alleged in Racketeering Act 5(b) of Count 1. I will not repeat them here.

Count 17 - Conspiracy to Travel in Aid of Drug Trafficking Business and Bribery.

Count 17 charges that from on or about June 8, 2007 through August 2007, Mr. Bergrin knowingly and

intentionally conspired and agreed with others to commit an offense against the U.S., that is, to travel in or use the facilities in interstate commerce and to cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, (a), bribery, contrary to New Jersey statutes, and distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to the U.S. Code, and to thereafter perform an act to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity, in violation of the statutes.

The conspiracy charged in Count 17 requires the Government to prove beyond a reasonable doubt the same four elements I described in Count 14, and you should use those instructions here, except that with respect to the fourth element, you should consider the overt acts alleged in Count 17 of the Indictment. I gave you detailed instructions with respect to the unlawful activity underlying the Travel Act offense when I instructed you on Racketeering Acts 1(a) and 6(a). Please refer back to those instructions. Please remember that while you do not need to find that the unlawful activity involved both bribery and drug

trafficking, you must unanimously agree upon which one.

Count 18 charges that on or about June 21, 2007, in the County of Essex, in the District of New Jersey and elsewhere, Paul Bergrin knowingly did travel and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is (a), bribery, and the distribution of a controlled substance and conspiracy to distribute a controlled substance, all in violation of the statutes.

This is the same offense that's charged in Racketeering Act 6(b) of Count 1. I've already given you detailed instructions. You must refer to that.

Count 19 charges that, on or about July 1, 2007, in the County of Essex, in New Jersey and elsewhere, Mr. Bergrin did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, bribery and the distribution of a controlled substance and conspiracy to distribute a controlled substance, in violation of the

statutes.

Again, this is the same offense that is charged in Racketeering Act 6(c) of Count 1. You must refer to those instructions.

Count 20 charges that from in or about June 2008 through in or about April 2009, in the counties of Essex and Monmouth, in the District of New Jersey, Mr. Bergrin knowingly and intentionally conspired with others to commit an offense against the United States, that is, to travel or use the facilities in interstate commerce, and to cause the travel in and the use of the mail and facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to the statutes.

The conspiracy charged in Count 20 requires the Government to prove beyond a reasonable doubt the same four elements I described in Count 14, and you should use those instructions here, except that with respect to the fourth element, you should consider the overt acts alleged in Count 20 of the Indictment. Also, I gave you detailed instructions with respect to the unlawful activity underlying the Travel Act offense when I instructed you on

Racketeering Act 7(b). Please refer to those instructions. Also, please remember that while you do not need to find that the unlawful activity involved both drug trafficking and a crime of violence in furtherance of drug trafficking, you must unanimously agree on at least one to find the Defendant guilty.

Count 21 alleges that on or about July 7th, 2008, in Essex and Monmouth, in the District of New Jersey, Mr. Bergrin did knowingly travel in and use the mail in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, contrary to the statutes.

This is the same offense alleged in Racketeering Act 7(b) of Count 1. You must refer to those instructions.

Count 22 alleges that, on August 5th, 2008, in Essex and Monmouth, in the District of New Jersey and elsewhere, Mr. Bergrin knowingly did travel in and use the mail and facilities in interstate commerce, and cause the travel in and the use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to

distribute a controlled substance, in violation of the statutes.

This is the same offense that is alleged in Racketeering Act 7(c) of Count 1. I refer you to my instructions.

Count 23 alleges that on or about August 21, 2008, in the counties of Essex and Monmouth and elsewhere, the Defendant did knowingly travel in and use the mail and facilities in interstate commerce and cause the travel in and use of the mail and facilities in interstate commerce with the intent to commit a crime of violence to further an unlawful activity, again, the distribution of a controlled substance and conspiracy to distribute a controlled substance, in violation of the statutes.

This is the same offense as alleged in Racketeering Act 7(d) of Count 1. I refer you to those instructions.

Count 24 alleges that, on or about September 5, 2008, in Essex and Monmouth, in the District of New Jersey and elsewhere, and Count 25, on or about December 8, 2008, in the counties of Essex and Monmouth, in the District of New Jersey and elsewhere, the Defendant knowingly did travel in and use the mail and facilities in interstate commerce and cause the travel in and use of mail and facilities in interstate commerce with the intent to commit a crime of

violence to further an unlawful activity, that is, the distribution of a controlled substance and conspiracy to distribute a controlled substance, in violation of the statutes.

Count 24 is the same as Racketeering Act 7(e) of Count 1.

Count 25 is the same as Racketeering Act 7(f) of Count One.

You can refer to those instructions.

Count 26 alleges on or about September 4, 2008, in the County of Essex, in the District of New Jersey and elsewhere, that Paul Bergrin did knowingly and for the purposes of evading the reporting requirements of Title 31, U. S. Code, section 5331, and the regulations issued thereunder, cause a nonfinancial trade and business, namely the Law Office of Paul Bergrin, to fail to file a report required under the statute in connection with the receipt by Law Office of Paul Bergrin of United States currency in amounts over $10,000, in violation of the statute.

This is the same offense that is alleged in Racketeering Act 8 of Count 1. And I would refer you to those instructions.

During the trial, you heard both parties refer to the Sixth Amendment of the United States Constitution. I instruct you that the Sixth Amendment provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

I will now define certain elements in the Indictment, "knowingly," "intentionally," and "willfully."

Many of the offenses require that the Government prove that Mr. Bergrin acted "knowingly" with respect to certain elements of the offenses. This means that the Government must prove that the Defendant was conscious and aware of the nature of his actions and of the surrounding facts and circumstances, as specified in the definition of the offense charged.

In deciding whether Mr. Bergrin acted "knowingly," you may consider evidence about what the Defendant said, did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in the Defendant's mind at that time. The Government is not required to prove that the Defendant knew his acts were against the law.

Intentionally.

Some of the offenses in the Indictment require the Government to prove that Mr. Bergrin acted "intentionally" with respect to certain elements. This means the Government again must prove that, one, it was the Defendant's conscious desire or purpose to act in a certain way or to cause a certain result; or, two, that the Defendant knew that he was acting in that way or would be practically certain to cause that result. In deciding whether the Defendant acted "intentionally," you may consider evidence about what the Defendant said, what he did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in the Defendant's mind.

Some of the offenses charged in the Indictment requires the Government to prove that Mr. Bergrin acted "willfully." This means the Government must prove that the Defendant knew his conduct was unlawful and intended to do something that the law forbids. That is, to find that the Defendant acted "willfully," you must find that the evidence proved beyond a reasonable doubt that Defendant acted with a purpose to disobey or disregard the law.

"Willfully" does not, however, require proof that this Defendant had any evil motive or bad purpose other than the purpose to disobey or disregard the law. "Willfully" does not require proof that this Defendant knew of the

existence and meaning of the statute making his conduct criminal.

Often the state of mind with which a person acts at any given time - intentionally, knowingly and willfully - cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, Defendant's Paul Bergrin's state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine what the Defendant intended or knew at a particular time, you may consider evidence about what the Defendant said, what he did and failed to do, how he acted, and all the other facts and circumstances shown by the evidence that may prove what was in Defendant's mind at that time. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about Mr. Bergrin's state of mind.

You may also consider the natural and probable results or consequences of any acts the Defendant knowingly did, and whether it is reasonable to conclude that the Defendant intended those results or consequences. You may find, but you are not required to find, that the Defendant knew and intended the natural and probable consequences or results of acts he knowingly did. This means that if you find that an ordinary person in Defendant's situation would have naturally realized that certain consequences would

result from his actions, then you may find, but you are not required to find, that the Defendant did know and did intend that those consequences would result from his actions. This is entirely up to you to decide as the finders of fact.

Motive is not an element of the offenses with which Defendant Paul Bergrin is charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that the Defendant is guilty and proof of good motive alone does not establish that the Defendant is not guilty. Evidence of the Defendant's motive may, however, help you find the Defendant's intent.

Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular act is done. Personal advancement and financial gain, for example, are motives for human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable while prompting another person to intentionally do an act that is a crime.

During the trial, you heard testimony by Richard Pozo about events that occurred in 2004. It is your decision whether to credit that evidence according to the instructions I gave you earlier. If you do decide to credit that evidence, you may consider it with respect to the racketeering charges alleged in Counts 1 through 4 of

the Indictment, and with respect to the offenses charged in Count 5. You may also consider that evidence for a limited purpose when considering Counts 12 and 13, which relate to the murder of Kemo McCray, and when considering Counts 20 through 26, which relate to the travel in aid of a drug trafficking business. Specifically, you may consider the testimony of Pozo in determining whether Defendant Paul Bergrin acted with the specific intent to tamper with or kill a Federal witness, or to travel in aid of a drug trafficking business. You may not consider Pozo's testimony for the purpose of inferring that Mr. Bergrin has the character trait or propensity for wrongdoing.

You also heard testify from Oscar Cordova, Vicente Esteves, and Thomas Moran about events that occurred in 2008. It is your decision whether to credit that evidence according to the instructions I gave you earlier. If you do decide to credit that evidence, you may consider it with respect to the racketeering charges alleged in Counts 1 through 4 of the Indictment, and with respect to the offenses charged in Count 5 and Counts 20 through 26. You may also consider that evidence for a limited purpose when considering Counts 12 and 13. Specifically, you may consider the testimony of Cordova, Esteves, and Moran as to those events in determining whether Defendant Bergrin acted with the specific intent to tamper with or kill a Federal

witness. You may not consider their testimony for the purpose of inferring that Mr. Bergrin has the character trait or propensity for wrongdoing.

Other than the specific counts I have identified in the instruction - that is, Counts 1 through 4, Count 5, Counts 12 and 13, and Counts 20 through 26 - you may not consider the testimony of Pozo, Cordova, Esteves and Moran as to those events with respect to any of the other counts in the Indictment. Do not use it for any other purpose.

Also, you heard evidence that Bergrin entered guilty pleas to offenses in New York State Court in 2009. I instruct you that you are to consider those guilty pleas only in determining whether the Government has proven beyond a reasonable doubt the crimes charged in Counts 1 through 4 and Counts 14 through 16. You are not to consider those guilty pleas with respect to any other counts. You may not use the evidence of those guilty pleas, or any of the evidence I mentioned a short time ago, as a substitute for proof that this Defendant committed the crimes charged. You may not consider this evidence as proof that the Defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the Defendant may have committed the other acts, he must also have committed the acts charged in the Indictment.

Remember that the Defendant is on trial here only

for the offenses charged in the Indictment, not for these other acts. Do not return a guilty verdict unless the Government proves each element of each offense charged in the Indictment beyond a reasonable doubt.

Well, that concludes our instructions, explaining the law regarding the testimony and other evidence and the offenses charged.

Now let me just explain a few things about your deliberations in the jury room and your possible verdicts.

First, the first thing that you should do when you go to the jury room is to choose someone to be your foreperson. This person will speak for the jury here in court. He or she will also preside over your discussions.

However, the views and the vote of the foreperson are entitled to no greater weight than those of any of the rest of you.

Second, I want you to remind you that your verdict, whether it is guilty or not guilty, must be unanimous. To find Defendant Paul Bergrin guilty of an offense, every one of you must agree that the Government has overcome the presumption of innocence with evidence that proves each element of that offense beyond a reasonable doubt. To find Mr. Bergrin not guilty, every one of you must agree that the Government has failed to convince you beyond a reasonable doubt.

Third, if you decide that the Government has proved Mr. Bergrin guilty, then it will be my responsibility to decide what the appropriate punishment should be. You should never consider the possible punishment in reaching your verdict.

Fourth, as I have said before, your verdict must be based only on the evidence received in this case and the law I have given to you. You've got enough law. You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think your verdict should be. What the verdict should be is the exclusive responsibility of you, the jury.

Fifth, now that all the evidence is in, the arguments are complete, and once I have finished these few last instructions, you will be 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. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position is 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. Listen carefully to what the other jurors have to say, and then decide for yourself if the Government has proven the Defendant guilty beyond a reasonable doubt. No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. You should all feel free to speak your minds.

Sixth, once you start deliberating, you do not talk about this case to the Court officials, or to me, or to anyone except each other. If you have any questions or messages, your foreperson should write them down on a piece of paper, sign them, date them, and then give them to the Court official, who will give them to me. I will speak with the attorneys, Mr. Bergrin, about what you have asked, and then I will respond as soon as I can. In the meantime, while we're looking at the note, if possible, you should continue your deliberations on some other subject .

One more thing about messages. Do not ever write down or tell anyone how you or anyone else has voted. That should stay secret until you have finished your deliberations. If you have an occasion to communicate with the Court while you are deliberating, do not disclose the number of jurors who have voted one way or the other way,

either to acquit or convict of the offense charged in the Indictment.

I will tell you one last time, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media that I have already discussed with you. You are just not to do any Internet search or use of telephones or the like.

With respect to the verdict form, obviously there are a lot of counts here, and this would be somewhat daunting and confusing. What we have done is, we've put together a form for you which will make hopefully it much simpler for you to go down one by one, and it asks simple questions, and you mark yes, no, whatever it is, not guilty, guilty, proven not proven, whatever it is. Take this form with you to the jury room. When you have reached your unanimous verdicts, the foreperson should write the verdict on the form, date it, sign it, and return it to the Court. Give the form to my courtroom deputy or to me. If you decide that the Government has proved Paul Bergrin guilty of any or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate places on the form. If you decide that the Government has not proved Mr. Bergrin guilty of some or all of the offenses charged beyond a reasonable doubt, say so by having your

foreperson make the appropriate places on the form.

With respect to Count 1, the substantive RICO count, if you find the Defendant guilty, then you must indicate which of the predicate acts listed there you unanimously found proved beyond a reasonable doubt. With respect to Racketeering Act 1(a) of Count 1, as I already indicated, there are questions about the quantity of cocaine involved in the conspiracy which you must answer only if you find that the Government has proven the racketeering act.

This is more of a guide for you. You can use it. As I said, we're going to give you all of these instructions. You also have all of the other evidence to look at, and then you can start your deliberations.

Before you leave:

Counsel, anything you want to see me at sidebar about regarding the charge?

MR. GAY: Nothing.

THE COURT: Counsel?

MR. BERGRIN: No, Judge.

THE COURT: No? Everybody satisfied?

All right. With that, where are the -- who am I swearing in?

Want to swear in our officer?

THE COURT CLERK: Placing your left hand on the bible, raising your right hand:

R A F A E L M O R A L E S, Court Security Officer, was duly sworn.

THE COURT CLERK: Please state your name for the record.

THE WITNESS: Rafael Morales.

THE COURT CLERK: Spell it?

THE WITNESS: R-a-f-a-e-l, M-o-r-a-l-e-s.

THE COURT: All right. Ladies and gentlemen, you may go to the jury room. Take your books. Start your deliberations.

Oh, the alternates remain.

(The jury retired at 2:11 p.m.)

THE COURT: You may be seated.

All right. As far as the alternates, I thought, since you're here, we don't have a lot to do, I'd do the charge again.

(Laughter)

THE COURT: I know this is somewhat frustrating for you. You've been just as attentive as all of the 12 sitting jurors. In our Federal system, though, we just have 12 jurors.

But your job is not over. While we certainly hope this doesn't happen, there's always the possibility somebody can become ill or an emergency could arise and we still may have to call upon one or all of you, it depends. I have no

idea where the rest of the jurors are going here, how long they're going to take. So what we're going to do is ask you to remain until they're excused for today, and then we'll make a decision as to what to do with you. Probably we'll bring you in tomorrow, though I don't know.

(Off the record discussion between the Court and the Deputy Clerk)

THE COURT: Okay. My understanding is you wanted to remain until we reached a verdict. Scott apparently has found another nice jury room for you to remain in.

I will caution you, though, you should not discuss the case, and in the event some juror had to leave, they will have to restart all of their discussions if a new person comes in, so you are not to discuss the case.

But you can otherwise relax. We will continue to try to assist you any way we can. And Scott will be around to take lunch orders or whatever you need, and he'll get your personal belongings now. You can go with him.

And thank you so much for your continued cooperation.

THE COURT CLERK: All rise.

Just leave all your stuff on your chairs.

THE COURT: Scott, what are we doing with the evidence?

THE COURT CLERK: I'm going to bring it up as soon

as I get them out of the room.

(The alternate jurors exit)

THE COURT: You can be seated.

All right. Now, I don't know how much this jury is going to get done today. Remember I told you they have to leave at 3:30 because one of the jurors had a commitment.

It would be my intention to just let them go at 3:30. I don't know if it's necessary to bring them back down and excuse them in open court.

MR. GAY: Whatever the Court wants on that.

MR. BERGRIN: I would waive my appearance -- I would waive it, Judge.

THE COURT: I'm assuming that they're not going to get anything done, other than, maybe, you know, figure out who's the foreperson and start going through a little bit of the evidence. So what I'll do is just let them go at 3:30 and bring them back at nine o'clock tomorrow morning.

And I assume you'll all be back here tomorrow morning at nine o'clock also; correct?

MR. GAY: Sure.

THE COURT: And then we'll work out, once they get back here, as to where you have to be and how we can get ahold of you and everything like that.

I want to thank you and commend you for your behavior during this trial. I have no idea what the jury is

going to do, but I do want to state that I appreciate your professionalism that was shown throughout the trial itself.

I guess Mr. Bergrin should probably wait around until 3:30?

A DEPUTY MARSHAL: Yes.

MR. BERGRIN: Wait around for what?

THE COURT: Until 3:30, until I let them go. You said you'd waive your appearance. I mean, they might have a question, I don't know. So you might as well.

(Matter recessed)

(Matter adjourned until Friday, March 15, commencing at 9:00 a.m.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 09-cr-369-DMC
v.	:	
PAUL W. BERGRIN,	:	TRANSCRIPT OF TRIAL PROCEEDINGS
Defendant.	:	VOLUME 1

Newark, New Jersey
January 22, 2013

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.

Reported by:
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

asked him again, again, and again. We let them know when we had the final jury.

I'm going to tell him that he's going to stay on this jury, and we'll see how things go. He might have gotten himself a little worked up just worrying about it, thinking over the illness and our little hiatus there, but once he gets going, he'll probably see that it's not going to be as stressful as he might think. If he does, we'll deal with it when it comes along.

Does anybody disagree with my approach?

MR. GAY: No objection from the Government, Judge.

MR. LUSTBERG: No, Your Honor. We agree.

THE COURT: All right.

The second juror --

THE COURT CLERK: Seat six.

THE COURT: -- is seat six, and she called to request a financial hardship, saying that her husband was laid off on the 15th, and she's the sole breadwinner, and she wanted off.

I'm not letting her off. She, too, was told about this. And it's an unfortunate situation. She didn't mention anything about financial hardship or anything about her job. I don't know what her husband being laid off means. She didn't say that she wasn't being paid or anything else, and I have no intention of letting her off.

MR. BERGRIN: It's a documentation in reference to the financial -- financial benefits, essentially, that he has received since 2006.

THE COURT: Go ahead.

(Pause)

MR. GAY: I don't know -- do we want the witness on the stand yet?

THE COURT: I didn't even know he was being brought out.

MR. GAY: I'm sorry, Judge.

Just one minute.

(The witness left the courtroom.)

MR. BERGRIN: Judge, I'm going to go into this. I'm going to go into this.

THE COURT: Okay. I'm not going to stop you.

Mr. Gay?

MR. GAY: Okay, Judge. I will -- can I just have two seconds with my witness, because I told him before --

THE COURT: Yes, because I gave the jury until 10 of.

MR. GAY: Okay.

(Recess taken)

THE COURT CLERK: All rise.

(The jury enters)

THE COURT: Be seated.

Mr. Gay, call your first witness.

MR. GAY: The Government calls Lachoy Walker, Your Honor.

THE COURT: Please have him sworn.

THE COURT CLERK: Placing your left hand on the bible, raising your right hand:

L A C H O Y W A L K E R, called as a witness on behalf of the Government, and having been duly sworn, testified as follows:

THE COURT CLERK: Please be seated.

Just keep your voice up.

Please state your name, spelling it for the record.

THE WITNESS: L-a-c-h-o-y, Walker.

MR. GAY: May I inquire, Your Honor?

Thank you.

DIRECT EXAMINATION

BY MR. GAY:

Q. Sir, how old are you?

A. Thirty-eight.

Q. When were you born?

A. December 21st, 1974.

Q. Where were you born?

A. Union, New Jersey.

Q. Where were you raised?

A. Newark, New Jersey.
Q. Can you tell the jury what the highest grade you completed in school was?
A. Eleventh grade.
Q. Can you briefly describe what if any legitimate employment you had prior to March 4th of 2004?
A. I had a painting job, and I worked at a company called Century Distribution.
Q. What else did you do to make money prior to March 4th, 2004?
A. I sold drugs.
Q. Now, prior to that, were you part of a drug organization?
A. Yes.
Q. Who was the boss of that drug organization?
A. Mr. Hakeem Curry.
Q. On March 4th, 2004, did you get arrested by agents of the Drug Enforcement Administration?
A. Yes.
Q. Were you in possession of drugs at the time of your arrest?
A. Yes.
Q. Who were you working for when you were arrested?
A. Hakeem Curry.
Q. Who did the drugs you possessed belong to?

A. Mr. Curry.
Q. On the day of the arrest, did you decide to cooperate?
A. Yes.
Q. Soon after that, did you appear in court and get a lawyer?
A. Yes.
Q. Did you later plead guilty to conspiracy to distribute drugs?
A. Yes.
Q. Did you also sign a cooperation agreement at that time?
A. Yes.
Q. What was your understanding of what your obligation was under the cooperation agreement?
A. To tell the truth.
MR. GAY: I'd like to show the witness Exhibit 7005.
Q. Mr. Walker, do you recognize what that is?
A. Yes.
Q. What is that?
A. The cooperation agreement.
Q. Is that the one that you signed?
A. Looks like the one.
Q. Okay.
MR. GAY: Your Honor, I'd ask that this be entered

into evidence at this time.

THE COURT: Well, is there a signature page on it?

THE WITNESS: Yes.

MR. GAY: There is.

THE COURT: Is that your signature?

THE WITNESS: Yeah. Yeah, it's my signature.

THE COURT: Any objection?

MR. BERGRIN: No objection, Judge.

THE COURT: Into evidence.

(Government Exhibit 7005 marked in evidence)

Q. Now, Mr. Walker, you can keep that up there for now.

What was your understanding of your obligations under the agreement?

A. To tell the truth.

Q. And did you -- after you cooperated with the Government -- let's set aside the agreement for now for a second.

A. Yeah.

Q. After you began to cooperate with the Government, did you provide information about Mr. Curry and Mr. Curry's organization?

A. Yes.

Q. And did you eventually testify at a trial against Hakeem Curry and William -- and, excuse me, Rakim Baskerville?

A. Yes.
Q. Do you recall approximately when that trial was?
A. It was in 2006.
Q. Now, what was your understanding of what would have happened to you if you lied at that trial?
A. I wouldn't have got the cooperation agreement.
Q. And what happened -- what was your understanding of what would happen if you lied under the prosecution's questions?
A. Same thing.
Q. What about with the defense questions?
A. Same thing.
Q. What was your understanding of who was responsible for determining what sentence you would receive?
A. Ultimately, it was up to the judge.
Q. Now, the judge that was the sentencing judge in that case, was that this judge, or a different judge?
A. A different judge.
Q. Was the judge that sentenced you the same judge that heard the testimony you gave in the Hakeem Curry and Rakim Baskerville trial?
A. Yes.
Q. Now, do you recall what sentence you were facing without cooperation?
A. Anywhere from 185 months to two-thirty-five, I

believe.

Q. And after you testified at the trial, did the Government write a motion on your behalf?

A. Yes.

Q. And do you recall what sentence you actually received?

A. Time served. I served about 46 months.

Q. Now, after you served that sentence, did you start a new life?

A. Yes.

Q. And since that time, have you committed any crimes?

A. No.

Q. Have you maintained legitimate employment since that time?

A. Yes.

Q. Now, let's briefly talk about your life prior to your arrest by the Drug Enforcement Administration.

Approximately when did you begin selling drugs?

A. When I was about 14 years old.

Q. And when was it that you stopped selling drugs?

A. The date of my arrest on March 4th, 2004.

Q. Now, on or about September 16th of 1993, were you arrested for distributing a controlled substance?

A. Yes.

Q. Did you later plead guilty to that charge and receive a sentence of probation?

A. Yes.
Q. On or about April 6th, 1994, were you arrested for distributing a controlled substance?
A. Yes.
Q. On or about February 1996, were you arrested for aggravated assault and criminal restraint?
A. Yes.
Q. On or about October 28th of 1996, did you plead guilty to both of those charges, the 1994 drug charge and the 1996 assault charge?
A. Yes.
Q. Did you receive a combined sentence of approximately four years on those charges?
A. Yes.
Q. Do you remember about how long you actually served in prison on those charges?
A. It was about 14 months.
Q. On February 4th, 1999, were you arrested for possession of a controlled substance and conspiracy to distribute a controlled substance?
A. Yes.
Q. Were you on parole at the time from those 1996 convictions?
A. Yes.
Q. Did you go to jail on a parole violation?

A. Yes.
Q. Do you recall approximately how much time you spent in jail?
A. It was about six months.
Q. Did you also plead guilty to the 1999 drug case --
A. Yes.
Q. -- on or about March of 2000?
A. Yes.
Q. And were you supposed to report to court to be sentenced on that case?
A. Yes.
Q. Did you fail to appear in court?
A. Yes.
Q. And did you remain a fugitive on that case until your March 4th, 2004 arrest?
A. Yes, I did.
Q. Now, you mentioned that you were arrested then on March 4th by the Drug Enforcement Administration; is that correct?
A. Yes.
Q. Now, did you ever use any false names when you were arrested during your lifetime?
A. Yes.
Q. Did you ever give a false date of birth when you were arrested?

A. Yes.
Q. You indicated that you had sold drugs since approximately the age of 14 until March 4th, 2004; is that correct?
A. Yes.
Q. And during that time, did you spend the majority of time distributing drugs for a particular organization?
A. Yes.
Q. What organization was that?
A. The Hakeem Curry Organization.
Q. And in that time, did you become familiar with the way drugs are sold on the streets?
A. Yes.
Q. And are you familiar with the term "connect"?
A. Yes.
Q. And what does that term mean?
A. A connect is a -- a connection the boss have to distribute drugs.
Q. Somebody who supplies drugs to the boss?
A. Yes.
Q. And you mentioned the term "boss." What is a drug boss?
A. He is the head of the organization.
Q. And is there anyone, particularly in Mr. Curry's organization, was there anyone under the boss?

A. Yes.
Q. And who was that be?
A. That would be lieutenants or managers.
Q. And what were they responsible for in Mr. Curry's organization?
A. They was to manage whatever spot they have, whatever block they have, they was to manage that particular area.
Q. Are you familiar with the term "pitcher"?
A. Yes.
Q. And in relation to drugs, what does a pitcher do?
A. A pitcher deals directly with the users. They are right up under the managers.
Q. Are you familiar with the term "consignment" as it relates to drug dealing?
A. Yes.
Q. Can you describe what that means?
A. Consignment is, you get the drugs up front, no money, and you filter the drugs back to the person that gave the -- gave it to you on consignment.
Q. Okay. So does the boss get the drugs from the connect on consignment?
A. Yes.
Q. And what about the managers from the boss?
A. Yes.
Q. And what about the pitchers from the managers?

A. Yes.
Q. And what about the end user; does the end user get it on consignment, or do they pay?
A. No, they pay for it up front.
Q. Can you briefly describe what the goals of a drug trafficker are, drug dealing?
A. Not to get caught.
Q. And what if any methods are you familiar with that drug traffickers use, that you used and Curry's organization used not to get caught by law enforcement?
A. Fake IDs, disposable cell phones, rental cars, vehicles with secret compartments in them called traps.
That's about it. That's all I can remember right now.
Q. Are you familiar with the term "lookout"?
A. Yes.
Q. And what is a lookout?
A. Lookout is a person who looks out for the police, whichever block you have, whichever set you have, they look out for the police. They usually have walkie-talkies, and they let everybody know if the police is coming, or they call "five-oh," which is a name for the police.
Q. Okay. Now, Mr. Walker, you mentioned throwaway or prepaid cell phones. How does that assist the drug trafficker in not getting caught?

A. It's no name attached to them. You can just use them, throw them away, buy another one, and then -- they're -- basically, the object is is no name attached to it.

Q. Okay. Now, what about rental cars?

A. Usually you get a user or somebody that's not associated with yourself to get the car for you, and then you can -- you can either change it out every week, a different color, or this way nobody would know if it was you coming, they can't get a bead up on you.

Q. What about the -- you mentioned traps or secret compartments. How are those used?

A. They usually -- they usually use -- you can store guns, you can store money, you can store drugs in them.

Q. Now, you mentioned that drug traffickers do use cell phones; is that correct?

A. Yes.

Q. And based on your experience when you were using phones, did you talk openly about drugs over the phone?

A. Not necessarily. I just tell a person to meet me, where to meet me at. We would meet face-to-face, and I'd talk to them face-to-face, or you can talk in code usually, but mainly you want to meet that person face-to-face.

Q. And what's the reason for that?

A. This way, you -- nobody can -- nobody can record your conversation unless that person was wearing a wire. But you

pretty much want to talk face-to-face 'cause the phones -- afraid the phones will be tapped.

Q. You mentioned tapped. What does that mean?

A. That law enforcement can -- can record your conversations.

Q. Okay. Now, you testified that you sold drugs with Mr. Curry and his organization since you were approximately 14 years old.

Can you briefly describe at its height what the Curry Organization was like?

A. At its height? We pretty much, we sold cocaine and heroin. At its height when? Give me a --

Q. Well, when it was -- well, let me ask you the question a little differently.

A. Yeah.

Q. At some point, did the Curry Organization grow from being something small to something larger?

A. Yes.

Q. So what I'm asking you is, when it was at its largest point, can you describe, again, just briefly, what it was like? Very briefly.

A. We mainly -- it was -- it was mainly him as the boss. He pretty much, instead of just -- just being in Georgia King Village, he had several different areas of Newark, New Jersey, Union, New Jersey, several different areas

instead of that, just that one area. He filtered the drugs down to those particular areas, and the managers filtered the -- filtered the money back to him, he filtered the money back up to the connect.

Q. All right. Now, based on your years of dealing with the Curry Organization, did you become familiar with other members of the organization?

A. Yes.

Q. Okay. I want to show you first what's been marked Government Exhibit 2258.

MR. GAY: Judge, if you don't mind, I'm going to approach the witness.

THE COURT: All right.

Q. Do you recognize who that person is?

A. Yes.

Q. Who is that?

A. Hakeem Curry.

Q. Does that fairly and accurately depict Hakeem Curry?

A. Yes.

Q. What was Mr. Curry's role in the organization?

A. He was the head of that organization. He was the boss.

Q. Did you know Mr. Curry by any other names besides Hakeem Curry?

A. We called him Dough Boy, ET, Eddie.

Q. How long did you know Mr. Curry?
A. Since I was about eight years old.
MR. GAY: Judge, I'd like to publish 2258 for the jury.
THE COURT: Any objection?
MR. BERGRIN: No, Judge.
THE COURT: Go ahead.
Q. I want to show you Government Exhibit 3512 for identification.
Do you recognize that individual?
A. Yes.
Q. Who is that?
A. Yes. Alquan Loyal.
Q. What was his role in the organization?
A. He was -- he was pretty much equal to Mr. Curry.
Q. Another boss?
A. Yes.
Q. Okay. Did you know him by any other names?
A. We called him Sheik, Sheik Ali.
Q. Okay.
MR. GAY: If we can publish 3512.
THE COURT: Any objection?
MR. BERGRIN: No, Judge.
THE COURT: Go ahead.
Q. I want to show you 3500, ask you if you recognize that

A. That's Mr. Taheed Mitchell.
Q. Was he part of the organization?
A. Yes.
Q. Do you remember what his role was in the organization?
A. He was a manager also.
Q. Where did he manage?
A. He managed in Georgia King Village.
Q. So you guys worked together?
A. Yes.
Q. Somewhat?
A. Yes.
Q. Okay. I'm going to show you 3523 and ask you whether you recognize that individual.
A. Yes.
Q. Who is that?
A. That's Kenneth Malik Sutton.
Q. And was he part of the organization?
A. Yes.
Q. What was his role?
A. He was a manager also.
Q. I'm going to show you 3511. Do you remember where it was that Malik Sutton managed?
A. Third Street in Newark.
Q. How about the next photo: Do you recognize that person?

A. Maurice Lowe.
Q. And what was his role in the organization?
A. He was a manager also.
Q. Do you remember where it was that he managed?
A. Ninth Street in Newark.
Q. Okay. If we could put that up.
Okay. What about 3050? Do you recognize that person?
A. Yes.
Q. Who is that?
A. That's Abdul Williams, called him Mutalib.
Q. And what was his role in the organization?
A. He was a manager also.
Q. Do you know where it was that he managed?
A. Bradley Court in Newark.
Q. Is that another housing --
A. Yes.
Q. Okay. How about 3519; do you recognize that person?
A. Yes.
Q. Who is that?
A. I know him as Keet.
Q. Okay. And do you know what his role was in the organization?
A. He was up under Mutalib, Abdul Williams, in Bradley Court.

Q. I'm going to show you 3515 and ask you whether you recognize that individual.
A. This is Jarvis Webb.
Q. And what was his role in the organization?
A. He was a manager also.
Q. Do you know where it was that he managed?
A. He pretty -- he pretty much freelanced. Prince Street in Newark; Jersey City.
Q. I'm going to show you the next two photos in a combination, 3505 and 3506, and ask whether you recognize those two persons.
A. Jason and Justin Hannibal.
Q. Okay, and did you have any particular names for these two?
A. We called them the Dummies, Beavis and Butthead.
Q. Do you know whether -- what relationship they had to each other?
A. Oh, they was brothers.
Q. Do you know whether or not they were twins?
A. Yes, they were.
Q. What was their role?
A. They was managers also.
Q. And were they under a particular person?
A. Yes, they was up under Jarvis.
Q. Okay. I want to show you 3503 and ask you whether you

recognize that person.

A. That's Norman Sanders.

Q. And what was his role in the organization?

A. He was a manager also. He managed Seymour Avenue in Newark.

Q. And now I'm going to show you 3507 and ask whether you recognize that person.

A. Atif Amin.

Q. And what was his role?

A. He was a manager also.

Q. And finally, I'm going to show you 3510 and ask you whether you recognize that person.

A. He go by the name of Rashid Prior.

Q. Do you know any nicknames for him?

A. We call him Akmon.

Q. Okay, and what was his role?

A. He was a manager also. He was pretty much up under Mr. Loyal.

MR. GAY: That's all I have for this for right now.

Q. Okay. Now, Mr. Walker, based on the chart that you see up here, can you tell the jury briefly, the individuals in that second row you mentioned as managers, where did they get their drugs from?

A. They got them from the boss.

Q. Okay, and that was?
A. Mr. Curry or Mr. Loyal.
Q. Okay. Now, specifically, is there anybody on that list that was more associated with either Mr. Loyal or Mr. Curry that you're aware of?
A. Well, the majority of them was -- well, almost all of them was associated with Mr. Curry. Only one of them on the screen was associated with Mr. Loyal.
Q. And which one was associated with Mr. Loyal?
A. Mr. Rashid Prior.
Q. Now, with respect to the individuals Al-Hamid Rakim and William Baskerville, are you aware whether or not they had any familial connection to Mr. Curry?
A. Supposedly, they were supposed to be cousins. I don't know what the relationship was, but on the street, they called each other cousins.
Q. Now, Mr. Walker, was Mr. Curry's organization always this large?
A. No.
Q. Okay. Can you briefly, and again, briefly, just describe, were you there in the beginning when Mr. Curry started the organization?
A. Yes.
Q. And can you briefly describe what it was like in the beginning, and then again, briefly, its evolution?

A. Basically, in the beginning, we pretty much sold drugs ourselves hand-to-hand. After '96, after I went to jail and came home in '97, it pretty much evolved into almost what it is now -- or what it was then as it began to get larger.

Q. Okay. Now, let me just say, before, when you initially said you did hand-to-hands, was there a particular spot you and Mr. Curry did hand-to-hands?

A. In Georgia King Village.

Q. Now, you mentioned after your arrest and you came back in 1997 that the organization had changed.

A. Yes.

Q. How had it changed?

A. He was making more money. He controlled different areas besides Georgia King Village. He was introduced to another connect, which pretty much grows into what it was at that point.

Q. Okay. Now, do you know how he was introduced to that other connect?

A. He was introduced to that connect from Mr. Alquan Loyal.

Q. Now, what drugs did Mr. Curry and his organization sell?

A. Well, then, it was heroin.

Q. Okay. Also sell cocaine as well?

A. Yes.

Q. Okay. Now, I want to ask you a couple of questions about, first of all, with respect to -- you said you were arrested in 1999, is that correct, on a drug charge?

A. Yes.

Q. And you also had a parole violation connected to that charge?

A. Yes.

Q. Did you obtain a lawyer on that charge?

A. Yes.

Q. And who was that lawyer?

A. Mr. Bergrin.

Q. Okay. Do you know his full name?

A. Mr. Paul Bergrin.

Q. Okay. Do you see Mr. Bergrin in court today?

A. Yes.

Q. Can you please point him out and describe an article of clothing he's wearing?

MR. BERGRIN: I'll stipulate identification, Judge. I have no problem.

THE COURT: For the record. Thank you.

BY MR. GAY:

Q. Now who paid Mr. Bergrin to represent you in that case?

A. Mr. Curry.

Q. Can you describe based on your knowledge of the Curry

Organization and based on your knowledge of drug trafficking what is the role of the drug boss when it comes to paying for lawyers for persons who are arrested in their organization?

A. Well, once you get arrested and locked up, you get your bail paid and you get referred a lawyer, which was Mr. Bergrin at the time for me.

Q. Okay. And when you say you get your bail paid, who pays the bail?

A. The boss.

Q. And that's Mr. Curry?

A. Yes.

Q. And who refers the lawyer?

A. Mr. Curry.

Q. And who pays for the lawyer?

A. Mr. Curry.

Q. Now, what is the reason that Mr. Curry paid for your lawyer?

A. He wanted -- he pretty much want to keep tabs on what is going on with the underlings, make sure nobody's cooperating, make sure they doing the right thing, get information about the case as far as whether it's going to trial or if you gonna plead out.

Q. Okay. Now, you mentioned keep tabs to see whether or not the underling was cooperating. How would the lawyer

assist in keeping tabs like that?
A. Well, he -- he -- they usually call the lawyer or the lawyer call Mr. Curry.
Q. And describe -- I'm not clear on that. What would that mean?
A. Well, he -- Mr. Curry would call the lawyer and ask him what's going on, what's going on with the case, or if -- if he's cooperating, this way he can -- he can pretty much know what's going on with that person.
Q. Okay. Now, how would a lawyer know whether or not his client was cooperating?
A. When you have a lawyer, you pretty much got to tell him what's going on, tell him what's going on with the case or on -- tell him what -- what you decide that you gonna do far as if you gonna plead out or if you gonna cooperate, things like that.
Q. Now, what would Mr. Curry do if he learned that somebody was cooperating?
A. Cooperation is a no-no. You in danger. You can get killed by cooperating.
Q. Okay. Now, are you aware of whether or not what if any relationship Mr. Bergrin had with Mr. Curry other than simply representing you?
A. He represented Mr. Curry. Matter of fact, he represented Mr. Curry --

Q. Are you aware of whether or not he arrested -- he represented any other underlings in the organization besides you?

A. He represented a couple other people. I can't remember right now.

Q. Now, were you ever present with Mr. Curry when he discussed Mr. Bergrin's representation of other members of the organization?

A. Say that again?

Q. Were you ever present with Mr. Curry when he discussed Mr. Bergrin representing other members of Curry's organization?

Do you understand the question or not?

Did you ever hear Mr. Curry ever speak about Mr. Bergrin representing another member of the organization?

A. Once, he -- he talked about Al-Hamid one time.

MR. BERGRIN: Judge, who? Could we hear that again?

THE WITNESS: Al-Hamid Baskerville.

Q. Now, Mr. Walker, at some point, did you temporarily stop selling drugs and get a legitimate job?

A. Yes.

Q. Do you recall approximately when that was?

A. That was 2002, maybe.

Q. Okay, and do you remember how long -- well, first of

all, what was the job?

A. I had a painting job.

Q. And how long did you maintain that painting job, approximately?

A. Probably about four or five months.

Q. Did there come a time after that that you started selling drugs with Mr. Curry again in approximately the summer of 2002?

A. Yes.

Q. Okay. Can you describe how that came about?

A. I seen him one day by Georgia King Village. We -- I stopped and talked to him. He asked me where I been. I told him, you know, I just was -- I just was chilling out, I fell back from the business. He -- we talked about my coming back to the business. We talked about, he told me he was -- he was selling kilos of cocaine now. We talked again, and he asked me to come back to the business, and after that, I agreed to.

Q. Okay. Can you briefly describe what, if anything, you did in connection with the business at that time?

A. Well, I -- I helped him distribute kilos of cocaine. I helped him -- basically, I helped him distribute and deliver kilos of cocaine.

Q. Okay. And can you describe briefly what the operation was like at that time that you were assisting Mr. Curry

with?

A. You want me -- say that again?

Q. Okay. Let me rephrase the question.

A. Yeah.

Q. You talked about what you did.

A. Yeah.

Q. Do you know what amounts of cocaine was Mr. Curry getting around that time?

A. Anywhere from 25 or 50 kilos at a time.

Q. And how often was Mr. Curry getting those kilos?

A. Every 10 to 12 days.

Q. And were you assisting him once he got those kilos?

A. Yes.

Q. And was there a particular place that he stored the kilos?

A. At his stash house in Orange, off Center Street. We called it the dungeon.

Q. Okay. So just describe the typical, when Mr. Curry would receive cocaine, what would happen and what did you do.

A. Usually, when he -- he would call me, tell me he getting ready to go purchase -- well, get the cocaine. He'd tell me to meet him at the dungeon. I'd meet him at the dungeon. Once he get there, we take the cocaine in the house, separate the cocaine from who getting what, make the

phone calls. Certain individuals would come to the dungeon to get theirs. Certain individuals, we would deliver to.

Q. Okay. Now, do you remember specifically any of the persons that would get -- would get cocaine from Curry at that point, any of the managers in particular?

A. I can't hear you.

Q. Okay. I'm sorry. Usually my voice is up so high. I apologize for this.

Do you remember any managers or persons that obtained cocaine from Mr. Curry at that time in your presence that you were assisting him with?

A. That came up or we delivered to?

Q. Well, let's talk about came up first.

A. Okay.

Q. Do you remember any of the persons?

A. We got Jarvis Webb, Al-Hamid Baskerville, Ishmael Pray, Abdul Williams, Taheed Mitchell, Maurice Lowe, Malik Sutton, Jason and Justin Hannibal.

Q. And what about, did you deliver cocaine to anybody, you yourself?

A. Yes.

Q. And who was it that you delivered cocaine to?

A. Rakim and William Baskerville, Keet.

Q. Just to be clear, the cocaine you were delivering was the cocaine -- was Mr. Curry's cocaine at that time; is that

correct?

A. Yes.

Q. Okay. Did you ever have any discussions with Mr. Curry about who he was getting the cocaine from?

A. Yes.

Q. Can you briefly describe those conversations?

A. Well, one day we was in the dungeon, the stash house, and we had a brief conversation while we were separating kilos of cocaine, and just in general conversation, he just -- he blurted out, he was like, Guess who I got -- guess who I got this connect from?

I'm like, Who?

And he said, Paul.

I'm like, Paul who? I'm like, Paul Paul?

And he said, Yeah, Paul.

And I just -- I just shook my head, like...

Q. Okay. Now, when he said Paul, did you know who he was referring to?

A. Yes.

Q. Who was he referring to?

A. Mr. Bergrin.

Q. And is there any other Paul that you were aware of that Mr. Curry could have been referring to at that time?

A. No.

Q. How long, approximately -- you said that you started

about the summer of 2003 -- or, excuse me, 2002 that you started with Mr. Curry with these kilograms of cocaine, --

A. Yes.

Q. -- sometime around then?

A. Yes.

Q. Let me back up and ask you one more thing. Did you also, when you were in the dungeon with Mr. Curry, did you ever count money for him?

A. Yes.

Q. And can you describe, do you remember what the largest amount of money you ever counted with Mr. Curry in the dungeon?

A. It was $850,000.

Q. Can you briefly describe the circumstances of that?

A. Well, I met him at the dungeon. I got there before him. He called me again, told me he was outside. I walked out to the vehicle. I helped him carry the large laundry-like bag inside the house. Once we got the money inside the house, we recounted it to make sure the money was straight, and then he left again, said he'll be right back.

Q. Okay. Did there come a time when he came back?

A. Yes.

Q. And briefly describe what happened then.

A. He came back. He came back to get the money. I helped him back outside, to put the money back in the

vehicle. He pulled off, he went to see the connect. Then he came back, called me again. Came back outside, helped him inside the house with the drugs.

Q. Okay. And did you see what -- do you recall approximately how much drugs he picked up at this point?

A. It was about 40 kilos.

Q. Now, did there come a time when you stopped selling cocaine with Mr. Curry?

A. Yes.

Q. And do you recall approximately when that was?

A. After -- after we came from the All-Star game, which was February 2003, after that point, I stopped selling with Mr. Curry.

Q. Okay. Now, the All-Star game would refer to what? Which All-Star game would that be?

A. It was the basketball All-Star game.

Q. The N.B.A. basketball All-Star game?

A. Yes.

Q. To your knowledge, did Mr. Curry continue to get kilograms of cocaine from Paul's connect after that time?

MR. BERGRIN: Objection, Your Honor.

THE COURT: What's the objection?

MR. BERGRIN: His testimony was that he heard Hakeem Curry blurt out these words, but that's the only connection he's ever heard, the only time he's ever heard

it. To allow him to testify to this I believe is pure speculation and conjecture.

THE COURT: No, no, I'll overrule the objection. Go ahead.

MR. GAY: I'll rephrase. I'll ask the question again.

BY MR. GAY:

Q. To your knowledge, did Mr. Curry continue to get kilograms of cocaine from Paul's connect after you came back from the All-Star game in February of 2003?

A. Not to my knowledge.

Q. Now, did Mr. Curry continue to distribute drugs after that?

A. Yes.

Q. And what drugs was he distributing after that?

A. Heroin.

Q. Did you -- who took over the cocaine business at that point?

A. At that point, Ishmael Pray.

Q. Did you assist Ishmael Pray with the cocaine business?

A. Yes.

Q. Now, did there come a time in early 2004 when Mr. Curry asked for your help in distributing drugs again?

A. Yes.

Q. And do you recall briefly or explain briefly what was

the circumstances of that.

A. At that time, Jason and Justin had gotten arrested with his drugs. He was kind of frantic about using the dungeon, the stash house. He was kind of frantic about giving Jason and Justin large quantities of heroin. So I was living on the other side of town. He asked me to store -- store -- store the drugs for him, and we pretty much came up with a plan whereas though Mr. Mitchell would come to my house and get the drugs and give them -- give Jason and Justin Hannibal small quantities at a time.

Q. Okay. Now, where were you living at the time, if you remember?

A. Smith Street in Newark.

Q. And did there come a time when Mr. Curry actually gave you drugs?

A. Yes.

Q. And what were the drugs that he gave you, heroin, cocaine? In what form was it in, if you recall?

A. Heroin.

Q. And what quantities were there?

A. The quantity at that time?

Q. Yes.

A. It was about -- it was a hundred bricks.

Q. What is a brick of heroin?

A. A brick is five bundles of heroin. Ten -- 10 bags of

heroin equals a bundle, and five bundles of heroin equals a brick.

Q. Do you remember approximately how many bricks he delivered to you on the first occasion?

A. It was about a hundred bricks.

Q. And was there anything else at that time that Mr. Curry gave you besides the bricks?

A. It was three guns.

Q. Do you remember what kind of guns they were?

A. Nine-millimeters.

Q. Now, did there come a time when Mr. Curry retrieved any of those guns from you?

A. Yes.

Q. Can you briefly describe the circumstances of that?

A. One day we was -- myself and Mr. Curry was together, we met up with Mr. -- both of the Baskerville brothers, Rakim and Al-Hamid. Al-Hamid wanted -- I guess one of those guns was Al-Hamid's. He wanted the gun back. I couldn't get to the gun at that point in time, I couldn't get in the house, so we waited until later. Mr. Curry came back and got the gun from me and gave it to Al-Hamid Baskerville.

Q. Okay. Now, I want to try to put this in the context of time.

You were arrested on March 4th of 2004. Do you recall approximately how long before your arrest that this

incident you just talked about happened?
A. It would be a week or two prior.
Q. You mentioned that the plan was that Mr. Mitchell would come and pick up heroin from you and deliver it to the Hannibals; is that correct?
A. Yes.
Q. And did he do that in this case --
A. Yes.
Q. -- at this time? And at some point, did all of the bricks that Mr. Curry had given you, did Mr. Mitchell come and pick them up?
A. Yes.
Q. Now, at some point, do you remember having any conversations with Mr. Curry in the vicinity of 22 McKay Street in East Orange, New Jersey?
A. Yes.
Q. And can you briefly describe what happened?
A. Mr. Curry called my cell phone, told me to meet him on the vicinity of 22 McKay Street. I met him over there. He parked on one side of the street, I parked on the other. I got out my car, got in the passenger seat of his vehicle, and he started telling me about he went to the spy store and got this wand that detects like wires and that such, and then he told -- he go into telling me about he found a tracker up under his -- his vehicle.

Q. When you say a tracker, what is that?
A. I guess a tracker is the -- what law enforcement used to -- to track whoever they following.
Q. And did he say which vehicle it was he found the tracker on?
A. It was his white Range Rover.
Q. Continue. What, if anything else, did he say at the time?
A. He told me he found the tracker, he called Mr. Bergrin and asked him what it was. Mr. Bergrin told him what it was, told him to get rid of his cell phone, told him don't talk on the phone. This is what he telling me in the van.
Q. Okay. And you mentioned he had a wand, I think you described it?
A. Yes.
Q. Can you describe what that was?
A. It was a wand that detects wires or like recording devices.
Q. What, if anything, did he tell you to do at that time?
A. He told me to get a new cell phone, throw away my -- the cell phone that I had, to get a new one.
Q. And did you do that?
A. I already had another prepaid cell phone. I just started using that one.
Q. Now, on the day before your arrest, March 3rd of 2004,

did you do any drug business with Mr. Curry?
A. Yes.
Q. Can you briefly describe what happened?
A. Mr. Curry called me. He said he was coming to pick me up. Once he picked me up, we went to -- we went to go see the connect. Once we -- it was by a park in Orange. Once we got up there, we pulled behind the connect. Mr. -- Mr. Rakim Baskerville pulled in front of the van or the vehicle that the connect was in. Mr. Curry got out -- out the vehicle, he got into the vehicle with the connect. They talked maybe about five, five to seven minutes. He got out the vehicle, he walked -- he walked to the vehicle where Rakim was at, gave him half -- half of the drugs, got back in the vehicle that he was driving, and then we pulled off.
Q. Okay. And what did you do with the drugs at that point?
A. Once -- once we left there, he drove me to my house, I got out the car with the drugs, which was the other half, and walked in the house.
Q. And did you store those drugs inside the house ?
A. Yes.
Q. Do you remember where it was you stored the drugs?
A. It was up under my bed in a Timberland box.
Q. Do you remember approximately how much drugs it was?
A. The whole quantity was 200 bricks. One hundred bricks

what you were supposed to do pursuant to that plan?
A. I was -- I was supposed to return the drugs back to Mr. Curry wearing a recording device.
Q. And prior to returning them, were you supposed to give him a phone call, call him as well?
A. Yes.
Q. And briefly describe what that was about.
A. I called Mr. Curry, told him I need to speak to him. He agreed. He came to the -- he came to where I was at. I got in the vehicle, I dropped -- I put the drugs in the console, in the middle of us, told him to take the drugs back, I couldn't hold onto the drugs. I told him me and my girlfriend got into a argument, she didn't want the drugs there, I didn't have anywhere to keep the drugs, so I told him to take the drugs back.
Q. Okay. Now, let me back up. You said you had a telephone conversation with Mr. Curry, is that correct, and was that recorded as far as you understood?
A. Yes.
Q. Okay, and what about, were you wearing a recording device when you met with Mr. Curry to deliver the drugs back to him?
A. Yes, I was.
Q. Okay. And now can you briefly describe again the conversation you had with Mr. Curry -- well, let me back up

and ask you this. How did Mr. Curry get to the location that you met him?

A. He was driving his van.

Q. Okay. So you said you got into the van with him?

A. Yes.

Q. Okay. Describe what happens once you get inside the van.

A. Once I got into the van, I dropped the drugs in the console, I told him to take the drugs back. He told me -- he told me just to hold onto them. I told him no, I was like, you gonna have to take the drugs back. He told me it was a -- my car was sitting there, he told me to put them in the trunk of my car so he can go get the -- get the Dummies or Justin and Jason Hannibal, which we called the Dummies, he was like, I'm going to go get the Dummies' Cherokee, it's faster than this, I can't drive this -- well, I can't pretty much say what he said, but he said, I can't drive this piece of shit. He was like -- he was like, I just -- I'd rather walk than to drive this and get caught.

Q. Okay. Now, was there anything else besides the drugs that Mr. Curry talked with you about at that time?

A. And then he asked me -- he asked me where the gun was. I told him I left the gun at my girlfriend house and I didn't want to travel with the gun, I was just worried about the drugs.

Q. Now, at some point during this conversation, did you notice whether or not law enforcement agents descended on Mr. Curry's vehicle?

A. Yes.

Q. And briefly describe what happened.

A. Yes. Once we -- we gone doing the back and forth, about him taking the drugs, law enforcement just -- just came from everywhere. He got out the van and ran, and I ran -- I ran the other way.

Q. Okay. And when you say you ran, what was the reason you ran?

A. I just ran just to -- just to make it look good.

Q. Okay. You had no intention of trying to escape from the police at that point --

A. No.

Q. -- is that correct?

A. No.

Q. So, now, did you see agents recover the drugs from the van at that point?

A. No.

Q. Okay. Now, do you remember whether or not after that you made any additional phone calls?

A. Yes.

Q. And do you recall calling Taheed Mitchell?

A. Yes.

Q. And do you remember what it was that you discussed with Mr. Mitchell?
A. I told Mr. Mitchell, I was like -- made the phone call, I told him to meet me at the dungeon, it's important. He said okay. Once -- yeah. Yeah, I told him to meet me at the dungeon, and he said, Okay, I'm on my way right now.
Q. And then are you aware of whether or not law enforcement arrested any other members of the Curry Organization at the dungeon that day after your phone call?
A. Yes.
Q. Now, Mr. Walker, I want to ask you a couple of questions.

You said that after you got out of jail serving time on this 2004 arrest that you started a new life.
A. Yes.
Q. Did you enter into the Witness Protection Program?
A. Yes.
Q. What was the reason that you entered into the Witness Protection Program?
A. There was a threat on my life.
Q. From whom?
A. Mr. Curry.
Q. And do you recall whether or not that happened during your testimony at that -- Hakeem Curry's trial?
A. Yes, it did.

Q. And were you aware of whether or not that plot had continued from the time that you were arrested all the way up until the time you testified at trial?

A. Certainly.

Q. And that was a threat on your life?

A. Yes, it was.

Q. And that's the reason you went into the Witness Protection Program?

A. Yes, it is.

Q. Okay.

MR. GAY: No further questions at this time.

THE COURT: Mr. Bergrin?

CROSS-EXAMINATION

BY MR. BERGRIN:

Q. Now, you were asked questions in reference to Hakeem Curry's connections; correct?

A. Correct.

Q. During your debriefings; right?

A. Correct.

Q. As a matter of fact, you were asked specific question about who supplied Hakeem Curry with cocaine. Wasn't that the question that you were asked specifically?

A. Say that again?

Q. Weren't you asked specifically who supplied Hakeem Curry with cocaine?

MR. GAY: Your Honor, I'm going to object. Could we have a time frame about this? He had a number of discussions. Is he talking about testimony, is he talking about --

Q. May 23rd of 2006, when you testified under oath before a jury in your sworn testimony.

MR. GAY: Your Honor, I'm going to object to this.

THE COURT: Wait.

What's the objection?

MR. GAY: He wasn't asked about this at that trial. That's the question -- that's the objection. So he's trying to impeach him with testimony, with questions he was not asked about at a prior trial.

THE COURT: Well, let him answer. Then let him answer it.

MR. GAY: Okay.

THE COURT: Go ahead, Mr. Bergrin.

BY MR. BERGRIN:

Q. Were you asked when you testified at the Hakeem Curry trial about who supplied Hakeem Curry with drugs?

A. Repeat the question, please?

Q. Yes.

When you testified at the Hakeem Curry trial in 2006, were you asked who supplied Hakeem Curry with drugs?

A. It was a -- it was a long time ago. I don't think I

was -- I was asked who was the supplier of Hakeem Curry.

Q. But you were asked that question specifically when you pled guilty as a cooperating witness on November the 10th of 2005, you were asked the specific question, who supplied Hakeem Curry with cocaine; correct? Do you remember being asked that question?

A. I mean, if you -- if you show it to me, I can answer it.

Q. I asked you a question. Do you remember being asked that question?

MR. GAY: He answered the question.

THE COURT: Hold it. Wait a minute.

If you don't know or you don't recall, you can say that.

THE WITNESS: Yeah.

A. I don't recall. If you can show it to me, I can -- I can -- I can answer the question.

Q. Who is Kareem Hurrell?

A. Kareem -- who, Kas (ph)? I know a Kas.

Q. Kas, also known as Kareem Hurrell?

A. Yes.

Q. Who is Atif Amin?

A. Atif Amin.

Q. You said -- you just testified a few minutes ago that Atif Amin worked for Hakeem Curry and was a manager. Isn't

that what you testified to before the jury a couple minutes ago?

A. Yes. You didn't say which -- I mean, you just asked me who was he. That's his name.

Q. Isn't it a fact, sir, that when you pled guilty on November the 10th of 2005, you said and you were asked the question, who supplied Hakeem Curry with cocaine, and isn't it a fact you said Kareem Hurrell, the name, not Kas, and you said Atif Amin?

MR. GAY: I'm going to object to this, Judge. If he's reading from something, he should be reading from it, not from his notes. I don't believe that's actually what was said there.

THE COURT: No, I'm sorry, he doesn't have to do that. He can ask the question.

Can you answer the question?

Would you like it read back?

THE WITNESS: Yeah, read it back.

(Record read)

A. That was -- that was a long time. I mean, I can't recall.

Q. You can't recall individuals that sold cocaine to the person that you worked with and were with since you're nine years old; is that what you're telling us?

A. Say that -- I mean, you -- you trying to cross me up

here. Say that again?
Q. You worked for Mr. Curry; correct? Isn't that what you said?
A. Correct.
Q. You said that you were a manager for Mr. Curry; correct?
A. Correct.
Q. You were able to remember a specific conversation, blurted out, correct, in 2002; right?
A. We had a conversation. We had a lot of conversations.
Q. You had a lot of conversations, but as you just testified, you were able to remember that Hakeem Curry said Paul, and you said Paul Paul, and Hakeem Curry said yes.
A. Exactly.
Q. You were able to remember that conversation; right?
A. Exactly.
Q. But you didn't remember telling the judge in 2005, three years later -- which is closer to today's date; right?
A. You can say that.
Q. You didn't remember saying the words or the name Kareem Hurrell; correct? You acted surprised when I asked you, and you said you mean Kas?
A. That's his name.
Q. So you're telling us that you didn't know the name Kareem Hurrell? Is that what you're telling us?

A. I know a Kas.
Q. You're telling us that you don't know a Kareem Hurrell; is that what you're testifying to?
A. That's his -- that's his -- that's his name, Kas. That's what I know him by. We don't call him Kareem Hurrell in the street.
Q. So you didn't know the name Kareem Hurrell, and you didn't know Kas was known as Kareem Hurrell; is that what you're telling us?
A. I did know that.
Q. Now, you said that Atif Amin, you described him a couple minutes ago when Mr. Gay was asking you questions, you said he was a manager for Hakeem Curry; correct?
A. Correct.
Q. And my question to you is, when you were asked a specific question under oath in front of the judge as a cooperating witness that you pled guilty to, isn't it a fact that you told him that the suppliers of cocaine to Hakeem Curry was Kareem Hurrell and Atif Amin?
A. I don't believe it was in specifics like that. I mean, if you show it to me, I mean -- it's all well and good, I mean.
Q. I'm going to show it to you.
A. Yeah, you show it to me, I mean...
Q. Now, you worked with Ishmael Pray; correct?

A. Correct.
Q. And you worked with Ishmael Pray as he dealt cocaine; correct?
A. Correct.
Q. And you were with him every single day; correct?
A. Not every day.
Q. Well, you spent a lot of time with him from 2003 until you were arrested in 2004; correct?
A. No, because he wasn't on the street up until 2004.
Q. How much time did you spend with Ishmael Pray from after the basketball game when you left Hakeem Curry and stopped dealing cocaine?
A. I spent -- I spent time all the way up until probably right before he got shot.
Q. So approximately a year, a year and a half with him?
A. About eight months, nine months. Whatever time from -- from February 2003 up until maybe to December 2003, somewhere around there.
Q. So approximately 10 months with him; correct?
A. You can say that, yes.
Q. And you had frequent contact with him; right?
A. Yes.
Q. And he was dealing cocaine and took over essentially for Hakeem Curry; correct?
A. I wouldn't say he took over. I mean, he had his own

thing going on.
Q. He had his own thing going on. But Hakeem Curry and him were very close; right?
A. Correct.
Q. Isn't it a fact that you have never heard me have one conversation with Ishmael Pray? Correct?
A. Correct.
Q. Isn't it a fact that Ishmael Pray never mentioned getting cocaine from Paul Bergrin's connect to you; correct?
A. Correct.
Q. And this is an individual that essentially continued the cocaine business that was connected to Hakeem Curry; correct?
A. You can say that.
Q. Now, you have never seen Hakeem Curry bring me a dime, a penny; correct?
A. A penny of what?
Q. Any money at all, any money.
A. Any money?
Q. Yes.
A. As far as legal fees or what?
Q. As far as anything, legal fees or anything.
A. No.
Q. And isn't it a fact that you, besides this one conversation you testified to, you never heard Hakeem Curry

bring up my name again in reference to drugs; right?
A. He didn't need to. That was -- I mean, that was in general conversation. He told me that, and that was the end of the conversation.
Q. He never brought up my name in reference to drugs; correct?
A. He -- he brought up your name saying that you gave him the connect, yes.
Q. In one conversation according to you one time; correct?
A. Yeah, that conversation was enough.
Q. One conversation, one time, according to you; right?
A. I mean, he didn't need to -- he only need to say it one time, I mean, he didn't have to -- I knew he told me. He didn't have to say it again.
Q. You never saw Hakeem Curry meeting with me to discuss drugs; correct?
A. No.
Q. You have never been in a conversation where Hakeem Curry's on the telephone talking to me about drugs; correct?
A. No.
Q. You have never brought money to me on behalf of Hakeem Curry; correct?
A. Me?
Q. Yes.

A. Personally? No.
Q. And you were picking up money for Hakeem Curry; right?
A. Yeah, I picked up a lot of money for him.
Q. You have never, ever, under any circumstances seen me meeting with Hakeem Curry and any connections for drugs; correct?
A. No.
Q. Describe the connect that Hakeem Curry said he got from Paul.
A. What do you mean?
Q. Describe his physical appearance.
A. I never met him.
Q. You never met him? And you were working with Hakeem Curry as a manager almost on a daily basis; correct?
A. I would say I never got a chance to meet him.
Q. You never met him; correct?
A. No.
Q. Did Hakeem Curry ever describe him?
A. No.
Q. Did Hakeem Curry ever give you a name?
A. No.
Q. Did you ever hear Hakeem Curry talking on the phone and saying, This is Paul's connect that I'm talking to?
A. No.
Q. You had been present with me and Hakeem Curry when

we've had conversations; correct?
A. What conversations?
Q. Well, you said that Hakeem Curry introduced to me -- you to me as an attorney; correct?
A. He referred me to you.
Q. Referred you to me.
A. Um-h'm.
Q. Were you ever present with me and Hakeem Curry when we've had a conversation?
A. May have. I can't remember. I mean, it's been a long time.
Q. But you never heard me under any circumstances ever talking to Hakeem Curry about drugs; correct?
A. No.
Q. Now, you talked about your plea agreement. At the time that you pled guilty, you were facing life in prison; isn't that a fact?
A. Was facing anywhere from 185 months to 235, I believe.
Q. The statute that you pled guilty to, you were facing up to life in prison; right?
A. 185 to 285 months is what -- what I believe I was facing.
Q. That was your Guideline level; right?
A. Yeah. Yeah.
Q. The statute that you pled guilty to -- are you telling

us that you don't know what statute you pled guilty to?
A. Yeah, it was 185, that was the Guideline, 185 to 235.
Q. The statute that you pled guilty to, isn't it a fact that in your plea agreement, it says that you can receive life in prison?
A. Yes. Yeah, I could have.
Q. So then why did you just argue with me and say that you would plead guilty to only 185 months?
A. That was the -- that was the Guideline. You could get anywhere from 185 to 235. That was the Guideline.
Q. But the judge doesn't have to sentence you within the Guidelines; right?
A. No, he don't.
Q. So you can receive life in prison; right?
A. Whatever the judge -- whatever the judge -- that's in that Guideline, that's what the JUDGE gonna give you.
Q. My question to you is, you could receive up to life in prison; right?
A. It's up to the judge.
Q. Under the statute that you pled guilty to -- why don't you answer my question -- you can plead guilty up to life in prison; correct?
A. It's ultimately -- it's ultimately up to the judge, am I right?
Q. But you could have received a life sentence; right?

A. I could have received a significant amount of time, yes.
Q. And you walked out of jail the day of your sentencing; right?
A. No, I didn't.
Q. How much time, additional time did you serve?
A. Maybe a month.
Q. A month. Facing 185 months minimum under the Guidelines, the statutory facing life in prison, and you do another month; correct?
A. Correct.
Q. With -- how many felony convictions did you have? Ten?
A. I don't remember. It's been a long time.
Q. But you can remember a conversation that you heard, right, in 2002, but you can't remember how many convictions you had.
A. It's two different -- two different instances.
Q. Now, isn't it a fact that you received over $100,000 as a Witness Protection person?
A. I don't know how much I received.
Q. You don't remember how much you received?
A. I don't. It's not -- it's not a specific amount of money that they just give you.
Q. But you can remember the conversation that you had,

right, the words that you heard in 2002.

A. Say that again?

Q. But you can remember the words that you heard in 2002; right?

A. Yes, I can.

MR. BERGRIN: Can I have an exhibit marked, Your Honor, so-called witness financial information?

THE COURT: Go ahead. Scott?

MR. BERGRIN: And mark it D-1?

THE COURT: Okay.

(Defendant's Exhibit 1 marked for identification)

MR. BERGRIN: May I approach the witness, Your Honor?

MR. GAY: Judge, I just want to -- this is not a document this witness has ever seen before, so I'm not sure what the question is or --

THE COURT: Well, I think I know what this document is, and we discussed it before. Is there any question but that this is an accurate and appropriate document as the amount?

MR. GAY: No, it's not, but this witness has never seen the document and has no idea what's contained in the document. So I just don't know what --

THE WITNESS: I mean, I can look at it, I mean, if it's accurate information, I can --

THE COURT: Mr. Bergrin, what is that document?

MR. BERGRIN: It's the financial information that shows that he received $118,077.

THE COURT: This is the document that you received from the Government telling you how much this witness received --

MR. BERGRIN: Exactly, Judge.

THE COURT: And this is over what period of time?

MR. BERGRIN: Essentially, it was received within three years, Judge.

THE COURT: Okay. If you want to show it to him, you can show it to him.

Do you understand what that is, now?

THE WITNESS: Yes. I can look at it.

MR. BERGRIN: May I approach, Judge?

(Defendant's Exhibit 1 was placed before the witness.)

THE COURT: Mr. Bergrin, how long are you going to be with this witness?

MR. BERGRIN: A while, Judge.

THE COURT: Half hour, an hour?

MR. BERGRIN: Yes.

THE COURT: All right.

Ladies and gentlemen, I promised you about our times, so we're going to break for the day, and this gentleman will come back tomorrow, and we will continue with

the cross-examination.

I want to tell you again: Please don't discuss this case with anyone.

You have to be here tomorrow no later than quarter of nine. We will start promptly at nine.

Also, don't do any Internet searches or read anything or listen to anything about the case.

Enjoy the evening.

THE COURT CLERK: All rise.

Just place your notebooks on your chairs, please.

THE COURT: Leave your notebooks there. They will be back in the morning.

(The jury exits)

THE COURT: All right. Counsel, 8:30 tomorrow morning.

(Matter adjourned until Wednesday, January 23, 2013, commencing at 8:30 a.m.)